THE

FEDERAL CASES

COMPRISING

CASES ARGUED AND DETERMINED

IN THE

CIRCUIT AND DISTRICT COURTS

OF THE

UNITED STATES

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

BOOK 6

Case No. 2954 — Case No. 3582

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COGBILL—DARST

Case No. 2,954—Case No. 3,582

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FEDERAL CASES.

BOOK 6.

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

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

Case No. 2,954.

In re COGBILL.

[2 Hughes (1877) 313.][1]

District Court, E. D. Virginia.

HOMESTEAD—WAIVER BY DEED OF TRUST—LETTING IN PRIOR JUDGMENT.

1. The bankrupt's lands were bound by the lien of a judgment creditor, on an obligation not containing a waiver of homestead. One parcel of them was also bound by a deed of trust junior in dignity to the judgment. The law of Virginia makes the right of homestead superior to a judgment, but makes it liable to waiver by deed of trust. In this condition of things, *held*, that the deed of trust cleared the land of the right of homestead; but, being secondary in priority to the judgment, the deed was displaced by the judgment, which must be paid first.

[Distinguished in Re Bowler, Case No. 1,735.]

2. The right of subrogation did not, in consequence, accrue to the trust deed lienor, as to the lands as to which the right of homestead was not expressly waived.

In bankruptcy. The subject of controversy was the sum of $1,751, which arose from the sale of the greater portion of the bankrupt's real estate, it having been agreed that the proceeds of the land should be treated as the land itself. All this real estate was bounded by a judgment lien for a debt due the Mecklenburg Female College to the amount of about $1,350, which contained no waiver of the homestead right. A portion of the land sold was subject to a deed of trust junior in priority to the judgment, for the amount of about $1,030. The land covered by the deed of trust brought $840. By the law of Virginia the right of homestead has priority over a judgment, and a deed of trust has priority over a right of homestead, as to the land covered by it. The deed is treated as a waiver as to the land.

Mr. Henry submitted the following views: Let us look at this question first without reference to the question of homestead. What would be the law did the debtor not come within the description of persons entitled to it? It cannot be denied that the judgment creditor having a lien on all real estate of the debtor, and the deed of trust creditor having only a subsequent lien on parts of said real estate, the judgment creditor would be forced to subject all the balance of the real estate of the debtor before he can trust the subject. And if he were to get any part of the trust subject before exhausting the other, the deed of trust creditor would have a right to subject the real estate outside of his deed to the repayment to him of the amount so taken from him. And the rights of creditors to marshal the assets of the debtor for the purpose of securing the payment of their debts are absolute as to the debtor himself. That is, he cannot defeat this right by any act of his, as it is a right given by law, and attaches to the liens. See 2 White & T. (4th Ed.) Lead. Cas. Eq. 228; and Withers v. Carter, 4 Grat. 407. By the constitution of Virginia (article 11, § 1) every householder or head of a family shall be entitled to hold exempt from sale under legal process, his real or personal estate or either, to the value not exceeding $2,000. By section 3 of same article it is provided that nothing contained in this article shall be construed to interfere with the sale of the property aforesaid, or any portion thereof, by virtue of any mortgage, deed of trust, pledge, or other security thereon. These provisions regulate the questions in this case. It is apparent (and it has been so decided by the supreme court of the United States, in construing a similar provision in the Illinois Code (see Black v. Curran, 14

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

Wall. [81 U. S.] 463) that no estate in the land, in any proper sense, is given to the householder or head of a family, but simply a right of occupancy, and that so soon as that occupancy lawfully ceases the land occupied is liable to his creditors just as though never held as a homestead. See also decision of Judge Fitzhugh, in Richardson v. Butler, 1 Va. Law J. Feb. No. 1877, p. 120. It follows, therefore, that when the sale is made under the deed of trust in this case, as it was made, the trust subject is liable to the judgment lien before the debt secured in the deed can be paid; and, therefore, unless the creditor has the right to marshal the assets, he will lose the amount for which the trust subject sold, to wit, $840. This gives him the right to require that the proceeds of the other land not in the deed of trust be applied to the payment of the judgment, to his own exoneration. But the saving in the section above quoted covers this case. It is undoubted that by the law of the land the right to marshal assets gives a "security thereon." It undoubtedly gives the deed of trust creditor a security on the real estate of the debtor other than the trust subject, when the trust subject is liable to a judgment lien which was sought to be enforced against it. This being the legal consequence of giving a subsequent lien on part of an estate while there exists a prior lien on all, it follows that this bankrupt by giving the deed of trust gave all the liens and securities legally flowing or issuing out of said deed, and cannot now defeat any of them by any act of his. And, in truth, the liens and security on his estate, that he himself has given, defeat the right to homestead by the express provisions of the homestead law. The householder has a right to waive the homestead; his deed of trust is a waiver of it, not only to the extent of the trust subject, or the debt secured thereon, but is also a waiver to the extent of the rights given by law to others, which follow or flow from the deed of trust. And while in some cases third persons may not be affected by the act of the debtor, yet the debtor himself is estopped and all persons who only stand in his shoes or for whom he has a right to act are also estopped. See Withers v. Carter, 4 Grat. 407.

Mr. Bouldin contended, per contra, that the law of homestead made a careful and express distinction as to the homestead between liens created by the voluntary act of the debtor and liens created by law, and did not intend that the debtor should lose his homestead by construction or any indirection. If the deed of trust had conveyed only five acres of land of the value of five and twenty dollars, the common sense of all men would be shocked and outraged if that conveyance could be construed as subjecting the remaining $1,975 of the homestead to a judgment creditor whose lien proprio vigore was inferior to the claim of the homestead; for if the homestead was constructively waived as to any of the remaining land, it was waived as to all. If the judgment creditor is to have precedence over the claim of the homestead, that precedence must be given by virtue of the superiority of his lien over the claim of homestead, and not by reason of its superiority over another claimant and incumbrance of the realty of the bankrupt. It must prevail, if it prevails at all, by virtue of its own inherent strength, not by reason of the weakness of this claim of homestead as against a wholly different creditor holding a part of the homestead voluntarily conveyed to him.

HUGHES, District Judge. The first question here is, whether or not the homestead right may be set up against the judgment, and, in defeating that, defeat also the deed of trust which is subordinate to it. The proposition can not be entertained for reasons stated in the sequel.

The second proposition is, that the deed of trust, by defeating the homestead, lets in the judgment which is prior to the deed, which I concede. The third proposition is, that the deed of trust creditor is entitled to have his debt made good out of the proceeds of the land which was not covered by the deed, by virtue of the principle governing courts of equity in marshalling assets; that is to say, the principle of subrogation. This last proposition I must reject. If the bond, for securing which the deed of trust was given, contained on its face a waiver of the homestead in writing, I would then think the proposition worthy of some consideration; for then there would be a waiver as to the debt as well as a waiver as to the land; but as there was no such express waiver on the bond, and the waiver in the form of the deed of trust applied only to the land, for reasons stated in the sequel I must reject this proposition. The deed of trust operated to exempt the land which it conveyed, from liability to the grantor's (the bankrupt's) right of homestead. It cleared the land of the homestead claim. The homestead right is not an estate in the land, but a mere right of using it for a specific purpose, during a period of time defined by the law, but of uncertain duration. The deed of trust removed from the land its liability to such use for as long a period as its provisions should remain unsatisfied. If the judgment creditor has a first lien or claim against land thus exempted from liability to the homestead it must be satisfied. If a deed of trust stands second to the judgment, that must then be satisfied. It is only after both are satisfied that the homestead liability returns again to the land. But these principles are confined in application exclusively to land as to which the homestead right has been waived. They apply to that particular land only, because of the reasons just stated. They do not apply to other lands, because those reasons do not apply. "Cessante ratione cessat et ipsa lex."

The doctrine of subrogation does not apply to this case on general principles. That doctrine is, that where a creditor has two funds out of which to satisfy his demand, he shall not disappoint a creditor who can obtain payment of his claim only out of one of the funds. The doctrine does not apply except in cases where there are two funds already in existence and available to the first-named creditor. In this case the judgment creditor has but one fund, and the deed of trust creditor had only that same fund, and it is simply a question which of the two creditors shall have payment out of that one fund. It is not a question of marshalling assets, but of mere right of priority. Besides, even if this were not so, we can not extend the principle of marshalling assets, or of subrogation, to lands subject by law to the homestead right. That right is given irrespective of the rights of creditors to be paid their debts, whether by subrogation, or in any other way. It is given as to all lands from which the right of homestead has not been removed by specific waiver. If a debtor owned but one piece of land, and that not greater in value than the amount limited by law for the homestead, and there were debts due to an amount exceeding the amount allowed as to the value of the homestead, still the law disregards the rights of creditors and gives the homestead if it has not been waived either as to the debt or the land. It is, therefore, a right superior to the rights of creditors of every sort and origin. The law intends to make the homestead right superior to all the rights of creditors, except as to any specific debt or land as to which the householder voluntarily and expressly in writing waives it. It is partly because the right of homestead is not an estate in land, but is a mere privilege of using it for a certain purpose, which privilege is not capable of estimation in dollars and cents, that the principle of subrogation does not apply as against it. If it were an estimate capable of appraised valuation, then there would be more ground for considering whether or not it could be subjected to the principle of subrogation. It seems to me that it would be a subversion of the objects of the law of homestead, a perversion of its aim, and a violation of its spirit, to apply the doctrines governing in the marshalling of assets in equity to the destruction of the homestead right in favor of other debts and against other property than those in regard to which the right of homestead has been expressly waived. The courts have already gone very far in judicially legislating the homestead right out of existence. But I know of no case in which they have carried the power of judicial legislation so far as to resort to the expedient of constructive waiver in attacking the homestead rights. At all events, I will wait to be overruled before employing the expedient myself.

I will give a decree declaring that the right of homestead does not exist as to the $840 produced by the land covered by the bankrupt's deed of trust, and, therefore, that that debt, being relieved from the homestead, is liable first to the judgment, but recognizing the superiority of the homestead to the claim of the judgment creditor, in respect to the proceeds of the land not so covered, leaving the deed of trust wholly defeated. I infer from the absence of any evidence or proceeding to show that the prices bought at the sale of the bankrupt's land were inadequate, that there is no objection to the sale on that score.

The decree of the district court was affirmed by the chief justice on petition for revision.

Case No. 2,955.

COGGESHALL v. POTTER et al.

[Holmes, 75;[1] 6 N. B. R. 10.]

Circuit Court, D. Rhode Island. Oct., 1871.[2]

UNRECORDED CHATTEL MORTGAGE — BANKRUPTCY —BONA FIDE PREFERENCE — PETITION FOR REVIEW—BURDEN OF PROOF.

1. A mortgage of personal property valid as between the parties, and not fraudulent under the bankrupt act, is good against the assignee or trustee of the mortgagor in bankruptcy, although not recorded as required by law of the state in which it is made.

[Cited in Rogers v. Winsor, Case No. 12,023; Johnson v. Patterson, Id. 7,403; Schulze v. Bolting, Id. 12,489; Re M'Kenna, 9 Fed. 34.]

2. The second clause of the thirty-fifth section of the bankrupt act [of 1867 (14 Stat. 534)], declaring void certain conveyances of his property by a bankrupt, does not apply to a bona fide preference of one of his creditors, made more than four months before the proceedings in bankruptcy.

[Cited in Clark v. Hezekiah, 24 Fed. 667.]

3. On petition for review of the finding of the district court, in bankruptcy, on a matter of fact, the burden is on the petitioner to show that the evidence cannot support the finding.

[Cited in Re Mooney, Case No. 9,748.]

In bankruptcy. Petition for review of a decision of the district court holding valid a mortgage of personal property given by Joseph Dow, a bankrupt, as security to one of his creditors. [Case No. 11,322.] The petitioner [James H. Coggeshall] was trustee of the bankrupt's estate, duly appointed under the bankrupt act. The mortgage in question was given by the bankrupt more than four months before, but within six months of, the commencement of the proceedings in bankruptcy. It described the mortgaged property only by reference to certain annexed schedules. The mortgage itself was duly recorded in the office of the clerk of the city of Providence, under the law of the state; but the schedules annexed were never recorded.

[The petition in the district court to de-

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

[2] [Affirming Case No. 11,322.]

termine the validity of the mortgage was filed by Potter, Denison & Co.]

James Tillinghast, for petitioner.

A. Payne, and Ashley & Colwell, for mortgagees.

SHEPLEY, Circuit Judge. This is a petition under the first clause of the second section of the bankrupt act, for the exercise of the supervisory jurisdiction of the circuit court. The first question presented for adjudication is, whether, in the absence of fraud, the assignee takes only such rights and interests as the bankrupt himself had and could assert at the time of his bankruptcy, or whether he is to be considered as a purchaser for a valuable consideration, in the proper sense of those terms. Joseph Dow, the bankrupt, on the twenty-fourth day of December, 1867, made a chattel mortgage to Potter, Denison & Co., in the common form, which was acknowledged on the same day, and lodged for record on the twenty-sixth day of December, in the same year. The property mortgaged was described as "the articles of personal property enumerated and described in the schedules and bills marked respectively A, B, C, and D, hereto annexed, and constituting a part of this mortgage." These schedules, although attached to the mortgage, and forming a part thereof, and although left with the mortgage at the office of the city clerk in Providence, were not in fact recorded. The mortgage which was recorded contained no enumeration or description of the articles conveyed; so that the record-book gave to inquirers no other information than that contained in the general description referring to the schedules. While the mortgage and schedules were remaining in the city clerk's office unrecorded, after having been received and entered by him, the originals of both could have been seen and examined, and were all which could be found in the office indicative of the claim of the mortgagee. But after the clerk has extended his record, it is that only which the law treats as the evidence required. Sawyer v. Pennell, 19 Me. 173. If, therefore, the assignee of the bankrupt, or, as in this case, the trustee, is to be considered as entitled to the same rights as an attaching creditor, or a purchaser for a valuable consideration without notice, he would take a good title as against Potter, Denison & Co., who claim under the unrecorded mortgage. Under the English bankrupt act, Lord Hardwicke, in Brown v. Heathcote, 1 Atk. 160, 162, says: "The ground the court goes upon is this, that assignees of bankrupts, though they are trustees for creditors, yet stand in the place of the bankrupt, and they can take in no better manner than he could." See, also, Jewson v. Moulson, 2 Atk. 417, 420; Mitford v. Mitford, 9 Ves. 87, 100; Worrall v. Marlar, 1 P. Wms. 459, note. Under the bankrupt act of 1841 [5 Stat. 440], in the case of Mitchell v. Winslow [Case No. 9,673], Mr. Justice Story says: "Now it is most material to bear in mind, under this aspect of the case, that it is a well-established doctrine, that (except in cases of fraud) assignees in bankruptcy take only such rights and interests as the bankrupt himself had, and could himself claim and assert, at the time of his bankruptcy; and consequently they are affected with all the equities which would affect the bankrupt himself, if he were asserting those rights and interests." See, also, Winsor v. McLellan [Id. 17,887]; Ex parte Newhall [Id. 10,159]; Fiske v. Hunt [Id. 4,831]. But it is urged with much force and ability on the part of the petitioner, that the decisions of Mr. Justice Story above cited, having been made under the bankrupt act of 1841, are not applicable to the statute now in force. Reliance is placed upon the distinction in the phraseology of the respective sections of the act of 1841 and the act of 1867, saving the rights of mortgagees. The second section of the bankrupt act of 1841 provided "that nothing in this act contained shall be construed to annul, destroy, or impair any lawful rights of married women, or minors, or any liens, mortgages, or other securities on property, real or personal, which may be valid by the laws of the states respectively, and which are not inconsistent with the provisions of the second and fifth sections of this act." The proviso in the act of 1867 is, "that no mortgage of any vessel, or of any other goods or chattels, made as security for any debt or debts, in good faith and for present consideration, and otherwise valid and duly recorded, pursuant to any statute of the United States, or of any state, shall be invalidated or affected hereby." The fourteenth section of the act of 1867 vests in the assignee (with certain specified exceptions) all the property and estate of the bankrupt, and all the property conveyed by the bankrupt in fraud of his creditors; and authorizes him, "under the order and direction of the court, to redeem or discharge any mortgage, or conditional contract, or pledge or deposit, or lien upon any property, real or personal," &c.

It must be borne in mind, in determining this question, that the statute of Rhode Island, like the statute of Maine, under consideration in the case of Mitchell v. Winslow [supra], decided by Mr. Justice Story, expressly recognizes the validity of an unrecorded mortgage of personal property between the parties, so that if the assignee is to be considered as merely standing in the place of the bankrupt, he would, in contemplation of law, be one of the parties to the instrument, and, as against him, no record would be necessary. The literal terms of the proviso, it is true, only save mortgages which have been duly recorded. But can it therefore be inferred that those mortgages are not saved which are valid by the laws of the respective states which need no record? Are

mortgages which are good at common law, and mortgages otherwise valid, made in states where there is no provision for the recording of mortgages, avoided by the bankrupt law, while those are upheld which are made and recorded in states requiring a record? Such could not have been the intent of the statute or the object of the proviso. The proviso, as stated by Judge Lowell (Ex parte Dalby [Case No. 3,540]), "appears to have been inserted out of greater caution, lest it should be supposed that valid chattel mortgages should be affected by the assignment, and not with any view of construing the laws regarding record; and so if the mortgage be one that requires no record,—as if it be executed in a state having no statute on the subject, or if, as in this case, record is not required between the parties,—the proviso will not defeat it." The language of Mr. Justice Field, in the opinion in the case of Second Nat. Bank of Leavenworth v. Hunt, 11 Wall. [78 U. S.] 391, might seem at first glance to favor a different construction; but, on more careful examination, it will appear that the decision is placed upon the ground that the mortgage was not valid by the laws of Kansas, and was fraudulent as against creditors.

Two other questions decided by the district judge are presented for revision,—one a question of law on the construction of the statute, the other a question of fact upon the evidence in the case. The district judge in effect decided, that, after the lapse of four months from the date of the conveyance, simple preferences of a bona fide creditor by an insolvent debtor not otherwise fraudulent are to be held valid, so far as the preferred creditor is concerned. Prior to the passage of the bankrupt act, the acts described in the thirty-fifth and thirty-ninth sections were such as were not forbidden by the common law, or, generally, by the statutes of the different states. A preference by an insolvent, or a person approaching insolvency, may sometimes be unjust to other creditors, and, under other circumstances, may be the dictate of the purest justice in reference to all concerned. Preferences are not in their essential nature necessarily immoral or dishonest. The bankrupt act of 1867 gives priority to five classes of debts, to be first paid in full in the order in which they are successively named in the act. Congress, therefore, has adopted a purely conventional rule to determine the validity of mortgages given as security for bona fide debts, and which operate as preferences. The creditor who receives payment or security to the exclusion of other creditors, with the knowledge, express or implied, of the insolvency, does so at the risk, that, if within four months the debtor himself or his creditors shall invoke the aid of the law providing for an equal distribution, the transaction will be invalidated, and the property thus received must go into the common fund for distribution. This question of construction of the first clause of the thirty-fifth section, considered in connection with the second clause of the same section and the thirty-ninth section, is so fully considered in the very able opinion of the circuit court of the United States for the district of Missouri, in the case of Bean v. Brookmire [Case No. 1,168], that we deem it unnecessary to say more upon this point than to express our entire concurrence with the reasoning and decision in that case. Sustaining, therefore, as we do, the decision of the district judge, that the second clause, commonly called the "six-months' clause," of the thirty-fifth section of the act, is not applicable to the case of a simple preference by a bankrupt of a creditor's claim, his decision upon the question of fact, that the circumstances of the transaction between Dow, the bankrupt, and Potter, Denison & Co., did not, in point of fact, bring the case within the provisions of the second clause, becomes comparatively immaterial. Appellate courts, even in appeals, proceed upon the ground that the decree in the subordinate court was correct; and the burden to show error is upon the appellant. The Baltimore, 8 Wall. [75 U. S.] 377, 382. Matters of fact, as well as matters of law, may doubtless be revised in the circuit court; but it was not the intention of congress, in this form of proceeding, to give a party a second trial merely as such, but to secure to him an appellate tribunal for the re-examination and revision of the rulings, orders, and decrees of the district courts, and for the reversal of the same in case they are found to be erroneous. Littlefield v. Canal Co. [Case No. 8,400]. When the revisory jurisdiction of the circuit court is invoked over the decision of the district court upon a question of fact, the burden is on the petitioner for review to show error in the decision. It is not sufficient merely to show such a condition of the testimony in the case, that different minds, with equal fairness, might possibly arrive at different conclusions, but to show, more nearly in analogy to the case of a motion for a new trial, that the evidence cannot support the finding. After a careful revision of the testimony, we see no reason for disturbing the decision of the district judge. Decree affirmed, with costs.

COGGESHALL (POTTER v.). See Case No. 11,322.

Case No. 2,956.

COGGILL et al. v. LAWRENCE.

[1 Blatchf. 602.] [1]

Circuit Court, S. D. New York. Oct. Term, 1850.

CUSTOMS DUTIES—"SHEEP-SKINS"—APPRAISEMENT.

1. Under the tariff act of July 30, 1846 (9 Stat. 42), Buenos Ayres sheep-skins, imported with the wool on, and dried but not dressed, usually invoiced as sheep-skins, and known in commerce by that name, fall within section 3 of that act as a non-enumerated article, and are subject to a duty of 20 per cent. ad valorem.

2. Although the chief value of the sheep-skins is in the wool, and a large proportion of those imported are, after importation, shorn for the wool, yet the well known commercial designation of the article as a whole must govern, and the government cannot appraise the wool and the pelt separately, and charge duty on the former under Schedule C., as "wool, unmanufactured."

3. Such sheep-skins do not fall within Schedule H, under the head of "raw hides and skins of all kinds, whether dried, salted, or pickled," that description referring to a class of articles well known in the trade, and used extensively by manufacturers of leather.

At law. This was an action against [Cornelius W. Lawrence] the collector of the port of New York, to recover back an excess of duties paid by the plaintiffs [Henry Coggill and others] under protest on Buenos Ayres sheep-skins. [The action was brought originally in the superior court of the city of New York, and was from there removed to this court.] The article was imported with the wool on the skin, and was not dressed, being in the same condition in which it was when taken from the animal, except that it was dried. By the instructions of the secretary of the treasury the collector directed the wool and the pelt or skin to be appraised separately, and a duty of 30 per cent. ad valorem was charged on the former, and of 5 per cent. ad valorem on the latter. The importation was under the tariff act of July 30, 1846 (9 Stat. 42). At the trial before Mr. Justice Nelson in May, 1849, it appeared by the evidence, that the article was usually described in invoices and shipped as sheep-skins, and was known in trade and commerce by that designation; that the wool upon the pelt was worth from fourteen to thirty cents a pound, each skin yielding from half a pound to a pound of wool; that the pelt, when shorn, was worth from four to ten cents, and was tanned and used as leather; that some of the skins were sheared, and some were dressed with the wool on and used for mats, military saddles, soles for the inside of shoes, coverings for the cylinders of rice-mills, men's caps, sleigh-robes, &c.; that from 50 to 70 per cent. of those imported were shorn for the wool; and that they were sometimes imported without any wool on them, when they were called bazils or pelts, and were tanned or salted before being shipped.

The defendant insisted, that the wool upon the skin was "wool, unmanufactured," and chargeable, under Schedule C of the act of 1846, with a duty of 30 per cent. ad valorem, on the ground that the chief value of the article consisted in the unmanufactured wool, the skin being of little value. The plaintiffs claimed, that the article was chargeable with a duty of 5 per cent. ad valorem, under Schedule H, as falling within the designation of "raw hides and skins of all kinds, whether dried, salted, or pickled, not otherwise provided for." The court charged the jury, that the article was chargeable with a duty of 20 per cent. ad valorem, under Schedule E, under the head of "skins of all kinds, not otherwise provided for." The jury accordingly found for the plaintiffs, and a motion was now made for a new trial, on a case.

NELSON, Circuit Justice. The article in question in this case was specifically charged with a duty under the tariff acts of 1828, 1832, and 1842 (4 Stat. 271, § 2; 584, § 2; and 5 Stat. 548, § 1), as "wool imported on the skin;" but the description is omitted in the act of 1846.

It is claimed on the part of the plaintiffs, that it should be ranged under Schedule H in the act of 1846, within the description "raw hides and skins of all kinds, whether dried, salted, or pickled, not otherwise provided for;" while the defendant insists it should be charged under Schedule C, as "wool, unmanufactured."

We are of opinion that it comes within neither description. If it falls under any of the schedules, it would more properly be ranged under Schedule E, within the words "skins of all kinds, not otherwise provided for;" or else it is a non-enumerated article within the third section of the act. It is not very material under which of these provisions it is placed, as the rate of duty is the same.

The articles described in Schedule H, under the terms "raw hides and skins of all kinds, whether dried, salted, or pickled," are different from the one in question, if we take the commercial designation. That description refers to a class of articles well known in the trade, and of extensive demand in the market on the part of the manufacturers of leather. It was doubtless for the encouragement of these manufacturers, in part at least, that the low rate of duty was charged.

Neither do we perceive how the article can be separated, as is claimed by the government, and the duty be apportioned upon each of its parts, the same as if they were imported after separation. The article has a well known commercial designation as a whole, which, upon general principles, must govern in rating it as a dutiable article. And besides, the rule of construction that would separate it, and apportion the duties upon its

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

parts, could not be confined to this particular article. "Hair of all kinds, uncleaned and unmanufactured" is chargeable with a duty of ten per cent. ad valorem, under Schedule G; and a large portion of the skins imported are imported with the hair on the skin. The rule would seem to apply equally to this class of articles. The difficulty in ascertaining the dutiable value of each of the parts is also a serious objection to the introduction of the rule.

The omission to charge the duty on the article specifically in the act of 1846, as it was charged in the preceding acts, may have been an oversight; but the natural, if not legal inference, is rather the contrary.

As the article has a fixed designation in trade and commerce, which has not been carried into the enumeration under either of the schedules, we are inclined to think it falls most apropriately within the third section, as a non-enumerated article, and is chargeable with a duty of twenty per cent. ad valorem.

A new trial, therefore, must be denied.

[NOTE. Both parties subsequently moved for costs, and the motions of both were denied. Case No. 2,957.]

Case No. 2,957.

COGGILL et al. v. LAWRENCE.

[2 Blatchf. 304.][1]

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

COSTS—ACTION TO RECOVER BACK EXCESSIVE DUTIES—REMOVAL FROM STATE COURT.

1. In suits at common law, in the circuit courts of the United States, neither party can recover costs upon any equity in the case, nor do those courts possess authority to award them as an incident of their power over the parties or the subject-matter in litigation. They are purely a subject of legislative appointment.

2. Where an action was commenced in a state court against a collector, to recover back an excess of duties paid on the importation of foreign merchandise, and the action was removed into this court by the defendant, under section 3 of the act of March 2, 1833 (4 Stat. 633), and the plaintiff obtained a verdict for $9.50: *Held*, that the plaintiff was not entitled to any costs.

3. It was the intention of congress that the description of revenue cases mentioned in section 3 of said act, should, when removed into this court, after being commenced in a state court, be proceeded in, in all particulars, as cases originally commenced in this court.

4. Such removal does not bring with it the state law as to costs, and, therefore, in cases of that kind, the costs in this court are regulated by section 20 of the judiciary act of September 24, 1789 (1 Stat. 83), which allows no costs to a plaintiff when he recovers less than $500, and provides that he may, in such case, be adjudged to pay costs, at the discretion of the court.

[Distinguished in Field v. Schell, Case No. 4,771. Overruled in Scripps v. Campbell, Id. 12,562.]

5. Where, in a cause removed into this court under section 3 of said act of 1833, the plaintiff obtained a verdict for $9.50: *Held*, that the case was not a proper one for the allowance of costs to the defendant.

6. Semble, that cases removed into this court from a state court, under section 12 of the judiciary act of September 24, 1789 (1 Stat. 79), do not bring with them the state law of costs, but are subject to the provisions, as to costs, of section 20 of the same act.

This was an action originally brought in the superior court of the city of New York, against the defendant [Cornelius W. Lawrence], as collector of the port of New York, to recover the sum of $150, as so much duty charged and received by the defendant on the importation and entry of foreign merchandise by the plaintiffs [Henry Coggill and others] above the amount collectable by law. Under the provisions of the 3d section of the act of March 2, 1833 (4 Stat. 633), the defendant removed the cause into this court, and, on a trial before a jury, the plaintiffs obtained a verdict for $9.50. [A motion was thereafter made for a new trial, which was denied.] The plaintiffs now moved that full costs of suit, according to the rate of costs in this court, be awarded to them; and the defendant made a counter application that full costs be adjudged to him.

Before NELSON, Circuit Justice, and BETTS, District Judge.

BETTS, District Judge. In common law cases in this court, neither party can recover costs upon any equity in the case, nor does the court possess authority to award them as an incident of its power over the parties or the subject-matter in litigation. They are purely a subject of legislative appointment. Kneass v. Schuylkill Bank [Case No. 7,876]. In that case, Judge Washington held that there was no distinction between cases over which a circuit court of the United States had jurisdiction because of the amount in controversy, and those over which it had jurisdiction because of the subject-matter; and, accordingly, he denied costs to the plaintiff in a patent cause where the recovery was less than $500. The patent acts of April 10, 1790, and February 21, 1793 (1 Stat. 109, 318), did not grant costs to plaintiffs in patent suits, and, accordingly, costs in those suits were recoverable only by virtue of the provisions of the 20th section of the judiciary act of September 24, 1789 (1 Stat. 83). This construction seems to have been acquiesced in by congress, as it has since regulated costs in patent cases by express enactment. Act July 4, 1836 (5 Stat. 123, § 14). It has also made express provision in regard to costs in suits brought by the United States for penalties, without respect to the amount demanded or recovered. Act May 8, 1792 (1 Stat. 277, § 5).

The act of congress of March 2, 1833 (4 Stat. 633, § 3), under which this cause is removed into this court, makes no provision respecting costs to plaintiffs, but, in a certain contingency, gives them to defendants. It moreover expressly declares, that a cause removed from a state court by virtue of the act, and entered on the docket of the circuit court, shall be thereafter proceeded in as a

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

cause originally commenced in that court. Id. § 3. We are of opinion that the plaintiffs cannot recover costs in this case, although it was originally commenced in a state court; because costs are not given by the act authorizing the removal of the cause, nor are they given, upon a verdict of like amount, by any other act of congress, and because it seems to have been the purpose of congress to place all actions against revenue officers, for acts done in relation to the collection of imposts and duties, upon the footing of causes originally commenced in a circuit court. In such cases, no costs are allowed to the plaintiff, if he recovers less than $500, but he may be adjudged to pay costs, at the discretion of the court.

So, also, if the doctrine of Judge Story in Ellis v. Jarvis [Case No. 4,403] in relation to causes removed from a state court into a circuit court of the United States under the 12th section of the judiciary act of 1789, applies to causes removed by virtue of the act of 1833, and they are to be held to carry with them the law of costs of the court in which they are instituted, the plaintiffs must be denied costs in this case, because the recovery, being under fifty dollars, would not carry costs in the state court where the action was commenced. Laws N. Y. 1849, c. 438, § 304. The rule adopted by Judge Story is eminently equitable, but it is not clear to our minds that the quality attached by the 12th section of the judiciary act of September 24th, 1789, to the cases provided for by it, that the cause shall there proceed in the same manner as if it had been brought there by original process, does not bring them under the general law of costs established by the 20th section of the same act. The variance of phraseology employed in the 3d section of the act of 1833, in our opinion, makes the intention of congress clear, that this description of revenue cases commenced in a state court must, after being brought into this court, be proceeded in, in all particulars, as cases originally commenced here, and will thus necessarily be subject to the restrictions as well as partake of the privileges applicable to original actions in this court.

The defendant in the present case would, by the state law, have been entitled to costs on the present recovery, had the case remained in the state court. Section 305 of the state act before cited provides, that "costs shall be allowed of course to the defendant in the actions mentioned in the last section," (which includes actions for the recovery of money,) "unless the plaintiff be entitled to costs therein." If, as before suggested, the removal of the cause does not bring with it the state law of costs, there is manifest reason against allowing the defendant to impose the costs of a jurisdiction into which he forces an unwilling plaintiff, without the object of correcting an erroneous judgment against him, and, unless controlled by a positive law on the subject, this court would, upon the equity of the case, refuse him costs against such plaintiff. The 20th section of the judiciary act leaves this matter to the discretion of the court, and, under the circumstances, we think that costs should be denied to the defendant.

There must be a judgment for the plaintiff for $9.50, without costs to either party.

COGGINS v. HELMSLEY. See Case No. 14,109.

Case No. 2,958.

COGGSWELL v. WARREN et al.

[1 Curt. 223.][1]

Circuit Court, D. Maine. Sept. Term, 1852.

EXECUTION — LEVY ON EQUITY OF REDEMPTION— EXTENSION—SHERIFF'S RETURN.

1. An attachment of all the right, title, and interest of the defendant in and to any lands in the county, binds his right of redemption of mortgaged land, and not the fee, and if the execution be extended on the land, the title dates only from the seizure on the execution.

[Cited in Wyman v. Babcock, Case No. 18,113.]

2. By the law of Maine a mortgagee may extend on the land mortgaged, an execution issuing on a judgment for the debt secured by the mortgage.

3. If an officer's return can be fairly construed so as to be sufficient in law, it is the duty of the court so to construe it.

This was a bill in equity to redeem a mortgage. The respondents denied the title of the complainant to redeem. It appeared that the complainant's title was derived from Mr. C. S. Daveis, who having caused the equity of redemption of the mortgagor to be attached on an original writ, extended his execution on the land within thirty days after the date of his judgment. The respondents claimed under the president, directors and company of the Portland Bank, who being the assignees of a note and the mortgage sought to be redeemed, also caused the right, title, and interest of the mortgagor, in any land in the county, to be attached on an original writ founded on the mortgage debt, and extended their execution on part of the land mortgaged, and other lands of the mortgagor. The attachment in behalf of the bank was prior to that in behalf of Mr. Daveis, but the latter preceded the extent of the execution of the bank. Some other facts are sufficiently adverted to, and stated in the opinion of the court.

Mr. Barnes and E. H. Daveis (with whom was W. P. Fessenden), for complainant.

Mr. Shepley, for respondents.

CURTIS, Circuit Justice. The first and most important question in this case is, whether the execution in the name of the Portland Bank could lawfully be levied on

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

part of the land embraced in the mortgage given to secure the same debt for which the execution issued. Another question was made and argued at the bar, whether the attachment in behalf of the bank on the original writ was valid. I do not deem it necessary to decide this question. The only interest which the debtor had in this land, when both the attachment in behalf of the bank, and that in behalf of Mr. Daveis, was made, was an equity of redemption, and neither attachment could bind any thing besides that equity. But neither the bank nor Mr. Daveis caused an execution to be levied on this equity of redemption pursuant to the attachment. An equity of redemption, as such, can be levied on, only by a sale at auction, in the manner prescribed by the statute. Warren v. Childs, 11 Mass. 222; Aiken v. Medex, 15 Me. 157. This was not done by the bank at all, nor by Mr. Daveis, until after the expiration of thirty days from the date of his judgment. Each party attached the equity of redemption, and extended the execution on the fee. This may be done, and be good as against the debtor and those claiming under him subsequently to the extent, but such extent does not relate back to the attachment of the equity, except in one case specially provided for in the statute (Rev. St. 1821, c. 60, § 1): "When any right in equity of redeeming real estate which is mortgaged, shall be attached on mesne process, and pending such attachment such mortgaged real estate shall be redeemed by the mortgagor, the attaching creditor shall have the same lien on the said estate as though the attachment had been of the fee, and execution may be levied thereon accordingly." This clearly implies what, independent of this provision, would seem to be clear, that in other cases an extent cannot be made on the land as if the attachment had been of the fee, when it was of the equity of redemption only; and the case stands clear of the attachments, and must be decided upon a comparison of the titles gained by the extents. That of the bank was prior in time, and, if valid, must prevail. The objection made to it is, that the debt, for which the execution issued, was secured by a mortgage covering the land levied upon. Whether this objection be valid depends upon the local law of Maine. The argument is that this law has given to the mortgagor three years, after entry for condition broken, to redeem the land; that if the creditor can extend his execution on the land he may thereby cut down the term of redemption to one year from the date of the extent, which may be, as in this case it was, less than three years from the breach of the condition; and that by taking a mortgage, the creditor does impliedly agree, that in respect to that debt, the debtor shall have a right of redemption for three years, from the entry for breach of condition. This argument has had the sanction of high authority (Atkins v. Sawyer, 1 Pick. 351); but, in my mind, as applied to an extent on the land, it is open to much question. The statute which gives this right of redemption is limited to a particular class of cases. There is no general and positive provision of statute law, that mortgagors shall have a right to redeem, for three years after the debt becomes payable. The design of the statute was to regulate foreclosures, by entry for condition broken, and it merely provides, that when the mortgagee shall have obtained actual possession for condition broken, the mortgagor may redeem at any time within three years next after such possession obtained, and not afterwards. But the same system of statute law enables every judgment creditor, to levy his execution on the land of his debtor, and just as clearly grants this right to the creditor, as the other law grants the right of redemption to the debtor. Both must stand and be effectual, if possible. The legislature, having made no exception out of its grant of remedy to the creditor, none can be implied by the court, unless clearly demanded by some other provision of law; and if that other provision is applicable only to a different remedy by foreclosure, and may have a legitimate effect according to its terms and apparent meaning, without interfering with other remedies, I should hesitate long, before I resorted to it, to create a limitation upon the right of creditors, to use the ordinary process of the law.

To say that the creditor has agreed that the debtor may have three years to redeem, is to assume the very point in controversy. He has placed himself in a position, in which, if he seeks to foreclose the right to redeem, three years are required to complete that remedy, but if he extend his execution on the land, only one year is required to give him an absolute title. And the debtor may as well be supposed to have agreed to the latter, as the creditor to the former. Besides, this supposed agreement would be inconsistent with the right of the creditor to seize other property of the debtor on the execution, for the debt secured by the mortgage; because this proceeding compels a redemption within the term of three years. Cushing v. Hurd, 4 Pick. 253. The truth seems to me to be, that without resorting to any implied agreement, the debtor, by giving the mortgage, subjects his land to all such rights as the law confers on mortgagees; and by giving his promissory note for the mortgage debt, he subjects his person and property, generally, to the remedies which the law affords to compel its payment at maturity. Whether one remedy or the other will most speedily extinguish the equity of redemption, must depend upon the course of the courts, and the time required to obtain a judgment; in which it is by no means a case beyond experience, to obtain a judgment at law, levy the execution, and wait a year for the right

of redemption from such levy to expire, would prove quite as tardy as a foreclosure by possession. I should feel great difficulty, therefore, acting on my own views of the law, in assenting to the doctrine of Atkins v. Sawyer, as applied to an extent on the land mortgaged. I should yield to its authority in adjudicating upon titles in Massachusetts, although the same learned court, which decided that case, refused, in Buck v. Ingersoll, 11 Metc. 226, to apply the rule to personal property. But sitting in Maine, to try a title to real property in that state, I assent to the rule, which I think fairly deducible from the case of Porter v. King, 1 Greenl. 297. Some of the comments of the complainant's counsel on that case are well founded; but, at the same time it is true, that the question whether an extent on part of the land mortgaged, to satisfy, in part, the mortgage debt, was valid, and effectual to give the mortgagee an absolute title at the expiration of one year, was made and argued by counsel, and decided by the court. The case called for a decision of this question. The mortgagee having sold the land thus extended on, for a larger sum than the appraised value at which it was set off to him, the mortgagor claimed that he should account for that larger sum, upon the ground that the relation of the parties was not changed by the extent, nothing having passed thereby. To this it was replied, that the relation of the parties was changed by the extent, and that this land passed in the same manner as if the land levied on, had not been embraced in the mortgage; and the court said: "That the land having been regularly set off to the creditor at an appraised value, according to the forms of law, his title to it became perfect, after the lapse of a year from the extent. The mortgage was intended, merely to increase the certainty of payment of the debt, not to place any part of the debtor's estate out of the reach of the common and ordinary process of the law." It is observable, also, that the Portland Bank was the indorsee of the notes on which their judgment was recovered. In Crane v. March, 4 Pick. 131, it was held, that the indorsee of a note, secured by mortgage, might cause the equity of redemption to be attached, and sold on execution. In that case a third person held the mortgage, as a trustee, for the indorsee; here the mortgage, as well as the notes, were assigned to the bank; but this seems to me, not a distinction of any real importance. This objection to the respondent's title must therefore be overruled.

Two other objections are taken to the form of the levy. The first is, that the statute, in force when the execution was extended, required the appraisers to set out the land by metes and bounds, and they have only described the land generally, and then given a reference to a deed recorded in the registry of deeds for the county. Whatever might have been thought of this objection if the question were new, I am of opinion that it is foreclosed by the decision of the supreme court of Massachusetts, in Boylston v. Carver, 11 Mass. 515, decided in 1814, while Maine was a part of that state. When, after the separation of this state, it enacted the same statute here, I must consider that it was intended it should be expounded here according to the construction which had already been given to it.

The remaining question arises upon the officer's return on the execution. The part objected to is as follows:

"I have this day levied the within execution thereon, and I have delivered seisin and possession of said estate to the said attorneys and assignees of the creditors, John Warren and Nathaniel Warren; to have and to hold the same to them and to their heirs and assigns forever, in full satisfaction of this execution, and all fees and charges of levying the same; which charges amount to eighty-four dollars and eighteen cents. I therefore return this execution satisfied in full. Jere. Martin, Deputy-Sheriff."

"May 16, 1840. Received of Jeremiah Martin, deputy-sheriff, seisin and possession of the above described premises, in full satisfaction of the within execution, and the charges of levying the same.

"John Warren,
"Nathaniel Warren.

"Attorneys and Assignees of the Within-Named Creditors, but for Our Own Use and Benefit."

It is a fair presumption that the officer intended to make a legal extent and return, and therefore if his language fairly admits of a construction which will make the return legal and sufficient, it should be so construed. There is no doubt John and Henry Warren were duly authorized to receive seisin as attorneys for the creditors. The return of the officer declares he delivered seisin of the estate "to the said attorneys and assignees of the creditors." If they were attorneys, it is of no importance that they were also assignees, and mentioning that has no effect. The return proceeds "to have and to hold the same to them and their heirs and assigns forever, in full satisfaction of this execution." The last antecedent to "them" is "John and Nathaniel Warren," but the context shows they were not the persons meant, because the holding is to be in full satisfaction of the execution, and this could only be by the execution creditors having the land; setting it off to the attorneys would not satisfy the execution. I think that, taking the whole return together, the meaning is, that the land was set off to the execution creditors, and not to the attorneys, and this title of the creditors was subsequently conveyed to the defendants. Some objection was made to the receipt of seisin, the attorneys declaring therein, that it was accepted by them as attorneys and assignees

of the creditors, but for their own use. But if they acted as attorneys the statute was complied with, and whether they were also assignees, and intended to hold the land to their own use, were matters between them and the creditors, and did not affect the validity of the proceedings. There is no inconsistency in their acting as attorneys and being at the same time the equitable owners of the land. The result is that the defendant's title must prevail, and the bill must be dismissed with costs.

Case No. 2,959.

In re COGSWELL.

[1 Ben. 388;[1] 1 N. B. R. 62; Bankr. Reg. Supp. 14; 14 Pittsb. Leg. J. 616; 6 Int. Rev. Rec. 85.]

District Court, S. D. New York. Sept. 6, 1867.

BANKRUPTCY—APPOINTMENT OF ASSIGNEE WHEN NO DEBT HAS BEEN PROVED.

When no creditor who has proved his debt appears at the time and place appointed for the first meeting of creditors, the judge, or, if there be no opposing interest, the register, is to appoint one or more assignees.

[Cited in Re Bloss, Case No. 1,562.]

[On certificate of register in bankruptcy.]

[In bankruptcy. In the matter of Mortimer C. Cogswell.] In this case the register, at the request of the bankrupt, certified the following question for the opinion of the judge: When no creditor attends at the place and time specified in the warrant and notice for the first meeting of creditors, does the law provide for or require the appointment of an assignee of the bankrupt's estate? The register, in his certificate, said: "My view is, that there is not any provision of the act providing for the appointment of an assignee where there is not a meeting of creditors; that the only case in which a register is expressly authorized to appoint an assignee is where no choice is made by the creditors at the first meeting (section thirteen); that if there is not a meeting, this case does not occur; that a meeting is an indispensable condition of this power; that the justices of the supreme court seem to have so regarded the law, not having prescribed a form for an appointment by a register, except where no choice is made by the creditors at the meeting (form No. 11); that the twenty-third and twenty-ninth sections of the act [14 Stat. 528, 531], however, clearly contemplate an assignee in every bankruptcy; that, by necessary implication, there must be a power to appoint; that in the case under consideration, as the proceeding is before a register, he must possess the power to make the appointment; and that the opinion of the register, therefore, is, that in the case mentioned in the question, the law does provide for and require the appointment of an assignee of the bankrupt's estate."

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

BLATCHFORD, District Judge. The register is correct in his conclusion, that in case no creditor attends at the place and time specified in the warrant and notice for the first meeting of creditors, the law provides for and requires the appointment of an assignee of the bankrupt's estate. If the register attends at the place and time specified in the warrant and notice for the first meeting of creditors, and no creditor has proved a debt, the meeting is held, within the purview of the act, as fully and effectually as if debts had been proved and creditors had attended or been represented at the meeting, and the contingency happens which the thirteenth section speaks of, namely, the contingency that no choice is made by the creditors at the meeting. If creditors have proved their debts, and attend or are represented, but fail to choose an assignee, then no choice is made by the creditors. If no creditor has proved a debt, so that no creditor has a right to vote in the choice of an assignee, then equally there is no choice of an assignee made by the creditors. In either case the judge, or, if there be no opposing interest, the register is to appoint one or more assignees.

[The clerk will certify this decision to the register, Isaac Dayton, Esq.][2]

COGSWELL (UNITED STATES v.). See Case No. 14,825.

COGSWELL (WRIGHT v.). See Case No. 18,074.

Case No. 2,959a.

COHAN v. The ROLLING WAVE.

[23 Betts, D. C. MS. 121.]

District Court, S. D. New York. Dec. Term, 1857.

PLEADING AND PROOF IN ADMIRALTY.

[1. Admiralty will not entertain defenses inadequately pleaded and set up for the first time by formal objection at the trial.]

[2. An assignee of a claim may sue therefor in admiralty in his own name.]

[3. A vessel coming from sea into an American port and receiving repairs there will be presumed to be liable under the general maritime law, until the contrary is shown.]

[In admiralty. Libel by Daniel Cohan against the brig Rolling Wave to recover for labor and materials furnished in repairing the brig.]

BETTS, District Judge. The libellant is assignee of a mechanic who supplied labor and materials in this port to a sea-going vessel undergoing repairs by a ship-wright. The assignor who was a blacksmith was employed by the ship-wright, but the claimant who was the owner of the vessel knew of his employment and approved of it, and also paid a portion of the bill and tended a further sum which he claimed to be a full compen-

[2] [From 6 Int. Rev. Rec. 85.]

sation of the balance. It did not however cover the amount proved to be due. The defence is two fold, that the case does not come within the cognizance of the court, the debt not being created in favor of the libellants, and there being no proof that the ship repaired is not a domestic vessel. These objections are formal in their character. Neither is tenable in principle, nor are they raised by proper defensive exceptions in the pleadings. They are first brought forward at the hearing, and it is against the doctrines of the court to heed objections of that character first raised on the trial of the cause. Furniss v. The Magoun [Case No. 5,163]. It is matter of defence under special exception only, that the lien claimed, or right set up in the action exists by means of state law alone. The Active [Id. 34]. And in admiralty courts a suit is rightly instituted in the name of the party who has the actual interest in the subject matter. Fretz v. Bull, 12 How. [53 U. S.] 468. The alleged tender, if fully proved, was inadequate to the satisfaction of the debt, and accordingly constitutes no defence. But I apprehend it is a mistake to suppose that every sea-going vessel receiving repairs or supplies in an American port, on coming in from sea, is to be deemed in law a domestic vessel, unless the contrary is proved. She arrives subject to the marine law, and that dominion will be presumed to adhere to her unless displaced by proof of her exemption from it, in regard to liabilities of a maritime character. The privilege must be established by the party who sets it up in his own behalf. Decree for libellant, with reference to compute amount.

Case No. 2,959b.

In re COHAUS.

In re WILDMAN.

[Betts' Scr. Book, 91.]

Circuit Court, District of Columbia. Aug. 10, 1842.

DISCHARGE IN BANKRUPTCY—ACT OF 1841—"CREDITOR."

[1. Wherever a right is given to a "creditor" by the bankrupt law of 1841 [5 Stat. 440], a creditor who has come in and proved his debt is intended.]

[2. A creditor who has not come in and proved his debt under the act cannot oppose the bankrupt's discharge.]

[3. Other creditors, as well as the bankrupt, may contest the right of a creditor, who has not proved his debt, to oppose the bankrupt's discharge.]

In bankruptcy. Andrew Barby, claiming to be a creditor of the bankrupt, within the time prescribed by the rules of this court in bankruptcy, in order to show cause why the bankrupt should not be discharged, filed certain allegations, and a day was assigned by the court for the hearing thereof, on which day the bankrupt denied that Barby was a creditor, and contended that, if he was in fact a creditor, he had no right, as such, to appear and show cause why the bankrupt should not have his discharge and certificate, because he had not come in and proved his debt under the bankruptcy, according to the requisition of the bankrupt act of 19th August, 1841.

The same point having been raised in the case of Wildman, the question was argued by Mr. Jones and R. S. Coxe, for Cohaus; and Mr. Bradley, for creditor, Barby; and Mr. Jones, for Wildman; and Mr. Pratt and Mr. Coxe, for opposing creditors.

In both cases there was prima facie evidence that the persons who filed the allegations were in fact creditors of the bankrupt respectively; and in Wildman's case they were so returned in his schedule annexed to his petition; but none of them had come in and proved their debts in the manner prescribed by the bankrupt act.

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

CRANCH, Chief Judge. We have considered the preliminary point raised in these cases, and are of opinion that no creditor who has not come in and proved his debts in the manner prescribed by the bankrupt act is competent, as creditor, to appear and show cause why the bankrupt should not have his discharge and certificate. We think that no person can claim a right under the bankrupt law, as creditor, who has not come in and proved his debt according to the provisions of that law; and that it will appear by a careful contemplation of the provisions of the act, that wherever it gives a right to a creditor, as such, it means a creditor who has come in and proved his debt under the bankruptcy. By the 2d section of the act, although unlawful preference should have been given by the bankrupt, he may have a final discharge if "assented to by a majority in interest of those of his creditors who have not been preferred." How is that "majority in interest" to be ascertained? Must not those creditors have proved their debts under the law? And can any one who has not so proved his debts join in that assent? By the 4th section the bankrupt who has surrendered, &c., shall be entitled to a full discharge, "unless a majority in number and value of his creditors who have proved their debts shall file their written dissent thereto. No creditor who has not proved his debt as required by the 7th section of the act" [can therefore file a written dissent]. It seems to us that no sufficient reason can be given for permitting a creditor who has not come in to prove his debt under the bankruptcy, to come in and file objections to the bankrupt's discharge, when the same creditor would not be permitted to file his written dissent to the discharge without having first come in and proved his debt. By the same 4th section, notice by advertisement to creditors is to be notice to all creditors who have proved their

debts, "and other persons in interest." These other persons in interest must be persons other than creditors; persons who cannot be allowed to prove, or not in a situation to prove, their debts; persons who are not creditors, but who have an interest in the property and effects of the bankrupt. A person who claims a right under the bankrupt law, as a creditor, must prove himself to be a creditor in the manner prescribed by that law. He cannot claim under the law and against the law at the same time. By the same 4th section, it is provided that, when the residence of the creditor is known, a service (i. e. of the notice required by the preceding part of the sentence) on him personally or by letter shall be prescribed by the court. The words "the creditor" evidently allude to the creditors just before mentioned, viz. the creditors who have proved their debts; and it seems at least doubtful whether this personal notice is to be given to any creditor who has not proved his debt under the bankruptcy. But, however that may be, it seems to us clear that every creditor who would claim any right under the bankrupt law as a creditor must come in and show his title in the manner prescribed by that law.

The bankrupt is not the only person who has a right to contest the competency of the person claiming to be a creditor, and his right, as such, to object to the discharge. Any of the other creditors may contest it; and the bankrupt law prescribes the manner in which the claim to be a creditor shall be established. And by the same 4th section it is provided that if, at the time of the hearing of the petition of the bankrupt for a discharge, and majority in number and value of the creditors who shall have proved their debts shall, at such hearing, file their written dissent to the allowance of the discharge, &c., a discharge shall not be decreed to him. Here again it is evident that none can join in this dissent but creditors who have proved their debts. It would seem strange that a creditor who was not competent to file his written dissent to the allowance of the discharge should yet be deemed competent to come in to show cause against that allowance. In the 7th section it is provided that upon every petition by a bankrupt for the benefit of the act, or by a creditor against a bankrupt under the act, notice shall be published in some newspaper; and that "all persons interested" may appear and show cause why the prayer of the petitioner should not be granted. It does not say that creditors, as such, may appear and show cause, &c., because, until the debtor is declared bankrupt, the creditors cannot prove their debts under the law, and therefore are not known to the law as creditors. The act, therefore, says, "all persons interested" may appear and show cause, not why the debtor should not have his discharge, but why he should not be declared bankrupt, thereby showing that only those can be recognized by the law, as creditors, who have proved their debts. The moment the debtor is declared bankrupt, the creditors may prove their debts in the manner prescribed by the law; and time is given them for that purpose, and notice is to be given by advertisement in some public newspaper. If, then, they would appear as creditors on the day appointed, and show cause, &c., they must show themselves to be creditors in the manner prescribed by the law under which they claim the right to appear as such. The 5th section of the act provides that "no creditor, or other person, coming in and proving his debt, or other claim, shall be allowed to maintain any suit, at law or in equity, therefor; but shall be deemed to have waived all right of action and suit against such bankrupt; and all proceedings already commenced, and unsatisfied judgments already obtained thereon, shall be deemed to be surrendered thereby."

This shows clearly the intention of the legislature that a creditor should not avail himself of any of the rights of a creditor under the law, without coming in under the law, and taking such remedy as the law gives; and should not stand out and hold on to his supposed rights, as against the bankrupt act, while claiming a right under that act. A creditor can be permitted to come in for one purpose only, but, if admitted for one purpose, he must be admitted for all.

For these reasons we have come to the conclusion that the persons who have offered these allegations were not, and are not now, competent to come in and show cause against the allowance of the bankrupt's discharge, inasmuch as they have not come in and proved their debts as required by the act.

THRUSTON, Circuit Judge (absent), was understood to be of a different opinion.

Since the court came to this conclusion, the judges have been referred to a decision of Judge Betts in the southern district of New York, as published in the Morning Courier and New York Enquirer of the 29th of July, 1842, corroborating the view which we have taken of this subject, and deciding the same point in the same way. [Case No. 7,784.]

COHEN, Ex parte. See Case No. 12,175.

Case No. 2,960.

In re COHEN.

[3 Dill. 295.][1]

Circuit Court, E. D. Arkansas. 1875.

BANKRUPT LAW — REV. ST. § 5045, CONSTRUED — EXEMPTED PROPERTY.

Under the Revised Statutes (section 5045), a bankrupt is entitled to have property exempted

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

to the amount allowed by the constitution and laws of the state in which he is domiciled, as existing in the year 1871, although the amount of such exemption was reduced by the constitution and laws of the state after 1871, and before the proceedings in bankruptcy.

In bankruptcy. Petition of review. Albert Cohen, domiciled in the eastern district of Arkansas, was adjudicated a bankrupt by the district court of that district, on July 26, 1875. By the new constitution of Arkansas, which went into effect October 30, 1874, there is exempted from sale on execution specific articles of personal property, to an amount not exceeding $500, in addition to wearing apparel, etc. By the former constitution of the state, in force from 1868 until the new constitution went into effect, October 30, 1874, there was exempted personal property to the amount of $2,000. The indebtedness of the bankrupt was contracted in part before and in part after the new constitution went into operation. The assignee set apart to the bankrupt specific articles of personal property of the value of $500 allowed by the bankrupt act, and to the value of $500 allowed by the present constitution. The bankrupt excepted to this, and claimed $2,000 as exempt. The district court sustained the bankrupt's exceptions to the assignee's schedule of exempted property, and ordered the assignee to set aside to the bankrupt, as exempted to him under the bankrupt act, property to the value of $2,000. To this order the assignee excepted, and brings the decision of the district court here for review. As applicable to this case, the 14th section of the original bankrupt act exempted such property to the bankrupt as was exempted "by the laws of the state in which the bankrupt had his domicile, etc., to an amount not exceeding that allowed by such state exemption laws in force in the year 1864." On June 8, 1872 (17 Stat. 334), congress amended the above, as follows: "By striking out the word 1864 and inserting, in lieu thereof, 1871." On March 3, 1873 (17 Stat. 577), congress passed "an act to declare the true intent and meaning of the act of June 8, 1872," supra; and therein declared "such true intent and meaning to be, and it is hereby enacted that they shall be, the amount allowed by the constitution and laws of each state, respectively, as existing in the year 1871; and that such exemptions shall be valid against debts contracted before the adoption and passage of such state constitution and laws, as well as those contracted after the same, and against liens by judgment and decree of any state court, any decision of any such court, rendered since the adoption and passage of such constitution and laws, to the contrary notwithstanding." This provision, without substantial change, is carried into the Revised Statutes (section 5045).

A. W. Bishop and Compton & Martin, for assignee.

Wilshire & Allen, for bankrupt.

DILLON, Circuit Judge. The constitution of the state of Arkansas in force in 1871, and until October 30, 1874, allowed an exemption to the amount of $2,000. The constitution of 1874, now in force, reduced the amount of the exemption to $500. The question is, whether the provision, in this regard, of the old or of the new constitution applies to the case of this petitioner, he having been declared a bankrupt since the new constitution went into operation. I have had some difficulty in reaching a conclusion entirely satisfactory to my own mind; but, after viewing the subject in its various lights, my judgment is, that the amount allowed by the constitution in force in 1871 is that to which the bankrupt is entitled. Such is the language of the act of March 3, 1873 (17 Stat. 577), which is carried into the Revised Statutes (section 5045); and I see no good reason for not giving to the words of the act their natural meaning and effect. Congress, in an act evidently intended to favor the exemption, dropped the words "not exceeding," etc., in the prior legislation, and substituted words which fixed the amount of the exemption to be "the amount allowed by the constitution and laws of each state, respectively, as existing in the year 1871." This was done ex industria; and the opposite construction would, as it seems to me, defeat the purpose of congress, as shown by the history of the legislation on this subject. The ruling of the district court is, accordingly, affirmed. Affirmed.

Case No. 2,961.

In re COHEN.

[19 N. B. R. 133.][1]

District Court, S. D. New York. Feb. 5, 1879.

BANKRUPTCY—ENJOINING PROCEEDINGS IN STATE COURT.

1. An action of claim and delivery of goods and chattels under the New York Code, brought against a bankrupt, must be stayed pending the question of his discharge so far as the action is one for the recovery of a money judgment for the value of the goods.

2. One W., in 1876, sold certain goods to the bankrupt, and in 1878 commenced an action of claim and delivery against him to recover the goods or their value. Upon the certificate of the sheriff that the goods had been concealed, removed, or disposed of, and upon affidavits setting forth that defendant had obtained the goods on credit by means of false representations as to his pecuniary circumstances and condition, and that said representations were made with intent to obtain the goods thereby, and not to pay therefor, an order of arrest was granted. The bankrupt, who had been adjudicated prior to the commencement of the action, thereupon procured an order staying proceedings under the order of arrest and all proceedings in the action for the recovery of a money judgment for the value of the goods. On motion to vacate this order, *held*, that the stay was properly granted.

In bankruptcy.

[1] [Reprinted by permission.]

A. J. Simpson, for plaintiff.
D. Leventritt, for bankrupt.

CHOATE, District Judge. This is a motion to vacate an order staying the proceedings of one Werner in an action against the bankrupt. The petition in bankruptcy was filed December 21, 1876, and the bankrupt was adjudicated September 12, 1878. In November, 1878, Werner commenced against the bankrupt an action of claim and delivery, as it is called by the New York Code, ostensibly, and so far as appears by the complaint, to recover certain goods and chattels. It is the substitute for the action of replevin. In this action, if it appears by the certificate of the sheriff that the goods sought to be replevied have been eloigned, concealed, removed, or disposed of, so that he cannot take the same, the plaintiff can proceed with his action and recover a money judgment for their value. And upon proof by affidavit of these facts, and that such concealment or disposition of the goods was with intent that they should not be found or taken, or to deprive the plaintiff of the benefit thereof, he can procure an order of arrest against the defendant, and he will be held to bail, the condition of the bail bond being "that the defendant will deliver the goods to the plaintiff, if delivery thereof is adjudged in the action, and will pay any sum recovered against him in the action." Code Civ. Proc. § 575. The sheriff having made the necessary certificate, the plaintiff procured the order of arrest, and at this stage of the case the bankrupt obtained the order of this court staying proceedings under the order of arrest and all proceedings in the action for the recovery of a money judgment for the value of the goods. The affidavits on which the order of arrest was procured are to the effect that in September, 1876, the defendant, to induce the plaintiff to sell and deliver to him on credit the goods in question, falsely represented to the plaintiff his pecuniary circumstances and condition, and thereby induced the plaintiff to part with the goods, and that these false representations were made with intent on defendant's part to obtain the goods thereby and not to pay therefor.

It is now insisted on the part of the plaintiff that this court has no power to grant a stay of a suit of replevin or of any proceedings or remedies given to the plaintiff therein. It is obvious, however, that this particular form of action is in reality a proceeding to obtain alternative judgments or relief; first, if the goods are found, the goods themselves; and, secondly, if they can not be found, in which case the action of replevin, strictly speaking, must utterly fail, a money judgment for their value. It is the combination in a single action of an action of replevin and an action of trover, and the arrest is clearly given as a provisional remedy in aid of this proceeding to recover the value of the goods alleged to have been disposed of. A claim for the conversion of goods and chattels is expressly enumerated among the debts that may be proved against the bankrupt (section 5067), and suits to recover all provable debts are by section 5106 to be stayed pending the question of the bankrupt's discharge. Even in such a debt was created by fraud and will not be discharged, proceedings therein, including arrest on mesne process, will be stayed pending the question of the bankrupt's discharge. In re Rosenberg [Case No. 12,054]; In re Schwartz [Id. 12,502]. Therefore, so far as the action is an action for conversion it must be stayed. The bankrupt law deals with proceedings against bankrupts, not according to their form merely, but according to their real character. In re Schwartz, supra. Otherwise, by ingenuity in framing a complaint, or by legislation as to the form of actions, the obvious purposes of the bankrupt law could be defeated. To allow the action to go on would be to allow the bankrupt, pending the question of his discharge, to be sued for the recovery of a provable debt, and to permit one creditor to have an advantage over all others by forcing the bankrupt to give him security for his claim. The stay was properly granted. In this particular case it is very plain that the form of action was adopted in order to avoid the difficulties which the bankrupt law interposes to the plaintiff's proceeding in any other form of action for the value of the goods. Two years and a half after selling goods to the bankrupt the vendor claims the right to disaffirm the sale and rescind the contract for fraud on the part of the bankrupt. The goods were merchantable articles, evidently, from their description, sold to the bankrupt to be sold again by him in his business. It is too plain that the form of action for replevin is resorted to thus after the bankruptcy, not with the expectation of replevying the goods, but for the alternative remedy for their value which that form of action permits, and upon the theory that, actions of replevin not being enumerated among those that may be stayed, any remedy given in such form of action is saved to the creditor. While it is hardly possible that it can be seriously claimed that the right to avoid a sale and delivery for fraud can survive after so long a time, yet so far as this action is prosecuted against the bankrupt strictly as an action of replevin, it is not interfered with by the stay, and this is all that the creditor is entitled to ask of this court.

COHEN (ALSTON v.). See Case No. 265.

Case No. 2,962.

COHEN v. The AMANDA FRANCES MYRICK.

[Crabbe, 277.][1]

District Court, E. D. Pennsylvania. June 14, 1839.

DEFENCES TO BOTTOMRY BOND.

A bottomry bond having been given to a party, in consideration of his assuming the debts due by a vessel, she left the port without opposition, and payment of the bond was afterwards contested, on the ground of the debts not being satisfied. This defence was required to be clearly made out, in order to contradict the prima facie proof afforded by the bond.

This was a libel for bottomry.

The libellant [Jacob Cohen, Jr.], a citizen of Charleston, S. C., claimed the sum of $1,529.97, being the amount of a bottomry bond given him, less a credit allowed for freight and commissions on certain goods, which had been transported in the schooner, on his account. It appeared that the bond was given in consideration of the libellant becoming liable for certain debts due for necessary repairs to the schooner, and that, after the bond was given, she sailed from Charleston, without opposition. The respondent alleged that the consideration for which the bond was given had failed, as the charges for repairs were not paid, and the schooner and her owners still liable therefor. It was also alleged that there were overcharges on some articles on the account.

H. M. Phillips, for libellant.

G. M. Wharton, for respondent.

HOPKINSON, District Judge. The bond is, prima facie, conclusive that the amount claimed on it has actually been furnished to the vessel. What defence has been made?

1. A charge on account of freight on the libellant's goods. This is not disputed and must be allowed, as also a charge for commissions, on the same account.

2. Certain small overcharges have been alleged, which have not been proved, and cannot be allowed.

3. It is alleged that the debts, the assuming of which was the consideration of the bond, have not been paid, and that the vessel, and her owners, are still liable on that account. The only proof offered of this is the copies of the bills, without receipts. These are not originals, and there is no proof as to who made them out; they were offered by the libellant, to show that his account was correct, but not to prove payment. It is in evidence that the schooner was allowed to leave Charleston, without any claim being made on these bills, and we must conclude that the accounts have been paid, or that the creditors are satisfied with Mr. Cohen's security.

The account will stand thus:

Amount of bond	$1,881 86
Credits allowed	351 89
	$1,529 97

Decree for libellant for $1,529.97, and costs.

An appeal from this decree was taken, by the respondent, to the circuit court of the United States for the third circuit; but it was afterwards discontinued.

COHEN (BAYERQUE v.). See Case No. 1,134.

Case No. 2,963.

COHEN v. GRATZ.

[3 Wall. Jr. 379;[1] 4 Pa. Law J. Rep. 52; 6 Pa. Law J. 333.]

Circuit Court, E. D. Pennsylvania. Nov. Term, 1862.

PRACTICE—FEIGNED ISSUE—MOTION FOR NEW TRIAL.

1. A motion for a new trial of a feigned issue, directed by a court of chancery, must be heard on the merits of such issue singly, and cannot be affected by the equities arising on the bill and answer.

2. A motion for a new trial of such an issue, must be disposed of before the cause will be heard on bill and answer.

At a former hearing by Grier, J. an issue was directed by the equity side of this court, on exceptions filed to the master's report in the above case, for the purpose of determining the value of certain lands in Union and Columbia counties, Pennsylvania. The jury having found a verdict fixing a specific valuation, a motion was made for a new trial.

Budd & Tilghman, for complainant, urged that on such motion all the equities of the case were opened, and that in hearing it the court would take into consideration the general merits on bill and answer. [Com. v. Judges, 4 Pa. St. 301; Baker v. Williamson, Id. 456.][2]

Reed & Williams, contra, contended that the motion made for a new trial must be heard and disposed of, before the equities of the whole case will be considered. [3 Daniel, Ch. Pr. 754–757.][2]

GRIER, Circuit Justice. In hearing the motion for a new trial of this issue, the court will confine itself to the question, whether the verdict of the jury is in conformity with the weight of evidence, and the law, on the particular issue submitted. The motion must be disposed of, and the verdict either confirmed or a new verdict taken and confirmed, before the court will hear the whole merits.

[NOTE. For prior litigations in the state courts between the same parties or their privies, and affecting in some degree the subject-matter

[1] [Reported by William H. Crabbe, Esq.]

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

[2] [From 6 Pa. Law J. 333.]

of this controversy, see Gratz v. Phillips, 1 Bin. 588; Gratz v. Simon, 3 Bin. 474; Gratz v. Phillips, 5 Bin. 564, 14 Serg. & R. 144, 1 Pen. & W. 333, and 2 Pen. & W. 410; Simon's Ex'rs v. Gratz. Id 412; Cohen's Appeal, 2 Watts, 175.

[For a case in the supreme court of the United States, reversing a decree of the circuit court for the eastern district of Pennsylvania, for an accounting and conveyance by the executors of Simon Gratz, see Gratz's Ex'rs v. Cohen, 11 How. (52 U. S.) 1.]

COHEN (HYDE v.). See Case No. 6,967.

Case No. 2,964.

COHEN v. PHELPS.

[2 Sawy. 530;[1] 19 Int. Rev. Rec. 67.]

Circuit Court, D. California. Feb. 3, 1874.

CUSTOMS DUTIES—"FISH PLATES"—ACT OF 1842—ACT OF 1864.

1. Section 20 of the act of congress of 1842, to provide revenue from imports, etc. (5 Stat. 565), in relation to duties on non-enumerated articles, is not repealed by the act of 1864, to increase duties on imports, etc. (13 Stat. 202).

[Cited in Lloyd v. McWilliams, 31 Fed. 263.]

2. Said section 20 of the act of 1842 being still in force, it affords a rule of construction for determining under which head of articles specifically enumerated in the act of 1864, articles not specifically mentioned by name in said act are to be classed.

3. Under section 3 of said act of 1864, construed in connection with said section 20 of the act of 1842, "fish plates" are to be classed under the head of "wrought-iron railroad chairs," which are subject to a duty of two cents per pound; and not under the head of "all manufactures of iron not otherwise provided for," subject to a duty of thirty-five per cent. ad valorem.

[At law. Action by A. A. Cohen against T. G. Phelps, collector of the port of San Francisco.]

Cutler McAllister, for plaintiff.

L. D. Latimer, U. S. Dist. Atty., for defendant.

SAWYER, Circuit Judge. The sum sued for is the difference between two cents per pound and thirty-five per cent., ad valorem, on a quantity of "fish plates," paid by the plaintiff under protest to the defendant as collector of the port of San Francisco.

The defendant claims that section 20 of the act of 1842 is still in force; that the fish plates not being specifically named in the act of 1864, are non-enumerated articles within the meaning of said section 20, most resembling "wrought-iron railroad chairs," and as such subject to the duty of two cents per pound imposed on the latter by the act of 1864.

The plaintiff, on the other hand, insists that they are enumerated in the act of 1864, under the head of "manufactures of iron, not otherwise provided for," and only subject to a duty of thirty-five per cent., ad valorem. Section 3 of the act of 1864 (13 Stat. 203, 204) provides that "there shall be levied, collected and paid on the goods, wares and merchandise herein enumerated and provided for," * * * the following duties and rates of duty, that is to say * * * "on wrought iron railroad chairs, two cents per pound," * * * "on all manufactures of iron, not otherwise provided for, thirty-five per cent., ad valorem." * * * Section 22 provides "that all acts and parts of acts repugnant to the provisions of this act be and the same are hereby repealed." Id. 216. Section 20 of the act of 1842 provides "that there shall be levied, collected and paid, on each and every non-enumerated article, which bears a similitude either in material, quality, texture, or the use to which it may be applied, to any enumerated article chargeable with duty, the same rate of duty which is levied and charged on the enumerated article which it most resembles in any of the particulars before mentioned."

It is clear to my mind, and it is conceded as a fact by the parties, that fish plates bear a similitude, in material, quality, texture and the use to which they are applied, to "wrought-iron railroad chairs," within the meaning of said section 20. The only questions, then, are, is section 20 of the act of 1842 still in force, and are the fish plates in question "enumerated and provided for, within the meaning of the words as used in section 3 of the act of 1864, in the terms 'manufactures of iron, not otherwise provided for?' —or are they embraced by the provision for wrought iron railroad chairs?" The words, "not otherwise provided for," must have some force.

These questions, it appears to me, are determined by the supreme court in the case of Stuart v. Maxwell, 16 How. [57 U. S.] 158; arising under the act of 1846. The questions in that case are precisely similar, although arising upon a different article. Section 3 of the act of 1846 provided that there should be levied and collected on "all goods, wares and merchandise imported from foreign countries, and not specially provided for in this act, a duty of twenty per cent., ad valorem." 9 Stat. 43. In another section it was provided that on certain goods there shall be collected a duty of twenty-five per cent., ad valorem, among which are "manufactures composed wholly of cotton not otherwise provided for." Id. 47, Schedule D. And section 11 provided, "that all acts and parts of acts repugnant to the provisions of this act be and the same are hereby repealed." The goods upon which twenty-five per cent. was demanded and collected were "manufactures of linen and cotton," and therefore not "manufactures composed wholly of cotton." There was no enumeration by name in the act of "manufactures of linen and cotton," and no enumeration to de-

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

scribe it except the words "manufactures composed wholly of cotton." It was, therefore, insisted by the owners that the goods came under the provision of section 3, "goods * * * not specially provided for in this act." But the supreme court held that section 20 of the act of 1842 was not repealed by the act of 1846, and that the act of 1846 was to be read as though section 20 of the act of 1842 was a part of it, and, therefore, that the goods in question were "specially provided for" in the act under the name of "manufactures composed wholly of cotton." In other words, section 20 is to be regarded as furnishing a definition of terms, or rather a rule for construction designed to cover unknown or overlooked articles, by which they are classed with those specifically and individually named to which they bear the greatest similitude.

Mr. Justice Nelson decided a similar question in the same way in Morlot v. Lawrence [Case No. 9,815]. Ross v. Peaselee [Id. 12,077], and Field v. Schell [Id. 4,772], are to the same effect. As we have seen the language of the repealing clauses in the acts of 1846 and 1864, is identical, and the construction, of course, must be the same. The provision of section 20 of the act of 1842 is in no respect repugnant to any provision in the act of 1864. If it constituted one of the sections of the act it would not be inconsistent with any other provision in it. The section is, therefore, still in force as a part of the revenue laws of the United States, and is to be read in connection with the provisions of the act of 1864. It affords a rule of construction for terms applied to specific articles, and substantially says that a non-enumerated article, that is to say, an article not designated by its specific name, shall be classed under the name of that article specifically named to which it bears most resemblance in material, quality, texture, or the use to which it is applied. Fish plates are not specifically named, and are, therefore, not enumerated. "Wrought-iron railroad chairs" are specifically named or enumerated. Both are made of wrought-iron, and both are used for the same purpose—for connecting and retaining in position the rails of a railroad track. The fish plates are in practice, substituted for the wrought-iron railroad chairs. They are, therefore, of precisely the same material and texture, and are applied to the same uses, and the term, "wrought-iron railroad chairs," construed by the rule furnished by the provisions of said section 20 for the purposes of revenue, includes the fish plates. They are, then, "otherwise provided for," and consequently not included in the general sweeping residuary clause, "all manufactures of iron, not otherwise provided for."

The cases of U. S. v. U. S. Telegraph Co. [Id. 16,603], and Fish v. Smyth [Id. 4,833], are distinguishable, and are distinguished from the cases before cited. There was no article specifically enumerated in the act under the name of which the goods could be classed other than the general one under which the learned judge classed them. However that may be, the language of the statute of 1846, construed by the supreme court in Stuart v. Maxwell [supra], is substantially identical with that in the act of 1864, now under consideration, and this case does not appear to me to be distinguishable. The decision of the supreme court is controlling, and the principle established by it, as it seems to me, is, that any article not mentioned by its specific name in the act of 1846, or subsequent acts, and which can be classed under the name of any other article specifically mentioned in the act, construed by the rule furnished by section 20 of the act of 1842, is a non-enumerated article within the meaning of that section, and must be classed under the latter name. Such would undoubtedly be the construction of section 20, had it been re-incorporated in each of the subsequent acts referred to, and as it is a part of the revenue laws still in force, it must be construed as if so incorporated. There must be judgment for defendant with costs, and it is so ordered.

Case No. 2,965.

COHEN et al. v. The MARY T. WILDER et al.

[Taney, 567.][1]

Circuit Court, D. Maryland. Nov. Term, 1856.

COLLISION — VESSEL AT ANCHOR — LOOK-OUT — LIGHTS—MUTUAL FAULT.

1. Where a vessel was at anchor at night, in the Patapsco river, in the channel through which sea-going vessels must pass in going to and from Baltimore, with no light set and no look-out, the wind blowing an eight knot breeze, and was run into by another vessel: *Held*, that there was gross negligence on the part of the vessel at anchor.

2. In the position in which she was anchored, it was her duty to have shown a light, during the period of darkness, and also to have had a look-out, competent to perform his duty, and who diligently performed it.

3. The omission either to set a light, or to have a competent look-out, was culpable negligence, and made the vessel liable for any damage another vessel might sustain by running into her in the dark, unless the colliding vessel was also in fault, and contributed to the disaster by some want of care or skill on her part.

[Cited in The Clara, Case No. 2,787, 102 U. S. 203.]

4. But if the disaster was, in any degree, occasioned by the want of proper care and vigilance on the part of the vessel under weigh, she must share the loss, notwithstanding there was gross negligence on the part of the vessel at anchor.

5. The want of a light on board the colliding vessel cannot affect the case, as this did not in any degree contribute to the disaster, and could have exercised no influence in preventing

[1] [Reported by James Mason Campbell, Esq., and here reprinted by permission.]

it; inasmuch as there was nobody on the deck of the vessel at anchor to see it, and to exhibit a light in return, or to hail the other vessel on her approach.

[Cited in The Kallisto, Case No. 7,600.]

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

In admiralty. The libel in this case was filed on the 11th of November, 1854, by the appellants [Estate P. Cohen and Andrew J. Cohen], owners of the barque Phantom, to recover damages sustained by said barque coming into collision with the brig Mary T. Wilder, on the night of the 3d of November, 1854, whilst the said brig was lying at anchor at the mouth of the Patapsco river. The libel was filed against the brig and her master, and the vessel was attached to abide the result, but released on the proper stipulation being entered into by Samuel Patterson, the claimant, on the part of her owners, who resided in the state of Maine. An answer to the libel was filed by Enoch B. Cunningham, master of the brig, on his own account, and on account of said Samuel Patterson, claimant, on behalf of the owners. The evidence adduced on both sides is substantially stated in the opinion of the court. The libel was dismissed with costs [case not reported] in the district court (Giles, J.), and an appeal was taken, and argued in this court.

Wm. B. Perine, for appellants.

Wallis & Thomas and T. K. Howard, for appellees.

TANEY, Circuit Justice. This is an appeal from the decree of the district court of the United States for the district of Maryland, dismissing the libel filed by the appellants. The appellants are the owners of the barque Phantom, and the libel was filed to recover damages for injuries sustained by the barque in a collision with the Mary T. Wilder. The collision took place in the Chesapeake bay, on what are called the "Five Fathom Shoals," which are about five miles below the mouth of the Patapsco.

It appears that the brig Mary T. Wilder came up the bay on the 2d of November, 1854, and anchored on the five fathom shoals about two o'clock in the morning of the third. These shoals are in the channel through which sea-going vessels are obliged to pass in going to and from Baltimore; and such vessels frequently anchor there; the channel at this place is about a mile and a half wide, and narrower further up. On the night of which I am speaking, there was a bright moon, and vessels could be seen at a considerable distance, until the moon went down; it set about five o'clock in the morning, and the sun rose about half past six; and in the interval between the going down of the moon and broad daylight, it was very dark, with a vapor on the water, which made it difficult, if not impossible, to see a vessel at anchor, and without sails, at the distance of a hundred yards. There was a fresh wind from the southwest, during the night, which was a free wind for vessels bound to Baltimore, and strong enough to bring them up at the rate of eight miles an hour, when under full canvas. The Mary T. Wilder came up without a pilot, and had none on board when the collision happened; she had no light during the night, nor any look-out.

It is true, that the witnesses on the part of the respondents state, that the cook of the brig had the watch on deck. But he says he went up to his watch when the moon was just setting, at about half-past four, and went below again at five; and thinks he could not have been down five minutes before he felt the shock of the collision; that he had not seen the barque Phantom, to notice her, before he went below; that he did not notice her, because it was light enough for any vessel to be seen; and that he had never been up the Chesapeake before, and did not notice how the wind was blowing. Certainly, such a watchman (if he can, with any propriety, be called by that name) cannot be regarded as a look-out, such as the law requires, even if he had remained on deck; but at the time of the collision, no one was on deck; every man on board was asleep except the cook, and he was below taking refreshment.

Upon this evidence, it is too clear to be disputed, that there was gross negligence on the part of the Mary T. Wilder. In the position in which she was anchored, it was her duty to have shown a light during the period of darkness; and also to have had a look-out competent to perform the duty, and who diligently performed it; ordinary prudence required both of these precautions, independently of any established usage on the subject; and the omission of either was culpable negligence, and made the vessel liable for any damage another vessel might sustain, by running into her during the period of darkness, unless the colliding vessel was also in fault, and contributed to the disaster by some want of care or skill on her part.

This brings me to the testimony in relation to the management of the Phantom. This vessel had a pilot on board, under whose direction she had come up the bay, bound for Baltimore; she had shortened sail some time before the collision, in order that she might not enter the river Patapsco before daylight, and was going at the rate of only four or five miles an hour. It was the first mate's watch, and he states that he had with him a look-out stationed on the topgallant forecastle, and two on the bow, looking over the rail, and a competent seaman at the helm; that he himself was standing on the larboard side of the deck, when the man on the forecastle sang out, that there was a vessel on the starboard bow; that he immediately went over to that side and saw the vessel, and sang out to the man at the wheel to starboard his helm, which he did; but before she would answer her helm, she struck the

other vessel, and at that time it was so dark, that he could not see a man from one end of the vessel to the other. The testimony of the mate is substantially corroborated by that of the pilot, who was heaving the lead at the time the alarm was given. It is true, there are some discrepancies between them, as to the time occupied in particular transactions, and the distance at which a vessel at anchor might be seen; and some, indeed, in different parts of the pilot's own deposition. But these discrepancies are not of sufficient importance to impair, in any degree, their credit as witnesses; such estimates of times and distances, are always and necessarily vague and indefinite, being generally made from recollection afterwards, and almost always vary to some extent, when made by different men, in relation to the same transaction.

The pilot testifies to the darkness of the weather, the sufficiency of the look-out, the difficulty of seeing a vessel at anchor until near to her, if she had no light; and to the propriety of the measures taken to avoid the collision, after the Mary T. Wilder was discovered; he also swears that the vessels were entangled for thirty-five or forty minutes, and that the day had just broken when they got clear.

The master of the Phantom, it appears, is unable to speak on the subject; he was in bed at the time, and when he hurried on deck, his attention was altogether directed to the vessel alongside, and he did not observe the state of the weather, until after they were separated; he could then see vessels at a distance, but could not say how it was before.

The mate and the pilot, therefore, are the only witnesses on board the Phantom, who are able to speak of the circumstances which led to the collision. The sailors who were on the look-out have not been produced by the libellants; but I think their absence is sufficiently accounted for, and throws no suspicion on their case. And the two other pilots examined for the libellants, who were both on the water that night, one in the bay, and the other on the river, and therefore had their attention strongly drawn to the state of the weather, confirm the testimony of the mate and pilot, as to the darkness intervening between the close of the moonlight and the opening of the day, and the vapor upon the water, which rendered it impossible to see a vessel at anchor, without sails, and without a light until you were close upon her.

Standing upon this proof, there would seem to be no ground for imputing negligence to any one concerned in navigating the Phantom.

But the respondents contend, that there was light enough to have seen the Mary T. Wilder at a greater distance, and in time to have avoided the collision, if the look-outs on the barque had done their duty. And undoubtedly, if the disaster was, in any degree, occasioned by the want of proper care and vigilance on the part of the Phantom, she must share the loss, notwithstanding the proof of gross negligence on the part of the brig.

I, however, see nothing in the testimony of the respondents, to impair the weight of the proof offered by the libellants upon this point. As to the light spoken of by the cook of the brig, when he went below at five o'clock, it was the light of the moon, which set about that hour, as already stated. He says he had not been below more than five minutes before the collision; but he is obviously greatly mistaken in his estimate of the time; for all of the witnesses agree that it was broad daylight when the vessels separated, and as they appear to have been entangled for half an hour or more, the collision could not have taken place at five minutes past five, as the cook supposes, but about six o'clock, or a few minutes before. The light of the moon had faded away long before that time.

As regards the other witnesses who were on board the brig, although they all say they could have seen vessels at a considerable distance, when they came on deck, immediately after the collision, it must be remembered, that they were all aroused from their slumbers by the shock, and their attention exclusively drawn to the vessel actually in contact, and they were not likely to observe how far off they could see other vessels, from which no danger was apprehended. Indeed, it would hardly be just to them, to suppose that they were looking out for distant vessels, when the danger alongside demanded all their attention; and in this respect their testimony is hardly entitled to any weight, when in conflict with the testimony of witnesses who were watching during the whole period of darkness, and whose duty and employment it was, to look out, as far as they could see, in order to guard against danger to themselves. The respondent's witnesses appear to have recollected the light as it was when the vessels separated and they had time to look about them, and to have supposed it was equally bright when the vessels came together. This is obvious from the testimony of the mate; for although he, like the others, speaks of being able to see vessels a good way off, and says he thinks he could have seen one at the distance of three-quarters of a mile, yet he admits that he did not see one and did not look, because his attention was engrossed altogether by the one foul of them; but he also states that it was dawning day when he came up, and daylight before they got clear. Certainly, the mere dawn of the day would not immediately dissipate the darkness which followed the going down of the moon. The testimony of the mate of the Mary T. Wilder upon this point, tends strongly to confirm, rather than impeach, the testimony of those who were on board the Phantom, as regards the darkness of the

weather, immediately before and at the time of the collision.

Neither can the want of a light on board the Phantom influence the decision; it did not in any degree contribute to the disaster, and could have exercised no influence in preventing it; for there was nobody on the deck of the brig to see it, and to exhibit a light in return, or hail her on her approach.

The testimony of Thomas L. Libby, master of the Young Republic, has also been relied on for respondents; he says he was anchored about half a mile below the Mary T. Wilder, with which vessel he had come up the bay, and anchored about the same time with her, that is, about two or three o'clock, when the moon was shining, and a vessel could be seen at a considerable distance; he says the Phantom passed him about five o'clock, and that the moon, according to his time, went down between four and five; she, therefore, passed after the moon had set, and when the darkness was thickening every moment. This agrees with the testimony of the pilot of the Phantom, who says he passed within fifty yards of this vessel, and that the moon was then down; but Libby says it was light enough, at that time, to see the Mary T. Wilder from his vessel. He does not say that he actually saw her, or that he looked towards her; and from the residue of his testimony, it is evident that, if he had made the experiment, he would have proved himself mistaken in this opinion; for, although the Phantom passed so close to him, he did not discover her name on her stern; and although he never left the deck afterwards until daylight, except for a minute or two, and his business on deck must have been to look out, yet he never saw the Phantom after she passed, until the next morning, after she was clear of the Mary T. Wilder, and had proceeded two miles beyond her up the bay. He appears to have lost sight of her as soon as she passed him, and he did not see her when she was approaching the Mary T. Wilder, nor while she was entangled with her. This is strong evidence of the darkness at that time.

Neither is the omission of the Young Republic, and the other vessels mentioned in the testimony of Libby, to hang out lights any defence to the respondents; it only shows that others were equally careless, but were more fortunate in escaping from the hazards to which they imprudently exposed themselves.

In fine, the testimony shows that the Mary T. Wilder was anchored in a great thoroughfare of navigation, through which vessels were constantly passing in the night as well as the day; that during a period of great darkness, she showed no lights, and had no look-out. And when acts of such culpable negligence are proved, endangering life as well as property, justice requires that she should be held responsible for any injury which another may sustain, unless it can be clearly shown that the colliding vessel might, with due care and vigilance, have prevented the disaster. This, in my opinion, has not been done in this case.

The decree of the district court, dismissing the libel, must therefore be reversed, and a decree passed for the amount of damage found to have been sustained by the appellants, with interest thereon from the 3d day of November, 1854.

COHEN (UNITED STATES v.). See Case No. 14,826.

Case No. 2,966.

In re COHN.

[6 N. B. R. 379.][1]

District Court, D. Kentucky. 1873.

BANKRUPTCY—COMPENSATION OF ASSIGNEE FOR BENEFIT OF CREDITORS.

Assignees under the state law cannot receive allowance for attorneys' fees, nor compensation for their own services where the debtor has been adjudged a bankrupt.

[Cited in Gardner v. Cook, Case No. 5,226; Platt v. Archer, Id. 11,214; Re Kurth, Id. 7,948; Wehl v. Wald, 3 Fed. 94.]

[By J. H. Ward, Esq., Register:]

On the twenty-first of February, A. D. eighteen hundred and seventy, J. S. Cohn made an assignment to Louis Sechel of all his property, for the benefit of all his creditors. On the seventh of June, eighteen hundred and seventy, a petition for adjudication of bankruptcy was filed against him by his creditors, and on the eighteenth of June, eighteen hundred and seventy, he was adjudged a bankrupt. On the twenty-fifth of June, eighteen hundred and seventy, R. M. Mosby was appointed assignee in bankruptcy of said bankrupt, and accepted the trust. Mosby sued out a rule from the United States district court against Sechel, to show cause why he should not surrender to Mosby, assignee in bankruptcy, the property conveyed by Cohn on the twenty-first of February, eighteen hundred and seventy, to Sechel. Sechel responds that he has sold said property, and realized therefrom the sum of seven hundred and fifty-one dollars and six cents; that the expenses of said sale were thirty-nine dollars and seventy cents; attorneys' fees paid, fifty dollars; attorney's fee for which suit was brought and costs. &c., seventy-five dollars—one hundred and sixty-four dollars and seventy cents; that he paid taxes, internal revenue, sixty-four dollars and four cents; paid county and state taxes, forty-one dollars and twenty-five cents—one hundred and five dollars and thirty-one cents: total, two hundred and seventy dollars and one cent. He says, also, that he is ready to pay over to the as-

[1] [Reprinted by permission.]

signee in bankruptcy the amount received by him from the sale of the bankrupt's property, less the above items of expense of two hundred and seventy dollars and one cent, in administering his trust, and the cost of this proceeding. The attorney for Mosby asks that Sechel be ordered to pay over to Mosby the full amount of money received from the sale of the estate of said Cohn, less the United States, state and county or city taxes, paid by Sechel, making no contest about the two last items in Sechel's account as above stated, because he considered that liens existed on the bankrupt's estate for the payment of taxes, and the assignee in bankruptcy would have to pay them at any rate.

The only remaining questions then are, shall Sechel be allowed credits in his account for expenses of sale of bankrupt's estate, for the attorney's fee paid, and for another attorney's fee which he thought he might be adjudged to pay? Three items, amounting to one hundred and sixty-four dollars and seventy cents. The attorney for the assignee in bankruptcy says, "No; the assignment to Sechel on the twenty-first of February, eighteen hundred and seventy, was void;" and cites Perry v. Langley [Case No. 11,006], to show that such an assignment is void. The question before the court in that case was not whether the voluntary assignment was void or voidable, but whether it was an act of bankruptcy. The court in that case says: "It results conclusively that if the provisions of the bankrupt act were in force on the twenty-fifth of May, eighteen hundred and sixty-seven, the date of the assignment, and that the assignment was within the scope and intent of the law, and, as an act of bankruptcy, altogether null and void, the probate court of Gallia county had no jurisdiction of the assignment, and the acts of that court in regard to it are altogether invalid." I have failed to find any case where the question, "whether an assignment of all the property of the assignor for the benefit of all his creditors was void or voidable?" came up directly before the court, and such assignment was decided to be void.

In Re Pearce [Id. 11,141], Cadwalader, J., says: "Even where the assignment has been the sole foundation of the proceedings in bankruptcy I have considered it not a void act, but an act voidable by the assignee in bankruptcy by a bill in equity filed for the purpose of avoiding it." The questions before the court in that case were, whether a voluntary assignment was an act of bankruptcy if proper proceedings were instituted in six months, and whether such an assignment is a bar to a discharge under section twenty-nine of the bankrupt act, in the absence of actual fraud. Catlin v. Foster [Id. 2,519], decided by Deady, J., in district of Oregon, is cited by the attorney for Sechel, to show that the credits claimed by S. in his account should be allowed. In that case the voluntary assignee set up two counter claims in his answer; one for two hundred and fifty dollars, to pay an attorney's fee for which he said he was liable, and two hundred and fifty dollars for his own services under said assignment. On motion, the first of these counter claims was stricken out, as it did not appear that the defendant had ever paid the amount to the attorney, but only that they claimed that he was liable for it. The second, for services of the assignee under the voluntary assignment, to the extent of one hundred dollars was allowed, under the twentieth section of the bankrupt act [of 1867 (14 Stat. 526)], as a "mutual credit." It appears to me that this section refers only to creditors of the bankrupt before the act of bankruptcy. It is the theory of the bankrupt law, that a balance is struck between the bankrupt and his creditors at the time he files a voluntary petition in bankruptcy, or a petition is filed against him in an involuntary proceeding in bankruptcy, upon which he is adjudged a bankrupt. All settlements with a bankrupt's estate must be made precisely as though they were made at the moment in which such petitions were filed. I do not suppose it would be contended that a "payment, sale, assignment, transfer, conveyance, or other disposition of his property," made by a bankrupt "to any person who has reasonable cause to believe him insolvent, or to be acting in contemplation of insolvency," and that such "sale," &c., "is made with a view to prevent his property from coming to his assignee in bankruptcy, or to prevent the same from being distributed under this act, or to defeat the object of, or in any way impair, hinder or delay the operation and effect of, or to evade any of the provisions of this act," could stand after adjudication of bankruptcy, and proper proceedings to recover the bankrupt's estate. How, then, can it be argued that in committing the very act of bankruptcy itself, the bankrupt may incur a liability which shall be paid in full out of his estate to the prejudice of his other creditors? Section 35 forbids a bankrupt or insolvent in any way to dispose of his property, yet does not this decision, by permitting him to incur a debt to be paid in full, and to the prejudice of all other creditors, allow him, to that extent, to dispose of his estate? He cannot pay any debt, even where the debt is of the most sacred character; and this section, by making a difference of two months in favor of creditors in the limitation, shows that creditors are to be preferred, at least to that extent, to strangers or persons not creditors. Can we, then, believe that a proper construction of sections 20 and 35 would forbid a bankrupt to pay the most sacred obligation, and at the same time permit him to at once create and to pay in full a new obligation to a person who knows that the bankrupt and himself are then acting in open violation of the bankrupt law?

The question whether an assignment like the one under consideration is void or voidable, appears not to have been directly decided by any court since the passage of the present bankrupt act. The question whether a voluntary assignee, under such an assignment, should receive compensation for services and expenses under such assignment, has been decided both ways, depending, it appears, upon the merits of the particular case under consideration. We have the above case by Deady, J., allowing the assignee to have one hundred dollars for his services. On the other hand, we have Fox, J., in Re Stubbs [Case No. 13,557], in a similar case, who says: "The proceedings under the state law were had in fraud of the act, and the court in bankruptcy cannot allow a party the expenses incurred by him in his attempt to defeat the provisions and operations of the bankrupt law." Also in Burkholder v. Stump [Id. 2,165], in the eastern district of Pennsylvania, it is said: "Every person receiving one of these assignments ought to know that the assignment is liable to be set aside if a bankruptcy follows; and the allowance to him of his charges and expenses ought to be refused where it cannot be so guarded as to prevent any injurious duplication of charges. In some of the judicial districts of the United States the allowance is refused wholly, and occasional precedents of contrary directions here will not be followed, if to follow them would result in any injustice to creditors. The decisions on this point being thus variant, since the passage of the present bankrupt law, we must examine the authorities upon the relative subject of fraudulent conveyances. In the case of Hastings v. Spencer [Id. 6,201], "Where an assignment, made by an insolvent debtor, was held voidable, as actually fraudulent against creditors, and the assignee either had knowledge of the extraneous facts, which rendered the assignment voidable, by creditors, or the means of knowing them, and was put upon inquiry, it was held, that he had no lien as against an attaching creditor, upon the proceeds of the property assigned for his services in partially executing the trust, or for retainers paid to counsel." "If the assignees were themselves participators in the fraud, or, in other words, if they undertook to execute the trusts, knowing that they were fraudulent and unlawful, the law cannot recognize such services as ground for a legal claim for compensation, and cannot treat them as creditors of the assignor." In Harris v. Sumner, 2 Pick. 129, and Burlingame v. Bell, 16 Mass. 318, it was held, "that an assignment, fraudulent on its face or actually fraudulent, could confer no lien on the assignees, so as to enable them to hold the property against the attachment thereof specially by a creditor." The case of Bartlett v. Bramhall, 3 Gray, 257, is referred to by attorneys for Sechel, in which it is decided that an assignee under the insolvent laws of Massachusetts may sue an assignee under a voluntary assignment and recover the money and property of the insolvent, "deducting his expenses for collection, which the plaintiff must have incurred if the defendant had not, but deducting nothing for his labor and services, which are shown by the events that have occurred, to have been unwarranted and illegal. The deduction for expenses of collection is not allowed as compensation to the defendant for collecting, but because the claims collected were not worth more to anybody than the sum which the claimants could obtain therefrom, after incurring the necessary expenses of collection." Is an assignment like the one under consideration, void or voidable? I think it is not void but voidable. The thirty-fifth section only says such an assignment is void, if it is made "within six months after the filing of the petition by or against" the bankrupt. Then if a petition is not filed "within six months by or against" a bankrupt, such an assignment would stand. It then has virtue or vitality enough to live if not attached within six months. This must be in it from the first, for it continues good unless the petition is filed "within six months." It is in the nature of a conditional conveyance, the condition being that no petition in bankruptcy shall be filed "within six months." It continues to exist, and is good if such petition is not filed within that time. It is then only voidable by the filing of such petition in said time. This is my construction of this section.

Shall the assignee under the state law be paid for his services, and reimbursed his expenses out of the estate of the bankrupt? The thirty-fifth section of the act plainly forbids all such assignments. Their effect is to defeat the operation of the bankrupt law. The assignee, Sechel, must have contemplated the natural results of his own acts, and is presumed to know the law. He was then acting in fraud of the law, in the language of Hastings v. Spencer, above cited. "The assignees knowing that they (his acts) were fraudulent and unlawful, the law cannot recognize such services as ground for a legal claim for compensation and cannot treat them as creditors of the assignor." If such assignees cannot be treated as creditors of the assignor, the foundation for the decision Catlin v. Foster is gone, and the principle of "mutual credits" or the twentieth section of the bankrupt act does not apply. I therefore conclude that the second item of Sechel's account, (amount paid attorney, fifty dollars,) and the third item, (for which he is sued by Phelps & Son, seventy-five dollars,) cannot be allowed him as credits in the settlement of his accounts. On the principle laid down in Bartlett v. Bramhill above, which appears to me equitable, I allow him the item of thirty-nine dollars and seventy cents for the expense of sale of property, as it appears

from the affidavit filed with Sechel's answer that the sale was a good one. The account will then stand thus:

Louis Sechel, Dr.—To proceeds of sale		$751 06
Cr.—By taxes paid......	$105 31	
By expenses of sale..	39 70	
		145 01
Balance due..................		$603 95

All of which is respectfully submitted.

BALLARD, District Judge. I approve the foregoing opinion and report of the register.

Case No. 2,967.

In re COHN.

[7 N. B. R. 31; 29 Leg. Int. 309; 5 Chi. Leg. News, 13; 6 Alb. Law J. 276; 20 Pittsb. Leg. J. 29.][1]

District Court, D. New Jersey. 1872.

ACT OF BANKRUPTCY—IMPRISONMENT UNDER MESNE PROCESS.

A was arrested on mesne process issued out of a state court, and actually imprisoned thereon for a period exceeding seven days. The judge of the state court, before whom the matter was afterward brought, decided that the order by the commissioner on which A was imprisoned was improvidently made, and ordered A.'s release on entering common bail, or an appearance to the action. After A had remained imprisoned more than seven days, and before the judge decided the order to have been improperly granted, a petition in bankruptcy was filed against A. *Held*, that the imprisonment being submitted to for more than seven days before an effort at liberation was made, became an act of bankruptcy.

In bankruptcy.

Mr. Randolph, for petitioning creditors.
Mr. Fleming, for alleged bankrupt.

NIXON, District Judge. A creditor's petition was filed in this case against the alleged bankrupt on the thirtieth of January, eighteen hundred and seventy-two. The issues raised by the denial of bankruptcy have been tried by this court. No question has been made about the validity of the petitioning creditor's debt; it is admitted to exceed two hundred and fifty dollars, to wit: the sum of five hundred and two dollars and fifty cents for goods, wares and merchandise, sold and delivered to the debtor by the petitioning creditor, that is a debt founded upon a demand in its nature provable against the bankrupt's estate under the act, and also a debt founded on a contract between the parties. It only remains for me to consider the acts of bankruptcy alleged in the petition, and inquire whether they or either of them, have been proved. These are stated by the petitioning creditors in the following words: First. "That the said Bernard Cohn has been arrested and held in custody under and by virtue of mesne process, issued out of the circuit court in and for Hudson county, at suit of Samuel Levy and others, on the twenty-second day of January, inst.; and that he has been actually imprisoned for more than seven days in the said action, which was a civil action, founded on contract for the sum of three thousand five hundred dollars and upwards." Second. "That the said Bernard Cohn has been arrested and held in custody under and by virtue of mesne process, issued out of the circuit court in and for Hudson county, at suit of Abraham Levy and others, on the twenty-second day of January, inst.; and that he has been actually imprisoned for more than seven days in the said action, which was a civil action founded on contract for the sum of six hundred and fifty dollars and upwards." Third. "That the said Bernard Cohn, being a merchant and trader, has fraudulently stopped payment of all debts owing by him to various creditors in New York. That the said creditors are wholesale dealers, from whom said Cohn has at various times purchased stock, goods, wares and merchandise for his, the said Cohn's, business in New Jersey. That for the last four months, as these petitioners are informed and believe, the said Cohn has altogether neglected and refused to pay any of said creditors, and that he has, during that period, been constantly engaged in retail trade in Jersey City, and has sold large quantities of the goods, wares and merchandise so purchased by him as aforesaid, and has received therefor large sums of money at various times." As the acts stated in this last allegation, even if true, are not made acts of bankruptcy by the laws, it may be dismissed from consideration. The fraudulent stopping of the payment of commercial paper by merchants or traders is quite a different thing in the routine of commercial life to the vague charge of fraudulently stopping the payment of all debts owing by him. If, therefore, the debtor may be adjudged a bankrupt upon these proceedings, it is because an act of bankruptcy is stated in the first or second allegations, and because the proofs sustain the allegation. As they refer to the same acts of bankruptcy, although to different transactions, as they are stated in the same phraseology, and as the proofs are the same in each case, they may be properly considered together.

The charge is, that the debtor has committed the sixth and seventh acts of bankruptcy, enumerated in the thirty-ninth section of the bankrupt law [of 1867 (14 Stat. 536)]. That section, divested of the parts not applicable to the present inquiry, reads thus: "That any person, residing and owing debts as aforesaid, who, after the passage of this act, * * * has been arrested and held in custody under and by virtue of mesne process of execution, issued out of any court of any state, district or territory within which such

[1] [Reprinted from 7 N. B. R. 31, by permission. 6 Alb. Law J. 276, and 20 Pittsb. Leg. J. 29, contain only partial reports.]

debtor resides or has property, founded upon a demand in its nature provable against a bankrupt's estate under this act, and for a sum exceeding one hundred dollars, and such process is remaining in force and not discharged by payment, or in any other manner provided by the law of such state, district or territory applicable thereto for a period of seven days, or has been actually imprisoned for more than seven days in a civil action founded on contract, for the sum of one hundred dollars and upwards, * * * shall be deemed to have committed an act of bankruptcy, and * * * shall be adjudged a bankrupt on the petition of one or more of his creditors, the aggregate of whose debts, provable under this act, amount to at least two hundred and fifty dollars, provided such petition is brought within six months after the act of bankruptcy shall have been committed."

The facts of the case are here: The alleged bankrupt has been for some years past a merchant, residing and carrying on business in Jersey City. He was indebted in large amounts to merchants in New York, who became alarmed for the security of their claims. The demand of Levy Brothers & Co. was three thousand five hundred and ninety-four dollars and eighty cents, and that of A. Levy & Bro. seven hundred and fourteen dollars and eighty cents. Instead of bringing suit by summons against their debtor, they made application to a New Jersey supreme court commissioner, living in Jersey City, for an order to hold the defendant to bail, by virtue of the provisions of an act entitled "An act respecting imprisonment for debts in cases of fraud." Nixon, Dig. 385. Upon the proofs then and there made, the commissioner certified that the defendant, Cohn, was indebted to the plaintiff in the above stated sums respectively, and that he was satisfied "he was about to assign, remove and dispose of his property with intent to defraud his creditors." As the claims were distinct, although the proofs were substantially the same, he made separate orders; in the one case, directing the defendant to be held to bail in the sum of three thousand five hundred and ninety-four dollars and eighty cents, and that a capias ad respondendum issue against him at the suit of Levy Brothers & Co.; and in the other, that he be held to bail in the sum of six hundred and ninety-five dollars and thirty-eight cents, and a like capias at the suit of A. Levy & Brother. The orders and affidavits were filed in the office of the clerk, according to law, writs of capias ad respondendum issued and delivered to the sheriff of the county of Hudson, and the debtor arrested and committed to custody in the jail of said county, on the twenty-second day of January, last past. He continued under arrest and in actual imprisonment until the fifth day of February, following, when his Hon. Justice Beadle, of the circuit court, in which the suits were pending, after an argument of a motion before him to set aside the orders to hold to bail, determined that the commissioner had improvidently made the orders, and that the defendant should be discharged from arrest in each case, upon entering common bail, or an appearance to the action. In the meantime, after the expiration of seven days from the arrest, whilst the debtor was still in custody, and before the motion for his discharge was heard by the judge, to wit: on the thirtieth day of January, last, Moses S. Herman & Co., other creditors of the alleged bankrupts, filed their petition in this court, praying for an order of adjudication against him, and alleging the arrest and continued imprisonment in these cases for upwards of seven days as acts of bankruptcy. A rule to show cause was granted, returnable on the sixth day of February, inst., and on the return day, the defendant appeared by counsel, put in his denial, and now relies upon the order of Beadle, J., discharging him from arrest, as a ground for relief from the legal effects and consequences of the acts of bankruptcy committed.

The acts of bankruptcy stated in the petition are new in this country, and were not included in the act of eighteen hundred and forty-one [5 Stat. 440]. They have been taken from the English bankrupt acts, but have lessened the time for holding the parties in custody from twenty-one days to seven days. Section 12 (13 Vict. c. 106, § 39). If any judicial construction has been given to either of them, in any of the districts, the fact has escaped my observation, and I am compelled to examine the case as one of first impression. It is not necessary that I should advert to the distinction which the statute seems to make between being "held in custody for the period of seven days," and being "actually imprisoned for more than seven days," nor to the difference in the nature and character of the debt on which the proceedings depend—the one case requiring the process to be founded upon a demand in its nature provable against the bankrupt's estate under the act, and for a sum exceeding one hundred dollars, and the other only stipulating that it shall be a civil action founded on contract for the like sum; because these elements and conditions, the arrest, the custody, the actual imprisonment for more than seven days. the cause of action springing from contract, and in its nature provable against the bankrupt's estate, all join and exist in the case under consideration. All the facts proved or admitted bring it precisely within the letter of the law. The defendant has been arrested and held in custody under a mesne process issued out of a court of a state within which the debtor resides and has property. The demand, in respect to which the process issued, is in its nature provable against the

estate of the debtor, if adjudged bankrupt, and exceeds the sum of one hundred dollars. The process remained in force, and was not dicharged by payment or in any other manner provided by law for the period of seven days. Actual imprisonment for more than seven days resulted in a civil action founded on contract, for the sum of one hundred dollars and upwards.

But the allegation is, that although the case falls within the letter of the law, it is outside of its spirit. That as the judge ultimately set aside the order for arrest as improvidently made, and discharged the defendant on common bail, the imprisonment was illegal from the start, and that no act of bankruptcy can be predicated upon an illegal arrest. There is more than one answer to the allegation.

1. The capias, upon which the defendant was arrested and held in custody, was not void, but voidable. It was prima facie good, being issued under and according to all the forms of law. It was founded upon an order made by an officer authorised by the law to exercise his discretion on the affidavit and proofs laid before him. The defendant voluntarily submitted to the imprisonment for the full period of seven days, before he asked for a hearing to test the legality; then he did not seek to quash the writ as a void proceeding, but claimed in effect that he ought to be discharged upon common bail, because the discretion of the commissioner had not been wisely exercised. Not being void, but at best only voidable, was it not a legal arrest until set aside? and before it was set aside, had not the acts of bankruptcy charged in the petition been committed by the debtor?

2. What is the meaning of the clause in the thirty-ninth section, limiting the time to seven days in which the debtor under arrest may discharge the process by which he is held in custody, if a discharge after seven days may be set up by him to avoid the act of bankruptcy? Does it not clearly imply that if he voluntarily submits to an arrest good upon its face for that period of time, he shall then be estopped from pleading that such imprisonment is not a confession of insolvency? For,

3. It must be borne in mind, that the principle on which the arrest and yielding to an actual imprisonment for seven days constitute acts of bankruptcy, is, that they afford proof of the debtor's insolvency, Barnard v. Palmer, 1 Camp. 510. The proceedings must be at his home, or where his property lies. If he is not insolvent, the law presumes that seven days time is long enough for him, either to pay the debt, to procure bail to the action, or, if he deem the arrest unlawful, to have its lawfulness tested before the proper tribunal. If he neglects or delays within that time to obtain his discharge from duress in either of these ways, he commits the acts of bankruptcy defined in the statute. He acknowledges his insolvency by such delay, and it is the duty of the court of bankruptcy to take charge of his estate for administration under the law.

Let an order of adjudication be made.

Case No. 2,968.

COHN v. NATIONAL RUBBER CO.

[3 Ban. & A. 568;[1] 15 O. G. 829.]

Circuit Court, D. Rhode Island. Oct. 9, 1878.

PATENTS—LICENSOR AND LICENSEE — RIGHTS AND DUTIES.

1. Persons duly licensed by the owner of a patent may make, use and vend the patented product within the terms and conditions of their license without hindrance or interruption by the patentee, if they themselves comply with the terms and conditions of the license.

2. Licensees will not be permitted to put an end to the contract, or deny the validity of the patent, repudiate the title of their licensor, refuse to pay the stipulated royalty, and, when the validity of the patent is sustained, in spite of their hostilities, set up, as a defense to the charge of infringement, the prior license which they had wrongfully repudiated, and the terms and conditions of which they had refused to acknowledge and perform, upon the ground that the patent was inoperative, invalid and void.

3. Where the licensees repudiate the license, they may be treated by the owner of the patent, at his election, as infringers. He may have his remedy by suit upon the license, or he may treat the licensees in future as infringers of his exclusive rights under the patent.

[Cited in White v. Lee, 3 Fed. 224; Hammacher v. Wilson, 26 Fed. 240; Starling v. St. Paul Plow-Works, 32 Fed. 291; Heaton Peninsular Button-Fastener Co. v. Dick, 55 Fed. 26. Criticised in Seibert Cylinder Oil-Cup Co. v. Detroit Lubricator Co., 34 Fed. 221.]

[In equity. Bill by Leopold Cohn against the National Rubber Company to enjoin infringement of a patent, and for other relief.]

Charles B. Stoughton, for complainant.
Benjamin F. Thurston, for defendant.

CLIFFORD, Circuit Justice. Inventors whose inventions are secured by valid letters patent have the exclusive right, for the period allowed by law, to make, use and vend the thing patented, and by virtue of that right they may assign the patent, or license others to practise the invention. Persons duly licensed by the owner of the patent may make, use and vend the patented product, within the terms and conditions of their license, without hindrance or interruption by the patentee, if they themselves comply with those terms and conditions; but they cannot be permitted to put an end to the contract, or deny the validity of the patent, repudiate the

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

title of their licensor, refuse to pay the stipulated royalty, and, when the validity of the patent is sustained in spite of their hostility to the rights of the owner, set up successfully, as a defense to the charge of infringement, the prior license which they had wrongfully repudiated, and whose terms and conditions they had refused to acknowledge and perform, upon the ground that the patent was inoperative, invalid and void. Moody v. Taber [Case No. 9,747]; Brooks v. Stolley [Id. 1,962]; Neilson v. Fothergill, 1 Webst. Pat. Cas. 287.

Sufficient appears to show that letters patent, in due form, for a new and useful improvement in shoes, were granted to the complainant's assignor, and that the complainant, by certain mesne conveyances, acquired the title to, and became the owner of the same; that the original patent was duly surrendered and reissued to the complainant, and that the latter patent is in full force. Alleged improvements in shoes are quite too numerous to justify any attempt to describe such as preceded the one patented, nor does the patentee profess to do more than to describe his own improvement, as set forth in his specification. According to his description of the same, it consists in a shoe in which that part of the upper required to be spread open or turned down, to permit the insertion or extrication of the foot, is so constructed that the vamp, or front part thereof, shall overlap or overlay the quarter or rear portion of the same, and shall be connected together round about said quarter by the described fastener; that the vamp and quarters, or front and rear portions of the upper, are united by a seam extending from the sole of the shoe, at a point near the front of the heel, upward some distance, and from the point at which the vamp and quarter cease to be united, to the top of the upper. These parts overlie each other, the vamp, or front portion, being outside of, or on top of, the quarter, or rear portion of the shoe, which overlapped portions are durably united by a rivet at the proper point on each side of the shoe, so as to permit the insertion of the foot, and insure, at the same time, a proper retention of the shoe on the foot. Superadded to that is the statement that it has been found expedient to locate the points down to which the upper parts of the shoe can be opened out or turned over in a line or plane, passing through the point of the heel and the curve of the instep, as shown in the drawings, which also show a loop for pulling on the shoe, and a strap or buckle for fitting the same around the ankle. Representation is also made in the specification that the forward underlying edges of the quarters extend upward vertically from the point where the vamp and quarters are separable, while the back edges of the overlapping front part, or vamp, incline rearward as they ascend, or extend obliquely upward, making the lap greatest at the upper part or top of the shoe, leaving the overlapping portion of the vamp to draw well down around the ankle.

Service was made, and the corporation respondents appeared and filed an answer, setting up certain defences to the effect following: 1. They admit that the original and reissued patents were issued, and that the complainant became the owner of the invention. 2. They admit the license, and that they are largely engaged in the manufacture and sale of rubber goods of all kinds, including four different kinds of rubber and cloth overshoes, designated by the names set forth in the answer. 3. They allege that they were the first to introduce rubber and cloth overshoes into public use, having the peculiarity of construction which resides in connecting the vamp with the hind quarter by a folding flap, which dispenses with an open seam and allows the foot to be easily inserted in the shoe, so as to prevent the admission of snow or water when the shoe is on the foot, and buckled. 4. That the manufacture of shoes containing that peculiarity is secured to the several persons named in the answer by the letters patent therein described, under all of which patents they hold the exclusive license. 5. They admit that they procured the license of the complainant, denominated "Exhibit A," and contend that they still have the right under it to practice the invention upon paying the stipulated royalty. 6. That the complainant licensed the company named in the answer to practice the invention in violation of the license and agreement they made with the respondents. 7. That the shoes they manufacture, called in the answer Monitor shoes, do not contain or embody the invention described in the reissued patent. 8. They deny that they have ever, since the date of the agreement referred to, manufactured or sold any shoes which contain or embody the patented invention, but allege that, if they have, they are ready and willing and offer to pay the stipulated royalty.

Questions admitted need not be discussed, which is all that need be said in respect to the reissue and ownership of the patent. Nor is there any substantial controversy in respect to the nature and character of the patented improvement. Beyond all doubt it consists of an improved shoe, in which the front or vamp overlaps the quarter or back portion of the upper on both sides, and has the overlapping portions of the vamp connected together around the quarter by a strap, buckle or thong, extending from one portion of the vamp, around the heel or ankle, to the vamp on the other side, thus fastening the two overlapping sides of the vamp securely together. Both sides admit the utility of the invention, and, inasmuch as the answer of the respondents does not deny that the complainant is the original and first inventor of the improvement, the prima facie presumption in that regard is sufficient to en-

title the complainant to a decree, unless the respondents have established some one or more of the defences set up in the answer. They admit that they procured a license of the complainant, as alleged in the bill of complaint, and the proofs show beyond all doubt that they have since repudiated it, and refused to comply with its terms and conditions. Licensees, if they fulfil the stipulations of their licenses, are entitled to practise the invention, within the terms and conditions of the instrument, to the extent of the authority conferred, without question or impediment by the owner of the patent. Doubt upon that subject cannot be entertained; but if they refuse to perform on their part, and repudiate the license, they may be treated by the owner of the patent, at his election, as infringers. He may have his remedy by suit upon the license, in case they have repudiated the license, or he may elect to treat them in future as infringers of his exclusive rights under the patent. Being infringers, they cannot set up the license in defence of a suit, any more than if they had never possessed any such authority. Curt. Pat. [3d Ed.] § 217; Brooks v. Stolley [supra]; Woodworth v. Weed [Case No. 18,022]; Woodworth v. Cook [Id. 18,011]; Crossley v. Dixon, 10 H. L. Cas. 304; Lawes v. Purser, 38 Eng. Law & Eq. 50; Cutler v. Bower, 11 Q. B. (N. S.) 986; Kinsman v. Parkhurst, 18 How. [59 U. S.] 293. Viewed in the light of the preceding authorities it is undoubted law, that the patentee may treat the license which he gave to the respondents as forfeited, and may proceed against the persons who held the license as infringers, just as if they never had any such license. Persons who had a license, and have repudiated it, stand in no better condition than persons who never had any such authority; nor will a license, after it has been repudiated by the holder, avail him to any extent as a defence in a suit for infringement.

Tested by these suggestions. it is clear that nothing remains to be considered. except the question of infringement. Much discussion of that question is quite unnecessary, as it is obvious, from comparison of the alleged infringing exhibit with the exhibit of the complainant, that the charge of infringement is fully sustained. Attempt is made in argument to show that the shoe manufactured by the respondents, called the Monitor shoe. does not infringe the patented improvement, but the court is entirely of a different opinion. Suffice it to say, without entering more into details, that the complainant is entitled to relief as prayed in the bill of complaint.

Decree in favor of complainant for an account, and for an injunction.

COHN (UNITED STATES v.). See Cases Nos. 14,827 and 14,828.

Case No. 2,969.

COHN v. UNITED STATES CORSET CO. et al.

[12 Blatchf. 225;[1] 1 Ban. & A. 340; 6 O. G. 259.]

Circuit Court, S. D. New York. June 20, 1874.[2]

PATENTS—"CORSETS"—VALIDITY—PRIOR PUBLICATION.

1. The letters patent granted to Moritz Cohn, April 15th, 1873 [numbered 137,893], for an "improvement in corsets," the claim of which is "A corset having the pockets for the reception of the bones formed in the weaving, and varying in length relatively to each other, as desired, substantially in the manner and for the purpose set forth," are void, because the invention set forth therein was previously described in a publication printed in England, being a provisional specification left by John Henry Johnson at the office of the commissioner of patents, with his petition, on the 20th of January, 1854.

2. A prior printed publication, in order to invalidate a subsequent patent, must describe the thing claimed by such patent, and must do so in a manner so distinct and clear as to leave no reasonable doubt that the thing described is the same.

3. The patent to Cohn claims, that the corset, to be his corset, must not only have the pockets stopped and finished off in the weaving, but must have them varying in length relatively to each other, as desired, each pocket starting from one edge of the fabric and running towards the other, but stopping short of it at a point predetermined as the point at which the end of the bone to be inserted in that pocket is to be located, according to the shape to be given to the corset. Johnson's provisional specification describes the same features in a corset.

4. The fact that a corset made in pursuance of Johnson's description existed, is sufficiently shown by such description, and it is not necessary to show otherwise the existence or use of such a corset.

5. Nor is it necessary that Johnson's description should show how the apparatus for weaving the corset should operate, to produce the features he describes as pertaining to his woven corset.

6. If that were held to be a defect in Johnson's description, the specification of Cohn's patent would be defective in the same respect, in not stating the arrangement of machinery necessary to produce the features of his corset.

[See note at end of case.]

[In equity. Bill by Moritz Cohn against the United States Corset Company for relief for infringement of letters patent No. 137,-893, granted to complainant April 15, 1873, for an improvement in corsets.]

Charles M. Keller, for plaintiff.

George Gifford and William C. Witter, for defendants.

BLATCHFORD, District Judge. This suit is brought on letters patent granted to the plaintiff, April 15th, 1873, for an "improve-

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

[2] [Affirmed by Supreme Court in Cohn v. U. S. Corset Co., 93 U. S. 366.]

ment in corsets." The specification of the patent says: "Previous to my invention it has been customary, in the manufacture of corsets, to weave the material with pocket-like openings or passages running through from edge to edge, or all stopped and finished off at a uniform distance from the edge, and adapted to receive the bones, which are inserted to stay the woven fabric, and which serve as braces to give shape to and support the figure of the wearer. This method of manufacturing the corsets necessarily involves a great deal of hand labor, and, consequently, expense, in stitching up the ends, where they are woven with pockets running through from edge to edge, to hold the bones in place, or else the upper ends of the bones are necessarily all located at a uniform distance from the edge, resulting in a less perfectly shaped corset than is produced by following out my invention. I propose, by my invention, to overcome the objections just named, and produce a corset in which the location or position of the bones endwise shall be predetermined with the accuracy of the jacquard in the process of weaving the corset-stuff or material, while I, at the same time, effect a great saving of labor and expense, and give a more perfect shape. My invention has for its main object, therefore, not only the production of a better article, but, also, a reduction in the cost of manufacture; and, to these ends, my invention consists in having the pocket-like openings or passages, into which the bones are put, closed up near the end, at that point at which it is designed to have the end of each located, as will be hereinafter more fully set forth." The drawings then represent two corsets. One is made according to the mode of manufacture stated to have been theretofore most generally practised, that is, with the bones secured in place endwise in the pockets by stitching, after the insertion of the bone, so as to retain the bone endwise, by closing up the pocket, it being, when woven, a passage running through from edge to edge. "This," the specification says, "is in accordance with or illustrates the mode of manufacture originally practised, and only departed from prior to my invention, as heretofore explained." The other corset represented in the drawings is one made according to the plan of the patentee. The specification states, that, instead of having the woven fabric of the corset made with pocket-like openings or passages running through from edge to edge, or up to a uniform distance from the edge, the patentee proposes to have such woven fabric "woven with pockets or passages which extend from one edge of the fabric toward the other, but stop short of the latter at such point or locality as is predetermined for the location of the end of each bone, according to the design or shape to be given to the corset, as shown." It also states, that the fabric is woven with the pockets extending from one edge of the fabric towards the other edge as far as certain points which are not at uniform distances from either edge; that from those points out to the latter edge the fabric is woven solid or without any passages; that the bones are made of the proper length, and are inserted at the open ends of the pockets; and that, after their insertion, the bones are pushed home to the bottoms of their respective pockets, and the mouths or open ends of the pockets are then closed up by the stitching and binding of the edge, and the perfect retention of the bones is thus effected. The specification proceeds: "It will be understood, that, by forming the corset as described, with pockets closed at one end, and weaving in such pockets of varying lengths, I am enabled to determine, in the manufacture of the corset-fabric, the precise points to which the subsequently inserted bones shall extend, and thus pattern any number of corsets exactly alike, and to the most desirable model. Corsets made according to my improved plan, it will be seen, can be made to a perfect and regular pattern, will be more desirable in appearance, and can be produced at less cost than those made according to the mode of manufacture practised previous to my invention. I am aware of, and do not claim, a woven corset with the pockets stopped and finished off at a uniform distance from the edge. I am also aware of, and do not claim, a hand-made corset with pockets of varying lengths stitched on." The claim is in these words: "A corset having the pockets for the reception of the bones formed in the weaving, and varying in length relatively to each other, as desired, substantially in the manner and for the purpose set forth."

The application for the patent was made on the 30th of January, 1873. In the specification originally presented there was no recognition of the fact, that, prior to the plaintiff's invention, it had been customary, in the manufacture of corsets, to weave the material with pocket-like openings or passages stopped and finished off at a uniform distance from the edge; and it was stated, in such specification, that it had always been necessary to insert the bones in pocket-like openings or passages running through from edge to edge, and then to secure each bone endwise by sewing. Such specification proceeded on the assertion that the plaintiff was the first person who stopped or finished off by weaving the bone pockets which had before been woven to run through from edge to edge, and the first person who thus dispensed with the operation of fastening endwise by stitching the bones in such bone-pockets, and the first person who, by the process of weaving, closed up such bone-pockets at the place where the end of the inserted bone was to be located. The claim applied for, on such specification, was a claim to "a corset woven with the pockets for the bones closed at one end, substantially as and for

the purpose set forth." On the 26th of February, 1873, the application was rejected, on the ground that it had been anticipated by what was stated to be "English patent No. 143, of 1854." This reference was to a "provisional specification left by John Henry Johnson at the office of the commissioners of patents, with his petition, on the 20th Janusary, 1854," which says: "This invention received provisional protection, but notice to proceed with the application for letters patent was not given within the time prescribed by the act." The invention is called, in such provisional specification, an "invention for improvements in the manufacture of stays or corsets," and is therein stated to have been communicated to Johnson by Adolphe Georges Geresme, of Paris, in the empire of France, manufacturer. The entire text of such provisional specification is in these words: "This invention relates to the manufacture of what are known as woven corsets, and consists in the employment of the jacquards in the loom, one of which effects the shape or contour of the corset, and the other the formation of the double portions or slots for the introduction of the whale-bones. These slots or double portions are made simultaneously with the single parts of the corset, and, in place of being terminated in a point, they are finished square off, and at any required length in the corset, instead of always running the entire length, as is usually the case in woven corsets. When the corset is taken from the loom, the whalebones are inserted into these cases, and the borders are formed, thus completing the article, which contains all the elegance and graceful contour of sewn corsets made by manual labor." On the 12th of March, 1873, amendments were made in the specification and claim, but none which limited the scope claimed for the invention. On the 15th of March, 1873, the application was again rejected. On the 25th of March, 1873, the claim was amended so as to read as it is in the patent issued, but the application was again rejected March 29th, 1873. On the 10th of April, 1873, the specification and claim which are found in the patent issued were presented, and the patent was, on the next day, ordered to issue. In an argument addressed to the patent office, on behalf of the patentee, on the 12th of March, 1873, in reference to what appears in the provisional specification of Johnson, it is said: "Prior to Cohn's invention, the material for corsets had been woven into the required shape, with the gussets, &c., by the action of the jacquard of the loom, and the openings or pockets for the bones were woven through from selvage to selvage of the stuff, each pocket terminating in a sort of point. As the selvages were cut off afterwards, the pockets were, of course, left open at the ends, necessitating the adjustment of the bones by hand, and their securement in the proper position endwise by sewing. It is a fact known to all those in the corset trade, that all imported corsets are, and have for years been, woven after this fashion. No one in this country has ever seen a corset with pockets woven of different lengths, to determine the position of the bones endwise, and hold the bones in, until the making of such corsets by Cohn; and the presumption is, that no such corsets as just named were ever made abroad. Now, in view of these facts, the fair presumption is, that what the English patent cited alludes to and means is simply a woven corset, having the pockets, in lieu of closed pointedly near the selvage, in the old-fashioned way, stopped off square, at any required distance from the selvage, but not at different distances in one corset, for the purpose of regulating the position endwise of a number of bones of different lengths, and thus determining the design or figure of the corset. At any rate, no such thing as a corset with its pockets woven of various lengths is described in this very brief English specification, nor has any such corset ever come here from abroad. As it is necessary, in a fine corset, to have the bones of different lengths, and to have the ends of the bones placed at certain points in the pockets, it follows, that, in a corset woven as proposed in the English patent, with all the pockets one length, the adjustment by hand, and securing with stitching, of many of the bones, would be necessary, and hence, by so weaving the corset, (with square bottomed pockets all the same length,) no particular advantage would be gained, and it is reasonable from this to conclude, that, for these reasons, what the English patentee proposed has never gone into practice abroad and been imported here. All the surrounding facts and circumstances, to say the least, raise a very strong doubt as to whether this English specification really describes, or its author ever contemplated, the invention of Cohn, and, in view of such doubt, the applicant is entitled to his claim." In pursuance of the views set forth in this argument, the specification finally presented, and which is the one annexed to the patent, manifestly refers to the Johnson invention, in saying that, in weaving the material, the pocket-like openings or passages had before been stopped and finished off at a uniform distance from the edge, and then goes on to say that the woven fabric of the patentee's corset, in lieu of being made with pocket-like openings or passages running through from edge to edge, or up to a uniform distance from the edge, is to be "woven with pockets or passages which extend from one edge of the fabric toward the other, but stop short of the latter at such point or locality as is predetermined for the location of the end of each bone, according to the design or shape to be given to the corset, as shown," and then disclaims "a woven corset with the pockets stopped and finished off at a uniform distance from the edge," and limits the claim to pockets

"formed in the weaving, and varying in length relatively to each other, as desired."

The principal defence relied on in this case is, that the invention of the patentee is found in the Johnson provisional specification, regarded not as a patent, but as a publication printed in England prior to the patentee's invention. The Johnson specification, in order to be sufficient to invalidate the plaintiff's patent, must describe the thing which the plaintiff's patent claims, and must do so in a manner so distinct and clear as to leave no reasonable doubt that the thing described is the same. The 61st section of the act of July 8, 1870 (16 Stat. 208), provides, that where it is set up, as special matter of defence to a suit for the infringement of a patent, that the invention covered by it had been previously described in some printed publication, and such special matter is found for the defendant, judgment shall be rendered for the defendant. Therefore, this defence must be established affirmatively by the defendant, in order to be found for him, the patent having been issued and standing until overthrown.

The plaintiff's patent claims, distinctly, that the corset, to be the plaintiff's corset, must not only have the pockets stopped and finished off in the weaving, but must have them varying in length relatively to each other, as desired, each pocket starting from one edge of the fabric and running towards the other, but stopping short of it, at a point predetermined as the point at which the end of the bone to be inserted in that pocket is to be located, according to the shape to be given to the corset. Now, while the Johnson specification or description is brief, it sets forth distinctly what it purports to set forth in regard to a woven corset. It sets forth, in that respect, that the shape or contour of the corset is to be given by weaving; that the double portions or slots for the introduction of the whalebones are to be formed by weaving, and are to be finished square off, in place of being terminated in a point, and are to be finished off at any required length in the corset, instead of always running the entire length, as is usually the case in woven corsets; that, when the corset is taken from the loom, the article is completed by inserting the whalebones into these cases, and forming the borders; and that the completed article contains all the elegance and graceful contour of sewn corsets made by manual labor. The matter in dispute is, as to whether Johnson describes pockets varying in length relatively to each other, and each pocket stopping at a point predetermined, according to the shape designed for the corset, as the point where the end of the bone to be inserted in that pocket is to be located. The determination of the point where the end of the bone and the end of the pocket are to be is governed, according to the plaintiff's specification, solely by the shape to be given to the corset. No particular length of pocket, and no particular location of the end of any bone, are set forth, in the plaintiff's specification, as giving, or conducing to give, any particular shape to the corset. That whole matter rests in the will of the manufacturer. All that the plaintiff's specification really says is, that the patentee intends to stop off his pockets, by weaving, at any required point, and thus make them of any required length, and that the shape to be given to the corset will demand that the pockets be stopped off at definite points, to enable the bones to be the proper bones for such shape, and that this will require that the pockets in the corset shall vary in length relatively to each other. It was well known that the shape to be given to a woven corset demanded that the pockets should be stopped off at definite points, to enable the bones to be the proper bones for such shape; and it was well known that this required that the pockets in a corset should vary in length relatively to each other. This was known before the date of Johnson's specification; and Johnson, in that specification, speaks of the elegance and graceful contour of his corset, necessarily implying that his pockets and bones are of proper lengths to give such elegance and grace of contour, and not of such lengths as to defeat such a result. Therefore, in reality, all that the plaintiff says, in his specification, is, that he intends to stop off his pockets, by weaving, at any required point, and thus make them of any required length. Johnson stops off his pockets, by weaving, at any required length in the corset. There is no just foundation for the idea that Johnson describes stopping off the pockets at a uniform length. It was a part of the history of the art, at the date of Johnson's specification, that the bones in a corset must be of varying lengths relatively to each other, in order to suit the shape of the wearer and give any grace of contour, and, consequently, that the pockets containing the bones must be stopped off at varying heights in the same corset. No person desiring to make a salable corset, much more, one described by Johnson as containing "elegance and graceful contour," would, at the date of Johnson's specification, have made the bones or the pockets of uniform length. Such a corset would not be a corset of proper shape, or, in the language of one of the witnesses, would be a corset without a shape. When the pockets, prior to Johnson's specification, were woven the entire length, they were stopped off by sewing, at varying heights in the same corset, according to the varying lengths assigned to the various bones, to produce the predetermined shape of the corset. When, therefore, in view of such state of the art, Johnson directs the pockets to be finished, by weaving, at any required length in the corset, he necessarily conveys the idea that the weaving can be employed to stop off the several pockets at the several places where they had before been stopped off by sewing. In

view of what there is in Johnson's specification, the plaintiff's patent conveys no new idea. It says, that each pocket is to be stopped, by weaving at the place where the end of the bone which is to be inserted in such pocket is to be, and that the ends of the bones are not all to be at a uniform distance from the openings of the pockets. Johnson says the same thing, in saying that the slots are to be finished at any required length in the corset, when his language is read in view of the state of the art in January, 1854.

It is urged, for the plaintiff, that there is no evidence that such a corset as the plaintiff's ever existed, made in pursuance of Johnson's description. But it must be assumed, from Johnson's language, that such a corset as he describes existed, for he speaks of it as a corset which contains elegance and graceful contour. Moreover, if the description by Johnson is a sufficient description of the plaintiff's corset to show its structure in the particulars covered by the claim of the plaintiff's patent, it is not necessary to show otherwise the existence or use of the corset described by Johnson.

It is also urged, that Johnson does not sufficiently describe how the two jacquards are to be arranged, so as to produce the features he describes as pertaining to his woven corset. It is not necessary this should have been described. The plaintiff, in his specification, merely points out the features which exist in his woven corset, but does not describe how the jacquard or the loom is to produce those features. It must be assumed that Johnson and Geresme had employed two jacquards to produce the features Johnson describes—one jacquard to effect the shape or contour of the corset, and the other to form the slots. Johnson says, that the slots "are made" simultaneously with the single parts of the corset, and "are finished" square off, that the whalebones "are inserted" into these cases, and the borders "are formed," and that the article thus completed "contains" all the elegance and graceful contour of sewn corsets made by manual labor. The plaintiff makes no claim, in his patent, to any invention in connection with the loom, or the jacquard, or the particular shape of the corset. Therefore, he describes nothing in those respects. He describes, and needed to describe, only the features of his corset, as an article. So, we are to look, in Johnson's specification, only for a description of like features in a woven corset, and not for any description of any means for producing those features. It might, with as much force, be urged, that the plaintiff's specification does not sufficiently describe his invention, because it does not state how the loom and the jacquard are to be arranged to produce the described features of the corset, but merely speaks of using the jacquard in a loom. To this suggestion it is replied, that any weaver would know how to do that, when told by the plaintiff what features were to exist in the corset woven; but that no weaver would have known how to arrange two jacquards to produce like features in the corset woven, when told by Johnson that such features were to exist in the corset woven. Yet the plaintiff shows, by the testimony, that, after he had determined at what points he wished the pockets to be stopped off, to give the required shape to the corset, he tried in vain, for some time, to make his loom and jacquard so work as to stop off the pockets at such points; and that it finally required the employment of an experienced weaver, and a special arrangement of cords, needles and cards, to produce the desired result. But, there is nothing of this in his specification. If Johnson's description is insufficient in this respect, the plaintiff's description is also insufficient.

It is also insisted, that the defendants must prove that, at the date of Johnson's description, a loom with two jacquards, suitable to produce the features required in the corset woven, was known to the arts; and that none such was known to Johnson, because his description declares that the invention consists in the employment of two jacquards, with the functions assigned to them respectively. But, if such employment of two jacquards was invented by Geresme, it was known to him, and the description shows that it had been used, and that the described corset had been made by means of it. It would be more proper, therefore, to say, that it is for the plaintiff to show that such employment of two jacquards was not known to Geresme. No such fact has been shown. On the contrary the defendants have proved that they have caused corsets to be woven with the pockets stopped off by weaving, and of varying lengths in the same corset, by the employment of two jacquards in the loom, one affecting the shape or contour of the corset and the other the formation of the pockets, and the pockets being made simultaneously with the single parts of the corset, and being finished square off.

If the plaintiff has made an invention, it is in the means of producing the features he describes as belonging to the corset described, and it is not the corset itself with those features. Such a corset is described by Johnson.

The above views are fatal to the validity of the patent. But I ought to say, that the defendants have not established a forfeiture by the patentee of his rights, as set up in the answer, by his having sold his corset and allowed it to be used for more than two years before he applied for his patent; nor the defence of a prior knowledge and use of the corset by the Convex Weaving Company.

The bill must be dismissed, with costs.

[NOTE. On complainant's appeal the supreme court affirmed the decree herein, on the ground that the invention patented to the complainant was clearly described in 1854 in the printed publication of the Johnson (Geresme)

provisional specification, and the patent was therefore invalid. Opinion by Mr. Justice Strong. Cohn v. U. S. Corset Co., 93 U. S. 366.]

Case No. 2,970.

COHN v. VIRGINIA FIRE & MARINE INS. CO.

[3 Hughes, 272.][1]

District Court, E. D. Virginia. Aug. 2, 1877.

ACTION ON POLICY OF INSURANCE TO HUSBAND ON WIFE'S ESTATE—PLEADING.

If a husband, who has insured for himself without mention of his wife's ownership, sues for damages by fire to his wife's estate, claiming an insurable interest, his declaration must set out his interest, and claim damages to that interest, or he cannot recover.

On motion for new trial.

HUGHES, District Judge. Oscar Newman insured his wife's separate property as his own, held in his own right. The suit is by his assignee in bankruptcy. The policy describes, and the declaration demands, the full value of the property as "his stock of groceries and liquors," "his store fixtures," and "his household furniture, wearing apparel, pictures, and books." Nothing whatever is said in the policy, nothing in the declaration, of his interest in that property contingent upon the death of his wife and children, or of the interest he had as husband in the use of the property named. He did not insure the right of user which he had in the property. That right of using was an insurable interest, but it was not insured by description, and it must have been specifically insured by description to entitle him to recover damage from the loss of it, in the event of the destruction of the property by fire; just as the insurance of a ship does not per se insure the cargo and freight. And even after insuring the specific interest by name (if that had been done), the declaration should have demanded his loss from the destruction of that specific right to use, to entitle the insured to recover. You cannot recover the loss of a cargo under a policy which merely insures the ship, or under a declaration which only demands damages from the loss of the ship. It is clear in this case that the jury found that Newman's loss was from his loss of the right to use the property; and as that right was not insured by the policy, nor demanded by the declaration, the verdict was against the law and the evidence, and must be set aside. An order will be made to that effect, without prejudice to the plaintiff's right to amend his declaration if he should think proper. If there had been positive proof of the existence of property in Newman's place of business belonging to himself, and not embraced in the wife's separate property; and if at the trial the existence of such property had been shown in the evidence, and relied upon in the argument, there would have been some basis for the verdict of the jury. But as it is clear to me that the verdict was not founded upon such a fact or claim, for that reason also the verdict should be set aside.

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

COHN (WILCOX v.). See Case No. 17,640.
COIT (CONVERSE v.). See Case No. 3,145.
COIT (UNITED STATES v.). See Case No. 14,829.
COLBURN (HEMSTEAD v.). See Case No. 6,347.
COLBURN (HUNT v.). See Case No. 6,886.
COLBY, In re. See Case No. 2,297.
COLBY (FULLER v.). See Case No. 5,149.
COLBY (STURGES v.). See Case No. 13,-566.
COLBY (STURGIS v.). See Case No. 13,-574.
COLBY (UNITED STATES v.). See Case No. 14,830.
COLCHESTER (UNITED STATES v.). See Case No. 14,831.

Case No. 2,970a.

In re COLCORD.

[2 Hask. 455.][1]

District Court, D. Maine. Dec., 1880.

BANKRUPTCY—BOOKS OF ACCOUNT—SALE OF PARTNERSHIP ASSETS—BOOK ENTRIES.

1. The want of proper firm books of account will bar a partner in a firm of tradesmen of his discharge in bankruptcy.

2. The sale of firm assets to a new firm composed of the same members and one other, without any entry of the transaction upon the books of the old firm, is in violation of the law requiring tradesmen to keep proper books of account.

In bankruptcy. Petition by one member of a firm of tradesmen for his discharge. A firm creditor objected because the firm did not keep proper books of account.

F. S. Nickerson, for petitioner.
George F. Holmes and Almon A. Strout, for objecting creditor.

FOX, District Judge. Cassius C. Roberts, one of this firm, having petitioned for his discharge, Loring B. Small, one of the firm creditors, has appeared in opposition thereto, on the ground that from Nov. 4, 1870, to April 15, 1871, the firm did not keep proper books of account. The firm failed in the fall of 1870, having before that been engaged in ship-building at Stockton, in this state, at the same time carrying on business as traders in their store at that place. About the time of the failure, they formed a new copartnership with one S. L. Hall, which car-

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

ried on the business of the store as before under the old style of Colcord, Berry & Co.

It is conceded that, up to the time of the failure, the firm complied with the requirements of the bankrupt act by keeping the proper books; but, after that time, they did not keep any cash book, nor did they enter on their journal, or any other book, the transfer of the stock to the new firm, or in any way refer thereto.

An examination of the books of the old firm nowhere discloses this transfer of the stock, or that anything was paid therefor by the new firm; the business was continued until February or March by the new firm, which made purchases of groceries from W. H. Kinsman, that, with most of the old stock, was disposed of to the men who were employed in finishing two vessels then on the stocks belonging to the old firm, but mortgaged to Kinsman. Some portion of the old stock was retailed by the new firm to other parties. When the workmen rendered in their accounts of their labor on the vessels, they were credited with the amounts on the books of the old firm, and were charged with the goods received by them in part payment from the new firm. A day book and ledger are the only account books shown to have been kept by the new firm; neither is produced, and the court is not advised as to the entries made thereon, and cannot presume that they fulfilled the requirements of the act in this behalf.

The amount of the goods turned over to the new firm by the old is stated by the bankrupt to have been about $2,000; the entire omission of any reference to this transaction on the books of the firm, and of any account with the new firm arising therefrom, in the opinion of the court, requires the refusal of the bankrupt's discharge. The books afford no information upon this subject to the assignees or creditors, either that there was a sale of the stock to the new firm, or what amount was paid therefor, or how much remained due and unpaid on this account when the firm went into bankruptcy; upon this whole proceeding, the books are silent.

Roberts testifies that when the new firm was formed, the old firm was deeply indebted to Hall, the incoming partner; that when the business of the new firm was wound up, the old firm had a settlement with the new and were still largely in debt to Hall. Of all this, so far as the court is informed, the books of the old firm make no disclosure, and there is nothing to be found therein which can in any way aid the assignees in determining for what sum the old stock was disposed of to the new firm, and how much has been paid, or to whom or what account.

This case, therefore, in this respect, is similar to that of In re Tyler [Case No. 14,305], and for this cause the court is compelled to deny the discharge.

COLCORD (WILLIAMSON v.). See Case No. 17,752.

Case No. 2,971.

The COLDILLERA.

[See Case No. 3,229a.]

Case No. 2,972.

The COLDSTREAM.

[4 Sawy. 172.][1]

District Court, D. California. Jan. 20, 1877.

MASTER'S LIABILITY FOR DEBTS CONTRACTED BY CREW.

Where the master was arrested for certain debts contracted by his crew, which by their authority he paid: *Held*, that he was entitled to deduct the amounts so paid from their wages, but not the costs incident to the arrest.

In admiralty.

C. T. Botts and D. T. Sullivan, for libellant.

Clark Churchill, for claimant.

HOFFMAN, District Judge. The only question in this case is, whether the master paid a debt contracted by the libellant, a mariner on board the vessel, by the authority of the latter. The libellant denies that he authorized the master to pay the bill. He asserts that Wallach Brothers (the creditors) were his friends, and that they had given him a credit until his return to Sydney, on receiving from him a watch and chain as security.

The master testified in the most positive manner that Timmer authorized him to pay the bill, and in this he is corroborated by both his mates, who appear to have no interest in the controversy.

The preponderance of testimony is thus clearly in favor of the master, and this conclusion is strengthened by other circumstances which seem to have some significance.

It is not denied that the master was arrested at the suit of Wallach Brothers, for the debt due by Timmer, and for other debts contracted by the mates; that he paid those debts is also undisputed. If Timmer had, as he says, arranged for a credit with Wallach, by pledging his watch and chain, the conduct of the latter in arresting the captain and insisting upon payment was fraudulent and dishonest. It was also irrational; for how could they have expected that the demand would be complied with, when they had given a credit and retained in their possession a valuable pledge. Again, the libellant could not have been ignorant of the captain's arrest, of the nature of the demand made upon him, and of the fact of his payment. And yet he does not appeal to have mentioned to any one that Wallach Brothers held his watch and chain, and that their enforcement of their demand was a breach of their

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

contract with him; nor does he seem to have made the slightest attempt to recover his watch and chain, or to have given any expression to his surprise and indignation at the gross breach of faith committed by Wallach Brothers, whom he styles his friends. The story of the pledge is told by him for the first time, so far as appears, when testifying in his own behalf.

Under the proofs I feel compelled to reject it. His claim is at best a technical one. He admits his indebtedness to Wallach Brothers. It is not denied that the master paid it. Whether he authorized the master to do so or not, he ought not now to refuse to reimburse him. The only justification for doing so which he can honestly set up, is the fact that he has parted with a valuable security, which the creditor still retains. For the reasons given above I reject this story; but even if it be true, his total silence with regard to it, after he knew the debt had been paid by the master, and his failure to make any attempt to recover it, can scarcely be reconciled with fair dealing. He has at all events put it in his power, if he prevails in this suit, to perpetrate a fraud; for on his return to Sydney he can recover his pledge, and thus entirely evade the payment of his debt.

I think the master is entitled to deduct the amount of Timmer's debt paid by him, but not the costs incident to his arrest. Timmer did not cause the suit to be brought. It is not pretended that he authorized the master to pay any portion of the costs of the proceeding. If, as I must presume, the law of Australia is the same as our own, the master was not liable for debts contracted by his crew. If he has chosen to pay the costs of the suit rather than submit to the delay of defending it, he has done so in his own interest and that of the ship. He has no right to charge the libellant with any portion of the moneys so paid, any more than he would be entitled to charge him with the expense of defending the suit if he had seen fit to do so.

A decree will be entered in accordance with this opinion.

Case No. 2,973.

Ex parte COLE.

[1 McCrary, 405.][1]

Circuit Court, D. Iowa. Oct., 1879.

OFFICERS OF COURT — POWER OF COURT OVER — ATTORNEYS AT LAW— SUSPENSION—DISBARMENT —UNFITNESS — HOW SHOWN — INCITING CLIENT TO ATTACK THE COURT—PARTICULARITY NOT REQUIRED—THE INTENT AND ATTEMPT SUFFICIENT —PRIVILEGED COMMUNICATIONS—ATTORNEY AND CLIENT—COMMUNICATIONS BETWEEN CLIENT AND ATTORNEY — IMPROPER PROPOSAL TO INFLUENCE JUDGE—ATTEMPT TO SECURE PLEDGES IN FAVOR OF CLIENT.

1. All courts possess an inherent power of control over all their officials, including attorneys, and these officers are liable to be attached for contempt and punished, by fine or imprisonment, for misconduct, and all except the marshal are liable to be removed from office by the court, for sufficient reason and on proper showing.

2. An attorney may be suspended or disbarred for any matter or thing, whether sufficient to constitute a criminal offense, or create a civil liability, or not, if it shows that he is unfit to be permitted to practice in the courts as one of their officers.

3. This unfitness may be shown by proof of crime, or of bad moral character, or of specific acts done by an attorney in the course of his practice, which show him to be unfit to be trusted.

4. An information charging an attorney with inciting and encouraging his clients, who were parties to a pending litigation, to influence improperly the judicial action of the court in such litigation, by newspaper publications and printed circulars, disparaging the judicial conduct of the court, with intent to intimidate the judges in their action, *held* good on demurrer.

5. In such an information the precise mode by which the attorney conveyed suggestions to his client, whether by letter, direct oral conversation, or by a message sent through a third person, need not be stated.

6. It is not necessary in such an information to aver that the publications suggested by the attorney were in fact made by the client. The offense is complete when the suggestion is made in earnest to a party likely to act on it.

7. Such an information is not to be held bad on demurrer upon the ground that the suggestion being one made to a client concerning a matter in suit, is a privileged communication.

8. Short of an attempt to pervert justice by bringing to bear on the judge who is to decide, influences of corruption, intimidation, or the improper weight of personal influence, in a secret and unjustifiable manner, a very large latitude is permissible to the lawyer in discussing the means of successfully asserting the rights of the client. And this privilege extends to the discussion of the fitness of the judge before whom the case may come, to try it, and the peculiar influences which may work on his mind to favor one side or the other of the controversy.

9. A proposition by a lawyer in a letter to his client, that he will visit with his family the family of the judge, and while an honored guest will avail himself of the freedom of conversation, to seek to commit the judge to the expression of opinions favorable to his client, should exclude him from practice in the courts and from the confidence of the judge.

10. A proposition by a lawyer in a letter to his client, that he will control newspapers and induce them to attack the judge, is evidence of a purpose on the part of such attorney to improperly influence the judicial action of the judge.

11. An allegation in an information against an attorney, that, when the appointment of two different persons at different times as receiver of a railroad was under consideration, he endeavored to secure from them, as a condition to his consent to their appointment, a secret promise that each of them would, if made receiver, appoint one Pickering general manager of the road, and one Atherton to some other place in its business, *held* insufficient to warrant disbarment, in the absence of an allegation that the persons named were unfit, or that the pledge was not sought in the interest of his client.

A committee of the Iowa Bar Association presented to the court an information against

[1] [Reported by Hon. George W. McCrary, Circuit Judge, and here reprinted by permission.]

C. C. Cole, making certain charges of unprofessional conduct against him, and praying his disbarment. To this information a demurrer was interposed. The hearing on the demurrer was before Mr. Justice MILLER, who states in his opinion the substance of the allegations of the information.

[For the determination of a motion to attach R. L. Ashhurst and I. M. Cate for refusal to answer certain questions, see Case No. 2,975.]

James T. Lane, R. H. Gillmore, and others, for prosecution.

Mr. Cummings and Mr. Lehman, for defense.

MILLER, Circuit Justice. The proceeding against the respondent in this case is neither an indictment nor information for an offense against the criminal code of the state or of the United States. The matters with which he is charged are not made an offense by any act of congress, and this court possesses no power to try a man for any crime or misdemeanor at common law. It is not, therefore, a prosecution for any crime or misdemeanor known to the law. But all courts possess an inherent power of control over their own officers. Some of these officers are of the court's appointment, others receive their appointments from different sources. In this court the clerk is appointed by the court, or one of its members; so are certain examiners, masters, commissioners, etc. The marshal is appointed by the president and senate of the United States. Attorneys and counselors of the court are as much officers of the court as those above mentioned. Their office is conferred by the court by an order admitting them to practice in the court. All of these officers are liable to be attached for contempt and punished by fine and imprisonment for disobeying an order of the court properly made, or for any other act or misconduct connected with their office disrespectful to the court or prejudicial to the administration of justice. They are all, except the marshal, liable to be removed from office by the court for sufficient reason and on proper showing.

This reason and this showing is not necessarily limited to criminal offenses or to an act which would create a civil liability. In the case of an attorney of the court, he may be removed from his office of attorney absolutely or for a limited period of time, or in the common phrase, may be suspended or disbarred for any matter or thing proved against him which shows that he is unfit to be permitted to practice in the courts as one of their officers. This unfitness may be shown by his guilt of a crime, as theft, murder, burglary. It may also be shown by proof of such bad moral character as is inconsistent with such an honorable office. It may be shown by specific acts done in connection with his business in the court or out of it, if it be in the practice of the duties of an attorney, which may show him unfit to be trusted as such, but which are short of any criminal offense. The respondent in this case is proceeded against for such misconduct, and the object is to disbar him.

He is not proceeded against for a crime or misdemeanor under any act of congress; and he is not proceeded against for mere contempt of court. If it was the latter, it would fail, for the act of congress (Rev. St. § 725) forbids punishment by court for any contempt not committed in its presence. The charges on which it is proposed to disbar the respondent are divided into four separate paragraphs, to each of which a demurrer, which may be treated as the exception of the civil law, is filed; and I am called on to determine whether all of these paragraphs, or how many of them, are sufficient in law to require him to answer the rule served on him to do so.

The first paragraph reads as follows: "And in pursuance of the said appointment and by virtue thereof, the said committee of the Iowa State Bar Association do hereby charge that the said C. C. Cole, having been admitted to practice in the said United States circuit court for the district of Iowa, and being an attorney of the said court, and an officer thereof, did during the year A. D. 1877 willfully violate his duties as an attorney of said circuit court in a suit depending in said court, wherein the Farmers' Loan and Trust Company, trustee, was the plaintiff, and the Central Railroad Company of Iowa and others were defendants, for the foreclosure of a mortgage on the said Central Railroad of Iowa, for that heretofore, to wit, on the twenty-sixth day of April, A. D. 1877, and at sundry times both before and after said date, he did willfully and in violation of his duties as an attorney of said court, incite and encourage R. L. Ashhurst and Isaac M. Cate, persons interested in said suit, to influence improperly the judicial action of the said court in said suit, and particularly the judicial action in said suit of the Hon. John F. Dillon, one of the judges of said court, by the publication in the newspapers published in the state of Iowa and other states, and in printed circulars, of articles designed and intended to disparage the judicial conduct in said suit of the judges of the said court, and to intimidate them in their judicial action in said suit; and particularly to influence and control improperly and wrongfully the judicial action in said suit of the Hon. John F. Dillon, one of the judges of the court, by the publication in the newspapers aforesaid and in printed circulars, of articles accusing the said Dillon of improper motives in his judicial action in said suit, and of partiality in his judgments therein, and of warping the law for friendly and other personal considerations, he, the said C. C. Cole, then and there well knowing the said imputations against the said Dillon to be untrue."

I am of opinion that if respondent did what is here charged against him, he should no longer be trusted as an officer of this court to aid in the administration of justice.

Divested of legal verbiage, and put in plain English, the charge is that he suggested, advised and incited his clients, parties to an important suit in this court, being at a distance from this state, to influence the action of the court by intimidation applied to its members, by publications in the newspapers and printed circulars; that the purpose was to influence them improperly in their judicial action in that suit—and especially that they were advised and incited to thus influence the action of Judge Dillon, one of the judges of the court, by publications in the newspapers of an abusive character, impeaching his motives and charging him with partiality and warping the law for personal considerations. I will not stop here to argue the question whether this is a legitimate mode of furnishing reasons to a judge for his decision, nor do I think it necessary to consider whether such a mode of winning a judgment is one which a court can tolerate in its own officers.

I am not now considering the right of the newspaper press to discuss for itself the conduct of the judges, in court or out of it, nor the right of any individual to criticise the acts and judgments of the court. This is a case of an attorney of the court, employed to conduct a suit pending in that court, who advises his client in advance of the hearing of the case or motion in hand, urging his client to endeavor to procure a decision in his favor, by exciting the fears of the judge by the terrorism of newspaper attacks and abusive circulars, under the expectation that rather than endure their repetition the judge will secure repose by a favorable decision. It is not criticism after the act that is intended. It is threat for the future.

It is my opinion that no lawyer who will advise this as a means of securing a judgment or order or decree of a court should be permitted to practice in that court. Objections are taken to this paragraph aside from the nature of the matters charged.

1 It is said that it is not sufficiently specific as to the manner or means, by what word, act or letter, respondent made the suggestions to his clients which are complained of. The objection thus stated, whether made to an indictment or information or a plea in a civil action, is to be governed by the same rule, namely: It is sufficient to inform the defendant of the matter with which he is charged, and enable him to make answer as to his guilt or innocence of the charge. The thing here charged is the effort to induce his clients, who are named—Ashhurst and Cate—to publish articles in the newspapers and circulars calculated to intimidate and otherwise improperly influence the judges in their judicial action. That is sufficiently specific. If he did this, he knows it. If he did not, he knows it and can deny it. I do not see that the precise mode by which he conveyed these suggestions to Ashhurst and Cate, is either a part of the act of inciting them to do it or necessary to the description of the offense or to enable the defendant to answer the charge. In point of fact the prosecution may not know whether it was done by letter or by direct oral conversation or by message sent through a third person. They may be dependent on the powers of the court to produce this evidence for the first time to themselves as well as to the court. But respondent certainly knows whether he ever represented, suggested or incited them to do this thing or not. If he did, he must also know how it was done. If he did not, he can safely answer by a denial. It is no part of any system of pleadings in any class of cases that all the evidence to support a charge of misconduct must be set out in the indictment, information or complaint.

2. It is said that there is no averment that Ashhurst or Cate ever made any such publication, and that the unexecuted suggestions of respondent can form no ground of removal. It is proper to repeat here that the respondent is not proceeded against for a criminal offense. It may also be conceded that he cannot be disbarred for the thoughts of his mind uncommunicated to others. The influence of respondent's conduct in endeavoring to stimulate his clients to use wicked and improper means of influencing the judges in their favor on the question of his fitness to occupy the place of an officer of the court to aid in administering justice, does not depend on his success in that endeavor, but upon his willingness to make that suggestion and the effort to have it carried into operation. If that is his view of the mode in which judgments are to be won or orders procured, he is not fit to be a member of the honorable profession of lawyers. The act which proves this is the suggestion, and it is complete when the suggestion is made in earnest to a party likely to act on it. This act is sufficient to show the principles which govern his action in similar cases.

3. A third objection is that the suggestion, being one made to a client concerning the matter in suit, is a privileged communication. This divides itself into two branches. The first is that it is so privileged, that in whatever mode the prosecutors may be able to procure the evidence necessary to establish the charge, the respondent cannot be held liable civilly or criminally for so advising his client. The reported cases mainly relied on are suits for libel, and whether the respondent, if sued by Judge Dillon for a libel in anything set out in this information, could be held civilly liable, admits of grave doubt. As to much of it he certainly could not. But this is not a suit for libel. The proceeding is not founded on the idea of a

personal injury to Judge Dillon. Its basis is an attempt on the part of respondent to influence the administration of justice in a suit pending in court by the use of threats and intimidations. By raising a public scandal, which shall operate on the fears of the judge. It is an effort to organize a conspiracy to defeat the ends of justice. When called upon by the court to answer for such practices in pain of dismissal from the bar, it is no defense to say, "I only intended to conspire with my clients. I did not urge any one but them to do this thing. I had a legal right to incite them in their own interest to frighten the judge until he did what they desired." In the other aspect of the case, namely, whether the persons to whom the communications were made can be compelled to disclose them on the trial, it will be time enough to decide that question when it is raised on the hearing, if the prosecution shall be compelled to resort to that mode of securing the evidence. I am of opinion that the first paragraph of this information sets forth conduct of the defendant, which, if true, justify this proceeding, and that they are sufficiently set forth to place respondent on his defense.

The second paragraph is made up of extracts from letters written by respondent to Cate and Ashhurst pending certain motions and efforts to get the court to proceed in executing a decree it had already rendered for the sale of the railroad, which was the result of the litigation. Some of these extracts, though censuriously reflecting on the court, are, in my opinion, so far protected by the relation of client and attorney existing between respondent and the parties to whom they were written, as that, whether true or false, they cannot become the foundation for expulsion from the bar. For I am very clearly of opinion that short of an attempt to pervert justice by bringing to bear on the judge who is to decide, influences of corruption, intimidation or the improper weight of personal influence in a secret and unjustifiable manner, a very large latitude is permissible to the lawyer in discussing the means of successfully asserting the rights of his client, and that this extends to the discussion of the fitness of the judge before whom the case may come, to try it, and the peculiar influences which may work on his mind to favor one side or the other of the controversy.

But there are two extracts from these letters which very far transcend this right. They come directly within the principle I have laid down as applicable to the charges of the first paragraph. In one of these extracts respondent acknowledges the receipt of articles of incorporation of the purchasers of the road under the sale, which, it seems, required the approval of the court, and in reply, he says: "I have yours of the twenty-third also with the articles of incorporation inclosed. I am not a sufficient railroad man to be enabled to criticise with any judgment or sagacity. So far as I am able to judge, they are without objection, and I have no doubt will prove acceptable to the court. I was going to suggest to you, whether or not, since the approval by the court, although nominally a judicial act, in this case is essentially a matter of executive conduct, whether it would not be well for myself and wife, in our vacation, to make a short visit to Davenport, to Judge Dillon and family; and while there and before the sale, to present to him the articles of incorporation and discuss them, and get his actual approval of them before the sale, and thus practice on our friends the game they have been practicing on us hitherto. I have no doubt I could get a very frank and thorough expression of his opinion in that way. What do you suggest in respect to that? It is possible that I can go to Davenport week after next." As it may become my duty hereafter to consider the judgment which ought to be pronounced, if respondent wrote this letter without sufficient excuse, I will not discuss it further than to say that in my opinion the lawyer who will coolly offer to his client to take his wife on a visit to the family of the judge—a visit which should be sacred to friendship alone,—and there, while an honored guest, to avail himself of the freedom of conversation, which it would seem like rudeness in the host to forbid, and in the absence of the other party to the suit, to seek to commit the judge to the expression of opinions favorable to his client which are to govern him in the court, should be excluded from practice in the courts or from the confidence of the judge. While this court has no control over the social relations of the judge and the lawyers, it has power to exclude such persons from the bar. The flagrant turpitude of such a proposal is not mitigated by the statement that it is a game—fit word to express it—which the other side have been practicing on respondent's clients. If the entire bar shall ever adopt this rule of practice, and the belief of the respondent that it can be successfully done is true, then will the courts of law instead of deserving the name of courts of justice, become the facile instruments of all forms of fraud and injustice.

Another extract, which reads as follows, is from a letter written to Mr. Ashhurst: "Please confer with Mr. Cate and Mr. Latrobe, and see whether it is not best to renew our motion at the May term and for you to come here and argue it. I think it is, and it is not improbable, that I could control enough of the newspapers of the state, in ventilating the course of the trustee, its attorney, and the court, to awake Judge Dillon to the idea that perhaps he had better let the law take its course than to further warp it for personal or friendly considerations. If you shall advise me of the adoption of the course suggested, I will see that the thorns in the flesh are properly entered." I think this letter, if ever written, is evidence of the matters alleged in the first paragraph. It is the worst of the whole series of charges

against respondent. As I have already shown that the first paragraph, if sustained by proof, is sufficient, it follows that this, which sets out with more particulars, the facts themselves, is also sufficient.

The third paragraph charges that respondent falsely and libelously stated in a letter, written to Ashhurst, his client, that Judge Dillon "was partial in his judicial action in said suit and warped the law for personal and friendly considerations in said suit." As I have already said, it is my opinion that it is both the right and the duty of the counsel to take into his consideration the question of the existence of such a state of mind in the judge and to confer freely with his client on the subject. And this may and often must be done, if done at all, by letter. There is no allegation in any part of this information that respondent ever expected or desired that these letters would be made public, or would reach the ear of Judge Dillon so as to wound his feelings. There is every reason, in the nature of the case, to believe that this was the last thing the respondent would have wished. There was, therefore, no intentional offense against the judge or against decorum. It is said that the statement was false. I have no doubt it was erroneous; it can hardly be supposed that counsel as deeply interested in his case as these letters show respondent to have been, will pass a very impartial judgment on the partiality of the judge who decides against him. Still he was entitled to form a judgment and communicate it to his client, and its truth or falsehood cannot be inquired into here. That is one of the class of communications between attorney and client which the patrons of the law should and must protect, for any other rule would work a restriction in the freedom of intercourse between them more injurious to the sound administration of justice than the effects of any mistaken opinion or even false misrepresentation of the attorney. This paragraph is not, in my opinion, sufficient if all it states is true, to authorize action by the court against the respondent.

Paragraphs four and five may be considered together. They allege that when the appointment of two different gentlemen at different times as receiver of the road was under consideration of the court, the respondent endeavored to procure from them, as a condition of his consent to their appointment, a secret promise that each of them would, if made receiver, appoint one Pickering general manager of the road, and Atherton to some other place in its business. It is not alleged that his client's interests would not have been promoted by the appointment of Pickering and Atherton. It is a fair inference from all that is said that they very much desired it, and that it was solely on that account that respondent sought the pledge. Nor is it alleged that Pickering or Atherton were unfit persons for the places for which they were suggested. The gravamen of the charge is, that the pledge sought was a secret one and that the opposite party in the suit would not have consented to the appointment of any one as receiver who had made such a pledge, and the court, if it had known of such a pledge, would not have made him manager. It was an attempt, say counsel, to deceive the court and the opposite party. I confess the action of the respondent, as thus stated, does not show the nicest sense of professional honor. But we are not to expel a member of the bar of long practice and high standing in the profession because in some transaction he has in the interest of his client failed to come up to the highest standard of professional ethics. This standard is not fixed. It varies with the locality, the times and the delicacy of mind of each member of the profession. The object to be attained here was one beneficial to respondent's clients. If pursued openly, it was a duty of the respondent to endeavor to effect it. I can see no obligation he was under to the opposite party, to reveal to them that his consent to the appointment of Morrill or Smith, as receiver, was conditional on action with regard to Pickering and Atherton, or that he had secured from either of them a promise to appoint them.

The only point of slightest doubt is the suggestion of deceiving the court. But he may well have supposed that the court had no right to make the exclusion of Pickering and Atherton from occupation in the business of the road, a condition of any man's appointment. And if he knew they would do so, it may well be doubted whether he was bound to aid the court by telling of the arrangement he had made, or desired to make, with the receiver. I repeat, that however a nice sense of honorable dealings with the court might have prevented some men from seeking this secret pledge, or induced them, if they had obtained it, to make it known to the court, I am very clearly of opinion that the matter as stated in these paragraphs affords no sufficient ground for suspension or expulsion from practice in the court. It is proper to add that the allegations that respondent acted corruptly in this matter, does not change the aspect of the matter unless some corrupt act is alleged. Indeed it is not easy to see where the corruption comes in. If there was any attempt to bribe Morrill or Smith by a pecuniary consideration, surely a matter which thus varied the whole aspect of the case should have been alleged. The three last paragraphs are insufficient.

NOTE [from original report]. Upon the announcement of the foregoing opinion, the respondent answered. Subsequently, before the final hearing, the respondent made a satisfactory acknowledgment and apology; whereupon the proceeding was, upon motion of the committee of the bar association, dismissed.

Case No. 2,974.

In re COLE.

[1 MacA. Pat. Cas. 539.]

Circuit Court, District of Columbia. Oct., 1857.

PATENTS—NOVELTY—UTILITY.

[Where each one of the features of an improvement, separately considered, strongly resembles known things and known results, to which it has been assimilated, but, when considered as a whole, the combination differs from each and all in the specific results of the parts, and accomplishes the desired result of manufacture with a saving of material and of operative force, it amounts to something more than "placing known means in a certain position;" and, if a positive benefit will result to the trade, the novelty of the invention should not be too vigorously questioned, especially as, if there be real patentable novelty, a refusal to grant the patent would work irremediable injury, and, if the combination be not substantially new, the fact of the patent will not prevent the public from using it.]

[Appeal from the commissioner of patents.

[Application of Richard H. Cole for letters patent for an improved machine for making metallic nuts. From a decision of the commissioner of patents rejecting the application, the applicant appeals.

[The patent was subsequently issued to the applicant, October 27, 1857, and is numbered 18,499.]

Z. C. Robbins, for appellant.

MERRICK, Circuit Judge. The claim of the applicant in this case lies so close upon the line which divides the new from the old in the arrangement of machinery to produce a better result in manufactures; or, rather, to be precise, comes so near to the principle of exclusion, on account of analogous use, that I have found great practical difficulty in placing him beyond the rule of exclusion. And did I construe the claim he has preferred to comprehend as much as the office has considered it to comprehend, I should feel obliged to affirm the judgment of rejection; and indeed that construction is itself so far from unreasonable that if the recent decisions upon this branch of law did not warrant, especially in the initiatory stages of an application, very large latitude for benignant interpretation, I should be further constrained to say that the construction placed upon the claim by the office was itself correct. But the claim, upon looking to all parts of the specification, may, I think, fairly be determined to amount to a claim for an improvement in the combination of machinery for the manufacture of metallic nuts by a preliminary shaping of the end of the heated metallic bar out of which the nut is to be made, so as to make it conform on all sides, save one, with the cross-section of the die box of the machine into which it is to be thrust by the punch, and this preliminary shaping to be further effected by means of an attachment to nut-making machines of vibrating jaws, to be operated and adjusted by the combination thereof in the way detailed in the specification, immediately in front of, and exactly opposite to, the mouth of the die box, by means of which the necessity of cutting off, by the punch, of more than one side of the nut is prevented, and all waste of metal from the sides of the bar is prevented, and power in operating the machine is saved. His invention is therefore limited not merely to a preliminary shaping of the bar by compression. This was no novelty. And as the claim stood and was construed before any amendment, it was well rejected. Nor is the invention limited only to a preliminary shaping in front of a die box irrespective of the especial agency by which, and of the extent to which, that shaping is accomplished, for without that additional limitation it would fall within the objection taken by the office of substantial identity with Griffith's machine. So, also, unless we regard the precise extent of this preliminary shaping connected with the especial benefits flowing from the order of its arrangement in the process of manufacture, it would be obnoxious to the objection of analogous use of the vibrating jaws in machines for making axes, spikes, &c., so forcibly urged in the written statements from the office. But the difference between this machine and Griffith's, both in the character and the adjustment of the compressing agency, and the extent of the preliminary shaping—that being effected here on all sides of the bar save one, and there no less than two sides, afterwards demanding a severing appliance—appears to furnish a distinction in the result produced. And in the machines for axes, &c., the vibrating jaws, although used for proximate shaping of the particular articles, are not shown to be combined in the same way, so as to give an absolute finish to the shape of the article in certain of its proportions at an important stage of the manufacture, nor so as to determine the precise amount of metal used; or, to vary the expression, to act as an ultimate and rigorously exact measure of form, size, and density. In each one of the features of the improvement, separately considered, there is strong resemblance to the known things and known results to which it has been assimilated; but when considered as a whole, the combination differs from each and all in the specific result of the parts; and appearing by the united action to accomplish the desired result of manufacturing a uniform-sized and perfect nut with a saving of material and of operative force, it amounts to something more than "placing known means in a certain position;" the process seems thereby to be substantially modified and improved and the trade to have derived a positive benefit.

Under all the circumstances, I am disinclined to question too rigorously the novelty of this

invention, especially when I consider that if there be real patentable novelty in the combination, a refusal to grant a patent would operate irremediable injury; whereas, if it be not substantially new, the patent will not prevent the public from the use of the combination; but being only prima-facie evidence in his favor, a jury of the country could protect a party charged with infringement upon evidence given that there is no novelty. Giving, then, to the applicant the full benefit of my doubt, as also of the most favorable interpretation of his claim, I am of opinion that there is error in the decision of the office. Perhaps in concluding this opinion it may be allowed that I suggest to the applicant to amend his specification before the emanation of a patent, so as to make the language of his claim accord unequivocally with the intention which I have ascribed to the terms used therein.

[NOTE. A patent was subsequently issued to the applicant, October 27, 1857, and is numbered 18,499.]

Case No. 2,975.

In re COLE.

[8 Reporter, 105;[1] 7 Wkly. Notes Cas. 114.]

Circuit Court, E. D. Pennsylvania. May 9, 1879.

PRACTICE—COMMISSION TO TAKE TESTIMONY—EXAMINATION—REGULARITY—COUNSEL AND CLIENT—PRIVILEGED COMMUNICATIONS—PERPETRATING CRIME.

1. Where a commission to take testimony has issued from the court of another circuit, and the aid of the court in whose jurisdiction the witnesses reside is sought to enforce it, the latter court will not inquire into the regularity of the issuance of the commission before compelling witnesses to answer.

2. Privileged communications between counsel and client are those which are lawful, and which relate to the business of the client, and fall within the scope of professional duty. A communication relating to the perpetration of a crime by the counsel is not privileged.

Motion for attachment. C. C. Cole, Esq., was of counsel for the Iowa Central Railroad, in a suit in the circuit court of Iowa, to foreclose a mortgage on said road. R. L. Ashhurst, Esq., was chairman of a committee of stockholders of the road; J. F. Cate was president of the said road; both the latter gentlemen were in frequent confidential communication with Cole, with reference to the litigation and matters connected therewith. During the case certain libellous publications appeared, attacking the character and motives of [Hon. John Dillon, United States circuit judge for the district of Iowa] [2] the judge before whom the case was. Cole was charged with the authorship of said publications, and proceedings were had by the Iowa bar association for the purpose of disbarring him as intending to obstruct the course of justice; and a commission was directed by the circuit court of Iowa to a commissioner in the eastern district of Pennsylvania, directing him to take testimony. Before the commissioner, Messrs. Ashhurst and Cate refused to answer certain questions as to whether they had received certain letters from Cole, &c., on the ground that they were confidential communications between counsel and client. Attachments were then asked for.

Cook & Lane, for the motion.

E. G. Platt and J. C. Bullitt, contra.

BUTLER, District Judge. Two questions were raised: 1. That the circuit court of Iowa had no authority to issue the commission. 2. That the communications were privileged.

As to the first, I, as a judge, have no authority to inquire into the jurisdiction of the circuit court of Iowa, or whether or not there is there pending a civil action. That court has decided that question, and issued a commission. It would be highly discourteous to look behind its record, and I decline to do so.

Secondly, are the communications privileged? The general law in regard to privileged communications is well understood, and originated far back in the history of jurisprudence. How far, in modern times, the law has been modified, it is not now necessary to consider. It is sometimes said that all communications between counsel and client are privileged; but this is too general, and is inaccurate. They must relate to the business and interest of the client; and, moreover, they must be lawful; for, if unlawful, public policy forbids their concealment under the plea of privilege; and, if lawful, they must fall within the scope of professional duty. Communications by counsel to client, likewise, are usually privileged, because closely connected with the client's interest and business. See Weeks, Attys. at Law, p. 252. Suppose a case most favorable to the witnesses, viz., that these communications were by client to counsel, would they be privileged? I do not mean to imply any fault in these gentlemen. I have no doubt they are entirely free from blame. But suppose a client had devised, with the assistance of counsel, a scheme to obstruct the administration of justice, would the communications be privileged? The authorities applicable to such cases say not. The charge here is that Mr. Cole intended to promote perpetration of crime. Had it not been for the learned argument of counsel who opposed the motion, I should not have had the slightest doubt about the case. The matter does not fall within the scope of professional employment. Moreover, these communications have been already given to the public. The inquiry is not what they were, but who made them, and how are the client's interests affected by them? The protection is for the benefit of the client, not the counsel. I am of opinion

[1] [Reprinted from 8 Reporter, 105, by permission.]

[2] [From 7 Wkly. Notes Cas. 115.]

that witnesses must answer [all material questions under this commission].[1]

[If it is intended that the process of the court should be invoked, the questions must be first written out and shown to be material.][1]

[NOTE. The respondent Cole demurred to the information presented against him by the bar association, and the sufficiency of the information was passed upon by Mr. Justice Miller. See Case No. 2,973.

[In a note to the report of Mr. Justice Miller's opinion in 1 McCrary, 405, it is stated that before the final hearing Mr. Cole made a satisfactory acknowledgment and apology, whereupon, on motion of the committee of the bar association, the proceeding was dismissed.]

Case No. 2,976.

COLE v. The ATLANTIC.

[Crabbe, 440.][2]

District Court, E. D. Pennsylvania. Sept. 10, 1841.

MARITIME LIEN FOR WORK AND MATERIALS—LACHES—LIMITATIONS.

1. The law will not suffer a mechanic's claim on a vessel, for work and materials furnished, to be defeated on slight grounds, but will be astute to prevent it.

[Quoted in Reeder v. The George's Creek, Case No. 11,654. Cited in The Tonawanda, 27 Fed. 576.]

2. A lien for work and materials is not barred by the lapse of two years, unaccompanied by culpable or unreasonable neglect, but will bind the vessel after that time, even in the hands of a bona fide purchaser.

[Cited in The D. M. French, Case No. 3,938; The E. A. Barnard, 2 Fed. 722; The Bristol, 11 Fed. 163.]

In admiralty. This was a libel [by John Cole, a sailmaker] for work and materials furnished nearly two years before the commencement of suit. The only defence was the lapse of time, and an alleged unwarrantable neglect.

O. Hopkinson, for libellant, cited The Rebecca [Case No. 11,619]; The Mary [Id. 9,186]; The Nestor [Id. 10,126]; The Jerusalem [Id. 7,294]; North v. The Eagle [Id. 10,309].

Gerhard, for respondent, cited, in addition, Blaine v. The Charles Carter, 4 Cranch [8 U. S.] 328.

HOPKINSON, District Judge. The libel sets forth that the brig Atlantic, owned by Samuel Mowrey, of Lubec, in the state of Maine, about the 19th October, 1839, came to the port of New York, in need of repairs and supplies to render her competent to prosecute her voyages; that the libellant contracted to furnish the necessary repairs and supplies, and did furnish them according to his contract, to the amount of three hundred and twenty-six dollars and seventy cents, as appears by a schedule annexed to the libel; and that this sum is now due and unpaid. The supplies in question were furnished to the master of the brig. The answer is put in by one Jeremiah Fowler, of Maine, who avers that he is the true and lawful owner of the brig, and has been so since the 26th of June, 1841, and that he became owner without any knowledge or notice of the claim of the libellant; that, since the said claim has arisen, the brig has made many voyages between the said port of Lubec and New York, and between Lubec and Philadelphia; that she is regularly enrolled at Lubec, and that he is ignorant of the facts and allegations contained in the libel, and prays that the libellant may be obliged to make due proof of them. The libellant proved his account as it was annexed to his libel, and no dispute has been made of its correctness. A commission was taken by the respondent, to Lubec, and the first witness examined was Jabez Mowrey, the former owner of the brig, who is erroneously called "Samuel" in the libel. The competency of this witness was objected to by the counsel of the libellant, but his testimony was read, reserving the objection. He testifies that he believes Jeremiah Fowler is the sole owner of the brig; that he gave the said Fowler a bill of sale for her, dated the 1st of April, 1841, a copy of which is annexed to his deposition. He says he knew nothing of this claim, and never ordered the master, or requested the libellant, to furnish the brig with the sails and other articles mentioned; and he is confident that Fowler had no knowledge of the claim. He says the brig has been at New York two or three times since October, 1839; that she has been to Boston, and Wilmington, North Carolina, and took a load of coal from Philadelphia to Boston. I give the evidence of this witness without prejudice to the exception, if it should hereafter avail the libellant. The next witness was Samuel Root. He testifies that he knows the respondent to be the owner of the brig, and that he became so on the 1st of April, 1841, by a bill of sale from Jabez Mowrey. He says that the brig has made a number of voyages since October, 1839, and has been once at New York and Philadelphia since that time, but as to other places he cannot say. The bill of sale has a clause in it from which the counsel for the libellant has inferred that the respondent had some knowledge of this claim, or, at least, a suspicion that there were unsatisfied claims against the brig, and from which he has endeavored to guard himself. This clause contains a covenant and warranty against all lawful claims and demands of all persons whomsoever. Such are the facts of the case, and we are to say what is the law, on the question between these parties.

This is a case of supplies furnished to a foreign vessel, and it has not been questioned that the law gave the libellant a lien for them on the brig, which may be enforced in

[1] [From 7 Wkly. Notes Cas. 115.]

[2] [Reported by William H. Crabbe, Esq.]

this court (The Nestor [Case No. 10,126]; Davis v. The New Brig [Id. 3,643]; The General Smith, 4 Wheat. [17 U. S.] 438); but it is contended that the libellant has lost or waived his right by the lapse of time and neglect. This is the question we have to inquire into. The lien now sought to be enforced is given to the mechanic who furnishes work or materials to a vessel, in a foreign port, which are necessary for the prosecution of her voyage. The policy of the law, as well as the principles of justice, regards this claim with high favor; and it does so not more for the security of the mechanic, than for the general interests of commerce and the particular interests of every ship-owner. A vessel bound on a distant voyage, with a valuable cargo, meets with a disaster which prevents her proceeding with safety, although in itself it may not be of much account, and may be repaired at a small expense. She puts into a port where her owner has neither funds nor credit, and, unless the repairs can be made, the voyage will be broken up, and both vessel and cargo exposed to a ruinous diminution of value. In this situation, the law says to the mechanic, "Relieve this vessel from her distress, save her owner from this loss, and the vessel herself, wheresoever she may go, shall be security for your payment." There is some generosity in the confidence thus given to strangers, because it is not without considerable hazard. The vessel may be lost; she may not come within the reach of the mechanic; her owners may be distant or insolvent; the mechanic, nevertheless, permits her to go, and the law will not suffer such a claim to be defeated on slight grounds, but will be astute to prevent it.

The respondent in this case puts his defence on two grounds. First, the time that has elapsed between the furnishing of the supplies, and the legal proceeding for recovering the amount due thereon, and that, in the mean time, the brig has passed into the hands of a bona fide purchaser. It is very clear that neither of these circumstances, nor both of them combined, will discharge the lien imposed by law on this vessel—unless, indeed, the time had been much longer than in the present case. There is no authority or principle which bars a claim of this sort in the admiralty, or indeed in any other court, by the lapse of two years; and if the lien remains, it holds to the vessel notwithstanding a sale. The purchaser takes it at his hazard, or on the faith of the vendor; the right of the mechanic cannot be divested by a sale, or he would in every case be in the power of the owner. He must, of necessity, permit the vessel to go out of his hands without payment; and, if a sale can deprive him of his right, he can never be safe. Whether the sale is made one month or two years after the work done can be of no importance, provided the time be not, of itself, such as to divest the right. The second point of defence is a culpable or unreasonable neglect, on the part of the libellant, to prosecute his claim. If this be sustained by the evidence, it will avail the respondent. It is obviously absurd to charge neglect, unless there has been an opportunity for vigilance. If the party has not had it in his power, by the exercise of ordinary diligence, to prosecute his claim against this brig, it is clear he cannot be charged with such negligence as will forfeit his right. What evidence have we of opportunities neglected by the libellant to enforce his claim? If the evidence of the late owner is received, he says the vessel has been at New York two or three times since October, 1839; but how long she was there is not stated, nor is it pretended that the libellant had any knowledge of her being there. It would surely be unreasonable to say that he was bound to know the arrival and departure of all the coasting vessels that came to New York in the course of the year, amounting, I presume, to many thousands. It would be straining probabilities to the utmost to say that we must presume the libellant knew this vessel to be at New York, perhaps for a few hours only, or to say that he was bound to know it, or to be liable to be charged with such negligence as would forfeit his claim. On the evidence of Samuel Root, the brig was but once at New York in the period mentioned, and how long she was there is not stated. As to the voyage of the vessel to Boston, to North Carolina, and Philadelphia, it cannot be pretended that he was bound to know them. When, fortunately, he was informed of her being at this port, he was prompt to have her arrested for his claim.

The cases cited by the counsel for the libellant fully support these general views of the law of this case. In The Rebecca [Case No. 11,619], the learned judge gave a careful examination and elaborate opinion to this, among other questions that were presented to him. The libellant there shipped, at New York, certain goods on board of the Rebecca, to be delivered at Portland. The vessel arrived there, and the consignees offered to pay the freight, and demanded the delivery of the goods. The captain refused to deliver them, they having been lost in consequence of bad stowage. The libellant prayed for process against the vessel, and that she might be sold to pay his damage. It was decided that the merchant who ships goods has a lien on the vessel for loss or damage to them by the fault of the master; that this lien might be enforced in the admiralty; and that this claim is to be preferred to those of general creditors. The part of the case which is particularly applicable to ours, is on page 211. It was contended by the respondent that the shipper had lost his lien by neglecting to enforce it in time. The judge agrees that liens of this description should be enforced without undue delay. What is undue delay must de-

pend on the circumstances of each case. In the case of The Rebecca, the owner of the goods ordered process against the vessel as soon as he heard of the loss; but before it was served she had left Portland for her home port, and did not return for nine months, when she was arrested. In the intervening period she was engaged in transporting stone between the Hudson river and the Delaware, passing the city of New York at every trip, and stopped there for a few days. New York was the place of residence of the libellant; but it was not proved that he knew these facts. Under such circumstances, the judge thought the delay of nine months was no bar to the suit. We should here remark that there was some negligence on the part of the consignees, the agents of the shipper, in not arresting the vessel immediately on receiving information that the goods were lost or damaged, and, more especially, in suffering her to leave Portland without any proceeding against her; whereas, in our case, the libellant, as will be seen, could not in the true spirit of his contract prevent the brig he had repaired from proceeding on her voyage, until he was paid. Again, it was much more likely, and would be much more reasonable to presume, or require, that a shipping merchant at New York, should know of the arrival and departure of vessels at and from that port than a mechanic, whose daily occupation does not put him in the way of such information. Another part of the case of The Rebecca has an application to that we are considering. It was there contended that the lien was defeated by the sale and transfer of the vessel to a bona fide purchaser, although she might still be liable in the hands of the original owner. This was overruled by the court, and the reasons, which to me are satisfactory, are given at length. The lien or right of the libellant was antecedent to that of the purchaser. Could he be deprived of it without any fault or negligence on his part? He must have a reasonable time to avail himself of his security, and an opportunity to do so, or he might be defeated by an immediate sale of the vessel. The judge does not mean to deny that if a privileged creditor remains silent, after having had a proper opportunity to enforce his right, and the vessel be sold to a bona fide purchaser, without notice, the lien will be forfeited or held to be waived; but he thought there was sufficient diligence in that case. I have already observed that there was one opportunity there, of which the agents of the libellant might have availed themselves to arrest the ship, but that none such was afforded to the present libellant. The case of The Mary [Case No. 9,186] was a claim upon the vessel for mariners' wages. The seamen had shipped in June, 1818, on a voyage from New York to New Orleans, at which last port the ship remained until August, 1819, when the seamen were discharged, and the captain left the ship. In October following, the claimants purchased the ship, and sent her to Liverpool, and thence to New York, where she arrived in July, 1820. The master had dissuaded the men from libelling the vessel in New Orleans, telling them that if they would come to New York he would see them paid. The defence was, that the seamen did not arrest the vessel at New Orleans, but elected to return to New York and look to the owners or master, and could not now proceed against the ship in the hands of a bona fide purchaser. This was certainly a stronger case of neglect or waiver than we have to decide. The reply to the defence was, that the statute of limitations did not apply to the subject, and that there was no evidence of that gross neglect which would forfeit the remedy. It was an appeal from the district court of New York. Judge Livingston gave the judgment. After stating what might be a reasonable rule in the case of a claim not seasonably prosecuted, he says, that no rule has been adopted, either in England or this country, which requires a seaman to assert his lien in any given time, or which will justify the court in saying that if he does not proceed by libel on the very first opportunity which is afforded to him, he shall forfeit all right of obtaining satisfaction in that way, unless the vessel shall belong to the same person. He then answers the argument that a lien is lost by parting with the thing, and also the argument from the neglect of the seamen at New Orleans. He says it was nothing more than a forbearance on the part of the libellants to libel at that time, but not a waiver of any remedy they might have if they were not paid, as promised, at New York. The decree, as in the court below, was in favor of the libellants. In [Case No. 10,126] we have the case of The Nestor, decided by Judge Story. The points decided, according to the syllabus, are—First, that the admiralty has jurisdiction in rem for supplies furnished by material-men to foreign ships in our ports, or in the ports of other states; second, that the giving credit, for a fixed time, for the supplies, does not extinguish the lien, nor does the allowing a ship to depart from the port, on her voyage, without payment; third, that the fact of the master or owner being personally liable does not destroy the lien. No question on the first point has been raised in the argument of this case. As to the second—giving credit—the judge says that the objection is founded upon a notion that the liens given by the maritime law are governed exactly by the principles which govern common law liens. He explains this objection with his usual learning and experience in admiralty law; and observes that a maritime lien does not include or require any possession of the thing; it exists altogether independently of such possession. He shows the absurdity of supposing that a lien for materials would be lost by parting with the

ship, as it would be utterly inconsistent with the professed object of all such supplies, to retain the possession. The object is to procure necessary repairs and supplies for the purpose of completing the voyage. But how is the voyage to be completed if the material-man is to hold possession of the vessel, in order to secure his lien for the necessary repairs and supplies? After explaining the nature and policy of this law, the judge says that the claim is indelible; but that it may be lost by gross neglect and delay to enforce it, at least when the rights of other persons have intervened. It requires only reasonable diligence in enforcing the claim at a proper time, and under proper circumstances.

We have here a plain and equitable rule for our guidance in deciding this case. Has the libellant been guilty of gross neglect or delay in enforcing his right? How can this be if there is no proof, or no reason to believe, that he ever had an opportunity known to him, or which the law required him to know at his peril, to prosecute his claim against the vessel? Has he used reasonable diligence to obtain his right at a proper time, and under proper circumstances? Time and circumstances must have a reference, to his power to prosecute his claim; for we cannot say that he has neglected time or circumstances, if neither brought him the means to use his remedy. The case cited by the counsel for the respondent from 4 Cranch [8 U. S.] 328 (Blaine v. The Charles Carter) has nothing in it to impeach or diminish the authority of those referred to on the part of the libellant. The obligee of a bottomry bond allowed the ship to make several voyages, without asserting his claim, having the power to do so, and executions were levied on her by other creditors. It was held that the obligee had lost his preference. When his money became due and was unpaid he could have arrested the vessel, but he voluntarily suffered her to depart. Between the date of the bond and the filing of the libel, the ship made two voyages from England to America, and one from America to England.

In my opinion the facts and circumstances of this case, tested by the authorities referred to, do not show any neglect or delay on the part of the libellant to enforce his right, which should forfeit it; he seems to have used all the diligence in his power, and no evidence has been given of an opportunity to arrest this vessel which he failed to take advantage of. As to the clause in the bill of sale from Mowrey to the respondent, which warrants to secure him against all claims, I would not infer from it, in the face of the denial and proof on the part of the respondent, that he knew of this claim; it will, however, give him a resort to the vendor for indemnity against this claim upon the brig, and he will be aided in the recovery of his indemnity by this decree in this case, which, if not decisive, will place him on stronger ground than a voluntary payment. Decree for the libellant for the full amount demanded, with costs.

On the 16th September, 1841, an appeal was taken from this decree, to the circuit court of the United States for the third circuit, but, up to the date of this report, has been no further prosecuted. [Case nowhere reported.]

Case No. 2,977.

COLE et al. v. BATLEY.

[2 Curt. 562.][1]

Circuit Court, D. Rhode Island. Oct. Term, 1855.

DESCENT.

1. Under the statute of descents of Rhode Island, the maternal grandfather of the intestate takes an estate which descended to the intestate from her mother, to the exclusion of uncles and aunts of the intestate who were brothers and sisters of her mother.

2. The canon of descents of ancestral estates is the same as of other estates, save that the descent is limited to those of the blood of the person from whom the estate came to the intestate, if any such there be.

3. A father is of the blood of his daughter, within the meaning of that act.

This was a bill in equity [by Samuel J. Cole and wife and others] for a partition. The only question made, was concerning the title of one of the respondents to an undivided eighth part of the land. The parties agreed on a statement of facts, which showed, in substance, that Rebecca Reed being seized of the one eighth in question, died intestate and unmarried, in 1842, leaving a maternal grandfather, Thomas Sessions, and two uncles and three aunts, brothers and sisters of her mother. Rebecca Reed derived the estate in question by descent from her mother, who also derived it by descent from her mother, the wife of the above-named Thomas Sessions, Rebecca's grandfather. The question was, whether, under the statute of descents of Rhode Island, Thomas Sessions, the grandfather, took, to the exclusion of the uncles and aunts; [John T.] Batley, who claimed this undivided eighth under a conveyance from Thomas Sessions, being a party respondent in the bill.

Bradley & Ames, for Batley.
Mr. Cozzens, contra.

CURTIS, Circuit Justice. The statute of descents of Rhode Island (Rev. Laws, 239) contains the following clause: "When the title to any real estate of inheritance, as to which the person having such title shall die intestate, came by descent, gift, or devise from the parent, or other kindred of the intestate, and such intestate die without children, such estate shall go to the kin next to

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

the intestate, of the blood of the person from whom such estate came or descended, if any there be." Two questions are made in this case. The first is, whether Thomas Sessions, the grandfather of the intestate, is "of the blood of the person from whom such estate came or descended," within the meaning of those words in the act. In Gardner v. Collins, 2 Pet. [27 U. S.] 58, the supreme court, construing this statute, held that the descent, gift, or devise there spoken of, means immediate descent, gift, or devise, and makes the immediate ancestor the sole stock of descent. So that though this estate in fact descended to Rebecca Reed from her maternal grandmother, yet, as it came to Rebecca through her mother, the latter, being the immediate ancestor, is "the person from whom such estate came," within the meaning of the act. And the inquiry is, whether Thomas Sessions, is "of the blood" of his daughter, Rebecca's mother? It was held in Gardner v. Collins [supra], that the expression, of the blood of another, in this statute, includes all who have any of the blood of that other. And it is well settled, that two persons are of the same blood, in part or in whole, who are descended from the same pair. If wholly descended from the same pair, as brothers and sisters having the same father and mother, they are wholly of the same blood; if they have different fathers and the same mother, they are partly of the same blood; because they are descended from the same pair, namely, their maternal grandfather and grandmother. Co. Litt. 157; 2 Bl. Comm. (Chit. Ed.) 210, and note. It follows that a father and daughter, are partly of the same blood, for both are descended from the same pair, namely, the parents of the father. It is insisted, however, that in this statute, the words, "of the blood of the person from whom such estate came," include only the descendants of that person. If this question were raised for the first time I do not think I could so construe these words, for it is not their natural meaning, and would give to this clause of the statute a far more restricted operation than I think belongs to it. But in truth it was decided in Gardner v. Collins. In that case, the intestate was Mary C. Gardner. The estate in question came to her from her brothers. Her half brothers claimed and recovered, as being of the blood of their half brothers from whom the estate came to the intestate. Of course they were not descended from those from whom the estate came. I am of opinion that Thomas Sessions was of the blood of his daughter, from whom this estate came.

The next question is, was he "the kin next to the intestate?" The same section of the statute, already referred to, contains, among its canons of descent, the following: "If there be no mother, nor brother, nor sister, nor their descendants, the inheritance shall go, in equal moities, to the paternal and maternal kindred, each in the following course:—First, to the grandfather. If there be no grandfather, then to the grandmother, uncles, and aunts, on the same side, and their descendants, or such of them as there be." Page 238. It is argued that this canon is established solely for the descent of estates not ancestral; and that as this estate is not distributable under it, its provision, placing the grandfather before the uncles and aunts, is of no effect. It is true, this estate is not divisible among both the paternal and maternal kindred, because it came to the intestate by descent from her mother, and so is affected by the other clause of the act above quoted. But it by no means follows, that this last-mentioned clause has the effect to take ancestral estates wholly out of the preceding part of the section, and leave them unregulated by any canon, determining who shall take as the kin next to the intestate. It can hardly be supposed, a priori, that it was the intention of the legislature to determine with precision, in what order estates not ancestral should go to the kin of the intestate, but to make no provision whatever of that kind in the case of ancestral estates. And an examination of this act brings my mind to no such conclusion.

The act begins with the following words: "When any person, having title to any real estate of inheritance, shall die intestate as to such estate, it shall descend and pass in equal portions to his kindred, in the following course." Then follows the canon of descents, including, among others, that which puts the grandfather before the uncles and aunts. Now this part of the section is unlimited in its terms, which describes the estates to be governed by it, and if it were not for the subsequent clause, ancestral estates would go in the course there indicated. But this was not intended. It was the purpose of the legislature to keep such estates in the blood of the ancestor who was the stock of descent. And this, I think, was all the distinction intended to be made between ancestral and other estates. The whole section must be construed together. And, so construed, it amounts to this; if there be no mother, nor brother, nor sister, nor their descendants, the inheritance shall go, first to the grandfather, &c. If the estate be not ancestral, both the paternal and maternal kindred should take in the order set down. If the estate be ancestral, the kindred of the blood of the person from whom the estate came, if any such there be, shall alone take in the same order. This gives to the entire section a consistent interpretation, and allows it to be, what it is presumable the legislature intended it should be, a systematic arrangement of a canon of descent, applicable to all estates, coming either by descent, or purchase, to the intestate.

My opinion is, that Mr. Batley has a valid title under Thomas Sessions, and partition must be decreed accordingly.

Case No. 2,978.

COLE v. The BRANDT.

[1 Betts, D. C. MS. 36.]

District Court, S. D. New York. April 27, 1841.

REMEDIES IN ADMIRALTY — POSSESSORY ACTION — FOREIGN ATTACHMENT — SALE OF VESSEL FOR DEBTS OF OWNER — TITLE OF PURCHASER.

[1. The remedies in admiralty resemble those of the common law, rather than those in equity, and in a possessory action for a vessel by one having the legal title the rights of claimants cannot be adjusted on equitable principles, but restoration must be awarded upon the legal ownership, without regard to collateral equities.]

[2. Foreign attachments, though effecting a seizure of property in specie, are not proceedings in rem. Therefore an adjudication by a foreign tribunal, ordering the sale of an attached vessel for the personal debts of the owner, is not a condemnation of the vessel, so as to give a purchaser at the sale a superior title to that of a prior mortgagee.]

[In admiralty. Libel by Charles Cole, Jr., to recover possession of the brig Brandt, A. J. Hill, claimant.]

BETTS, District Judge. The libellant claims to be owner of the brig under a bona fide purchase, whilst she was at sea or in a foreign port, and that she was conveyed to him by regular bill of sale by Hunt & Dascomb of Boston, her former owners. The matters of defence drawn from the pleadings and proofs and urged to defeat the action, are, that at the time of the alleged sale the vessel was in the port of Wilmington, North Carolina, and though she remained there a sufficient time, no change of possession was made and she went to St. Croix under her original papers and master. That under proceedings against the vessel, instituted in the Danish court at that island, she was decreed to be sold in satisfaction of debts owing there by her former owners, was purchased at such sale by the claimant, and that it is shown on the libellant's own evidence that he was not a purchaser, and only a mortgagee of the vessel.

The vessel belonged in Boston and was employed on a trading voyage in the West Indies and back and forward to American ports. She sailed from St. Croix October 29th and arrived at Wilmington November the 13th, where she remained until the 3d of December, when she sailed again for St. Croix on the 19th, and was arrested under an attachment at St. Croix on the 10th day of July, 1839, and sold at public auction the 10th of February. The fact of change of ownership was communicated to the master and attaching creditor at St. Croix, previous to any proceeding against the vessel, and the circumstances raise a strong implication that it was also known to the claimant. If he had no actual knowledge he was at least so circumstanced in respect to the subject matter as to afford occasion for applying to him the rule which charges him with the knowledge that a reasonable degree of inquiry could not have failed to furnish. As the evidence of actual notice is however only inferential and not direct and positive, this decision will proceed upon the assumption that the claimant came in as a bona fide purchaser without notice. The libellant is clothed with the legal title, and in the character of legal owner is entitled to the restitution of the vessel by decree in admiralty unless that title is displaced or counteracted by paramount equities on the part of the claimant. The English and American courts interpose such relief upon the basis of a legal title. The Tilton [Case No. 14,054]; The Two Sisters, 2 W. Rob. Adm. 138.

It was pressed with much force on the argument that the libellant by his own proof having shown that his title was only that of a mortgagee, the allegations of the libel were not sustained, and that he could not upon the proofs have the remedy claimed as absolute owner and no other than for satisfaction of the encumbrance charge. The argument is plausible, and at first view, of weight, inasmuch as if the libellant had proceeded upon his real interest in the subject matter as mortgagee, his only remedy in this court would have been exceedingly doubtful, and if it be maintainable it could be allowed only on principles of equity, which give the claimant the right to come in as junior creditor and discharge the older encumbrance and enforce his subsequent claim. The similitude of this court to chancery is far from exact in many particulars, and rarely exists in points of jurisdiction. Accordingly it cannot be justly reasoned that because a particular power is exercised with great justice and convenience to suitors in equity, that when the case presents an occasion for it, the like remedy should be applied here. A proceeding by a mortgagee to secure the effect of his right under the mortgage deed ought undoubtedly to disclose the actual title in equity because that court could so control his remedy as to secure the equities, as well as legal rights of all other parties. It would bring him to an accounting as to the consideration upon which the deed rested; it would uphold the interests of other parties attaching antecedently or subsequently to the mortgage deed, and would parcel out the subject matter charged within the mortgage so as to best subserve the interests of all other encumbrancers. This admiralty cannot do. Its functions rather correspond in this respect to those of common law courts than equity. It cannot even call on parties to account. [The Orleans v. Phoebus] 11 Pet. [36 U. S.] 175.

The right of a mortgagee at law to demand the delivery of mortgaged property by the appropriate possessory action, is unquestionable. It obtains to the fullest extent in the case of vessels at sea or in a foreign port.

and in no other way delivered at the execution of the mortgage than by delivery of the bill of sale. 4 Mass. 661; 8 Mass. 287; 7 Pick. 397; 4 Mason, 183 [Wheeler v. Sumner, Case No. 17,501]; The Sisters, 2 W. Rob. Adm. 138. The like rule is carried into effect in admiralty (5 Mason, 465 [The Tilton, Case No. 14,054]), and upon the legal ownership solely without regard to collateral equities in other parties (3 W. Rob. Adm. 176; 4 C. Rob. Adm. 225; The Sisters [supra]). The prima facie title and mode of proceeding being then sufficient to entitle the libellant to the restoration of the vessel, the main question upon the merits turns upon the validity of the right acquired by the claimant, as counteracting the title of the libellant. Assuming in his behalf that he purchased bona fide and without notice of the prior interest of the libellant, the acts before the tribunal at St. Croix have all the essential constituents of a legal procedure, such as a charge or claim specified against the vessel, her arrest therefor under the mandate of the court-notice to the master for all interested, a hearing and adjudication upon the matter in demand and the award of process commanding the sale of the vessel; and no foreign judicature will deny the appropriate effect to the procedure because of the incongruous functions of the principal official, or because of the wide variation of the narrative and proceedings from the more exact and scientific records and acts of European and American courts. The action was to recover a debt owing a resident in St. Croix from the former owner of the vessel residing in the United States, and the local law undoubtedly authorized the attachment of the debtor's property in the first instance, to abide the judgment that might be rendered on the demand.

It is contended that the judgment when rendered effects a sequestration of the property seized and is thus conclusive against the vessel and all persons having any interest in her. Story, Confl. Laws, 461–463; 4 Cow. 522, note. This doctrine is incontrovertible in the jurisprudence of the United States in respect to actions involving specifically a condemnation of the thing arrested, but it is by no means definitely settled what constitutes a suit and judgment in rem. Without undertaking by any express terms of limitation to restrict that proceeding to one or another class of cases, it may be safely asserted that foreign attachments, though effecting a seizure of property in specie, are not regarded as proceedings in rem. This is sufficiently indicated by the tenor of the English and American cases upon that head, and is so expressly decided by the late Chief Justice Marshall. 2 Brock. 125 [Mankin v. Chandler, Case No. 9,030]. Much less can an arrest of property initiatory to the action, for it is only a means of bringing the debtor within the jurisdiction of the court by retaining the thing in place of bail in redditum; because the property under attachment is never condemned as in delicto and only responds collaterally to the judgment obtained against the owner. So in this case there is no condemnatory accusation against the vessel. The gravamen of the prosecution is, that the supposed owner is indebted in his mercantile transactions to the complainant, and the judgment of the court proceeds to authenticate the claim, and then as incident to such judgment decree the sale of the vessel to satisfy it. This does not therefore present the case of a vessel condemned under municipal laws of a penal character, for the court to determine whether such condemnation carries all the attributes of a judgment in rem, but may admit it does so, without such admission affording any aid to this claim.

I am of opinion upon the whole case that the title in proof on the part of the libellant is sufficient to entitle him to maintain the action in the character of absolute owner, and also for the recovery of the possession of the vessel, and that upon the question of property the proceedings at St. Croix are not of a nature to convey a title to the claimant which can prevail against that in proof on the part of the libellant. Upon the pleadings and proofs as they stand, I accordingly decree in favor of the libellant, with costs.

On appeal, decree affirmed.

COLE (HOE v.). See Case No. 6,572.

COLE v. The KATE HUNTER. See Case No. 3,474.

COLE (SCAMMON v.). See Cases Nos. 12,432 and 12,433.

COLE (UNITED STATES v.). See Case No. 14,832.

COLE (WESCOTT v.). See Case No. 17,417.

COLEFAX (BAYARD v.). See Case No. 1,130.

Case No. 2,979.

In re COLEMAN.

[7 Blatchf. 192;[1] 2 N. B. R. 671.]

Circuit Court, N. D. New York. March, 1870.

APPEAL IN BANKRUPTCY.

Where a person claiming to be a creditor of a bankrupt, after the rejection of his claim by the district court, undertook to appeal from such decision to this court, under section 8 of the bankruptcy act of March 2, 1867 (14 Stat. 520), but did not comply with the provisions of that section in regard to entering his appeal, or with the provisions of general order number 26, prescribed by the justices of the supreme court, in regard to filing his appeal and setting forth a statement in writing of his claim, this court, on motion of the assignee in bankruptcy, dismissed the attempted appeal.

[Followed in Re Place, Case No. 11,200; Sedgwick v. Fridenberg, Id. 12,611. Cited in Fellows v. Burnap, Id. 4,721; Re McEwen, 4 Fed. 16.]

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

[In bankruptcy. In the matter of Columbus C. Coleman.]

WOODRUFF, Circuit Judge. This proceeding is brought before the court by a notice of motion made on behalf of the assignee of the property of a bankrupt, to dismiss an alleged or attempted appeal by John Blain from the decision of the district court rejecting his claim to share in the estate as a creditor of the bankrupt. At the close of the argument of the motion, papers supposed to present the appeal upon its merits were submitted, and a decision of the appeal was requested in the event of a denial of the motion.

The eighth section of the bankrupt law of March 2, 1867 (14 Stat. 520), provides, that any supposed creditor whose claim is wholly or in part rejected, "may appeal from the decision of the district court to the circuit court from the same district," but that no appeal shall be allowed unless it is claimed, and notice given thereof to the clerk of the district court, to be entered with the record of the proceedings, and also to the assignee, within ten days after the entry of the decree or decision appealed from; and that the appeal shall be entered at the term of the circuit court which shall be first held within and for the district, next after the expiration of ten days from the time of claiming the same. The tenth section provides, that the justices of the supreme court shall frame general orders for regulating the practice and procedure upon appeals.

Rule 26 of the general orders framed and promulgated by the justices of the supreme court provides, that "any supposed creditor who takes an appeal to the circuit court from the decision of the district court rejecting his claim in whole or in part, according to the provisions of the eighth section of the act, shall give notice of his intention to enter the appeal within ten days from the entry of the final decision of the district court upon his claim; and he shall file his appeal in the clerk's office of the circuit court, within ten days thereafter, setting forth a statement in writing of his claim, in the manner prescribed by said section; and the assignee shall plead or answer thereto, in like manner, within ten days after the statement shall be filed. Every issue thereon shall be made up in the court, and the cause placed upon the docket thereof, and shall be heard and decided in the same manner as other actions at law."

Upon all the papers submitted, it appears that the appellant has entirely disregarded rule 26 of the general orders. Assuming that he claimed an appeal and gave notice thereof to the clerk of the district court, to be entered with the record of the proceedings, within ten days after the entry of the decision, and that service of notice on the assignee and the actual receipt of such notice are sufficiently established, the allegation that he did not file his appeal in the clerk's office within ten days thereafter, as the general order directs, is neither denied nor attempted to be explained or excused. Nor do any of the papers show that he then or at any time thereafter set forth a statement in writing of his claim, to which the assignee could plead or answer, and thereby form an issue to be tried, as the general order directs.

In this condition of default in not complying with the general order, the appellant has failed to show, by way of resistance to the motion, that he entered his appeal at the term of the circuit court first held after the expiration of ten days from the time of claiming the same, as the act peremptorily requires, or that he has ever entered such appeal. If the general orders made by the supreme court are so absolutely binding upon this court that it cannot excuse or relieve a party from his default in not conforming thereto, then it cannot refuse to dismiss the appeal. If the court has any discretion to allow such excuse or give such relief, then the appellant should, at least, have shown a compliance with the express mandate of the act of congress, obedience to which has been held essential to give this court jurisdiction to hear an appeal under the section (section 8) giving the right of appeal. Bump, Bankr. p. 35, note to section 8. Indeed, the papers now before me do not show that this court has any jurisdiction to hear the alleged appeal; and it is certain that the case is not presented in the form which the general orders of the supreme court contemplate.

The assignee should, therefore, be permitted to enter an order dismissing the attempted appeal, so that the district court may not be embarrassed by the seeming pendency of an appeal, which the notice served upon its clerk indicates.

Case No. 2,980.

In re COLEMAN.

[15 Blatchf. 406.][1]

Circuit Court, S. D. New York. Jan. 2, 1879.

VIOLATION OF ELECTION LAWS—NATURALIZATION—COURT RECORDS—DOCKET ENTRIES.

1. An affidavit for a complaint of a violation of section 5426 of the Revised Statutes of the United States alleged that C. did, for the purpose of registering himself as a voter, unlawfully use a certain certificate of citizenship, knowing that such certificate had been unlawfully issued or made, without stating how such use was unlawful, or how the certificate had been unlawfully issued or made. *Held*, that the affidavit did not show probable cause for the issuing a warrant, within the fourth amendment to the constitution of the United States.

[Cited in Re Davenport, 48 Fed. 531.]

2. The question as to what constitutes a record of naturalization, considered.

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

3. Under the act of April 14, 1802 (2 Stat. 153), and the act of May 26, 1824 (4 Stat. 69), it is not one of the "conditions" of admission to citizenship, that the applicant shall see to it that the proceedings are recorded.

4. Where docket entries stand in the place of any other record, and are regarded by the court which makes them as the record, they receive from other courts the same consideration, as a record, which is accorded to them by the court which permits them to stand in the place of any other record, provided there is no express provision of law prescribing any other record.

[Explained in Charles Green's Son v. Salas, 31 Fed. 110.]

5. Where an applicant for citizenship complies fully with all the conditions imposed on him, as prerequisites to his admission, and the unlawfulness, if any, is in the want of form in the record of the court, and he receives at the time, from the court, a certificate stating that all the statutory requisites have been complied with, and that he is admitted to be a citizen, he cannot, if he afterwards uses such certificate, be convicted, under said section 5426, of using such certificate, knowing that it was unlawfully issued.

[Cited in Charles Green's Son v. Salas, 31 Fed. 107.]

On habeas corpus.

Stewart L. Woodford, Dist. Atty., and Samuel B. Clarke, Asst. Dist. Atty., for the United States.

E. Ellery Anderson and George W. Wingate, for Coleman.

BLATCHFORD, Circuit Judge. On the 3d of November, 1878, Stephen Mosher made oath before John I. Davenport, a United States commissioner, to an affidavit "that there is to be an election held in the city of New York, on the 5th day of November, 1878, at which representatives in congress are to be chosen; that there has, in accordance with the laws of the state of New York, been a registration of voters for said election; that such registration was held on the eighth, sixteenth, twenty-fifth and twenty-sixth days of October, 1878; that, as deponent is informed and believes, one Peter Coleman did, on one of the said days of registration, for the purpose of registering himself as a voter, or otherwise, unlawfully use a certain certificate of citizenship of the superior court in the city of New York, showing him to be admitted to be a citizen, knowing that such certificate had been unlawfully issued or made; this, in the eleventh election district of the second assembly district of the said city, and in violation of the laws of the United States; and deponent further says, that a portion of his information is derived from, and one of the grounds of his belief is founded upon, the statements of said Peter Coleman, made to the board of inspectors of election in said election district, at the time he so used said certificate, as the same are set forth and contained in the copy of the registry of said district, made and kept by one of the supervisors of election of the United States at said time and place, and the report made thereof by said supervisor, which statement, records and report deponent believes to be true." This affidavit was made for the purpose of obtaining a warrant of arrest against Coleman, for having committed an offence against section 5426 of the Revised Statutes of the United States, which provides, that "every person who in any manner uses for the purpose of registering as a voter, or as evidence of a right to vote, or otherwise, unlawfully, any order, certificate of citizenship, or certificate, judgment, or exemplification, showing any person to be admitted to be a citizen, whether heretofore or hereafter issued or made, knowing that such order or certificate, judgment, or exemplification has been unlawfully issued or made; and every person who unlawfully uses, or attempts to use, any such order or certificate, issued to or in the name of any other person, or in a fictitious name, or the name of a deceased person, shall be punished by imprisonment at hard labor not less than one year nor more than five years, or by a fine not less than three hundred nor more than one thousand dollars, or by both such fine and imprisonment." On this affidavit, the commissioner, on the 4th of November, 1878, issued a warrant under his hand and seal, to the marshal, as follows: "Whereas, complaint on oath has been made to me, charging that Peter Coleman did, in the 11th election district of the second assembly district of the city of New York, on or about the 16th day of October, in the year one thousand eight hundred and seventy-eight, unlawfully use a certain certificate of citizenship, purporting to be issued or granted by the superior court in the city of New York, showing him to be admitted to be a citizen, then and there knowing that such certificate had been unlawfully issued or made—this in violation of the laws of the United States—now, therefore, you are hereby commanded, in the name of the president of the United States of America, to apprehend the said Peter Coleman, and bring his body forthwith before me, or some judge or justice of the United States, wherever he may be found, that he may then and there be dealt with according to law, for the said offence." Coleman was arrested and brought before said commissioner on said warrant, and, the charge set forth in said warrant being explained to him, and an examination respecting the same being had, the commissioner, on the 5th of November, 1878, committed him to the custody of the marshal, to await the action of the grand jury in the premises, in default of $2,000 bail. The commitment was endorsed on the warrant.

Coleman was brought before this court, on a writ of habeas corpus, and the proceedings before the commissioner were brought before it by a writ of certiorari. Formal returns were made to both writs. The relator put in one traverse to both returns, and the commissioner put in a reply to such traverse. Thereupon, proofs were taken on the issues

of fact raised by said papers. The principles on which this court acts in issuing and adjudicating on writs of habeas corpus and certiorari, in cases like the present, are those laid down in Re Martin [Case No. 9,151]. The rulings established by this court in Re Stupp [Id. 13,563], apply solely to extradition cases.

The proofs taken herein were taken before a referee, and have not been submitted to the court, but the respective parties have stipulated in writing that the facts involved in these proceedings, are as follows: Peter Coleman was born in Prussia. He is now 34 years of age, having been born in 1844. From 1856 to 1860, he sailed to and from Liverpool in English bottoms. He arrived in this country in 1860, in the capacity of an ordinary seaman. From 1860 to 1863, he sailed to and from New York in American bottoms, living in the city of New York when in port. In February, 1863, he gave up going to sea, and has since resided continuously in said city. The certificate of which the following is a copy was given to Coleman, October 15th, 1868: "United States of America. State of New York. City and County of New York, ss: Be it remembered, that on the 15th day of October, in the year of our Lord one thousand eight hundred and sixty-eight, Peter Coleman appeared in the superior court of the city of New York, (the said court being a court of record, having common law jurisdiction and a clerk and seal,) and applied to the said court to be admitted to become a citizen of the United States of America, pursuant to the provisions of the several acts of the congress of the United States of America, for that purpose made and provided; and the said applicant having thereupon produced to the court such evidence, made such declaration and renunciation, and taken such oaths, as are by the said acts required, thereupon, it was ordered by the said court, that the said applicant be admitted, and he was accordingly admitted, by the said court, to be a citizen of the United States. In testimony whereof, the seal of the said court is hereunto affixed, this fifteenth day of October, one thousand eight hundred and sixty-eight, and in the ninety-third year of our independence. (L. S.) By the Court. James M. Sweeney, Clerk." Coleman testifies that his witness "was a man named Sandy Holland, who went by the nickname of Swain." Coleman offered himself for registry at the place of registry in the eleventh election district of the second assembly district of the city of New York, on the 25th of October, 1878. At that time he produced, for the purpose of enabling him to be so registered, what purported to be a certificate of naturalization issued by the superior court of the city of New York, on the 15th of October, 1868, of which a copy is above set forth. Thereupon, his right to register was challenged, on the ground that he had never been legally naturalized. At the time of being so challenged, he was also presented with, as the supervisor of election in the said district swears, a printed notice, of which the following is a copy, but Coleman denies the receipt of such notice: "United States Court House, Room 1, Fourth Floor. New York, October 15, 1878. Sir: As complaint has been filed with me charging you with being possessed of a false, fraudulent, and void certificate of naturalization, issued in 1868, your attention is called to the following notice from the U. S. district attorney. Respectfully yours, John I. Davenport. 'Office of the United States Attorney for the Southern District of New York. New York, October 12, 1878. To holders of certificates of naturalization purporting to have been issued from the supreme and superior courts in the city of New York in 1868: On August 24th and September 21st, ultimo, I gave notice that complaints had been lodged with John I. Davenport, Esq., United States commissioner, charging many persons residing in this district with being fraudulently possessed of fraudulent certificates of citizenship, (commonly known as naturalization papers;) that these certificates purported to have been issued by the supreme and superior courts in the city of New York, in the year 1868; and that such complaints further charged the holders of such certificates with having fraudulently registered thereon at the last congressional election in 1876. I gave further notice that these are offences against the laws of the United States. As some of the persons holding such certificates may be lawfully entitled to be naturalized, as many of them were possibly ignorant and misled, and in order that no injustice might be done to any person now willing to obey the law, I gave further notice, that each person against whom such complaint had been made could avoid arrest and prosecution by appearing before Commissioner Davenport, at his office in the United States court building, room 1, fourth floor, on or before the 12th day of October, 1878, and surrendering such certificate, if, upon examination, it should prove to be fraudulent. Commissioner Davenport has this day officially informed me that more than two thousand persons holding such certificates have presented themselves to him, since my said notice was given, and have voluntarily surrendered such certificates. At his request, and in order that full opportunity may be given to those who may still be disposed to obey the law, I hereby extend the time within which persons against whom such complaints have been made, may appear before Commissioner Davenport, at his said office, and surrender such certificates, if, upon examination, they shall prove to be fraudulent, until Friday, the first day of November, 1878. For the convenience of such of the accused as are laboring men, the U. S. commissioner's office will be kept open for the transaction of this

business until half-past eight o'clock in the evening. Stewart L. Woodford, U. S. Attorney.'" Coleman, upon being so challenged, was examined under oath respecting his claim to naturalization, and his right to said certificate, and took the statutory oaths for a challenged person, whereupon, such oaths being taken, said Coleman was, in compliance with the laws of the state of New York, duly registered by the inspectors of election. The only book in the office of the clerk of said superior court containing any entry in regard to the alleged naturalization of Coleman, is a book having pasted on its back labels of leather and paper, with the following words printed or inscribed upon them: "Naturalization Index, October 12, 1868, to October 16, 1868, Superior Court." The entry in said book relating to the case of Coleman, was as follows:

1868. Superior Court. 1868.		1868. Superior Court. 1868.		
Date.	Name.	Nation.	Witness.	Remarks.
Oct. 15.	Coleman (min.) Peter.	Queen of England.	Dwain, Edward.	339 Water, N. Y.

There is, in said book, no other entry relating to the case of Coleman, and no other matter except similar entries relating to other persons. Said book contains about 350 pages, and purports to cover four days, from October 12th, 1868, to October 16th, 1868, there being 35 names on a page, and 5,672 names in the book. With reference to the 15th of October, 1868, said book contains entries relative to 951 other persons besides Coleman. In the month of October, 1868, and prior thereto, there were, and, since that date, have been, several record books belonging to said superior court, entitled "Special Term and General Term Minutes," which were minutes kept in the manner that court minutes are usually kept, and there is no reference to Coleman therein, nor any mention of any matters relative to the naturalization of any alien, except as hereinafter mentioned, that is, before 1859 and since 1873. Among the papers on file in the office of the clerk of said superior court, is an original paper of which the following is a copy: "Superior Court of the City of New York. In the Matter of Peter Coleman, on his Application to become a Citizen of the United States. Minor. State of New York, City and County of New York, ss.: Edward Swain, of 339 Water St., being duly sworn, doth depose and say, that he is well acquainted with the above-named applicant; that the said applicant has resided in the United States for three years next preceding his arrival at the age of twenty-one years; that he has continued to reside therein to the present time; that he has resided five years within the United States, including three years of his minority, and that he has resided in the state of New York one year, at least, immediately preceding this application; and that during that time he has behaved as a man of good moral character, attached to the principles of the constitution of the United States, and well disposed to the good order and happiness of the same; and deponent verily believes, that for three years next preceding this application, it has been the real and honest intention of the said applicant to become a citizen of the United States. Edward (his X mark) Swain. Sworn in open court, this 15th day of October, 1868. James M. Sweeney, Clerk. State of New York, City and County of New York, ss.: Peter Coleman, of No. 330 Water St., New York, the above-named applicant, being duly sworn, says, that he has arrived at the age of twenty-one years; that he has resided in the United States three years next preceding his arrival at that age, and has continued to reside therein to the present time; that he has resided five years within the United States, including the three years of his minority, and that he has resided one year, at least, immediately preceding this application, within the state of New York, and that, for three years next preceding this application, it has been his real and honest intention to become a citizen of the United States. Peter (his X mark) Coleman. Sworn in open court, this 15th day of October, 1868. James M. Sweeney, Clerk. I do declare on oath, that it is my bona fide intention, and has been, for the three years next preceding this application, to become a citizen of the United States, and to renounce forever all allegiance and fidelity to any foreign prince, potentate, state or sovereignty whatever, and particularly to the queen of Great Britain and Ireland, of whom I was before a subject. Peter (his X mark) Coleman. Sworn in open court, this 15th day of October, 1868. James M. Sweeney, Clerk. I, ———, do solemnly swear, that I will support the constitution of the United States, and that I do absolutely and entirely renounce and abjure all allegiance and fidelity to any foreign prince, potentate, state or sovereignty whatever, and particularly to the queen of Great Britain and Ireland, of whom I was before a subject. Peter (his X mark) Coleman. Sworn in open court, this 15th day of October, 1868. James M. Sweeney, Clerk." The four several documents composing said paper are all on one page of a half sheet of paper, and are printed blanks filled in. In writing, across the face of said paper, and partly on the margin and partly on the affidavit of Swain, on said paper, are the initials "J. H. McC.," in the handwriting of the Honorable John H. McCunn, who was a judge of the said superior court, in October, 1868, and is now dead. On the back of said half sheet of paper are the following words: "New York Superior Court. In the Matter of Peter Coleman, on his Naturalization—Minor. Affidavits, &c. Filed, Oct. 15, 1868." These words are a printed blank, filled in. The only books now in the office of the clerk of

said superior court, which purport to relate to the naturalization of any person, at any time between January 1st, 1859, and January 1st, 1874, are books which resemble in all respects that in which the said entry in regard to Coleman appears, except that the label on each of the books which cover the years preceding 1868, is "Naturalizations," and the label on each of the books which cover the years succeeding 1868, is "Naturalization Record." The only papers on file in said clerk's office, purporting to relate to the naturalization of any persons, between January 1st, 1859, and January 1st, 1874, are papers which resemble those in the case of Coleman, in all respects, one of which is filed in the case of each person whose name is entered in said books. Said books, labelled "Naturalizations," "Naturalization Index," and "Naturalization Record," covering the time between 1858 and 1874, contain entries relative to between 50,000 and 60,000 persons, of which more than 1,000 are as to females, and 20,000 are as to persons who, it is claimed, were naturalized in the year 1868, 18,432 of whom were in the month of October alone. The establishment and keeping of the volumes in use between 1858 and 1874, which contain such entries as appear in relation to Coleman in the said book labelled "Naturalization Index," was not in pursuance of any order of any term, general, special or circuit, of the said superior court, so far as appears by any record in said court. Prior to January 1st, 1859, when an alien was naturalized in said superior court, an entry was made in the court minutes book, in the following form: "Thursday, October 7th, 1858. Daniel McCarthy and Francis Popper personally appeared in open court this day and made application to be admitted as citizens of the United States, and, producing the evidence as required by law, and upon reading and filing such evidence, it is ordered that they severally be admitted as citizens of the United States of America." Since January 1st, 1874, whenever an alien has been naturalized by said superior court, an entry has been made in the court minutes book in the following form: "Monday, March 2d, 1874. The following named persons personally appeared in court, produced the evidence required by the several acts of congress, and, having made the declarations and renunciations as by said acts required, it is ordered, that said applicants be admitted to be citizens of the United States of America: Michael Brasby—Patrick Hunt. Thomas Boese, Clerk." When Coleman was brought before the commissioner, he demanded an examination, which was granted. Upon such examination, the commissioner had before him all the facts above stated, and the said notice, of which a copy is above set forth, alleged to have been given to Coleman when his right to register was challenged, together with the opinion of Judge Freedman, hereinafter referred to, and proof that both had been previously published in most, if not all, the newspapers of said city, both German and English. Coleman was then committed by the commissioner, as having, for the purpose of registering himself as a voter, unlawfully used a certificate of naturalization, of which a copy is above set forth, knowing the same to have been unlawfully issued or made. All the issues arising on the pleadings and testimony in this case, except such as arise on the foregoing facts so stipulated in writing, and on the sufficiency of the original complaint, were waived by the counsel for the respective parties, by a stipulation in writing.

The sixth amendment to the constitution of the United States provides, that, in all criminal prosecutions, the accused shall enjoy the right "to be informed of the nature and cause of the accusation." This provision applies as well to the preliminary proceedings for arrest, before indictment, as to the indictment itself. The fourth amendment provides, that the right of the people to be secure in their persons against unreasonable seizures shall not be violated, and that no warrant shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the person to be seized. Assuming that the words "or otherwise," in the affidavit of Mosher, may be regarded as surplusage, and that such affidavit, taking all its language together, sufficiently alleges that Coleman used the certificate of citizenship for the purpose of registering himself as a voter, in the election district named, and on one of the four days named, yet it does not state how such use was unlawful, or how the certificate had been unlawfully issued or made. There is no statement as to wherein the illegality of the use, or as to wherein the illegality of the issuing or making, of the certificate consisted. The use by a person, for the purpose of registering himself as a voter, of a "certificate of citizenship of the superior court in the city of New York, showing him to be admitted to be a citizen," is not a forbidden act or an offence. The only specification of an offence in the affidavit, is that Coleman "unlawfully" used for such purpose such certificate, knowing that such certificate had been "unlawfully" issued or made. Characterizing the use as unlawful does not give any information as to the nature of the offence. Whether the use was unlawful or not is itself a conclusion of law, and to allege that the use was unlawful is not to allege a fact. So, also, to allege that Coleman knew that the certificate had been unlawfully issued or made, is not to give any information as to what fact or facts he knew. The allegation that Coleman knew that the certificate had been unlawfully issued or made, is, in substance, an allegation of two things: First, that the certificate had been unlawfully issued or made; and, second, that Coleman knew that, when he so used it. The allegation that the certificate was unlawfully

issued or made, gives no information as to any fact, or as to the nature of any guilty knowledge by Coleman; and, to say that Coleman knew that the certificate was unlawfully issued, gives no information, unless it is set forth wherein the unlawfulness of the issuing consisted, and that Coleman knew the facts so alleged to constitute such unlawfulness. No "probable cause" was set forth in the affidavit.

The warrant is open to the same objections as the affidavit, in the use of the same words, "unlawfully use," and "unlawfully issued or made;" and to the further objection, that it does not set forth that the certificate was used for the purpose of registering as a voter, or for what purpose, but simply that it was unlawfully used by Coleman, in the election district named, on or about the day named, he knowing that it had been unlawfully issued or made.

In U. S. v. Henry [Case No. 15,350], I held, that, in an indictment under a statute which made it an offence to execute a fraudulent bond by which the payment of any internal revenue tax shall be evaded, it was sufficient to aver, in the indictment, that the defendant executed a specified bond, and that it was fraudulent, and that, by means of it, the payment of a specified internal revenue tax was evaded, and that the defendant knew the bond to be fraudulent; and that it was not necessary to set forth in what particulars the bond was fraudulent. This decision was made in view of the rulings in U. S. v. Gooding, 12 Wheat. [25 U. S.] 460, 474, U. S. v. Mills, 7 Pet. [32 U. S.] 138, 142, U. S. v. Staats, 8 How. [49 U S.] 40, 44, and U. S. v. Pond [Case No. 16,067], establishing the principle, that, "in an indictment for an offence created by statute, it is sufficient to describe the offence in the words of the statute, and that, if the defendant insists upon a greater particularity, it is for him to show, that, from the obvious intention of the legislature, or the known principles of law, the case falls within some exception to the general rule." The allegation that a bond was fraudulent, is an allegation of a fact, even though it is not stated wherein it was fraudulent, and even though to so state would be to state a further fact. But, the allegation that a certificate was unlawfully used or unlawfully issued, is not an allegation of a fact, but is the allegation of a conclusion of law. In this connection, the case of U. S. v. Hirschfield [Id. 15,372], in this court, before Judge Benedict, may be referred to. There, an indictment, under section 5512 of the Revised Statutes, which makes it an offence to fraudulently register, not having a lawful right so to do, alleged that the defendant fraudulently registered, having no lawful right to register. It was objected that the indictment was insufficient, because it simply averred that the accused fraudulently registered, without stating any facts to show that a fraud was committed, or to enable the accused to know what he was charged with having done. The indictment was held insufficient, on the ground that it did not point out the fraud which it was supposed the accused had committed, so that he could know what it was that he was called on to explain. The subject has recently been considered by the supreme court, in U. S. v. Cruikshank, 92 U. S. 542, 557, and, within the principles there laid down, it must be held that the affidavit of Mosher failed to disclose "probable cause" for the issuing of the warrant. It is not intended to be held, that, if the evidence before the commissioner, on the examination, showed the defendant to have been guilty of an offence against section 5426, or, if the evidence taken in the proceedings on this habeas corpus showed such guilt, it would necessarily follow that the defendant must be now discharged, because of the insufficiency of the original affidavit and warrant.

The main question discussed, on the hearing on the writ, was, whether the certificate of citizenship which Coleman used was unlawfully issued. It was contended, by the attorney for the United States, that the certificate was unlawfully issued, because there was no matter of record in the superior court on which to found it; and that, what has been found in, and produced from, the books and files of that court, does not constitute a record of the naturalization of Coleman. The proceedings in the superior court, in the case of Coleman, took place under the act of April 14, 1802 (2 Stat. 153), and the act of May 26, 1824 (4 Stat. 69). The first section of the act of 1802 contained the following provisions: "Any alien, being a free white person, may be admitted to become a citizen of the United States, or any of them, on the following conditions, and not otherwise: First. That he shall have declared, on oath or affirmation, before the supreme, superior, district or circuit court of some one of the states, or of the territorial districts of the United States, or a circuit or district court of the United States, three years at least before his admission, that it was, bona fide, his intention to become a citizen of the United States, and to renounce forever all allegiance and fidelity to any foreign prince, potentate, state or sovereignty whatever, and particularly, by name, the prince, potentate, state or sovereignty whereof such alien may at the time be a citizen or subject. Secondly. That he shall, at the time of his application to be admitted, declare, on oath and affirmation, before some one of the courts aforesaid, that he will support the constitution of the United States, and that he doth absolutely and entirely renounce and abjure all allegiance and fidelity to every foreign prince, potentate, state or sovereignty whatever, and particularly, by name, the prince, potentate, state or sovereignty whereof he was before a citizen or subject; which proceedings shall be recorded by the clerk of the court. Thirdly. That the

court admitting such a lien shall be satisfied that he has resided within the United States five years at least, and within the state or territory where such court is at the time held, one year at least; and it shall further appear to their satisfaction, that, during that time, he has behaved as a man of a good moral character, attached to the principles of the constitution of the United States, and well disposed to the good order and happiness of the same; provided, that the oath of the applicant shall in no case be allowed to prove his residence. Fourthly. That, in case the alien applying to be admitted to citizenship shall have borne any hereditary title, or been of any of the orders of nobility, in the kingdom or state from which he came, he shall, in addition to the above requisites, make an express renunciation of his title, or order of nobility, in the court to which his application shall be made, which renunciation shall be recorded in the said court." Section 3 of the act of 1802 provides, that "every court of record in any individual state, having common law jurisdiction, and a seal and clerk or prothonotary, shall be considered as a district court, within the meaning of this act." The first section of the act of 1824 provides as follows: "Any alien, being a free white person and a minor, under the age of twenty-one years, who shall have resided in the United States three years next preceding his arriving at the age of twenty-one years, and who shall have continued to reside therein to the time he may make application to be admitted a citizen thereof, may, after he arrives at the age of twenty-one years, and after he shall have resided five years within the United States, including the three years of his minority, be admitted a citizen of the United States, without having made the declaration required in the first condition of the first section of the act to which this is an addition, three years previous to his admission; provided such alien shall make the declaration required therein at the time of his or her admission; and shall further declare, on oath, and prove to the satisfaction of the court, that, for three years next preceding, it has been the bona fide intention of such alien to become a citizen of the United States; and shall, in all other respects, comply with the laws in regard to naturalization." Propositions are announced in this case, by the attorney for the United States, the accuracy of which cannot be questioned—such as, that the admission of an alien to citizenship is a judicial act; that it is essential that a court should act; and that the evidence submitted to the court for the purpose of admission to citizenship must be legal evidence.

It is further contended, by the attorney for the United States, that the proceedings and judgment of admission must be recorded. The act of 1802 provides, that the alien may be admitted to become a citizen "on the following conditions, and not otherwise:" (1) He must have declared his intention. (2) He must take an oath to support the constitution, and renouncing his former allegiance. The statute then says: "Which proceedings shall be recorded by the clerk of the court." Then follow the third and fourth conditions: (3) The court must be satisfied, by proof, as to the prescribed residence and character of the applicant, some other oath than his own being required to prove his residence. (4) The applicant must expressly renounce all titles and orders of nobility, "which renunciation shall be recorded in the said court." It is hardly to be supposed that congress intended to make the applicant for citizenship responsible for a noncompliance with any other conditions than such as he had the power to comply with. The applicant can declare his intention, and can take the prescribed oath and make the renunciation. But he cannot see to it that the proceedings and renunciation are recorded. He can produce a witness as to his residence and character, and can appear in person in the proper court, and be sworn there in open court, with his witness, as to the matters prescribed in the statute. When this is done, he can do nothing more except to receive such a certificate from the court as that which Coleman received from the court—a certificate which sets forth that it is given "by the court" under its seal; that Coleman appeared in the court on a day named, and applied to it to become a citizen, and produced to it such evidence, and made such declaration and renunciation, and took such oaths, as are required by the acts of congress on the subject; and that, thereupon, the court ordered that he be admitted, and he was accordingly admitted, by the court, to be a citizen of the United States. When he has done what the certificate says he has done, and when he leaves with the clerk of the court such papers as he has signed, and when the court tells him, as it does by the certificate, that, he having done all that, the court had thereupon ordered that he be admitted to be a citizen, and had admitted him to be a citizen, and when the court gives the certificate into his keeping, he has done all he can to comply with the statute. It cannot be held that the word "conditions" applies to anything further. There must, undoubtedly, be an act of admission, but what shall be the evidence, directed by the court, of such act of admission, is another question. The provision for recording "proceedings," at the close of the second condition, and the provision for recording the renunciation mentioned in the fourth condition, are introduced in such form that they may very well be regarded as merely directory, and as no part of the "conditions." The conditions are well satisfied by limiting them to what the applicant is required to do, in the first, second and fourth paragraphs, and to what the court is required to do, in the third paragraph. The admission to citizenship is to follow the observance of those conditions.

The recording is to follow the admission and not precede it. The admission separates the conditions from the recording. The court admitting to citizenship must have evidence of the prior declaration of intention, or, in the case provided for by the first section of the act of 1824, evidence of what is required by that section, and satisfactory evidence as to residence and character, and the applicant must take the prescribed oaths and make the prescribed renunciations, and then the court is authorized to admit him to become a citizen. Even if the evidence as to residence and character is required to be recorded, yet it, and all evidence as to a prior declaration of intention, and the oaths and renunciations of the applicant, and the evidence as to residence and character, may very well be recorded by placing the written papers on the files of the court, in the shape in which the court receives them as complete. Such papers, when filed, are just as much recorded, and just as much records of the court, as if they were bound in book form, and the book were filed, or as if they were copied at length in a book, and the book were filed.

As said before, there must be an act of admission by the court. But the court has a right to say what it will regard as its act of admission, and it has a right to say what it will regard as its order that the applicant be admitted, and what it will regard as his admission. Whatever the court says is its act of admission, and whatever the court says is its order of admission, is such act and such order, whenever the question is brought up in a collateral proceeding, such as is the present proceeding, provided there is sufficient to reasonably amount to such act and such order. Here, the superior court has said to Coleman, by the certificate, that he has complied with all the requirements of the statute, and that it has made an order thereupon that he be admitted to be a citizen, and that it has admitted him to be a citizen. The evidence produced on the subject, from the files and records of that court, shows, that the certificate stated the truth, in stating that Coleman appeared in the court and applied to it to become a citizen, and produced to it such evidence, and made such declaration and renunciation, and took such oaths, as the statute required. The three oaths of Coleman, embracing also the necessary declaration and renunciation by him, and the oath of the witness as to his residence and character, are all sworn to in open court, and are on one and the same page of paper, at the head of which is a title, showing that all the proceedings are in the matter of the application of Coleman to the superior court to become a citizen of the United States. The original page of paper is on file in that court, and bears the mark of having been filed on the same day on which the certificate was issued. This filing was a recording, within the meaning of the statute.

It is contended, by the attorney for the United States, that it has been shown that there was no matter of record in the superior court on which to found the certificate that was given to Coleman; that what was put on record was not an act of admission or an order of admission; that there should have been a record of a judgment of the court, in the same form as the ordinary record of a judgment between parties; that there is nothing in this case that can be regarded as such record, even including what is found in the "Naturalization Index" and the affidavits, and what is in them and on them; and that, therefore, the certificate was unlawfully issued. The evidence in this case shows very clearly that the superior court regarded what is found in the "Naturalization Index," in regard to Coleman, in connection with the paper of oaths, &c., and the initials of the judge on such paper, as amounting to an order for the admission of Coleman to be a citizen. The evidence shows that there was no other record or entry of any order for the admission of Coleman; but, it equally shows, not only that the court understood that there was an order for his admission, but, also, what it was that was understood by the court to be an order for his admission. The certificate given by the court under its seal states that there was an order made by the court for his admission. It follows, that what is now found is what the court referred to as the order. It is not claimed, that, between the end of 1858 and the beginning of 1874, any other form of order admitting to citizenship was made by the superior court in any case, different from what now appears to have been made in the case of Coleman, while it does appear, that, during all the time from 1858 to 1874, the form of the order of admission was the same as in the case of Coleman, (except that nothing appears as to any initials of a judge,) and that such form covers the cases of between 50,000 and 60,000 persons, who appear by the books of that court, before mentioned, to have been admitted by that court, during that period, to be citizens, if Coleman was so admitted. It may be that some, and, perhaps, many of the entries in such books may have been intended as statements that persons were naturalized who were not in fact naturalized, who never appeared in the court, and who never took any oaths, and on whose cases the court never acted, or acted only to reject them, and it may be that certificates were issued like that issued to Coleman, not only in cases thus fraudulently entered in such books, but in cases where no entry appears in such books. But no such case is now presented to this court. It is to be presumed, that, if it shall be judicially shown to the superior court that any entries of naturalization in its books are fraudulent, or that any fraudulent certificates have been issued under its seal, it will annul such entries and certificates. But the only question in this court, on this branch of the case, is, whether what is found in the

records of the superior court amounts to an order for the admission of Coleman to be a citizen. That court, for a period of fifteen years, observed the same forms of procedure, and kept the same records, and made the same orders of admission, in all cases of naturalization, as in the case of Coleman, and none others. During that period, nineteen judges occupied seats on the bench of that court. They were: Joseph S. Bosworth, Murray Hoffman, John Slosson, Lewis B. Woodruff, Edwards Pierrepont, James Moncrief, Anthony L. Robertson, James W. White, John M. Barbour, Claudius L. Monell, Samuel B. Garvin, John H. McCunn, Samuel Jones, Freeman J. Fithian, John J. Freedman, James C. Spencer, William E. Curtis, John Sedgwick and Hooper C. Van Vorst. It is to be presumed, that, in each case of naturalization, during that time, a certificate was given, like in form to that received by Coleman, and averring that the court had ordered the admission of the party. That series of judges must have regarded what was found on the files, or in the records or books of the court, in each case, as an order of admission, or as a record showing that such an order had been made by the court. The stipulation of facts states, that, in the case of each person whose name is entered in the book as naturalized, there are on file papers resembling in all respects those in the case of Coleman. There is, therefore, no entry in the book, of a naturalization for which there are no proper oaths, declarations and renunciations. If any certificates were ever put into the hands of any person, not based on any actual proceeding in the court, they were certificates as to which both the entry in the book and the filed oaths, &c., were wholly wanting. The fact that there is no record in the court of any order directing the establishment and keeping of the volumes containing entries of naturalizations between 1858 and 1874, is of no consequence. The very keeping of them, for so long a period, is equivalent to an order that they be kept; and the absence of any order or practice, during that period, as to any other form of order of admission or record of admission, shows that what was kept and done is to be regarded as a record and as the record. The form of record in use before 1859, and that in use since 1873, cannot, in this collateral proceeding, be regarded as any better or more satisfactory form of record or order than that used during the period between 1858 and 1874.

No case is cited, where what is found of record and on file in the case of Coleman has been held to be not a sufficient record or order of admission. In Spratt v. Spratt, 4 Pet. [29 U. S.] 393, the naturalization was held to be good. This was the case, also, in Stark v. Chesapeake Ins. Co., 7 Cranch [11 U. S.] 420, and in The Acorn [Case No. 29], and in Ritchie v. Putnam, 13 Wend. 524, and in McCarthy v. Marsh, 5 N. Y. 263.

There are decisions that the docket entries of a court are not admissible without laying a foundation therefor by showing why a copy of the record is not produced. Such was the case in Ferguson v. Harwood, 7 Cranch [11 U. S.] 408, and in Leveringe v. Dayton [Case No. 8,288]. But, where docket entries stand in the place of any other record, and are regarded by the court which makes them, as the record, they receive from other courts the same consideration, as a record, which is accorded to them by the court which permits them to stand in the place of any other record, provided there is no express provision of law prescribing any other record.

In Philadelphia, etc., R. Co. v. Howard, 13 How. [54 U. S.] 307, a copy of the docket entries of a court in a suit were produced, to prove the pendency of the suit. It was objected, that a formal record ought to have been shown. It appeared that the docket entries and files of the court stood in place of the record. The supreme court says: "When a formal record is not required by law, those entries which are permitted to stand in place of it are admissible in evidence." It then cites with approval the case of Reg. v. Yeoveley, 8 Adol. & E. 806, where it was held, that the minute book of the sessions was admissible to prove the fact that an order of removal had been made, it appearing that it was not the practice to make up any other record of such an order; and it also cites with approval the kindred cases of Arundell v. White, 14 East, 216; Jones v. Randall, Cowp. 17; and Com. v. Bolkom, 3 Pick. 281.

In Washington, etc., Steam Packet Co. v. Sickles, 24 How. [65 U. S.] 333, the plaintiffs, contending that a prior verdict and judgment in their favor against the defendants, estopped the defendants as to material questions in the cause, offered, as evidence of such verdict and judgment, docket entries thereof in a court of the District of Columbia. The defendants objected that the docket entries were simply memoranda or minutes from which a record of a verdict and judgment were to be made. The supreme court says: "It appears, that, in this district, as in Maryland, the docket stands in the place of, or, perhaps, is, the record, and receives here all the consideration that is yielded to the record in other states. These memorials of their proceedings must be intelligible to the court that preserves them, as their only evidence, and we cannot, therefore, refuse to them faith and credit. Boteler v. State, 8 Gill & J. 381; Ruggles v. Alexander, 2 Rawle, 232."

These decisions are conclusive of the present question. The statute, in requiring the proceedings to which it refers to be "recorded by the clerk of the court," required no other record, in respect to Coleman, than that which was made, either as respects the order of admission or any of the oaths or affidavits. In Re Christern [43 N. Y. Super. Ct. Rep. 523], before Judge Freedman, of the supreme

court of the city of New York, October 15th, 1876, persons in the exact position of Coleman applied to that court to have the record of the proceedings in that court, admitting them to citizenship, perfected by an entry nunc pro tunc of the fact of such admission in the minute book of that court. The sole ground of such application was, that the validity of the admission of the party to citizenship was disputed, on the allegation that there was no legal record of the judgment admitting him to citizenship, for the reason, that the clerk of the court did not write out an entry in the minute book of the court, reciting the proceedings and showing the adjudication made. This is the same point now urged here. Judge Freedman, in his decision in that case, details the practice of the supreme court from the close of 1858 to the close of 1873, in naturalization proceedings, and shows it to have been the same, in all cases, as in the case of Coleman. He held, that what was so done constituted a sufficient record, and that the want of any further or different record, and the absence of an entry in the general minute book of the court, did not render the admission to citizenship invalid. He, therefore, denied the application, on the ground that no necessity existed for granting it, because there was no defect in the record, which required perfection by amendment.

It is urged, by the attorney for the United States, that there is nothing to show that the book labelled on the back "Naturalization Index," and found in the office of the clerk of the superior court, was ever regarded by that court as a record, or that that court even knew of its existence; that it is as much a private, unofficial book as the note paper in the clerk's desk is private, unofficial paper; that there is nothing to show when the entries in it were made, nor by whom they were made; that, for all that appears to the contrary, they were made up from the affidavits alone, some time after the time when the affidavits purport to have been made; that it does not appear that the book was kept even by the authority or direction of the clerk of the court; and that it may have been made up by, and have been the property of, some deputy who used it as an aid in making searches. There is no evidence tending to show that what is thus conjectured has any foundation in fact. It was open to the United States to show, that the "Naturalization Index" was not regarded by the superior court as a record, or that its existence was unknown to that court, or that it was a private, unofficial book, or that the book was not kept by the authority or direction of the clerk of the court, or that it was the property of some deputy. The record in the present case contains a certificate signed by the present clerk of the superior court, and attested by the seal of that court, certifying that the copy, before set forth, of the entry in regard to Coleman, in such "Naturalization Index," "is a true extract from the record of naturalizations of this court, remaining in my office, to date," which date is November 22d, 1878. When a certificate of the clerk of a court, under its seal, certifying that a book is a "record of naturalizations" of the court, is presented and accepted as evidence of the existence in the book, of the original entry of which a copy is annexed to the certificate, and no evidence is produced that the signature of the clerk is forged, or that the seal is not an impression from the true seal, or that the book has no existence, or that the entry is not in it, and when it appears that the book is in the office of the clerk of the court, and has on it and in it marks designating it as the property of the court, and as containing transactions of the court, and when the entry in question in it corresponds with the contents of papers on file in the office of the clerk of the court, which papers purport to be genuine, and the genuineness of which is not impeached, and which purport to have been filed on the day when the particular transaction took place, it is a proper legal conclusion, that the court regarded the book as one of its records, and knew of its existence, and that it is not a private, unofficial book, and that it was kept by the authority and direction of the court and of its clerk, and that it was not the property of some deputy. So, too, it is a proper legal conclusion, on the same evidence, that the entry in the book was made at a proper time and by proper authority.

In regard to the oaths or affidavits on file in the superior court, it is contended, by the attorney for the United States, that it is impossible to say, from the initials of the judge alone, that he ever made any decision concerning the affidavits, or, if he did, what decision he made, or that the decision was made in court; that, even though it be conceded that he examined the affidavits, and approved them, and put his initials on them, as a fiat that they be filed, yet it does not appear that he did so when in court and acting as the court; that the absence from the regular minutes of the court of an entry that the question of the naturalization of Coleman was before the court, without proof that the omission was accidentally made by the clerk, is evidence, that, if the judge considered and passed upon the affidavits, he did so out of court; that the affidavits are ex parte affidavits, and not legal evidence; and that it is to be inferred from the affidavits that the affiants were not examined in court, but merely signed and swore to the affidavits. These positions are recited, to show that they have been considered. The oaths or affidavits are all on one page of paper, with the title at the top: "Superior Court of the City of New York. In the Matter of Peter Coleman, on his Application to become a Citizen of the United States. Minor." Each one of them purports to be "sworn in open court." The attestation sig-

nature to each jurat is, "James M. Sweeny, Clerk." This is an attestation that the oath was taken in the court, in open court, in the presence of the court, when the judge holding the court was sitting as a court. As the initials on the page are the initials of a judge who was a judge of the court at the time, and competent to hold it, it is to be presumed, from such initials, in connection with the other evidence, that he did hold the court, and that he wrote his initials as an authority to the clerk to do what is found to have been done, namely, to enter the name of Coleman in the "Naturalization Index," as admitted to citizenship, with the date, and the other matters found in the book kept, and as authority to file the oaths or affidavits, and as an assertion that the court held by him, and he while holding the court, had received the application of Coleman and acted judicially on the matters covered by the oaths or affidavits, and been satisfied by the evidence, as to the residence and character of Coleman, and had admitted him thereupon to be a citizen of the United States. As the court is to be satisfied by proof, of the existence of the necessary prerequisites to admission to citizenship, it is to be presumed, in the absence of evidence to the contrary, that Coleman and his witness deposed, on examination on oath in open court, to the several matters set forth over their respective signatures as being deposed to by them on oath, and certified by the clerk as sworn to by them in open court, and that they did so to the satisfaction of the court. None of the objections taken in respect to the affidavits are regarded as tenable.

It, therefore, appears, that Coleman was duly and legally admitted to citizenship; and that the legality of his admission was not invalidated by any act or omission which occurred either prior or subsequently to his admission. As he was legally admitted, it was proper for the court to give to him the certificate of citizenship which was given to him; and that certificate was not unlawfully issued or made. On this ground he is entitled to his discharge from arrest.

But there is another ground on which Coleman is entitled to be discharged. Even if there were such a defect in the record of the superior court as to make the certificate given to him one that was unlawfully issued or made, he was not guilty of an offence, under section 5426, unless, when he used the certificate, he knew that it was unlawfully issued or made. As it appears that he complied fully with all the conditions imposed on him as prerequisites to his admission, and that the unlawfulness, if any, was in the want of form in the record of the court, and as he received at the time from the court a certificate stating that all the statutory requisites had been complied with, and that the court had ordered that he be admitted to be a citizen, and that he was accordingly admitted by the court to be a citizen, no court would permit a jury to convict him of using such certificate knowing that it was unlawfully issued. So manifest was this, that the moment the facts were brought to the attention of this court, on the hearing on the habeas corpus, it announced that Coleman would be discharged immediately, on this ground alone. Thereupon, the attorney for the United States stated, that he did not think the evidence disclosed sufficient guilty knowledge on the part of Coleman of the defects in the certificate of citizenship, and that he consented that he should go at large. He was accordingly released from custody, but no formal decision was made, in order that the other questions presented might be argued, considered and decided.

An order will be entered discharging Coleman from custody.

Case No. 2,981.

The COLEMAN, ETC.

[Brown, Adm. 456.][1]

District Court, E. D. Michigan. Sept., 1873.

COLLISION — INSUFFICIENT EQUIPMENT — RESPECTIVE LIABILITY OF TUG AND TOW—PLEADING.

1. A tug, whose chief officer also acts as wheelsman, is insufficiently manned, and every doubt as to her being in fault will be resolved against her.

2. The fact that she is fully manned, according to the custom of tugs plying on those waters, is no excuse.

3. In case of uncertainty or irreconcilable conflict of testimony between a tug and her tow, as to their respective manoeuvres, the fact that the tug is insufficiently manned will be regarded as a fault contributing to the collision.

4. Where the persons in charge of a tug and tow jointly participate in their control and management, the tug and tow are jointly liable for an injury done to a third vessel.

5. Objections to a libel for want of specific allegations of fault should be taken by exceptions, and if taken at the hearing, an amendment will be permitted.

6. An omission to state in the libel a material fact, peculiarly within the knowledge of the opposite party, as that one of the colliding vessels was improperly manned, will not be allowed to work an injury to the libellant, if the court can see there was no design on his part in omitting to state it.

This was a libel in rem, promoted by Michael B. Kean, owner of the schooner Ayr, for collision. On the 11th day of May, 1872, the schooner Ayr lay aground and helpless on the easterly channel bank of the dredged channel at the mouth of the Saginaw river. On the same day, while the Ayr so lay aground, and in the day time, the tug Coleman came down the same channel, with the schooner Foster in a tow by a line or lines astern. Although the channel is narrow,

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

yet there was sufficient room for the tug and tow to have passed the Ayr in safety. The Foster, however, when a little above where the Ayr lay, came near grounding on the opposite or westerly channel bank, and in the effort to keep her off, she was made to run into and collide with the Ayr, doing her considerable damage. The contest was mainly between the tug and the tow as to which should pay the damages done to the Ayr, there being no serious dispute as to the right of the Ayr to recover against the one or the other. On the part of the Foster it was insisted that she was without fault, and that the collision was caused wholly by the mismanagement and fault of the tug, and the following were insisted on: 1. That the threatened grounding of the Foster was caused by the tug towing her unnecessarily near the channel bank. 2. That in attempting to keep the Foster off the bank, the tug swung out into and across the channel further than was necessary, involving, as it did, the ultimate necessity of coming completely about and taking the Foster about with her, in attempting to do which the Foster was made inevitably to run into and collide with the Ayr as she did. 3. That the tug was not properly officered and manned. On the contrary, it was insisted on the part of the tug that she was without fault, and that the collision was caused solely on account of the following faults on the part of the Foster: 1. That her threatened grounding was caused by her sheering and not following in the wake of the tug. 2. That she was unseaworthy, in that her steering gear was out of order. 3. That she did not follow the tug in the attempt of the latter to keep off the channel bank.

H. B. Brown, for libellant.

W. A. Moore, for the Foster.

F. H. Canfield and G. V. N. Lothrop, for the tug Coleman.

LONGYEAR, District Judge. A large number of witnesses were examined, and a great amount of testimony taken on the part of each, the tug and the tow; and I believe it is safe to assert that, aside from the fact of the collision, there is but one other fact material to the controversy, as to which the testimony is not in the most direct and irreconcilable conflict. That one fact is, as to the manner in which the tug was officered and manned; and as that fact is, in my opinion, decisive of the case, I shall not make the attempt to find where the truth lies as to the other points in the case. I abandon such attempt all the more willingly, because I am satisfied it could only end in failure, or result at best in great doubt and uncertainty. The persons in charge of both the Coleman and the Foster knew the Ayr was aground, and were fully cognizant of the difficulties to be encountered, and ought to, if they did not, have fully comprehended the care and skill necessary, the one to tow and the other to be towed, in safety to themselves and the Ayr. The master of the tug remained on shore, and the towing was undertaken with the mate in command. This alone would not, however, necessarily constitute a fault. But the tug was without a wheelsman, the mate attempting to discharge that duty, besides that of master for the time being. In the case of The Victor [Case No. 16,933], recently decided, this court held this to be a fault, and used the following language: "The responsible character of the occupation of tugs requires that there should be some competent person in charge of their navigation, separate and distinct from the wheelsman, and who has no other duties when the tug is in actual service."

I have seen no occasion since to doubt the correctness of that decision. On the contrary, since making it, my attention has been called to three decisions of this court, namely, The Zouave [Case No. 18,221], The Armstrong [Id. 540], and The John Fretter [Id. 7,342], holding the same doctrine—the first two by my predecessor, and the last one by Associate Justice Swayne. In the last-named case Judge Swayne made use of the following strong language, which I can adopt in its full force. He said: "It is impossible, in the nature of things, that the captain or mate can perform properly his other duties and also that of lookout, and they ought not to attempt it." The same is certainly true, with equal if not greater force, in regard to the wheelsman. In the same case he further says, "that in such a case every doubt is to be resolved against the vessel committing such a fault." As we have already remarked, the grossly conflicting and contradictory character of the testimony leaves it in great doubt and uncertainty as to what particular manoeuvres of the two vessels, or of either, and which one was the immediate cause of the collision, in consequence of the unseaworthy condition of the tug in respect to her equipment of officers and men at the time. The doubt must be resolved against her, unless the answers contended for on the argument are sufficient to defeat a recovery against her on that account. Before noticing their answers, however, I will consider the case on the part of the Foster.

In Sturgis v. Boyer, 24 How. [65 U. S.] 110, 121, 122, the supreme court made use of the following language, the case being in some of its aspects very much like the one now under consideration: "Cases arise, undoubtedly, when both the tow and the tug are jointly liable for the consequences of a collision; as when those in charge of the respective vessels jointly participate in their control and management, and the master or crew of both vessels are either deficient in skill, omit to take due care, or are guilty of negligence in their navigation. Other cases may well be imagined where the tow alone would be responsible; as when the tug is

employed by the master or owners of the tow as the mere motive power to propel their vessel from one point to another, and both vessels are exclusively under the control, direction and management of the master and crew of the tow. * * * But whenever the tug, under the charge of her own master and crew, and in the usual and ordinary course of such an employment, undertakes to transport another vessel, which, for the time being, has neither her master nor crew on board, from one point to another, over waters where such accessory power is necessarily or usually employed, she must be held responsible for the proper navigation of both vessels. * * * Assuming that the tug is a suitable vessel, properly manned and equipped for the undertaking, so that no degree of negligence can attach to the owners of the tow, on the ground that the motive power employed by them was in an unseaworthy condition, and the tow, under the circumstances supposed, is no more responsible for the consequences of a collision than so much freight; and it is not perceived that it can make any difference in that behalf, that a part, or even the whole officers and crew of the tow are on board, provided it clearly appears that the tug was a seaworthy vessel, properly manned and equipped for the enterprise," etc.

To apply these doctrines to the present case: In the first place, those in charge of the respective vessels jointly participated in their control and management, or, in other words, each vessel was in the immediate charge and control of her own officers and crew, and so, under the law as above laid down, this comes within the class of cases in which both the tow and the tug may be jointly liable. In the second place, the tug, as we have seen, was not properly manned for the enterprise, and so this case comes also within the class of cases in which the tow may be held in fault for employing a motive power which was in an unseaworthy condition. That the tow should be held in fault, especially in view of the great doubt and uncertainty before mentioned concerning her condition and her conduct, I think scarcely admits of doubt. It results that both the tow and tug must be held jointly liable for the consequences of the collision, unless the answers to the above positions set up on the argument, which will now be considered, are sufficient to defeat a recovery.

The first objection to a recovery on the ground stated, viz: that the tug was not properly manned, is that there is no such specific fault charged or set up in the libel or other pleadings. It is true, the libel contains no specific allegations of fault against either vessel, the charge in that respect being in the most general terms imaginable, that the collision was caused "through the negligent and insufficient management of said tug, and schooner Foster." There are, however, two complete answers to the objection on this ground. Firstly, no exceptions having been taken to the libel, and the case having evidently been fully and fairly presented, so far as the matter in question is concerned, the court would direct the libel to be amended, if necessary to sustain a decree in favor of libellant. Secondly, in the case of The Syracuse, 12 Wall. [79 U. S.] 167, 173, the supreme court, in deciding an objection precisely like this one, and where it was expressly held that the libel was defective for want of such specific allegation, laid down the following rule: "But in admiralty, an omission to state some facts which prove to be material, but which cannot have occasioned any surprise to the opposite party, will not be allowed to work any injury to the libellant, if the court can see there was no design on his part in omitting to state them. The Quickstep, 9 Wall. [76 U. S.] 670; The Clement [Case No. 2,879]. There is no doctrine of mere technical variance in the admiralty, and subject to the rule above stated, it is the duty of the court to extract the real case from the whole record, and decide accordingly." As in that case, so in this, it is very clear that the libellant had no design in view in omitting to charge specifically as a fault, that the tug was not properly manned; and it is equally clear that the proof on that subject, coming, as it did, from the opposite parties, could not have operated to confuse them.

The remaining objection to a recovery is that, as appears by the proofs, the tug was fully manned according to the custom in this respect of tugs plying on those waters. The rule requiring that tugs, while in active service, should have a wheelsman separate from the officer in charge of her navigation, and that such officer have no other duties to perform, is a salutary one for the protection of life and property and inseparable from the very nature of the service, and no reckless and unsanctioned usage to the contrary can be allowed to do it away or modify it. If such a custom, as is contended, prevails at the mouth of Saginaw river, the sooner it is abandoned the better for the interests of commerce, as well as of tug owners themselves.

Decree for libellant.

Case No 2,981a.

COLEMAN v. BAILEY.

[See Case No. 8,604.]

COLEMAN (BARTLE v.). See Case No. 1,072.

COLEMAN (CLIFFORD v.). See Case No. 2,894.

COLEMAN (FURLONG v.). See Case No. 5,161.

Case No. 2,982.

COLEMAN et al. v. The HARRIET.

[Bee, 80.][1]

District Court, D. South Carolina. July 25, 1796.

SEAMEN—DOUBLE WAGES FOR INSUFFICIENT PROVISIONS.

1. Double wages are due by the act of congress in cases of failure of provisions, if the ship sail without the quantity specified in the act.

[Cited in Foster v. Sampson, Case No. 4,982.]

[2. Overruled in The Mary Paulina, Case No. 9,224, and Collins v. Wheeler, Id. 3,018, to the point that one third additional wages is sufficient compensation, where there is a deficiency in but one of the specified articles.]

In admiralty. The libel in this case consists of two counts or allegations. 1. For wages agreeably to the articles, the voyage being ended. 2. For double wages for ninety days, as provided by the act of congress; the men having been at short allowance of provisions during that time. The captain's answer admits that the contract was fulfilled on the part of the seamen, with the exception of one, whom he charges with embezzlement. The answer further states that the quantity of beef on board was nearly double of what the act requires; that there was one third more than the requisite proportion of water per man: but that he was obliged to put to sea with ninety pounds of bread, instead of one hundred pounds, per man, because he could procure no more at the port from whence he sailed. That the voyage was unusually long, the vessel having been dismasted in a gale of wind; without which there would have been no such failure of bread. The logbook shews that they procured some supplies from other vessels at sea. It was proved that the allowance of bread was diminished the day after they lost the mast. It is admitted that all the seamen are entitled to the usual wages, except one. With respect to him, the embezzlement of several articles was fully proved. The value of these must be deducted from what shall appear to be due to him. The others will be paid of course.

The only difficulty arises out of the claim for double wages. The oath of the master in his answer not being contradicted, it must be received as evidence so far as it goes. It proves clearly that the diminution of allowance extended only to the single article of bread. There was a great overplus of meat and water. The loss of the mast was an accident that could not reflect blame on the captain; but it occasioned their being at sea one hundred and thirty five days, instead of sixty six, and caused a failure of bread, in which article they were at short allowance from the 15th September to the 24th of December following. The act of congress having, avowedly, not been complied with, I am obliged to decree that the seamen receive one third of the amount of the wages contracted for in the articles, over and above their common wages. This I consider as a sufficient compensation for the deficiency in one article of provisions. Let the costs of suit be paid by the captain.

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

COLEMAN v. HUDSON RIVER BRIDGE CO. See Cases Nos. 12,851 and 12,852.

Case No. 2,983.

COLEMAN v. HUDSON RIVER BRIDGE CO.

SILLIMAN v. SAME.

[5 Blatchf. 56.][1]

Circuit Court, N. D. New York. July 17, 1862.

DIVISION OF SUPREME COURT ON CERTIFICATE OF DIVISION — PRACTICE — DISMISSAL OF BILL—EFFECT ON PROVISIONAL INJUNCTION—APPEAL.

1. Where a certificate of a division of opinion on the question of the jurisdiction of this court to entertain a bill in equity, sent from this court to the supreme court, is dismissed by that court because of an equal division of opinion in that court, and the mandate to this court directs it to proceed in the cause in conformity to law and the rules and proceedings in such cases provided, it becomes the duty of this court to enter a decree dismissing the bill.

2. From such decree, an appeal may be taken and the case be reviewed in the supreme court, the same as if the decree were pronounced by the judgment of this court.

3. A provisional injunction granted on the filing of the bill falls with the dismissal of the bill.

[Followed in Eureka Min. Co. v. Richmond Min. Co., Case No. 4,549.]

4. The provisions of the acts of September 24, 1789 (1 Stat. 85, § 23), and March 3, 1803 (2 Stat. 244, § 2), do not operate to continue such injunction.

[See note at end of case.]

[In equity. Bills by Robert D. Silliman and by Frederick W. Coleman against the Hudson River Bridge Company, at Albany, to restrain the erection of a bridge across the Hudson river at Albany, as authorized by an act of the legislature of the state of New York, April 9, 1856.

[A provisional injunction was granted (Case No. 12,851), but on the final hearing the judges were opposed in opinion (Id. 12,852), and a division was certified to the supreme court in October, 1859. The justices of the supreme court were equally divided on the points certified, and remitted the cases to the circuit court. Silliman v. Hudson River Bridge Co., 1 Black (66 U. S.) 582.]

These cases came before the court on a motion by the defendants to file the mandate

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

from the supreme court, on its decision reported in 1 Black (66 U. S.) 582, and to enter decrees dismissing the bills of complaint. The counsel for the plaintiffs, asked the court to so modify the decree of dismissal as to retain the provisional injunction heretofore granted (4 Blatchf. 74 [Case No. 12,851]), and prevent the erection of the bridge until after the decision of the supreme court on an appeal from the decree of dismissal.

Before NELSON, Circuit Justice, and HALL, District Judge.

NELSON, Circuit Justice. On the hearing of this case on its merits, in this court, before the two judges, a division of opinion upon the question of jurisdiction occurred (4 Blatchf. 395 [Silliman v. Hudson River Bridge Co., Case No. 12,852]), which made it necessary, under the act of congress, to certify such division to the supreme court. That court, after argument, were also equally divided in opinion, and, as a consequence, the certificate of division was dismissed, and the cause was remitted to the court below, with directions to proceed therein in conformity to law and the rules and proceedings in such cases provided. According to these rules and proceedings, and in conformity with law, as was intimated by the appellate court on the dismissal of the certificate of division, it becomes the duty of this court to enter a decree dismissing the bill, the same principle applying to the case in this court as in the appellate court, in case of a divided opinion. From the decree thus resulting, an appeal may be taken, and the case be reviewed in the court above, the same as if the decree were pronounced by the judgment of the court.

It is contended, however, that, conceding this view to be correct, it does not follow that the injunction heretofore granted falls with the dismissal of the bill, or, if it does prima facie, that it is still in the power of this court to continue the injunction until the decision on the appeal, and that the case is a proper one for the exercise of this power. The court cannot agree to either of these positions. The legal result of the division of opinion of the judges, is a dismissal of the bill without any qualification. Indeed, the condition of the court renders any qualification or modification of the dismissal impracticable. The case is out of court, so far as it respects any proceedings except an appeal to revise the decree. The judges are disabled, from the contrariety of opinion, to annex any condition, and it certainly requires no argument to show that, in the case of an unqualified dismissal of a bill, all the incidents fall with it. We agree that the chancellor may, in his discretion, direct a modified dismissal, and thereby annex to it such conditions as may seem to him just and equitable. Having the possession and entire control of the cause, this qualified exercise of power is practicable. But such a case is very different from this one, where the dismissal is the result of law, and absolute, and where, from the condition of the court, no modification can be annexed.

It was insisted, that an appeal, when taken within the time and in the mode described by the acts of congress of September 24, 1789 (1 Stat. 85, § 23), and March 3, 1803 (2 Stat. 244, § 2), will operate, under and by virtue of those acts, to continue the injunction. But it is quite clear that these provisions deal only with the writ of execution founded upon the decree rendered, and which is awarded by it, and have no application to the provisional writ of injunction or other incidental proceedings in the progress of the cause.

It may not be improper to add, in conclusion, that this question was the subject of observation in the course of the discussion of the main questions of the case, in the court above, and that no doubt was entertained in regard to it by any of the judges. Although the question had not been discussed by counsel, it became incidentally involved, on account of the division of opinion in the appellate court. After a full argument before us in this court, we find no ground for changing the opinion.

[NOTE. The complainant Coleman appealed from the decree herein dissolving the injunction and dismissing the bill, and the supreme court affirmed the decree of the circuit court by a divided court. Coleman v. Hudson River Bridge Co., 2 Wall. (69 U. S.) 403.]

COLEMAN (JENCKS v.). See Case No. 7,258.

Case No. 2,984.

COLEMAN v. LIESOR.

Circuit Court, S. D. Ohio. 1859.

PRESUMPTIONS OF PATENT—UTILITY—NOVELTY—INFRINGEMENT—ESTOPPEL—PRIOR USE—PRIOR PUBLISHED DESCRIPTION—MEASURE OF DAMAGES.

1. When ascertainable, the defendant's profits are the proper rule of damages.

2. The defence that an invention is wanting in novelty or originality goes to the validity of the patent.

3. If the defendants have used the plaintiff's invention, or something substantially like it, they are estopped from denying its utility, for use implies utility, and it is fair to presume that they would not use it if they thought it of no utility.

4. There is a presumption arising from the patent itself in favor of the novelty of the invention which it covers. But this presumption may be overcome by showing that the thing had been previously known.

5. It is always presumed from the patent itself that the invention is new, and if a party sued would avail himself of the want of such novelty, it is incumbent upon him to prove it by giving a proper notice to the plaintiff to prevent surprise.

6. A mere addition to a patented invention, will not justify the use of the invention first patented.

7. It is an infringement if a person had used a patentee's improvements or devices substantially the same, in which the same principles are brought into requisition, or in other words, which are alike in their principle of operation.

8. An invention must be of some utility; a patent cannot be granted for a thing altogether frivolous; but the presumption on the face of the patent is that it is of some utility, for the applicant is obliged to swear that the invention is useful before the securing of the patent.

9. There is a presumption arising from the patent itself in favor of the novelty of the invention which it covers. But this presumption may be overcome by showing that the thing had been previously known.

10. A prior use of a thing in a foreign country will not invalidate a patent afterward taken out in this country, where the inventor supposed himself to be the first inventor, unless the prior invention had been patented or described in some printed public work.

11. The description of an invention in any public work, to invalidate a patent, should be, to some degree, in the nature of a specification, so far as to enable a mechanic skilled in the art to construct the machine; they should not be vague references to or suggestions of the thing described.

[Before LEAVITT, District Judge.

The points stated above are taken from Law's Pat. Dig. 240, 246, 281, 311, 345, 357, 370, 435, 516, 602, 609. Nowhere more fully reported; opinion not now accessible.]

Case No. 2,985.

COLEMAN v. MARTIN et al.

[6 Blatchf. 119.][1]

Circuit Court, S. D. New York. April 20, 1868.

APPLICATION TO BE MADE PARTY.

A person who has no interest, in a legal sense, in the subject-matter of a suit in personam, and who is not a party to it, cannot compel the plaintiff to make him a party.

[Cited in Drake v. Goodridge, Case No. 4,062; Scott v. Mansfield, C. & L. M. R. Co., Id. 12,541; Chester v. Life Ass'n of America, 4 Fed. 492.]

[In equity. Bill by Charles R. Coleman against D. Randolph Martin and others.]

This was an application made to the court, by petition, by Charles H. Stewart, who was not a party to the suit, praying that he might be made a party defendant. The ground of his application was, that, by reason of certain matters, which he set forth, he might be held, both legally and morally, responsible, pecuniarily and personally, for certain transactions of which the plaintiff complained in his bill; and that the decree of this court in the suit would have "a powerful influence" in contributing to that result.

Luther R. Marsh, for petitioner.

E. Louis Lowe, for plaintiff.

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

BLATCHFORD, District Judge. The decree of this court in this suit can in no manner bind or affect the petitioner, in a legal sense; and it was never known that a person, not a party to a suit in personam, could compel a plaintiff to make him a party. The present defendants do not raise the objection that the petitioner should be made a party. This being so, the plaintiff is left free to sue whom he pleases, subject only to the power of the court at any time to compel him to join, as a party defendant, any person whom it is necessary to make a party, in order to make a decree fully effective against those who are already parties. It does not appear that the defendant is such a necessary party. He has no interest, in a legal sense, in the subject-matter of this suit, which is only a suit to compel the defendant Martin to surrender, to be cancelled, certain certificates of stock and bonds, and to compel the defendants Martin and Fant, as trustees, to release and cancel a certain deed of trust, and to compel Martin to account with the plaintiff for certain stock, bonds, and moneys, and to enjoin Martin from transferring, or disposing of, certain stock and bonds. In these matters, which are personal claims against Martin and Fant, the petitioner has no interest. In a suit in rem, where a court has jurisdiction over the res, and its decree affects the interest in the res of all persons who have any interest in the res, a person who has a lien or claim upon, or other interest in, the res, is allowed to intervene, and be heard for his own interest in the res. The theory of this is, that the person, by his interest in the res, has an interest, in a legal sense, in the subject-matter of the controversy. But in a suit in personam, a person not a party to the suit can have no interest, in a legal sense, in a personal claim made, in the suit, against a defendant therein, unless it is necessary that such person, not a party, should be made a party, in order to properly enforce such claim. The prayer of the petition is denied.

Case No. 2,986.

COLEMAN v. MARTIN et al.

[6 Blatchf. 291.][1]

Circuit Court, S. D. New York. Dec. 30, 1868.

PLEADING IN EQUITY—REPLICATION—ENLARGING TIME TO TAKE PROOFS—PRACTICE.

1. Under rule 66 of the rules in equity prescribed by the supreme court, the answer of every defendant in a suit in equity, when sufficient, must be replied to, without reference to the state of the cause or of the pleadings in regard to any other defendant.

2. The practice as to enlarging the time for the plaintiff to take proofs, under such circumstances, stated.

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

[In equity. Bill by Charles R. Coleman against D. Randolph Martin and others.]

Enoch Louis Lowe and Robert J. Brent, for plaintiff.

Enoch L. Fancher, for defendant Martin.

BLATCHFORD, District Judge. Under rule 66 of the rules in equity prescribed by the supreme court, the answer of every defendant, when sufficient, must be replied to, without reference to the state of the cause or of the pleadings in regard to any other defendant. The replication must be a general one. Rule 45 abolishes special replications. Any defendant, whose answer is sufficient, has a right to have the cause, as to him, put at issue, so that he may, under rules 67, 68, and 69, proceed to take his testimony, if he wishes to. But, where the cause is not at issue as to all the defendants, and where it is not proper to compel the plaintiff to go to proofs until it is at issue as to all of them, the court will, on a proper application, enlarge the time, under rule 69, for the plaintiff to take proofs in respect of the defendants as to whom the cause is at issue.

COLEMAN (SMITH v.). See Case No. 13,029.

COLEMAN (WOODROW v.). See Cases Nos. 17,982-17,984.

Case No. 2,987.

COLER v. WYANDOT COUNTY.

[3 Dill. 391, note.] [1]

Circuit Court, D. Kansas. June Term, 1874.

BRIDGE BONDS—LOCAL STATUTE—ELECTION.

Action on bridge bonds executed by the county, reciting that they were issued under the internal improvement act of 1866, as amended in 1871. Special plea that the bridge for which the bonds were issued cost more than $1,000, and that the question of incurring the debt was not submitted to the voters at a general election, of which the plaintiff had notice. This plea was based upon section 13 of the act of 1867, in respect of bridges. It was urged in support of this plea that the act last mentioned was an implied repeal of the internal improvement act of 1866, as to bridges. But the court (Miller, Circuit Justice, and Dillon, Circuit Judge), decided otherwise, holding that the bridge act of 1867 contemplated the case where bridges were to be paid for out of the county treasury, from the ordinary revenue, and that the internal improvement act of 1866, as amended in 1867 and 1871, contemplated the case of bridges to be paid for by the issue and sale of bonds, and that the vote under the last named act need not necessarily be at a general election, as the act provides that it may be at such time and place as the county commissioners may order.

Grant & Smith, for plaintiff.

Wheat & Cook, for county.

[NOTE. This case is reported in 3 Dill. 391, as a note to Thayer v. Montgomery Co., Case No. 13,870.]

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

Case No. 2,988.

COLES et al. v. MARINE INS. CO.

[3 Wash. C. C. 159.] [1]

Circuit Court, D. Pennsylvania. April Term, 1812.

MARINE INSURANCE — MISREPRESENTATION — MATTERS MATERIAL TO THE RISK—DEVIATION—PERILS INSURED AGAINST.

1. If the loss of the vessel arose from the ordinary circumstances of a voyage, or from sea damage or wear and tear, which, without the action of any extraordinary causes, was to be expected, the insurer is not liable. But if it happened in consequence of the violence of the winds and waves, running on rocks or the like, these are perils against which the insurer agrees to indemnify.

2. It is not sufficient for the insured to prove, that there were storms during the voyage, unless he can fairly trace the injury sustained to their influence.

3. What will be deemed a misrepresentation by the assured.

4. It is very certain, that every thing which concerns the state of the vessel, at any particular period of her voyage, is generally considered material to the risk.

5. What will be deemed a deviation from the voyage insured; and under what circumstances a vessel may proceed to a port, out of her direct course; and for what causes she may remain at such port.

In admiralty. Action on a policy on the Brothers, on a voyage from a port on the Brazil coast, to Canton, with liberty to touch or stop at the Pegu islands, or any other islands, ports, or places, the master may think proper, to take and trade for refreshments, sandal wood, skins, birds' nests, or any other articles. Premium 10 per cent., to return 2½ on safe arrival; valued at 10,000 dollars; 9,000 insured; warranted American property. This vessel sailed from the port, in company with a ship called the Hope, belonging to the plaintiffs, under an agreement to keep company during the voyage, which was the same with both. On the 13th of August, 1809, about two months after this vessel had left the port, on the voyage insured, the master, who was also a part owner, wrote to the plaintiffs, by a vessel he met with at sea, that at that time he had met with no misfortunes with his boats, &c.; that he had sailed in company with the Hope as her consort, and that they kept company very well when the weather was good, but when otherwise, she, the Brothers, could not keep way with the Hope. The letter, in other parts, plainly imports, that these vessels were to keep company during the voyage. This letter was shown to the defendants when this insurance was effected, and was by them annexed to the order. It appeared, by the evidence, that this vessel, in her voyage, was exposed to many storms and tempests, in which she suffered considerably, but principally in her sails and rigging. She stopped

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

at the Pegu islands, having previously stopped ten or twelve days at Tomgataboo, waiting for the Hope, from which she had been separated. From the Pegu islands, she went to the Norfolk island, entirely out of the course of the voyage, but, as was proved by the mate, it was the only place at which she could obtain refreshments, of which she stood in need. From Norfolk island she went to Fanning's island, where she remainded three months, for the purpose of repairing the vessel. Thence she went to Guma, where repairs were again necessary; and not being able to repair there, she went to Manilla, where, after a survey ordered by the court at that place, she was sold under an order of the court, it appearing that the costs of repairing her, would amount to nearly as much as she was worth. The objections made to the recovery were—1. That the loss was not occasioned by those perils of the sea, against which underwriters insure, but by the ordinary deterioration of so long a voyage. Marsh. 492, 540, 463. 2. By the captain's protest, made at Manilla, (which was read by consent,) it appeared, that on the 14th of August, the Brothers had met with much stormy weather, by which her sails and rigging were much injured. Of course, the letter of the 13th of August, which was shown to the underwriters, was a misrepresentation, so material as to vitiate the policy. 3. That the vessel had been guilty of a deviation in two respects—1. In waiting at Tomgataboo for the Hope; and—2. In going to Norfolk island, out of the course of her voyage. In waiting three months at Fanning's island; and in going to Manilla to repair, when she might with as much, or more ease, have gone to Canton.

WASHINGTON, Circuit Justice (charging the jury). The loss laid in the declaration, is by a peril of the sea. The cause of the loss forms the only point of your inquiry. If it arose from the ordinary circumstances of such a voyage as this was, as from sea damage, or the wear and tear; which, without the action of any extraordinary cause, was to be expected; the insurer is not liable. But, if it happen in consequence of the violence of the winds and waves, running on rocks, or the like; these are perils against which the insurer agrees to indemnify. It is not sufficient for the insured to prove that there were storms during the voyage, unless he can fairly trace the injury sustained to that cause; for, it may nevertheless appear, that the injury which caused the breaking up of the voyage, arose from the ordinary circumstances of a long voyage, as this was. To obtain satisfaction on this point, it may be well to inquire, what was her real situation when she arrived at Manilla? At New-York, the vessel was valued, with her standing rigging, at 3,500 dollars. At Manilla, she was valued at 2,900 dollars. The repairs necessary to be put upon her at Manilla, were valued at nearly 2,500 dollars; and she sold at 1,250 dollars. Could the repairs necessary upon the ordinary wear and tear of this voyage, about eighteen months, have amounted to the sum above mentioned?—What were these repairs? They embraced the injury done to her coppering, sheathing, sails, and rigging; and it is in evidence, that she was exposed to a number of tempests, and once ran upon a bar, over which she was drawn by the hands. You must decide, from these facts, whether the injury resulted from the ordinary wear and tear attending such a voyage, or from the bad weather, to which it is proved she was exposed.

2. Did the letter of the master and part owner of this vessel, of the 13th of August, amount to such a misrepresentation, as, in point of law, avoids the policy? To avoid a policy on the ground of misrepresentation, the representation must not only be false, but it must be material in relation to the undertaking of the insurer, either as to the rate of premium, or as to his taking the risk at all. See Clason v. Smith [Case No. 2,868]. If the injury stated in the captain's protest, is construed to refer to injuries sustained prior to the 13th of August, when his letter was written, then the statement in that letter was not true. The next question is, was it material? Would an underwriter, acting with reasonable caution, have insured for the same premium, having a knowledge of the fact stated in the protest, as he would upon a view of the letter of the 13th of August, supposing the letter to relate to what had occurred prior to the 13th of August? It is very certain, that every thing which concerns the state of a vessel, at any particular period of her voyage, is generally considered material; and if the master, in his protest, refers to what had happened prior to the 13th of August, it would seem, that he materially misrepresented his situation. On this point, there is some doubt; and the question is left to the jury. Where the materiality of a concealment or misrepresentation is clear, the court feels no reluctance in expressing its opinion on the point.

3. The next point is deviation. It is said, that there was a deviation—1. In waiting for the Hope; and 2. In going out of the course of the voyage—unjustifiable stoppage, and finally, going to Manilla instead of Canton.

1. As to the stopping for the Hope. Any departure from the usual course of a voyage, or stopping at any place, even in the course of the voyage, which is not permitted by the policy, is a deviation which will avoid the policy, unless it took place for some justifiable cause; such as to repair, obtain necessary refreshments, avoid an enemy, or the like. This stoppage is not justified on any of the above grounds. But, though not stated in the policy, it was tacitly allowed, that this vessel might stop a reasonable time in order

to keep company with the Hope; because the defendants knew when they took the risk, that these vessels had agreed to keep company, (an agreement which it was not then possible to countermand,) and as one sailed much faster than the other, (as the defendants also knew,) it was to be expected that they would separate, and might be obliged to wait for each other. But this could not be understood as exceeding a reasonable time; and therefore, the question of deviation, under this head, must depend upon your opinion, whether the stoppage of the Brothers at Tomgataboo, for twelve or fourteen days, waiting for the Hope, was reasonable or not.

2. As to the departure of this vessel from the ordinary course of the voyage, the rule, as laid down in the case of Winthrop v. Union Ins. Co. [Case No. 17,901], is, that if the termini of the voyage be fixed in the policy, the vessel cannot go out of the usual course of the voyage, notwithstanding she is permitted to stop and trade at any ports or places. That is the present case; and no evidence has been offered to show, that in a voyage like the present, it is the usual and established course to go out of the direct course, from one of the termini to the other. Nevertheless, the deviation to Norfolk island will not avoid the policy, if, from the evidence, you think it was necessary for the purpose of obtaining refreshments. Neither will the stay of three months at Fanning's island have this effect, if you are of opinion that the time was employed in necessary repairs to the vessel. But if the vessel could have got from Guma to Canton, in the situation in which she was, we think she was not justified in going to Manilla, merely because, by going to Canton, she must then have ended her voyage, before she had completed her cargo, because she had no right to go out of the usual course of her voyage, for the purpose of trade, or for any other reason than such as would justify a deviation in ordinary cases.

PETERS, District Judge, thought that on such a voyage as this, the vessel was not confined to the direct course of the voyage.

Verdict for plaintiff.

Case No. 2,989.

COLE SILVER MIN. CO. v. VIRGINIA & GOLD HILL WATER CO. et al.

[1 Sawy. 470.][1]

Circuit Court, D. Nevada. Feb. 13, 1871.

PARTIES TO BILL BEFORE SERVICE — EFFECT OF OMISSION ON JURISDICTION — JOINT TRESPASSER OMITTED—AMENDMENT—INJUNCTION—INCAPACITY OF CORPORATION NO DEFENSE TO TRESPASS—WRONGFUL DIVERSION OF WATER—PRELIMINARY MANDATORY INJUNCTION.

1. A person residing out of the jurisdiction of the court, though named as defendant in a bill, is, substantially, not a party to the action, till service of process or appearance.

2. Whenever the making of a person a party to a bill would oust the jurisdiction of the court, as to other parties, such person, if not an indispensable party, may be omitted, for the purpose of exercising jurisdiction, as to other parties, whose rights can be determined without his presence.

3. In an action to restrain the diversion of water by tort-feasors, one of the tort-feasors, who resides out of the jurisdiction of the court, may be omitted.

4. The court may permit an amendment to a bill, by omitting a non-resident, named thereon as defendant, but not served, without prejudice to a motion for injunction.

5. In an action by a corporation for injuries to property in its possession, the court will not, at the instance of the wrong-doers, enter into any inquiry as to the legal capacity of such corporation to hold the property.

[Cited in Southern Pac. R. Co. v. Orton, 32 Fed. 470.]

6. Plaintiff, in excavating a tunnel in a mountain to its mining claim, on the public lands of the United States, struck a subterranean flow of water, which it appropriated and enjoyed for several years. Defendants ran a tunnel from a distant point into the mountain, to a point some thirty feet in altitude, directly below the point where the plaintiff obtained the said water; and, thereupon, the water, which before flowed through plaintiff's tunnel, was intercepted and discharged through defendants' tunnel, and by them appropriated to their own use. *Held*, that said diversion and appropriation of the water was wrongful, and that complainant was entitled to an injunction.

7. Where defendants, by means of a tunnel run into a mountain at a lower altitude than complainant's tunnel, wrongfully intercept water appropriated by complainant, flowing in its said tunnel, and divert it therefrom, a preliminary injunction will be granted, restraining the continuance of said diversion, even though an obedience to the injunction should render it necessary for defendants to build a bulkhead, or dam, across the tunnel.

[Cited in Portland v. Oregonian Ry. Co., 6 Fed. 324; Hatch v. Wallamet Iron Bridge Co., Id. 338. Distinguished in Mutual Union Tel. Co. v. Chicago, 16 Fed. 313.]

In equity. Application for preliminary injunction heard on bill and affidavits. Complainant is a corporation, organized for the purpose of mining for silver. Its grantors took up a ledge supposed to contain silver ores, situate on the side of the mountain, above Virginia City. Complainant excavated a tunnel, commencing in a ravine some distance below the croppings of its ledge, on the surface of the mountain, and extended it into the mountain to and through its ledge at a considerable depth below the surface. In excavating the tunnel, complainant struck a seam in the rock, from which flowed a stream of water, which it claimed, and appropriated, in accordance with the custom in force. The water so discovered and appropriated, the complainant leased to the Virginia and Gold Hill Water Company, a corporation organized to supply water to Virginia City and Gold Hill, one of the defendants, upon certain designated terms. Said water company paid the stipulated rents, and enjoyed the water under said lease for the

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

agreed term. The water was conveyed to Virginia City, and sold to the people for various domestic and other uses. Other parties, also, took up sundry ledges or mining claims on the same mountain. Some claimed to be in front, and some in the rear, of complainant's ledge. Some of the claimants started a tunnel to run to their ledges, commencing lower down the mountain, and at a considerable distance to the southward of the entrance to complainant's tunnel. The excavation of this tunnel, called the "Nevada Tunnel," was prosecuted at times, and the work suspended at times, for several years. Finally the said several defendants, some of whom had acquired a portion of the interest of the original parties in said Nevada tunnel, entered into a contract to extend the said tunnel into the mountain, till they should strike the ledge, called the "Macey Ledge" —the location of which is left very much in doubt by the affidavits, but it cannot be west of or beyond complainant's ledge—or till they should strike water.

It is unnecessary for the purpose of illustrating the points decided to specify the terms of the contract, or to state more specifically the facts. Under this contract the defendants continued to excavate said tunnel in such a line as to strike a point at a lower altitude, directly below the point where complainant discovered and appropriated the water in its tunnel; and they so timed it, that they reached the said point not far from the time when said lease from complainant to the said defendant, the Virginia and Gold Hill Water Company, expired. The complainant insists that defendants extended the said tunnel expressly to take this water; and the defendants, that their object was to prospect ledges lying in the rear. But it did not appear to the satisfaction of the court, that the claim to any ledge mentioned lying in the line of the tunnel to the west or rear of complainant's ledge was located prior to the location of complainant's claim. When the defendants were approaching the point under complainant's tunnel, the complainant filed a bill in this court, stating what it claimed to be the facts; that defendants were running to the point referred to for the purpose of cutting off its water; that they would soon reach the water and intercept it, and prayed an injunction to restrain them from proceeding further. While the motion for injunction was pending, the defendants reached the point, and the water, thereupon, ceased to flow in complainant's tunnel, and was diverted through defendant's said tunnel, and appropriated by them. Thereupon, the five years mentioned in said lease having expired, complainant dismissed its first bill and filed this bill, setting up the new facts, and applied for an injunction to restrain the continuance of said diversion till the final hearing. The value of the water is alleged to be two hundred dollars per day. Since the diversion, it has been taken by defendants at the mouth of their own tunnel, and conveyed to Virginia City for sale as before.

The foregoing is a sufficient summary of the facts, as they appear in the bill and affidavits, to explain the points of the decision, without being more specific.

Mitchell & Stone and S. W. Sanderson, for complainant.

R. S. Mesick, for defendants.

SAWYER, Circuit Judge. As to the question of jurisdiction, the defendant, Glauber, has never been served, and he has not appeared. The bill shows that he is a resident of California, so that he cannot be served, and the court cannot acquire jurisdiction of him in the action unless he voluntarily appears. Although named in the bill, with a prayer that process issue, and he be made a defendant, yet, he is, substantially, not a party to the action until he is served, or till he appears.

The twenty-second and forty-seventh equity rules do not seem to contemplate that a person can be a party, in fact, till service or appearance. At all events, under these rules, when the making of a person a party—unless he is an indispensable party—would oust the jurisdiction of the court as to other parties, he may be omitted for the purpose of exercising jurisdiction as to those other parties, whose rights can be determined without his presence. Shields v. Barrow, 17 How. [58 U. S.] 141.

Upon the omission of Glauber the court would have jurisdiction over all the other parties, and their rights as against the complainant, may be determined without his presence. The acts complained of are tortious, and the cause of action is several, as well as joint. I do not think Glauber an indispensable party to the action. While the decree will finally settle the rights of the parties before the court, it will not bind him, and he may still litigate his claim with the complainant in another action, or he may voluntarily appear in this; for it is not to be presumed that he is in fact ignorant of the pendency of the suit. If Glauber is an indispensable party, it will be impossible for the court to restrain the commission of waste; the working or destruction of a mine; the diversion of water; the flooding of an upper riparian proprietor, or the erection or continuation of any nuisance, however offensive, dangerous, or destructive to the rights of another, when the wrong-doer has an associate or confederate residing out of the jurisdiction of the court, or when the tort-feasor himself keeps beyond the jurisdiction of the court, and performs the tortious acts through his agents and servants. It is notorious, that in the mining regions of Nevada, Oregon and California, and all the mining territories, many trespasses and wrongs of the kind mentioned, requiring the almost daily inter-

position of the courts, are perpetrated by parties having associates residing in other states. To deny relief against wrong-doers in such cases in this circuit, on account of the absence of one tort-feasor, would be to paralyze the right arm of the court in those cases wherein its effectual interposition is most imperatively demanded, and most frequently invoked. Let it be once established that the courts cannot interfere, or grant relief in the absence of one of the joint tort-feasors, and the mining interests of all the gold and silver producing states will, thereafter, be at the mercy of any bad men, who, relying upon a confederate beyond the jurisdiction of the court to enable them to evade all redress for injuries committed, may choose to combine for the purpose of wrongfully availing themselves of the labors and discoveries of others. In my judgment, in such cases it would be far more equitable to compel the absent tort-feasor to appear and defend his right, or submit to any inconvenience that may incidentally result from the execution of any decree entered against his co-trespassers, rather than deny all redress, no matter how grievous, to the injured party, because one of the wrong-doers withdraws and keeps himself beyond the jurisdiction of the court. In the one case the absent party may appear and have his rights adjudicated, if he so desires, and justice will be awarded to all; while in the other, the most grievous injuries must necessarily go wholly unredressed.

For example, can the courts of the United States properly refuse to redress clearly manifest injuries to its own citizens, by restraining the working of a gold or silver mine, waste, or the erection or continuance of a nuisance, because a citizen of Great Britain, residing in England, is interested in the profits of the wrong, or himself, safe in his retreat beyond the jurisdiction of the court, perpetrates it by means of his agents, servants and employees? The court, in such instances, must, from the necessity of the case, assume jurisdiction and proceed to a decree as to the parties before it, or sit helplessly by and permit an absolute failure of justice, by suffering our own citizens to be ruined with impunity by irresponsible, non-resident wrong-doers, or by parties in collusion with them.

On this principle of preventing a failure of justice, and even on grounds of convenience, courts of equity have often dispensed with parties interested in and affected by the suit, in cases calling far less loudly for such action, than the class of cases to which this belongs. Smith v. Hibernian Mine Co., 1 Schoales & L. 240, 241; Rogers v. Linton, Bunb. 200, 201; Attorney General v. Baliol College, 9 Mod. 409; Thompson v. Topham, 1 Younge & J. 556; Cockburn v. Thompson, 16 Ves. 326; Williams v. Whinyates, 2 Brown, Ch. 399; Wallworth v. Holt, 4 Mylne & C. 635, 636; Taylor v. Salmon, Id. 141, 142; Harvey v. Harvey, 4 Beav. 220–222; Reynoldson v. Perkins, 2 Amb. 565.

In my apprehension, it is no good answer to say, that the injured party may have his remedy in the state courts, where service may be had on non-resident defendants by publication of summons. The constitution and the laws entitle parties in certain cases to seek redress in the national courts, and the class of cases mentioned, is the very one in which the remedy in the national courts is most valued by litigants, and in this circuit most frequently sought. Besides, it is a mere accident if the state laws admit of acquiring jurisdiction in this mode. I doubt whether many of the states, if any, east of the Rocky Mountains, authorize a publication of summons at all, in that class of cases. If they do, when an action is commenced in a state court by a citizen of the state, and all the defendants are citizens of another state or foreigners, it is their absolute right to have a transfer to the national courts, and a transfer by the defendants served in the state would oust the jurisdiction, if any defendant should be a non-resident; for, in the national courts service by publication could not be recognized. Thus there would still be an evasion of the remedy and a failure of justice.

To my mind there is an obvious distinction between torts of the class to which this action belongs, wherein the injury and right of action are several as well as joint; and actions of partition, for the canceling of contracts, settlement of partnership affairs, and the like, wherein the decree is not binding even on the parties before the court in the absence of a party in interest. Such were the cases of Shields v. Barrow, 17 How. [58 U. S.] 139, and Barney v. Baltimore City, 6 Wall. [73 U. S.] 280.

In Marker v. Marker, a tenant under a claim of right, had sold to a stranger a large quantity of timber still uncut and standing on the premises occupied by him. A bill was subsequently filed to restrain the vendor from cutting the timber, in order that he might fulfill his contract of sale, but without making the purchaser a party. On objection for want of parties, the court held that the purchaser was not an indispensable party. 9 Hare, 1, 5, 12, 16. This case determines the principle, for the decree must necessarily have affected the rights of the purchaser of the timber.

Had Glauber's name been omitted there could have been no question as to jurisdiction, and he has not been brought within the jurisdiction of the court by service or appearance. My impression is that the jurisdiction is not ousted by merely naming him in the bill when it appears that he cannot be served. Glauber himself is not present to make, and he does not make, the objection to the jurisdiction, and the other parties who do raise the objection are in no way affected by his absence, or by his being named in the

bill. But, however that may be, since he might have been omitted in the first instance to prevent an ouster of the jurisdiction as to the other parties, I see no reason why the bill may not now be amended, before he is brought in, by omitting his name for the same purpose, without prejudice to the motion for an injunction; and the complainant asks leave to amend. I can perceive no good reason why leave should not be granted.

As to the merits. The leading and material facts alleged, showing the right to the water in question, as between the parties to the action, are not denied by the affidavits of the defendants. The water, as is shown by the bill, was discovered and actually appropriated by the plaintiff, and was enjoyed by it for many years, it having been sold to and paid for by the defendant, the Gold Hill Water Company, for several years prior to September, 1870. The plaintiff, upon the facts alleged, was also necessarily in actual possession of the land out of which the water issued for the purpose of its tunnel, and of taking and enjoying the water, and so far as was necessary to the accomplishment of these objects. Upon the facts as they appear in the bill and affidavits of the moving party, the complainant was the first actual appropriator of the water, and it acquired the right as against the defendants, if capable of so acquiring it.

It is urged that plaintiff was incorporated for mining purposes only, and that it, consequently, has no capacity to acquire a right to the water. But water is required for mining purposes, and in the before-mentioned lease to the defendant, the Virginia and Gold Hill Water Company, the complainant reserved a portion of said water, sufficient for its mining purposes, and only sold the remainder.

So far as required for mining purposes, a capacity to acquire the right to water necessarily exists as incident to the business of mining. But suppose, in pursuing a mining enterprise, other valuable things are found in the path of the work, cannot the corporation appropriate and use them to defray its many expenses, or enhance its profits? Must they be passed by and allowed to go to waste for want of a capacity to make them available, when the corporation can, in fact, render them available and useful in contributing to the success of the main enterprise?

May it not avail itself of all the incidental results of labor necessarily expended in pursuit of the real object for which the corporation was created, because some of these results were not made a specific object to be attained?

If a company is incorporated to mine for silver only, must it discard any gold that it may find in its mine, or in excavating to reach its mine? or if it should chance to fall upon a nest of diamonds in the bowels of the earth while running a drift for its silver ores, must it pass by the glittering treasures with averted eyes, because it has no legal capacity to pick them up and appropriate them to the expenses of the work, or an enhancement of the profits of the enterprise?

Running a tunnel to enable the plaintiff to reach its ledge is, certainly, a legitimate part of the business of mining. Why may it not appropriate everything valuable, not belonging to anybody else, that turns up in the line of the excavation, to pay the expenses of the work, or enhance the profits of the investment? Is it not one of the incidents to the work which the party developing it may render available?

In the affidavits filed, the defendants disclaim the idea that they are running the Nevada tunnel for the purpose of obtaining the water in question, but insist that they are running for the purpose of developing mines belonging to other parties. To that extent, then, the Virginia and Gold Hill Water Company, at least, is itself doing that which it has no legal capacity to do.

But it is enough to say, that the defendants, whether corporations, or natural persons, are not in a position to defend a trespass, on the ground that the plaintiff has no legal capacity to acquire the right in question. That the plaintiff may, legitimately, acquire a right to sufficient water for its mining purposes, is clear. Having the capacity to a limited extent, at least, to acquire a water right, whether they have assumed to acquire a larger right than their wants justify, or whether they use the water discovered and appropriated in the progress of their work for other purposes than mining, is no concern of defendants. A party who has trespassed upon the actual possession of the complainant cannot defend on that ground. It is a question between the corporation and the government. By express provision of statute, corporations are usually limited in their purchases of real estate, for instance, to such as are actually necessary to the exigencies of their business. But suppose a much larger amount should be conveyed to a corporation than it was authorized to take, it would not be contended, I apprehend, that a trespasser who had taken possession of a portion of such excess of land, could successfully set up a want of capacity in the corporation to take as a defense to an action of ejectment by the corporation. As between the party despoiled and the wrong-doer, the courts will not enter upon this inquiry. Farmers' & Millers' Bank v. Detroit & M. R. Co., 17 Wis. 372; Chester Glass Co. v. Dewey, 16 Mass. 94; Whitman G. & S. Min. Co. v. Baker, 3 Nev. 386; Natoma Water & Min. Co. v. Clarkin, 14 Cal. 552.

The defendants do not admit that they have been running their tunnel for the express purpose of cutting off the water in question, as alleged in the bill. They would hardly have the boldness to set up a right to take the water from plaintiff, if it is, in fact, the first appropriator.

They allege their object to be, to reach and develop certain mining claims. I am by no means satisfied that it is not the sole object of all the defendants to the action to secure this water.

The Virginia & Gold Hill Water Company was organized for the purpose of supplying Virginia City and Gold Hill with water, and any other purpose, as an end to be attained, than the procuring of water, would be wholly foreign to the objects of its incorporation. And the other defendants do not satisfactorily appear to have any interest in the mining claims set out in the affidavits.

The contracts set out in the defendants' affidavits, beginning with the principle one of April 29, 1867, have all been entered into long since the complainant discovered and appropriated said water, and leased it to the first defendant named in the bill, and that contract expressly refers to water as the principal object sought. The subsequent contracts are stated to have been made in pursuance of the provisions of that contract and to carry it out. Water, then, from the date of those contracts, at least, must have been the object of the defendants and their grantors, and the supply of water in question was known to exist, for it had already been discovered and appropriated, and it does not appear that there is any other known supply on the line of the defendants' tunnel.

The tunnel, since that time, has been excavated in a nearly direct line towards a point some thirty feet in altitude immediately underneath the point where complainants appropriated the water, until said point was reached, and the water thereby taken.

There can be no doubt, upon the facts as they now appear, that, but for the acts of the defendants in running their tunnel below that of complainant, the water which now flows through defendants' tunnel, would still flow through the tunnel of complainant, as it was wont to do in times past. The water ceased to flow in complainant's tunnel within a few hours after it was struck in defendants' tunnel. Indeed, this is not denied. If, then, the defendants excavated their tunnel expressly to cut off this water, before discovered and appropriated, and divert it from the complainant, their act is wrongful.

If, on the other hand, this was not their object, but the object was to prospect and develop claims owned by them, lying to the westward of complainant's ledge, and the water was necessarily diverted by running their tunnel at the place indicated, it was still wrongful, unless they had a right to so run it, regardless of the appropriation by complainant. Had they such a right?

"Sic utero tuo ut alienum non laedas," is one of the time-honored maxims of the law, and I do not perceive why it should not apply in this case.

I know of no principle of law that permits one man to destroy the property of another, or invade the rights of another, in order to enable him the more conveniently to obtain access to, and use, his own.

It may be, that, in a mining country situated as this is, a court would not restrain a party from merely running a tunnel through his neighbor's ledge, far below the surface, in order to reach his own, when it could be done without material damage, and there is no appropriation of his neighbor's property involved in the proceeding. To do so, might be to throw unreasonable obstacles in the way of carrying on great and highly important enterprises. But, however that may be, I know of no principle that would justify the owner of one ledge, or mine, in absolutely destroying the mine or property of another, not held subject, or in subordination to, the right of the party working the destruction, in order to conveniently reach his own. This would be a palpable violation of the maxim cited.

Water is a highly important element in conducting mining enterprises in California and Nevada, and it is very generally known that it is scarce in Virginia, and the supply of this indispensable necessity for domestic and other uses to the people of Virginia City is almost all, if not wholly, derived from mining tunnels. A stream of water, therefore, thus found in a tunnel excavated for mining purposes, is often as valuable to the possessor as the mine itself; and, to take any such supply of water from one who has acquired a right to it, by means of a tunnel excavated by another party not having a superior right, for the purpose of prospecting or working his own mine, is as clearly a violation of the maxim as the destruction of a neighbor's mine in the same mode.

The authorities cited to the point, that, where one has a spring on his own land, supplied by percolating water, coming from his neighbor's premises, such neighbor may, by digging in his own land, cut off the supply, admitting them to be correct, do not appear to me to reach this case.

The defendants do not appear, by the affidavits, to have made the diversion by digging in their own lands. The water is not shown to have come from their own ledges, or from their immediate vicinity, or from any land to which they have a prior right. It does not satisfactorily appear that any one of the ledges mentioned in the papers lying west of or beyond complainant's ledge, that could be reached or prospected by defendants' tunnel, is a prior location to that of complainant's, or that defendants have a prior right to anything in the line of their tunnel to the west, of complainant's ledge. The diversion is accomplished, taking the view most favorable to the defendants, by running a tunnel through other lands in search of ledges claimed by themselves, and ledges too, the location of which, if they have any real existence, seem as yet, and, according to defendants' own affidavits, after a ten years' search, to be entirely unknown. In doing

this, they ran directly beneath the place where the complainant appropriated the water on the same land, and cut it off from below. A very different condition of things from that which existed in the cases cited.

I presume it would not be maintained, that defendants in searching for their own mine, could run their tunnel for that purpose directly under complainant's tunnel for its entire length, and so near it, that complainant's tunnel would fall in, and be destroyed, or thus destroy any essential part of it, not passing through defendants' own ledge, or ground to which they have a prior right. This would be an injury of a strictly analogous kind.

The facts are not fully developed, and without a full discussion of the point, at this time, it is sufficient to say, that in my judgment, as the case is now presented by the bill and affidavits, the matters shown by defendants are not sufficient to overthrow the case made by the complainant. I think it very apparent, upon the case as now presented, as between the parties, that the complainant has the prior right to the water, and that it has been wrongfully cut off and diverted, by means of defendants' tunnel.

It is shown, and this does not seem to be seriously controverted, that the water can be restored by building a water-tight wall or bulkhead across the tunnel at a point indicated. But it is urged, that the injury has been committed, and that, this being so, the court will not, on motion for a preliminary injunction, issue a mandatory writ, affirmatively commanding the performance of an act such as to fill up a tunnel, rebuild a wall that has been demolished, and the like; and so the authorities seem to be.

But, while this seems to be an established rule, it, also, appears to be well established, that the result sought may be accomplished by an order merely restrictive in form. For example, if the water of a stream be raised by means of a dam, so as to wrongfully flood a party's land above, or obstruct with backwater, a mill situated higher up the stream, while the court will not direct the defendant in terms to remove the dam, it will require him to refrain from overflowing the land, or obstructing the mill, even though it be necessary to demolish the dam in order to obey the injunction. So if a party, by means of a dam, or canal, should wrongfully divert the water of a stream from the mill of his neighbor, clearly entitled to it, the court would restrain the continuance of the diversion, even though an obedience to the injunction should render it necessary to remove the dam, or fill up the canal. 2 Eden, Inj., by Waterman, 388; 3 Daniell, Ch. Pr. 1767, and notes, last edition. Robinson v. Lord Byron, 1 Brown, Ch. 588; Lane v. Newdigate, 10 Ves. 192; Rankin v. Huskisson, 4 Sim. (6 Eng. Ch.) 13; Earl of Mexborough v. Bower, 7 Beav. (29 Eng. Ch.) 127; Murdock's Case, 2 Bland, 470, 471; Washington University v. Green, 1 Md. Ch. 502-504; North of England C. & H. J. R. Co. v. Clarence R. Co., 1 Colly. (28 Eng Ch.) 521; Spencer v. London B. R. Co., 8 Sim. (8 Eng. Ch.) 193.

Under these authorities, by whatever name judges may see fit to call the injunction, the defendants may be restrained from continuing to cut off and divert the water in question, even though it should be necessary for them to fill up, or build a water-tight barrier across the tunnel to accomplish the end sought.

Upon the facts as now presented, I think the water is wrongfully diverted from complainant's tunnel by means of the tunnel of defendants, and that complainant is entitled to a temporary injunction restraining defendants from continuing the diversion, till the rights of the parties can be more fully ascertained.

For the present, I will fix the amount of the injunction bond at $15,000, with leave to defendants to move to increase the amount, at any time, if this amount be deemed too small.

Let an order be entered granting leave to complainant to amend its bill by striking out the name of Glauber as a defendant, without prejudice to the motion for an injunction, and upon such amendment being made, and on filing a bond to be approved by the clerk, or district judge, in the sum of $15,000, that a writ of injunction be issued by the clerk in the form indicated, restraining the defendants, their attorneys, agents and servants from further, by means of their tunnel or otherwise, taking or diverting the water, or any portion thereof, which heretofore flowed from complainant's ledge, and from the spring or point mentioned in the bill of complaint, about forty-eight feet west of said ledge, through and out of complainant's tunnel, or which would flow into and through said complainant's tunnel from said sources, but for the defendants' tunnel; and from receiving said water, or any part thereof, into and through said defendants' tunnel, and thereby depriving the said complainant thereof, until the further order of the court.

[NOTE. Defendant, the water company, subsequently moved on the bill and answer to dissolve the preliminary injunction, and the motion was denied. Case No. 2,990.]

Case No. 2,990.

COLE SILVER MIN. CO. v. VIRGINIA & GOLD HILL WATER CO. et al.

[1 Sawy. 685;[1] 7 Morr. Min. Rep. 516.]

Circuit Court, D. Nevada. Oct. 6, 1871.

INDISPENSABLE PARTIES—PROPER PARTIES—JURISDICTION OUSTED—MANDATORY PRELIMINARY INJUNCTION—DENIAL ON INFORMATION.

1. One whose rights will necessarily be affected by the operation of a decree in equity is an indispensable party to the action, and the

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

court will not proceed to a decree without his presence.

[Cited in Preston v. Walsh, 10 Fed. 327; Greene v. Klinger, Id. 691; Bell v. Donohoe, 17 Fed. 711; Chadbourne v. Coe, 51 Fed. 481.]

2. Where a decree can be made settling the rights of the parties before the court, without affecting the rights of others absent, the court may proceed to a decree, although those absent might be proper parties to the action.

3. Where the bringing in of an absent party, whose presence might otherwise be deemed material, would oust the court of jurisdiction; the court will "strain hard" to grant relief as to the parties before it.

4. In a proper case, a court of equity will grant a preliminary injunction in a restrictive form, although an obedience to the injunction should require the performance of substantive acts on the part of the party enjoined.

[Cited in Lathrop v. Junction R. Co., Case No. 8,110.]

5. The court will not dissolve a preliminary injunction upon the denials of the equities of the bill made upon information and belief merely; nor upon affirmative allegations of new matter meeting the equities of the bill made only upon information and belief.

[6. Cited in Giant Powder Co. v. Cal. Vigorit Powder Co., 5 Fed. 202, Preston v. Walsh, 10 Fed. 316, and Oglesby v. Attrill, 14 Fed. 215, to the point that the rulings of one judge of a circuit court are not open for review to any other judge sitting in the same court in the same case.]

In equity. Motion to dissolve an injunction on bill and answer. The facts sufficiently appear in the opinion, and in the report of the same case before Sawyer, Circuit Judge, on motion for an injunction. [Case No. 2,989.]

Mitchell & Stone and S. W. Sanderson, for complainants.

R. S. Mesick and Williams & Bixler, for defendants.

FIELD, Circuit Justice. This is a motion to dissolve an injunction issued upon the bill of complaint. It is made upon three grounds: 1. That Herman Glauber, who is a citizen of the state of California, is an indispensable party defendant in the suit, without whose presence the court cannot proceed to a decree. 2. That the injunction, though preventive in form, is mandatory in fact, and an injunction of this character cannot issue upon an interlocutory application. 3. That the equities of the bill are fully denied by the answer.

I. The question whether Glauber is an indispensable party depends upon the further question, whether he is materially interested in the matter in controversy, or object of the suit, and that interest would be necessarily affected by any available decree consistent with the case presented by the bill.

It is undoubtedly a general rule in equity that all persons materially interested in the matter in controversy, or object of the suit, should be made parties in order that complete justice may be done and a multiplicity of suits be avoided. And usually when it appears that persons thus interested are not brought in, the court will order the case to stand over until they are made parties. A court of equity, as has been said by a distinguished chancellor, delights to do complete justice, and not by halves. But sometimes, from the residence of parties thus interested, the court is unable to bring them all before it. Particularly is this so with the circuit court of the United States, which possesses no power to authorize a constructive service of process upon absent or non-resident defendants, and which can only exercise its jurisdiction in that class of cases depending upon the citizenship of the parties, where all the parties, however numerous on one side, are from a state different from that of the parties on the other side. In all such cases, the court will consider whether it is possible to determine the controversy between the parties present, without affecting the interests of other persons not before the court, or by reserving their interests. If the interests of those present are severable from the interests of those absent, such determination can generally be had, and the court will proceed to a decree. But if the interests of those present and those absent are so interwoven with each other, that no decree can possibly be made affecting the one without equally operating upon the other, then the absent persons are indispensable parties, without whom the court cannot proceed, and, as a consequence will refuse to entertain the suit. Shields v. Barrow, 17 How. [58 U. S.] 130; Barney v. Baltimore City, 6 Wall. [73 U. S.] 280.

The inquiry then, is this: whether Glauber possesses any interest in the controversy, or object of the suit, which is so interwoven with that of the other defendants, that no available decree consistent with the case presented by the bill, can be rendered against them, which will not necessarily affect him. The suit is brought to prevent a diversion of water of which the complainant claims to be the owner by discovery and prior appropriation. The water, or which amounts to the same thing, the exclusive use of it, is the matter in controversy, and the substantial object of the suit is to prevent any interference with such use by the defendants. Glauber, according to the allegation of the bill, is not interested in the water in controversy, but only in the tunnel by means of which the water is diverted.

Now if a decree can be rendered which will secure to the complainants the exclusive use of the water, and at the same time leave the right and interest of Glauber in the tunnel unimpaired, the objection founded upon his absence as a party defendant will not be tenable. The learned counsel of the defendants intimated on the argument of the case, that should the court ultimately determine that the complainant is entitled to the water, it might be necessary to decree that the tunnel be filled up. If only a decree of

that character can be rendered to give protection to the complainant's rights, then undoubtedly Glauber is an indispensable party. But the complainants' counsel suggest several forms in which a decree may be made protecting the asserted rights of the complainants without in any respect trenching upon Glauber's rights in the tunnel. The defendants might, for instance, be restrained from interfering with the water or performing acts to prevent the resumption by the complainants of its possession and use. It is stated, that even if the defendants should not be decreed to do any specific act, such as the erection of a bulkhead, or the restoring of the water diverted, a decree would not be altogether fruitless which would allow the complainants to pump the water from the bed of the Nevada tunnel into its own tunnel, provided no counter work should be carried on in the Nevada tunnel to prevent such pumping; or allow the complainants to resume possession of the water at the mouth of the tunnel. A decree which would enjoin the defendants from opposing the complainants' resumption of the water in either of these modes, would substantially accomplish the objects of the suit, and at the same time leave the Nevada tunnel and the interests of Glauber therein as they existed previously.

It would certainly be going a great way, and not entirely consistent with proper respect for my associate, who is possessed, in the circuit court, with equal authority with myself, if I should undertake to determine against his conclusions upon substantially the same representation of facts, without leave first granted for a re-argument of the question, that Glauber is an indispensable party, and thus decide, in advance of the presentation of the entire case, that no decree could possibly be rendered which would afford protection to the complainant without infringing upon the rights of the absent Glauber. I shall leave the matter to his determination, simply observing, that in a case of this kind, when the absent person alleged to be interested would, if brought into court, oust its jurisdiction, I should follow the course suggested by Mr. Justice Story in West v. Randall [Case No. 17,424], and strain hard to give relief as between the parties before the court.

II. The injunction, although preventive in form, is undoubtedly mandatory in fact. It was intended to be so by the circuit judge who granted it, and the objection which is now urged for its dissolution was presented to him, and was fully considered. I could not with propriety reconsider his decision, even if I differed from him in opinion. The circuit judge possesses, as already stated, equal authority with myself in the circuit, and it would lead to unseemly conflicts, if the rulings of one judge, upon a question of law, should be disregarded, or be open to review by the other judge in the same case.

But were I not restrained by this consideration from interfering with the order of the circuit judge, I should hesitate before dissolving the injunction upon the ground stated. The benefit of the preventive remedy afforded by courts of equity in the process of injunction would often be defeated, if the remedy only extended to cases where obedience would not require any affirmative acts on the part of the party enjoined. The owner of flumes, aqueducts or reservoirs of water might, for instance, flood his neighbor's fields by raising the sluice gates to these structures, and, if the flowing should not be speedily stayed, might destroy the latter's crops; and yet, according to the argument of the learned counsel, no injunction could issue to restrain the owner from continuing the flood, if obedience to it should require him to do the simple affirmative act of closing his gates. The person whose fields were inundated and whose crops were destroyed, in the case supposed, would find poor satisfaction in being told that he must wait until final decree before any process could issue to compel the shutting of the gates, and he must seek compensation for the injuries his property may suffer in the meantime, in an action at law.

There is no species of property requiring more frequently for its protection and enjoyment the aid of a court of equity, and particularly of its preventive process of injunction, than rights to water. For purposes of mining as well as for ordinary consumption, water is carried in the mining regions of Nevada and California over the hills and along the mountains for great distances, by means of canals and flumes and aqueducts, constructed with vast labor and enormous expenditures of money. Whole communities depend for the successful prosecution of their mining labors upon the supply thus furnished; and, it is not extravagant to say that much of the security and consequent value of this species of property is found in the ready and ample protection which courts of equity afford by their remedial processes of injunctions, anticipating threatened invasions upon the property, restraining the continuance of an invasion when once made, and preserving the property in its condition of usefulness until the conflicting rights of contesting claimants can be considered and dètermined. The limitation of the process to cases calling for no affirmative action on the party enjoined would strip the process in a multitude of cases of much of its practical benefit.

I am aware that there are adjudications of tribunals of the highest character denying the authority of a court of equity, on a preliminary application, to issue an injunction, even in a restrictive form, when its obedience would require the performance of a substantive act. Such is the case of Audenried v. Philadelphia & R. R. Co., recently decided in the supreme court of Pennsylvania, to

which my attention has been called by the defendant's counsel. 68 Pa. St. 370. The opinion in that case was delivered by Judge Sharswood, who is a jurist of national reputation, and anything which falls from him is justly entitled to great consideration. He states that the authorities both in England and in this country are very clear that an interlocutory or preliminary injunction cannot be mandatory. By this he means, I suppose, that the authorities show that such an injunction cannot be mandatory in form, for he refers to the case of Lane v. Newdigate, 10 Ves. 193, where Lord Eldon ordered an injunction to be drawn so that, although restrictive on its face, it compelled the defendants to do certain specific things. Of that case the learned judge observes that it is not a precedent which ought to be followed in any court, and that a tribunal which finds itself unable directly to decree a thing, ought never to attempt to accomplish it by indi-

Notwithstanding the great respect I entertain for the opinions of Judge Sharswood, and for the decisions of the supreme court of Pennsylvania, I am not prepared to assent to the view of the authorities stated in the case cited, nor to the conclusion there expressed that the cases in England ought not to be followed in any instance. Certain it is that the jurisdiction of the court of chancery in England to decree in special cases upon motion the issue of injunctions which, though restrictive in form, may still require for their obedience the performance of substantive acts, has been uniformly maintained since the time of Thurlow. In Robinson v. Lord Byron, 1 Brown, Ch. Cas. 588, a motion was made for injunction upon affidavits, stating that since April 4, 1785, the defendant who had large pieces of water in his park, supplied by a stream which flowed to the mill of the plaintiff, had at one time stopped the water, and, at another time let in the water in such quantities as to endanger the mill. The lord chancellor, Thurlow, ordered an injunction to restrain the defendant "from maintaining or using his shuttles, floodgates, erections and other devices, so as to prevent the water flowing to the mill in such regular quantities as it had ordinarily done before the fourth of April, 1785." The defendant was, therefore, compelled by this injunction, to remove such floodgates and other erections as he had constructed, if they impeded the regular flow of the water as it had existed before the date designated.

In Lane v. Newdigate, 10 Ves. 192, already mentioned as referred to by Judge Sharswood, the plaintiff was assignee of a lease granted by the defendant for the purpose of erecting mills and other buildings, with covenants for the supply of water from canals and reservoirs on the defendant's estates, reserving to the defendant the right of using the water for his own collieries. The bill prayed generally that the defendant might be decreed to use and manage the waters of the canal, so as not to injure the plaintiff in the occupation of his manufactory, but particularly that the defendant might be restrained from using certain locks, and thereby drawing off the water which would otherwise run to and supply the manufactory, and be decreed to restore a particular cut for carrying away the waste waters, and a certain stop-gate, and to restore the banks of the canal to their former height, and also to repair such stop-gates, bridges, canals and towing-paths as existed previous to the lease, and to remove certain locks since made. Upon motion for an injunction, the lord chancellor, Eldon, expressed a doubt whether it was according to the practice of the court to decree repairs to be done, but finally made an order restraining the defendant from impeding the plaintiff in the use and enjoyment of the demised premises and the mills erected thereon, and the privileges granted by the lease, by continuing to keep the canals, or the banks, gates, locks or works out of repair; and from preventing such use and enjoyment by diverting the water or the use of any locks erected by the defendants, or by continuing the removal of the stop-gate, the chancellor observing at the same time that the injunction would create the necessity of restoring the stop-gate.

In Rankin v. Huskisson, 4 Sim. 13, the defendants, were restrained on motion by Vice-Chancellor Shadwell from continuing the erection of stables on certain premises agreed to be laid out as an ornamental garden, adjoining a club-house, and from preventing such part of the building as was already erected from remaining thereon. They were therefore compelled to remove the building already commenced.

In Hepburn v. Lordan, 2 Hem. & M. 345, the defendants were restrained upon motion by Vice-Chancellor Wood from allowing inflammable damp jute deposited on premises adjoining those of the plaintiff, to remain there, and from bringing any more in such quantities as to occasion danger to the plaintiff's property. Other cases to the same purport might be cited, but these are sufficient, I think, to show that a court of equity has jurisdiction to issue, upon an interlocutory application, an injunction which will operate to compel the defendants, in order to obey it, to do substantive acts. It is a jurisdiction which should only be exercised in a case where irreparable injury would follow from a neglect to do the acts required. Some of the adjudged cases evince a disposition on the part of the court to restrict rather than enlarge this jurisdiction. Blakemore v. Glamorganshire Canal Nav., 1 Mylne & K. 154. Undoubtedly, the general purpose of a temporary injunction is to preserve the property in con-

troversy from waste or destruction or disturbance until the rights and equities of the contesting parties can be fully considered and determined. Usually this can be effected by restraining any interference with it; but in some cases the continuance of the injury, the commencement of which has induced the invocation of the authority of a court of equity, would lead to the waste and destruction of the property. It is just here where the special jurisdiction of the court is needed—to restore the property to that condition in which it existed immediately preceding the commencement of the injury, so that it may be preserved until final decree.

III. It only remains to consider whether the equities of the bill are so fully denied by the answer as to justify the dissolution of the injunction. The material allegations of the bill are that the complainant, in running certain tunnels into its mining claims, discovered and appropriated the water in controversy; and that the defendants subsequently, by means of the Nevada tunnel, struck the water, and diverted it from the complainant. These allegations are not positively denied by the answer. The construction of the tunnels of the complainant, and the diversion of the water by the defendants through the Nevada tunnel are admitted. The discovery and prior appropriation of the water by the complainant are only denied upon information and belief; and every denial which relates to the title of the water is made in a similar manner. Denials in that form may be sufficient to raise an issue for trial, but they amount, for the purposes of the motion, to no more than hearsay evidence. They will not justify the dissolution of the injunction.

"The sole ground," says Mr. Justice Story, "upon which the defendants are entitled to a dissolution of an injunction upon an answer, is, that the answer in effect disproves the case made by the bill, by the very evidence extracted from the conscience of the defendant, upon the interrogation and discovery sought by the plaintiff to establish it. But what sort of evidence can that be, which consists in the mere negation of knowledge by the party appealed to? Such negation affords no presumption against the plaintiff's claims; but merely establishes, that the defendant has no personal knowledge to aid it or disprove it. It is upon this ground that it has been held, and in my judgment very properly held, that if the answer does not positively deny the material facts, or the denial is merely from information and belief, it furnishes no ground for an application to dissolve a special injunction." Poor v. Carlton [Case No. 11,272]. See, also, Roberts v. Anderson, 2 Johns. Ch. 202; Ward v. Van Bokkelen, 1 Paige, 100; U. S. v. Parrott [Case No. 15,998].

The same objection applies to the allegations respecting the new matter relied upon to establish prior rights in the two Schiels, with whom the defendants claim to be in privity. Upon inspection of the answer, it appears that all which is stated in relation to the origin, working, continuance and transfer of the defendants of the claims of these parties is founded upon information and belief. The statement does not purport to be made upon any personal knowledge, possessed by the defendants, but only "according to their information and belief." Allegations resting upon this foundation furnish no ground for disturbing the injunction. For all the purposes of this motion the case stands precisely as though these allegations were omitted from the answer.

The questions suggested by the learned counsel of the defendants—whether the water exists in such state or condition as to render its diversion, under the circumstances, remediable, or anything more than damnum absque injuria; and whether the injunction is consistent with the policy and license of the general government to miners upon public lands—can be better considered and more justly determined on the hearing after the entire facts of the case are developed by the evidence. Upon the case as presented, I am of opinion that the injunction should be continued until the hearing. The motion to dissolve the injunction is therefore denied.

Case No. 2,991.

COLGATE v. GOLD & STOCK TEL. CO.

[16 Blatchf. 503;[1] 4 Ban. & A. 415; 16 O. G. 583; Mer. Pat. Inv. 359.]

Circuit Court, S. D. New York. July 22, 1879.

PATENTS—ADJUDICATION OF VALIDITY—NOTICE—SUBSEQUENT ATTACK—PRIOR PUBLICATION—PRELIMINARY INJUNCTION—FORM OF ORDER.

1. The decision of this court in Colgate v. W. U. Tel. Co. [Case No. 2,995] confirmed.

2. The considerations stated which apply to a case where, after a patent has been sustained on final hearing, a new defendant, in a new suit, seeks to attack the patent for want of novelty.

3. What degree of clearness and certainty of description is required in a prior publication, in order to defeat a patent.

4. Where, on a patent issued in 1867, a suit was brought, in 1872, against its most conspicuous and extensive infringer, and was prosecuted with reasonable diligence, that was sufficient notice to all other infringers that the right conferred by the patent was to be maintained, to require a particular defendant who alleges laches in the plaintiff, to show affirmative acquiescence by the plaintiff in the use of the invention by the defendant.

[Cited in Green v. Barney, 19 Fed. 421.]

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

5. Form of an order for a preliminary injunction on a patent, in a case where the plaintiff exercises his rights by granting licenses.

[Cited in Hoe v. Boston Daily Advertiser Corp., 14 Fed. 916; Campbell Printing-Press & Manuf'g Co. v. Manhattan Ry. Co., 49 Fed. 933.]

[In equity. Bill by Clinton G. Colgate against the Gold & Stock Telegraph Company to restrain infringement of letters patent No. 65,019.]

Betts, Atterbury & Betts, for plaintiff.

Porter, Lowrey, Soren & Stone, for defendant.

BLATCHFORD, Circuit Judge. This is a motion for a preliminary injunction to restrain the infringement of letters patent granted to George B. Simpson, May 21st, 1867, for an "improvement in insulating submarine cables." This patent has been sustained as valid by this court, on final hearing, in a suit brought on it by the same plaintiff against the Western Union Telegraph Company [Case No. 2,995]. The claim of the patent is as follows: "The combination of gutta-percha and metallic wire in such form as to encase a wire or wires, or other conductors of electricity, within the non-conducting substance gutta-percha, making a 'submarine telegraph cable,' at once flexible and convenient, which may be suspended on poles in the air, submerged in water, or buried in the earth, to any extent, for atmospheric or submarine telegraphic communication, and for other electric, galvanic and magnetic uses, as hereinbefore described." Infringement by the defendant, by the use of the invention thus claimed, is not denied. The sole defence to the motion is an attack on the novelty of the invention. Under such circumstances, when the patent has been sustained on final hearing, against the largest and most wealthy telegraph corporation in country, after exhaustive research and full testimony and argument, and when, as here, the Western Union Telegraph Company is shown to own nearly one-half of the capital stock of the defendant, and the relations of the two companies are shown to be such that the defendant is substantially a part of the Western Union Telegraph Company, it is incumbent on the defendant, in adducing any new matter in this case, on this motion, to make it extremely probable, at least, that, if such new matter had been put in evidence in the former case, a different result would have been reached by the court.

In construing the specification of the patent, in the former case, the court said, in its decision: "It is plain, from the language of this specification, that the point of the invention is to make use of the fact that gutta-percha is a non-conductor of electricity, to insulate, by means of gutta-percha, a metallic wire, which is a conductor of electricity, and thus prevent the escape of electricity from the metallic wire, when it is suspended in the air, or submerged in water, or buried in the earth, when, but for such insulation, the electricity would escape from the metallic wire. The mode of insulation described is to combine the gutta-percha and the metallic wire in such manner that the wire will be covered on all sides with a uniform coating of gutta-percha. Adequate means of softening the gum and putting it into such condition as to permit it to be so combined with the wire are set forth; and it is declared, that such mode of combination and insulation confines the electric current to the wire, and shields the wire from contact with all external electric influences. It is manifest that the gist of the invention is the discovery of the fact that gutta-percha is non-conductor of electricity, and the application of that fact to practical use, by combining it, by the means specified, with a metallic wire, in the manner described, and then using the cable formed by such combination for the purpose of conducting electricity along the enclosed wire." In regard to the novelty of the invention the court said. "Nothing that has been put in evidence by the defendant carries back the publication of the discovery of the insulating properties of gutta-percha to a date earlier than the 1st of March, 1848. That is the date of the publication in England of the discovery of such properties by Faraday. It is entirely clear that Simpson had, prior to that time, made a like discovery." The court then took as the date of the discovery by Simpson, the 24th of January, 1848, being the day on which he swore to his first specification, which he filed in the patent office on the 31st of January, 1848, which was a date sufficiently early to antedate the publication of Faraday's discovery, although the plaintiff contended for a date as early as November 22d, 1847.

An extract from a work in German, called Dingler's Polytechnic Journal, was put in evidence in the former case. A translation of the material parts of it was as follows: "Insulation of the wires of electric telegraphs. The public papers announce, that the experiments which the Prussian government is having tried at present, in respect to the most serviceable mode of constructing electric telegraphs, are turning out very favorably for the laying of the wires underground in coatings of gutta-percha, so that, probably, all public telegraphs will be laid in this manner. * * * If the insulation of the wires underground, discovered by Lieutenant Siemens, keeps good, all important towns can be easily connected with the capital." In regard to this extract, the court said, in its decision: "The publication in Dingler's Polytechnic Journal of 1848 gives an account merely of experiments then in progress, and not of a completed invention, even if the part of it in question was published prior to Simpson's invention, and it does not set forth the insulating or non-con-

ducting property of gutta-percha for use with a telegraphic wire under water." The defendant now introduces in evidence a publication in German, which was not in the former case, namely, the Bremen Gazette, of Sunday, December 19th, 1847, which contains an article, of the material parts of which the following is a translation: "Berlin, December 16. The trials which the government here is, at this time, causing to be made concerning the introduction of electro-magnetic telegraphs best answering the purpose, do result, in the highest degree, in favor of laying the wires underground in coatings of gutta-percha, so that, probably, all government telegraphs will be constructed in this manner, and it will be no longer necessary then to use for that purpose the railroad embankments, but the turnpikes may be used, under the pavement of which the lines will find safe location, and no special guarding of the same will be necessary. The trials, under the direction of Major-General O'Etzel, of Privy Councillor of Finance Mellin, and of Professor Dove, who constitute the royal commission, are carried out by Lieutenant Siemens. * * * If the insulation of wires underground, invented by Lieutenant Siemens, proves lasting, then, by means of it, all the principal cities may be easily put in communication with the capital." It is very manifest that the article in the Bremen Gazette conveys no more information than the article in Dingler's Journal, so that this defence was passed upon in the former case. Neither of them describes, or would enable any person to construct, a telegraph cable, consisting of a telegraph wire, covered, as Simpson's specification states, "on all sides, with a uniform coating of gutta-percha," such cable being "flexible and convenient," and capable of being "suspended on poles in the air, submerged in water, or buried in the earth." All this is embraced within the definition of the invention and the construction of the claim, given in the former case. There must not only be insulation by means of gutta-percha, but insulation "by the means specified" and "in the manner described." The extent of the article in the Bremen Gazette is, that the wires are laid "underground in coatings of gutta-percha," and thus insulated. How the coatings of gutta-percha are applied, or what their extent is, is not stated, nor is it said that the wire is covered on all sides with the coating, or that the covered wire is flexible or is capable of being suspended on poles in the air or submerged in water. The affidavit of the defendant's expert, Mr. Renwick, does not advert to these considerations, nor does that of Mr. Griffin, nor that of Mr. Pope, nor that of Professor Doremus. On this subject the affidavit of Mr. Burrill, on the part of the plaintiff, says, that the article in the Bremen Gazette is substantially identical with that in Dingler's Journal. It says, further: "Said publication in the Bremen Gazette and in Dingler's Polytechnic Journal did not, in my opinion, at the time they were published, convey any sufficiently intelligible information of the insulation of a wire with gutta-percha in such form that it could be used for a submarine cable. It is easy now for us to think that we understand the exact construction of the telegraph line of Siemens referred to in those publications. But this is on account of our knowledge outside of those publications, and not from any information derived from the publications themselves. The only statement in either of those publications, in regard to the construction of the telegraph line which was then undergoing trial, is, that the experiments or trials were resulting 'in favor of laying the wires underground in coatings of gutta-percha.' How those coatings were to be applied is not stated, nor is it stated that the wire is to be wholly encased, as described in the Simpson patent, with a uniform coating of gutta-percha. Obviously, the general wording of the description will apply to other modes of insulating the wires than that described in the Simpson patent. * * * It thus appears, that there were a number of ways of 'laying wires underground in coatings of gutta-percha,' and no one of those ways, as at that time devised, was a practical method of constructing a submarine cable, nor were any of those ways the mode of insulating a telegraph cable shown in the Simpson patent, to wit, that of encasing a wire on all sides in a uniform coating of gutta-percha, and forming thereby a 'flexible and convenient' telegraph cable. The extracts from the Bremen Gazette and Dingler's Polytechnic Journal, therefore, fail to convey any sufficient information as to the method of insuating a telegraph wire with gutta-percha so as to fit it for use for a submarine cable, and they do not tell how it was fitted for use as a subterranean telegraph." Professor Morton, in his affidavit on the part of the plaintiff, says: "The extract from the Bremen Gazette is substantially identical, so far as it purports to describe any experiments or trials with gutta-percha, with the extract from Dingler's Polytechnic Journal, which I examined in the previous case. * * * In the previous case I expressed the opinion, that the description in the Polytechnic Journal was insufficient to enable any one skilled in telegraphing at that time to insulate a telegraphic wire with gutta-percha, and I still adhere to that opinion, and the opinion applies with equal force to the extract from the Bremen Gazette. The extracts from the Bremen Gazette and from Dingler's Polytechnic Journal merely convey the information that experiments were turning out well for the insulation of the wire with gutta-percha. The final result of those experiments is expressly stated in the publications not to have been reached, and no description whatever is given as to the method of applying the insulation to the

wire, except the general phrase, that the wires are laid under the ground, 'in coatings of gutta-percha.' At that date, in 1847 and 1848, submarine and underground telegraphy were practically unknown. Experiments had been tried, as I find from the literature of the subject, with many substances, and coatings had been formed of such substances in many ways, but, up to that time, without success. Wires had been wrapped with thread or yarn, and varnished, and such a mode of coating would be included under the general phraseology of the articles in the Bremen Gazette and Dingler's Polytechnic Journal. Wires had been laid in pipes or channels of wood, varnished with resinous matter, and such a mode of laying underground might be included in the general phraseology. Wires had been laid in lead pipe, filled with asphalt, pitch, wax, and other substances, and such mode of coating might be included. Wires had been laid in tubes which had coatings of gutta-percha alternating with insulating supports of earthenware and this mode would be included in the general phraseology of said articles. Coatings might have been applied at intervals along a line of telegraph laid in a subterranean channel way, which would insulate the wire from the sides of the channel way, and support it at such intervals. Other modes of laying wires in coatings of gutta-percha might be included in the phraseology of said articles, other than the mode of encasing the wire in a complete uniform coat of gutta-percha, such as is described in the Simpson patent. While, therefore, it is easy for us, at the present day, to suggest from our knowledge since acquired what Lieutenant Siemens might have done, and to now suggest that his wires were completely covered, along their whole length, with continuous and homogeneous or uniform coatings of gutta percha, yet that information was by no means conveyed to the telegraphic world by the publications of the Bremen Gazette and Dingler's Polytechnic Journal."

The foregoing observations apply, also, to the Rutter patent of December 23d, 1847, except that the wire cords of Rutter were flexible. As pointed out by Mr. Burrill, in his affidavit, the Rutter patent does not describe or suggest the insulating or non-conducting property of gutta-percha for use with a telegraph wire under water, nor does it describe a wire completely covered with a uniform coating of gutta-percha, and adapted for use as a submarine telegraph cable or even as a subterranean cable. Mr. Burrill comments on the language of the Rutter specification, and says: "In my view, the specification of Rutter, so far as it relates to the use of gutta-percha, is too meagre and insufficient to convey any practical information in regard to insulating and covering a wire with gutta-percha for any purpose, and contains no hint of the use of gutta-percha as a submarine or subterranean cable insulator." Professor Morton, in his affidavit, examines the specification of the Rutter patent, and states, that, in his opinion, it conveys even less information than the extracts from Dingler's Journal and the Bremen Gazette. He also says: "It is impossible to gather from the slight mention made, in this specification, of the uses of gutta-percha, what the patentee understood of its uses or capacities, and I am by no means convinced by the specification, that the patentee supposed that gutta-percha was itself an insulating material. However that may be, the patent does not describe the invention described and claimed in the Simpson patent, of a wire adapted for submarine insulation by being encased in a complete and uniform coating of gutta-percha. A covering which would be 'suitable' to protect a swinging cord from rain, dust or contact, as I stated in the former case, in reference to the Wharton patent, would 'not be at all likely to be, and certainly would in no wise necessarily be, equivalent to the article produced by following the directions of the Simpson patent, or, indeed, available as an insulating conductor for submarine use;' nor would the suggestion of the use of a flat strap 'of leather, gutta-percha or other insulating substance affixed to the hand rail' of an engine, convey any sufficient information of a submarine cable insulated with gutta-percha. Both the construction and conditions of use suggested in the Rutter patent are so essentially different from those described in the Simpson patent, that no one, by following the directions of the Rutter patent, could intelligently construct Simpson's insulated cable." He further states, that, in his opinion, the Rutter patent, for the reasons set forth in his affidavit, does not contain any description of the invention described and claimed in the Simpson patent.

It is pointed out on the part of the plaintiff that Mr. Renwick, in his affidavit for the defendant, omits to say that he finds in either the Bremen Gazette or the Rutter patent the invention described and claimed in the Simpson patent or that, from either of those publications, he could construct a cable insulated with gutta-percha and adapted for the uses claimed by Simpson; and that the fact that Mr. Renwick is silent on this point is entitled to very great weight in considering the force of these defences. There is great force in these observations. The defects in the affidavits of Mr. Griffin and Mr. Pope and Professor Doremus, before pointed out, in connection with the article in the Bremen Gazette, exist equally in regard to the Rutter patent.

The affidavits of the experts for the defendant, and the argument of its counsel, are largely founded on the erroneous view, that Simpson's patent is invalid if he was not the first discoverer of the insulating property of gutta-percha. It is true that, in the former case, it was held on the evidence, that

Simpson was the first discoverer of the insulating property of gutta-percha, being prior to Faraday, and the publication in the Dingler Journal not being an account of a completed invention. But, as before stated, the claim of the patent is not for that discovery, but is for the means and manner by which that discovery is made use of, to construct such a cable as the specification describes, for such use as is specified.

It appeared in evidence, in the former case, that, in February or March, 1848, Simpson was in Baltimore, exhibiting to Professor Rogers, a gentleman extensively connected with telegraphy, a piece of wire covered with gutta-percha, which he represented as intended to be used under water at drawbridges in rivers, and that it was then and there tested in water and found to be a good insulator. This evidence is cited in the decision of the court in the former case. The structure so exhibited at Baltimore was such a structure as is described in the Simpson patent. It is not described in the Bremen Gazette, or in Dingler's Journal, or in the Rutter patent, or in Faraday's article, or in French's letter of February 10th, 1848. The evidence as to what Craven did, as given in the former case, did not, in my judgment, satisfactorily establish a date for Craven's invention prior to the exhibition by Simpson of such structure in Baltimore. The evidence before the court in the former case and in this case shows that Simpson embodied his invention in the form of a wire encased in gutta-percha in contact with and adhering to the wire, so as to constitute a flexible cable capable of the submarine and other uses set forth in his patent, before it was embodied in such form by any one else in the United States, and before it was patented or described in any printed publication by any one else; and that he originated and conceived what he claimed to have invented. It is, therefore, not necessary, in this case, any more than it was in the former case, to consider the question whether an earlier date than January 24th, 1848, can be assigned to Simpson's invention.

The foregoing views dispose of the criticisms made on Simpson's specifications of January and February, 1848, for, the invention described and claimed in his patent as issued is shown in existence, in a physical structure, in February or March, 1848, at a date earlier than anything adduced against it. Irrespective of this, as the view adopted in the decision in the former case, that Simpson meant, in his first two specifications, by the expressions "insoluble india rubber" and "gutta-percha," one and the same thing, still appears to be correct, and is not weakened, but is, if anything, strengthened, by what appears in the present case, it is plain, from an examination of the first two specifications of Simpson, that the invention claimed by him in his patent as issued is fully embodied in those specifications. Those specifications, besides saying that the metallic wire is to be first insulated with gutta-percha, say that the wire thus insulated is to be covered, that is, surrounded continuously throughout its whole length, with glass beads socketed together so as to form a close joint, and that a gutta-percha tube is to be drawn over the glass bead chain, and, of course, surrounding and covering the wire continuously throughout its whole length, such outer gutta-percha tube being "jointed, cemented and banded together so as to be both water and air-tight." They also state, that it is the outer non-conducting gutta-percha tube, "which encases the whole chain," that throws up an interminable, that is, impassable, barrier between the great volume of water outside of the tube and the interior of the tube, and thus effectually confines and controls the current of electricity passing over the telegraphic wire. They also state, that the joints in the glass chain and the elasticity of the outer gutta-percha tube make the whole sufficiently flexible to give any desired curve. They speak distinctly of using the structure to conduct electricity through water, and call it a submarine conductor of electricity, and it is plain that Simpson designed it especially for submarine use. As remarked in the decision in the former case, the specification of February 21st, 1848, "claims the combination and arrangement of the gums (that is, the interior insulating layer of gutta percha and exterior tube of gutta-percha) around the wire, as the controlling power which confines the current of electricity to the wire, and prevents its passing off, and it leaves out any claim to the glass beads in connection with the gutta-percha, whatever operation the glass beads may have as non-conductors of electricity." It is manifest, that, in the structure described in the first two specifications, the interior covering of gutta-percha and the glass beads and the outer tube of gutta-percha are intended to be compact and not loose, and that the outer tube would act to insulate the wire and produce the described result, as effectually as if it were in close contact with the wire or with the interior covering of gutta-percha. The specifications show that Simpson regarded the outer tube and the inner covering as both of them acting to insulate the wire.

As Simpson's attention was directed chiefly to making a cable for submarine use, when he had produced such a cable he had produced one which could, as the specification of his patent states, be "suspended on poles in the air," "or buried in the earth," as well as "submerged in water." Undoubtedly, if the structure of Simpson, as described and claimed by him, were described in a publication, or patented, of a date earlier than Simpson's invention, but stated to be made for underground or aerial use, and not stated to be made for submarine use, it could not be subsequently patented for submarine use. But, as Simpson was the first inventor of

such structure, he has the right, under his patent, to the exclusive use of it for all telegraphic or electric uses to which it is adapted.

All the views presented on the part of the defendant are covered by the foregoing considerations and by those set forth in the decision in the former case. It results, that nothing is shown to destroy the force of such decision or to throw such doubt upon its correctness as to deprive it of the usual weight to be accorded to such a decision on a subsequent application for a preliminary injunction.

In March, 1872, the former suit for infringement was brought on the patent against the Western Union Telegraph Company. That corporation was the most conspicuous and extensive infringer. That suit was prosecuted with all reasonable diligence by the plaintiff, and was defended with care, research and zeal, by able counsel. The bringing and pendency of that suit was sufficient notice to all other infringers, that the rights conferred by the patent were to be asserted and maintained. Nothing is presented which tends towards showing any affirmative acquiescence by the proprietors of the patent in the use by the defendant in this case of the invention covered by the patent.

The plaintiff, it appears, exercises the rights conferred by his patent, by granting licenses under it. On the 2d of January, 1879, he offered to the defendant a license under the patent on certain specified terms. If the defendant desires to take a license on reasonable terms, it ought to be allowed to do so. There are no data before the court from which it can be determined what is a proper license fee in respect to the defendant. The proper order to be now entered in this case, is, that a preliminary injunction issue to restrain the defendant from making the invention described and claimed in the patent, and also from using the said invention, except the identical wires and cables now used by it, and also from selling, transferring, lending, leasing or parting with in any manner, any wires or cables embodying said invention, or conferring upon any other person, persons or corporation, either in whole or in part, or alone or in conjunction or connection with the defendant, any use of, or right to use, any such wires or cables; that the question of the issuing of a preliminary injunction to restrain the further use of the identical gutta-percha insulated wires or cables now used by the defendant, be postponed until the coming in of the master's report of evidence to be ordered, or until such other or further order as the court may make in the premises, upon the application of either party; and that it be referred to Joseph Gutman, Junior, Esquire, a master of this court, to take proof to be offered by the plaintiff and any opposing proof by the defendant, on the question as to whether or not the license fees offered to be accepted by the plaintiff in his letter to the defendant, dated December 30th, 1878, are or are not reasonable license fees for the future use of the invention aforesaid by the defendant, and, if not, as to what other sums or rates, either greater or less, are such reasonable license fees; and, also, to take such proof as may be offered by the defendant, and any opposing proof by the plaintiff, on the question as to what, if anything, could be substituted for the gutta-percha covered wires now in use, with equally beneficial results or otherwise, and what would be the expense of such substitution and the time necessary to make the same; and that he take and report the evidence on such questions with all convenient speed, but he is not to report any opinion or decision as to such questions.

[NOTE. For other cases involving this patent, see note to Colgate v. W. U. Tel. Co., Case No. 2,995.]

Case No. 2,992.

COLGATE v. GOLD & STOCK TEL. CO.

[4 Ban. & A. 559;[1] 17 O. G. 193.]

Circuit Court, S. D. New York. Oct. 27, 1879.

ENJOINING INFRINGEMENT OF PATENT — ATTACHMENT FOR VIOLATION.

The defendant company had been enjoined against using the invention owned by the complainant, except the particular wires or cables then in use by it, and against "conferring upon any other person, persons or corporation, either in whole or in part, or alone, or in conjunction, or in connection with the defendant, any use of, or right to use any such wires or cables." Under an agreement made before the service of the injunction, the defendant company, after such service, furnished a wire containing the patented invention, such wire having been in use by the defendant long before, and at the time of the injunction. *Held*, that, upon these facts, the defendant was guilty of a violation of the injunction, and an attachment was granted against the defendant, and its president.

In equity. Bill by Clinton G. Colgate against the Gold & Stock Telegraph Company to enjoin infringement of letters patent No. 65,019, granted to George B. Simpson, May 21, 1867, for an improvement in insulating submarine cables. Complainant obtained a preliminary injunction (Case No. 2,991), and now moves for an attachment for violation of the injunction order

F. H. Betts, for complainant.

E. N. Dickerson and G. W. Soren, for defendant.

BLATCHFORD, Circuit Judge. The injunction in this case was served on Norvin Green, as president of the defendant, on the 5th of August, 1879. This was service on the defendant and on Mr. Green as its agent. The injunction was served on the solicitors for the defendant on the same day. The terms of the injunction were, that the defendant refrain from using the patented in-

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

vention, except the identical wires and cables then used by it, "and also from selling, transferring, lending, leasing or parting with, in any manner, any wires or cables embodying said invention, or conferring upon any other person, persons or corporation, either in whole or in part, or alone, or in conjunction, or in connection with the defendant, any use of, or right to use any such wires or cables."

The defendant, on the 22d of August, 1879, made an agreement with J. A. Bostwick to furnish to him a telegraph wire running under the East river, and to maintain the same in good working order, at its own proper cost and expense, for one year, for a monthly rent of $12 for the wire and instruments. This agreement is signed "Norvin Green, by J. O. Green, president's secretary." Under this agreement, the defendant furnished a gutta-percha-covered wire, being one of several wires contained in a cable which had been in use by the defendant long before, and which was in actual use by it at the time of the service of the injunction. This agreement conferred on Bostwick the right to use such gutta-percha-covered cable, and was a violation of the injunction. The fact that the defendant had before used and was using such cable is of no consequence. It could continue to use it, but it could not confer on any other person such a right to use it as was conferred by this agreement, without violating the injunction. For such violation an attachment must issue against the defendant and Norvin Green.

The wire furnished the Pioneer Tobacco Company under the agreement of September 16th, 1879, signed by Norvin Green, was not a gutta-percha-insulated wire. It is not shown that the agreement was for a gutta-percha-insulated wire.

The wire furnished the Brooklyn White Lead Company under the agreement of September 10th, 1879, signed by George B. Prescott, as vice-president of the defendant, was a gutta-percha-insulated wire. The agreement was in form like that with Bostwick. The observations before made, in regard to the case of Bostwick, apply to this case, and an attachment must issue against the defendant, and Mr. Prescott.

The agreements with J. G. Bennett and McAlden Brothers and the Export Lumber Company were before the service of the injunction. The wire furnished McAlden Brothers was not a gutta-percha-insulated wire. The wire furnished to the Export Lumber Company, though a gutta-percha-covered wire, was furnished before the service of the injunction. In the case of J. G. Bennett, I am not able to discover any violation of the injunction.

In the case of the Calvary Cemetery, the agreement being before the service of the injunction, and, in form, like that with Bostwick, I suppose the giving to the cemetery on the 23d of August, 1879, under the agreement, the use of a gutta-percha-covered cable, was a violation of the injunction, for which an attachment must issue against the defendant. The same facts exist and the same decision is made in the case of the Woodlawn Cemetery, and in the case of J. G. Bennett, No. 2.

In the case of the Ansonia Clock Company, there was no violation of the injunction, as the agreement was made and the gutta-percha cable service was commenced before the service of the injunction.

In the case of the Manhattan Chemical Company, there was a violation of the injunction, for which an attachment must issue against the defendant, for, although the agreement was made before the service of the injunction, the gutta-percha cable was furnished afterward. The above comprise, I believe, all the cases presented to my notice.

[NOTE. For other cases involving this patent, see note to Colgate v. Western Union Tel. Co., Case No. 2,995.]

Case No. 2,993.

COLGATE v. INTERNATIONAL OCEAN TEL. CO.

[17 Blatchf. 308;[1] 9 Reporter, 166; 4 Ban. & A. 609; 17 O. G. 194.]

Circuit Court, S. D. New York. Nov. 15, 1879.

ENJOINING INFRINGEMENT OF PATENT—SUBMARINE INSULATION—EXCLUSIVE RIGHTS OF DEFENDANT.

The defendant had, under an act of the legislature of Florida and an act of the congress of the United States, the exclusive right to lay and maintain a submarine telegraph cable between Florida and Cuba. In operating such cable it used an invention covered by letters patent owned by the plaintiff, granted after said acts were passed. *Held*, that, although the plaintiff could not use the invention for telegraphic purposes between Florida and Cuba, he could enjoin the defendant from using such invention for such purposes between such termini.

[Cited in Wirt v. Hicks, 46 Fed. 72.]

[In equity. Bill by Clinton G. Colgate against the International Ocean Telegraph Company to enjoin infringement of letters patent No. 65,019, granted to George B. Simpson, May 21, 1867, for an improvement in insulating submarine cables.]

Frederic H. Betts, for plaintiff.

Clarence A. Seward, for defendant.

BLATCHFORD, Circuit Judge. The motion for a preliminary injunction in this case is opposed, on special grounds not involving the construction or validity of the plaintiff's patent, or the question of infringement.

The defendant is a corporation created under the laws of the state of New York, prior to January 2d, 1866. On that day an act was passed by the legislature of the state of Florida, granting to said corporation "the sole and exclusive right and privilege," for 21

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

years from the date of the act, "of landing a submarine telegraphic cable or cables, on the shore, sea coast, islands, keys, reefs, or sand banks lying within the limits and jurisdiction of the state of Florida, and of connecting, by means of said submarine telegraphic cable or cables, the shore and sea coast of the state aforesaid with the island of Cuba." The same act gave to the corporation power to connect the terminus of such submarine cable or cables, on the shore, by a land line, with the most convenient land telegraphic line, and, for that purpose, power to erect, maintain and operate telegraphic lines through the state of Florida, and across the islands, keys, sand banks and reefs belonging to said state, and over which said state has control and jurisdiction.

On the 5th of May, 1866, an act was passed by the congress of the United States (14 Stat. 44) granting to said corporation the sole privilege, for a period of 14 years from that day, "to lay, construct, land, maintain and operate, telegraphic or magnetic lines or cables, in and over the waters, reefs, islands, shores and lands, over which the United States have jurisdiction, from the shores of the state of Florida, in the said United States, to the island of Cuba and the Bahamas, either or both, and other West India islands."

The corporation has, also, concessions from the government of Spain in regard to the maintenance, in Cuba, of a submarine cable landed there.

The bill alleges, that the defendant, "at the city of New York and elsewhere, has (particularly in the state of Florida, and the waters thereof, where said defendant uses and operates a telegraph cable extending to the island of Cuba, and also on the lines of telegraph connecting said cable with New York City and other points), within the said southern district of New York and elsewhere," without license, ever since the date of the plaintiff's patent, made, used and sold the patented invention in insulating submarine cables or telegraphic wires, used in connection with the telegraphic lines of the defendant, and in insulating wires and other conductors of electricity, used in connection with electric or galvanic batteries and telegraphic instruments.

The defendant has been using, for telegraphic communication between Florida and Cuba, cables containing wires insulated by gutta percha, within the claim of the plaintiff's patent, and is now using such cables. The defendant contends, that, because of the exclusive grants to it from the state of Florida and the congress of the United States, which were made before May 21st, 1867, the date of the issuing of the plaintiff's patent, the plaintiff has no right to use or operate his patented invention for telegraphic purposes between the shores of Florida and the island of Cuba, and, therefore, cannot enjoin the defendant from using such invention for such purposes between such termini. The proposition on the part of the defendant is, that, by the grants to it of the exclusive right, for a defined period of time, to lay telegraphic submarine cables, and maintain thereby telegraphic communication, between the state of Florida and the island of Cuba, it acquired the right to use without molestation all subsequently patented inventions in the construction of such cables, because the patentees of such inventions cannot lay such cables. In another form, it is contended, that, as the plaintiff has no right to use his patented invention in the place where the defendant is using it, he can recover no profits or damages for its use in that place, and, therefore, has no right in that place which can be protected by injunction.

The grants to the defendant are grants to lay a cable, not to lay a cable of a particular construction, nor to lay any cable the use of which would violate a patent either existing or subsequently granted. Neither the government nor an agent of the government, nor a private individual, whether claiming to act under the authority of the government or otherwise, can use a patented improvement without the license of the patentee. U. S. v. Burns, 12 Wall. [79 U. S.] 246; Cammeyer v. Newton, 94 U. S. 225, 235. [See Campbell v. James, Case No. 2,361.][2] The power to prevent, by injunction, the violation of a right secured by a patent, is conferred by section 4921 of the Revised Statutes, irrespective of any right, in the given suit, to recover profits or damages. The right of the plaintiff to use his patented invention where the defendant is using it, is exclusive as against the defendant, although the right of the defendant to lay and maintain a submarine telegraphic cable between Florida and Cuba may be exclusive as against the plaintiff. Such right of the plaintiff is a right secured by the patent. The distinction referred to is one which exists in all cases, under every patent. A defendant has an exclusive right, as against a patentee, to erect in his own house such structures as he pleases. The patentee cannot, against the will of the defendant or without his assent, erect in the house of the defendant any structure. Yet this does not give to the defendant the right to erect in his house a structure embodying the patented invention, or give him immunity from being restrained by injunction, at the suit of the patentee, from continuing the use of the patented invention in such structure.

The same order will be made in this case which was made in the case against the Western Union Telegraph Company [Case No. 2,995].

[NOTE. - For other cases involving this patent, see note to Colgate v. W. U. Tel. Co., Case No. 2,995.]

COLGATE (KIMBRO v.). See Case No. 7,-778.

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[2] [From 9 Reporter, 166.]

Case No. 2,993a.

COLGATE v. LAW TEL. CO.

[5 Ban. & A. 437.][1]

Circuit Court, S. D. New York. May, 1880.

PATENTS—EQUIVALENTS—INJUNCTION.

Where, upon a motion for a preliminary injunction, it appeared that the substance used by the defendant was not known, at the date of the complainant's patent, to possess properties rendering it suitable for the same purposes as the material used by complainant in his patented combination: *Held*, that the complainant's patent did not cover such substance as an equivalent, its qualities for those purposes having become known after the date of such patent, and the injunction was, therefore, refused.

[This was a bill in equity by Clinton G. Colgate, heard on motion for a preliminary injunction.] The claim of the complainant's patent [No. 65,019], issued to George B. Simpson, May 21st, 1867, was for "the combination of gutta-percha and metallic wire in such form as to encase a wire or wires, or other conductors of electricity, within the non-conducting substance gutta-percha, making a 'submarine telegraph cable,' at once flexible and convenient, which may be suspended on poles in the air, submerged in water, or buried in the earth, to any extent, for atmospheric or submarine telegraphic communication, and for other electric, galvanic and magnetic uses, as hereinbefore described." "Kerite," the material used by the defendant, is a substance composed of vegetable and mineral hydro-carbons (comprising cotton-seed oils, tar, etc.), with sometimes a slight admixture of pulverized clay or talc, combined with India rubber, and vulcanized. It appeared from the evidence submitted on the motion that kerite was not invented with a view to being used for insulating purposes, and that it was not known, until some time after its invention and after the date of the Simpson patent, that it possessed properties which made it a good material for insulating telegraph cables. It was disputed that kerite was an equivalent of the gutta-percha of the Simpson patent.

Betts, Atterbury & Betts, for complainant.
Childs & Hull and S. D. Cozzens, for defendant.

BLATCHFORD, Circuit Judge. So far as appears from the papers on this motion, it was not known at the date of the plaintiff's patent that the substance used by the defendant, and called "kerite," was such a non-conductor of electricity that it could be used in combination with a conductor of electricity in the manner claimed in the plaintiff's patent, to make such a cable as is claimed in the plaintiff's patent. Nor does it appear that qualities were then known as existing in that substance which would necessarily lead to the conclusion that it could be so used. Even if the things so unknown had then been known, and even if such substance had before been so used, the plaintiff's patent would still be valid. This being so, it would seem to follow that, under the conditions above stated, the plaintiff's patent cannot be construed to cover such substance, in regard to which such things became known after the date of the plaintiff's patent. It may be that a different case may be shown on other papers, or for final hearing, but, as at present advised, I do not see that the motion for a preliminary injunction, based on the use by the defendant of the aforesaid substance, can be granted.

[NOTE. For other cases involving this patent, see note to Colgate v. W. U. Tel. Co., Case No. 2,995.]

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

Case No. 2,994.

COLGATE v. WESTERN UNION TEL. CO.

[4 Ban. & A. 562;[1] 17 O. G. 194.]

Circuit Court, S. D. New York. Oct. 27, 1879.

VIOLATION OF INJUNCTION RESTRAINING INFRINGEMENT OF PATENT.

The defendant company, having been restrained by injunction from using the plaintiff's patented invention, except the identical wires or cables then in use by it, and also "from selling, transferring, lending, leasing or parting with in any manner, any wires or cables embodying said invention, or conferring upon any other person, persons or corporation, either in whole or in part, or alone, or in conjunction, or in connection with the defendant, any use of, or right to use any such wires or cables," and having, subsequent to the service of the injunction, entered into an agreement giving to a railroad company the use of cables embodying the patented invention: *Held*, that the same amounted to a violation of the injunction.

[In equity. Bill by Clinton G. Colgate against the Western Union Telegraph Company to restrain infringement of letters patent No. 65,019, granted to George B. Simpson, May 21, 1867, for an improvement in insulating submarine cables. There was a decree for complainant (Case No. 2,995), and a motion is now made for an attachment for violation of the injunction therein granted.]

Betts, Atterbury & Betts, for complainant.
Porter, Lowrey, Soren & Stone, for defendant.

BLATCHFORD, Circuit Judge. By the injunction, the defendant and its agents were restrained from using the invention, except the identical wires or cables then used by the defendant, "and also from selling, transferring, lending, leasing or parting with, in any manner, any wires or cables embodying said invention, or conferring upon any other person, persons, or corporation, either in whole or in part, or alone, or in conjunction, or in connection with the defendant, any use of, or right to use any such wires or cables."

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

The injunction was served on Norvin Green, the president of the defendant, on the 17th of January, 1879.

The contract of March 8th, 1879, made by the defendant, by Mr. Green, as its president, with the New York, Lake Erie and Western Railroad Company, contains an agreement by the defendant, to give to the railroad company, free of charge to it, "the exclusive use and enjoyment of three cable-conductors across the Hudson river, with all necessary connections into the railroad company's offices in Jersey City and New York," and also to "maintain the said cable-conductors and connections without cost or expense to the railroad company." This is not an agreement to furnish gutta-percha-covered wires. It would have been fulfilled by furnishing any cable conductors and connections. Mr. Green, however, states in his affidavit that the said agreement refers to three cables insulated with gutta-percha, which had been used by the Erie Railway Company and its receiver, the predecessors of the new railroad company, under a like arrangement with each of them. The cable conductors actually furnished under the agreement with the new company have been the said three cables insulated with gutta-percha.

Under the injunction, the right of the defendant to use for itself the identical wires or cables it was using for its own proper business is one thing, and the right to confer on any other person or corporation the right to use any wires or cables embodying the patented invention is another thing. The latter is forbidden. Yet the defendant and Mr. Green have done it by the agreement in question, in connection with the action taken under it, for thereby the railroad company is using, under a grant from the defendant, infringing cables. This is the very thing the injunction was designed to prevent. The intention was that the defendant should not establish any new relation with any new person or corporation in respect to gutta-percha-covered wires, by any new arrangement. If the existing contract applied to the new corporation, it did so without any new arrangement. If a new agreement was necessary to bring in the new party and confer on it the right to use the cables, the new agreement was a violation of the injunction. Mr. Green states, in his affidavit, that the defendant claimed that the existing arrangement applied to the new company, and it must be inferred that the new company did not assent to this view, for Mr. Green further states that the new agreement was executed, so far as the defendant was concerned, as a recognition by the new company of its existing liability, and of its willingness to continue the stipulations of the existing contract. An attachment must be issued against the defendant, and Mr. Green, in respect of this violation of the injunction. The granting of licenses by the Gold and Stock Telegraph Company, through Mr. Green and Mr. Prescott, as its officers and agents, is no violation of an injunction against the defendant and its agents.

[NOTE. For other cases involving this patent, see note to Colgate v. W. U. Tel. Co., Case No. 2,995.]

Case No. 2,995.

COLGATE v. WESTERN UNION TEL. CO.

[15 Blatchf. 365;[1] 4 Ban. & A. 36; 14 O. G. 943; Merw. Pat. Inv. 359.]

Circuit Court, S. D. New York. Nov. 26, 1878.

PATENTS—"SUBMARINE INSULATION"—CONSTRUCTION—EXPLANATION OF INVENTION—ABANDONMENT—WITHDRAWAL OF APPLICATION—VALIDITY.

1. The letters patent [No. 65,019] granted to George B. Simpson, May 21st, 1867, for an "improvement in insulating submarine cables," are valid.

[Cited in Cary v. Wolff, 24 Fed. 141.]

2. The invention defined.

3. The claim of said patent, namely, "the combination of gutta percha and metallic wire, in such form as to encase a wire or wires, or other conductors of electricity, within the non-conducting substance, gutta percha, making a 'submarine telegraph cable,' at once flexible and convenient, which may be suspended on poles in the air, submerged in water, or buried in the earth, to any extent, for atmospheric and submarine telegraphic communicatian, and for other electric, galvanic and magnetic uses, as hereinbefore described," construed.

[Distinguished in Ansonia Brass & Copper Co. v. Electrical Supply Co., 32 Fed. 86; Busell Trimmer Co. v. Stevens, 137 U. S. 434, 11 Sup. Ct. 154.]

4. The history of Simpson's efforts to obtain a patent for his invention, from January, 1848, until May, 1867, given.

5. His various applications were one continuous application, and he did not abandon his invention.

6. His receiving back from the patent office, after his application was rejected, $20 paid by him as a fee, *held* not to operate as a withdrawal of his application.

[In equity. Bill by Clinton G. Colgate against the Western Union Telegraph Company to enjoin infringement of letters patent No. 65,019].

William D. Shipman and Frederic H. Betts, for plaintiff.

George Gifford, George W. Soren, and William C. Witter, for defendants.

BLATCHFORD, Circuit Judge. This suit is founded on letters patent granted to George B. Simpson, as inventor, May 21st, 1867, for an "improvement in insulating submarine cables." The specification states, that Simpson has invented "a new and useful improvement in electrical conductors for telegraphic purposes." It says: "To enable others to

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

make and use my 'submarine telegraph cable,' I will describe its manufacture thus: I dissolve gutta percha with chloroform, or any other known solvent; I soften gutta percha in boiling water, steam or dry heat; I combine gutta percha with metallic wire, by means of a brush, or by immersing the wire in the solution, when in the solvent state; I combine gutta percha and metallic wire with the fingers, or any machine which may facilitate the operation and execute the work more perfectly, by pressing the gum upon and around the wire, or by spinning it only, when in a plastic state, into thin and ribbon-like strips, and twining it on then tightly and continuously around the wire, thus combining the gutta percha and metallic wire, and insulating the wire to any extent. By this mode of combination, I cover the wire on all sides with a uniform coating of gutta percha of any desired thickness, for the purpose of securing a conductor of electricity within the non-conducting substance, gutta percha, which combination forms a 'submarine telegraph cable,' flexible and convenient, which may be suspended on poles in the air, submerged in water, or buried in the earth. This mode of combination and insulation confines the electric current to the wire, wires or other conductors of electricity, shielding it and them from contact with any and all external electric, galvanic or magnetic influences whatsoever, thus attaining a great triumph in art, namely, the absolute control of electric and galvanic currents, for atmospheric and submarine telegraphic communication, and for other electric, galvanic and magnetic uses. (See drawings.)" The claim is in these words: "The combination of gutta percha and metallic wire, in such form as to encase a wire or wires, or other conductors of electricity, within the non-conducting substance, gutta percha, making a 'submarine telegraph cable,' at once flexible and convenient, which may be suspended on poles in the air, submerged in water, or buried in the earth, to any extent, for atmospheric and submarine telegraph communication, and for other electric, galvanic and magnetic uses, as hereinbefore described."

It is plain, from the language of this specification, that the point of the invention is, to make use of the fact that gutta percha is a non-conductor of electricity, to insulate, by means of gutta percha, a metallic wire which is a conductor of electricity, and thus prevent the escape of electricity from the metallic wire, when it is suspended in the air, or submerged in water, or buried in the earth, when, but for such insulation, the electricity would escape from the metallic wire. The mode of insulation described is to combine the gutta percha and the metallic wire in such manner that the wire will be covered on all sides with a uniform coating of gutta percha. Adequate means of softening the gum and putting it into such condition as to permit it to be so combined with the wire are set forth; and it is declared that such mode of combination and insulation confines the electric current to the wire and shields the wire from contact with all external electric influences. It is manifest, that the gist of the invention is the discovery of the fact that gutta percha is a non-conductor of electricity, and the application of that fact to practical use by combining gutta percha, by the means specified, with a metallic wire, in the manner described, and then using the cable formed by such combination, for the purpose of conducting electricity along the enclosed wire. The point of the invention is not the mere mechanical covering of a metallic wire with gutta percha, as a mechanical protection from abrasion or injury from without, or for any purpose aside from a use of the covered wire as a conductor of electricity. The claim is substantially a claim to the use, as a conductor of electricity, of a metallic wire insulated by gutta percha by the means and in the manner described in the specification. The claim is valid, even though a metallic wire covered with gutta percha existed before the plaintiff's invention, if it was not known that gutta percha was a non-conductor of electricity and could be used to insulate the wire. The use by the patentee of the wire so covered to conduct electricity was not a double use of the covered wire, even though the covered wire existed before, nor was it a use of it for a purpose at all analogous to any use before made of it, if such prior use of it was not to conduct electricity along the wire, and if it was not before known that gutta percha was a non-conductor of electricity and could be used to insulate a metallic wire used as a conductor of electricity.

The answer admits the use by the defendant of submarine cables in the insulation of which gutta percha was employed, but does not admit that it thereby used the invention patented to Simpson. It also sets up, that the alleged invention was before known and used, that it had been, for more than two years before Simpson's application for a patent therefor, in public use in the United States with the knowledge, consent and allowance of Simpson; that, if Simpson was the first inventor of the alleged invention, he wilfully and without excuse and for many years delayed and forbore to apply for a patent for it, and abandoned it and his right to have a patent for it, and dedicated it to the public, and, meantime, it became known to the public and the defendant from other sources; that the thing claimed by the patent is not patentable subject-matter, and, therefore, the patent is null and void; and that the patent is void for the reason that the alleged invention consists in applying to telegraph wires, or in using for telegraphic purposes, what before had been applied to other articles or uses for other purposes,

and, therefore, the invention is not patentable subject-matter. The fact of infringement, by the use by the defendant of what is claimed in the claim of the patent as the invention of Simpson, is satisfactorily proved and was not contested on the hearing.

It is contended, for the defendant, that the patent is broadly for the combination of gutta percha with a metallic wire, so that the wire is covered and encased by the gutta percha, and is not for the use of the combination or for a method of using it, and is not for a discovery or for an invention founded on or involving a discovery; that, whenever wire is found covered by gutta percha in such manner that the gutta percha is capable of confining electricity to the wire, an article is found which is included in the patent; that whoever so covers wire is as much an infringer of the patent as he is who uses it for telegraphic purposes; and that, if the wire be so covered, whoever uses it for a band for a cotton bale or for a belting for machinery, infringes the patent. The construction hereinbefore given to the specification and claim shows that these views on the part of the defendant are not sound.

It is further contended, for the defendant, that, as it was known that resins and gums, as a genus of articles, were electric insulators, it did not require or involve any invention, when gutta percha became known, to cover wire with it, to insulate the wire. It is very easy for wisdom after an event to say that it was a natural conclusion that gutta percha would be an insulator, from the known insulating properties of gums and resins generally. But, the evidence in this case shows, that, although gutta percha was known, and the means of softening and manipulating it were known, many experienced men, engaged in the business of telegraphy, groped about, experimenting first with one device and then with another, in fruitless effort to secure a practical means of crossing water courses with lines of telegraph wires, until it was at length found out that gutta percha was the needed insulator. It is also shown that Faraday, the distinguished scientist, announced to the world as a new thing the fact that he had discovered that gutta percha was a good electrical insulator. The position taken is, therefore, untenable.

Equally unsound is the view urged on the part of the defendant, that the use of gutta percha instead of India rubber, to insulate a wire, was a mere change of material, and an obvious substitution, and, therefore, not patentable. The cases of the door knob, and the button, and the wagon reach, have no application to a case like the present. Those who were seeking a practically perfect insulator had India rubber and found it not to be what was needed. The present case is not merely one of producing a better or cheaper or more durable article to attain the same result, nor is it one falling within the principle, that a change involving only mechanical skill is not patentable.

Nothing that has been put in evidence by the defendant carries back the publication of the discovery of the insulating properties of gutta percha to a date earlier than the 1st of March, 1848. That is the date of the publication in England of the discovery of such properties by Faraday. It is entirely clear, that Simpson had, prior to that time, made a like discovery. On the 24th of January, 1848, he made oath to a specification for a patent for "a new and improved mode of conducting electricity through water and beneath the earth," and such specification, with the oath and a drawing and a petition for a patent, but without any fee or model, were filed in the patent office on the 31st of January, 1848. In that specification Simpson says: "The nature of my invention consists in insulating the metallic wire, covering it with a glass bead chain, socketed and closely jointed together; also, covering the glass chain with an insoluble India rubber (or gutta percha) tube, jointed, cemented, and banded together, thus forming a submarine conductor of electricity, as hereinafter described. To enable others to make and use my invention, I will proceed to describe the combination, its construction and operation. The metallic wire (A in the drawing) is first insulated with insoluble India rubber or gutta percha; the insulated wire is then covered with glass beads (B), socketed together, so as to form a close joint, every *joint* (*C*) *bead* having a groove around the middle sufficient to admit of a band or fastening to prevent displacement on the wire; *an insoluble India rubber tube* (*D*) is then drawn over the glass bead chain, jointed, cemented and banded together (E), so as to be both *water and air tight*. The object of this arrangement or combination is, to guard against and prevent the water from coming in direct contact with the telegraphic wire, thus securing the entire control of this mysterious agent. This combination secures the object so much desired. By insulating the wire with the gums, prevents the water from coming in direct contact with it; by covering the insulated wire with *glass beads* closely jointed, confines the electricity to the wire; and if, by the operation of *natura laws*, chemical action produces moisture inside the *India rubber tube*, the space between the joints of the glass chain being comparatively nominal, the amount of water thus produced and occupying said space would amount to little more than moisture, and, even if this moisture were to come in direct contact with other conductors of electricity, it would require a vast amount of surface thus exposed, to destroy the entire current; but *the insoluble India rubber tube* which encases the whole chain, being *in and of itself a powerful non-conductor*, throws up an interminable barrier between the great vol-

ume of water outside and the comparative moisture inside the tube, thus effectually confining and controlling the great current of electricity passing over the telegraphic wire. The joints in the glass chain, and the elasticity of *the India rubber tube,* when complete, (D), *renders it* sufficiently flexible to give any desired curve. *Now,* what I claim by my invention and desire to secure by letters patent, is the combination and arrangement of *the gums and glass* around the telegraphic wire, in such form as to secure the controlling power of the mysterious agent 'electricity,' as hereinbefore described."

On the 21st of February, 1848, Simpson signed another specification, which he sent to the patent office in a letter bearing that date, which letter says: "Owing to the haste in which I prepared my first specifications, they were not as explicit as they ought to have been. I have, therefore, prepared another set, supplying the former deficiency and embracing the whole principles of my plan for which I have asked letters patent." This specification, like the first one, declares the invention to be "a new and improved mode of conducting electricity through water and beneath the earth." The expressions in the first specification which are varied in the second are put in italics in the above copy; and the language found in the second specification which is not found in the first is put in italics in the following copy of the second. The second specification says: "The nature of my invention consists in insulating the metallic wire, covering it with a glass bead chain socketed and closely jointed together, also covering the glass chain with an insoluble India rubber or gutta percha tube, jointed, cemented and banded together, thus forming a submarine conductor of electricity, as hereinafter described. To enable others to make and use my invention, I will proceed to describe the combination, its construction and operation. The metallic wire (*a* in the drawing) is first insulated with insoluble India rubber or gutta percha, the insulated wire is then covered with glass beads (*b*) socketed together so as to form a close joint, every *joint bead* (*c*) having a groove around the middle sufficient to admit of a band or fastening to prevent displacement on the wire; *an insoluble India rubber or gutta percha tube* (*d*) is then drawn over the glass bead chain, jointed, cemented and banded together, (*e*), so as to be both *air and water tight. In order that the submarine conductor of electricity may be applied to deep waters, I propose to attach around the conductor, at certain distances from each other, globular rings containing any required amount of air, so that the whole structure may be buoyed on the surface of the water or sunk to any desirable depth. Said globular rings are made of India rubber, covered with the gum percha, and fastened on the conductor with the same kind of gum.* The object of this arrangement or combination is, to guard against and prevent the water from coming in direct contact with the telegraphic wire, thus securing the entire control of this mysterious agent. This combination secures the object so much desired. By insulating the wire with the gums, prevents the water from coming in direct contact with it; by covering the insulated wire with *the glass beads* closely jointed, confines the electricity to the wire; and if, by the operation of *the laws of nature,* chemical action produces moisture inside the *India rubber or gutta percha tube,* the space between the joints of the glass chain being comparatively nominal, the amount of water thus produced and occupying said space would amount to little more than moisture, and, even if this moisture were to come into direct contact with other conductors of electricity, it would require a vast amount of surface, thus exposed, to destroy the entire current; but, *the insoluble India rubber or gutta percha tube,* which encases the whole chain, being a *non-conductor,* throws up an interminable barrier between the great volume of water outside and the comparative moisture inside the tube, thus effectually confining and controlling the great current of electricity passing over the telegraphic wire. The joints in the glass chain and the elasticity of *the India rubber or gutta percha tube,* when complete (*d*), *are* sufficiently flexible to give any desired curve. What I claim as my invention and desire to secure by letters patent is, the combination and arrangement of *the gums* around the telegraphic wire, in such form as to secure the controlling power of the mysterious agent, electricity, as hereinbefore described."

A careful examination of the first specification leads to the conclusion, that in it Simpson uses the words "insoluble India rubber" to indicate one and the same article that he indicates by the word "gutta percha;" that he uses the two forms of expression as synonymous and as meaning the same thing; that he does not, by "insoluble India rubber," mean India rubber, as that substance was then recognized, made insoluble or in the condition of being insoluble, nor in any condition; but that the whole expression, "insoluble India rubber or gutta percha," means, "gutta percha, otherwise called by me insoluble India rubber." Thus, in the first specification, he calls the outside tube, in one place, "an insoluble India rubber or gutta percha tube," and in two other places an "insoluble India rubber tube," and in two other places an "India rubber tube." He speaks, also, of first insulating the wire with "insoluble India rubber or gutta percha," before covering it, thus insulated, with glass beads. Therefore, he clearly contemplated putting gutta percha next to the wire, in such manner as to insulate the wire, and he also contemplated making of gutta percha the outside tube which was to go over the glass beads. He

speaks of such tube, calling it an "insoluble India rubber tube," as "a powerful non-conductor." He, therefore, clearly means, that gutta percha is a non-conductor, for it is the tube which is to be a non-conductor, and he speaks of the tube as being made of gutta percha as well as the insulator next to the wire. It is in evidence that these specifications were both of them written by Simpson himself. He was not an educated man, accustomed to the use of precision in language. His spelling is defective and his modes of expression rude. The expression in the claim of the first specification, "the combination of the gums and glass around the telegraphic wire," is criticised, as showing that he meant, by "insoluble India rubber," one gum, and by "gutta percha" another and distinct gum. But the expression is satisfied by a more natural meaning. He says that he puts gutta percha next to the wire, then glass beads next outside, and then outside of the glass beads a gutta percha tube. Here are two coverings of gutta percha, two envelopes made of that gum, which two, when spoken of collectively, he designates as gums; and he speaks of the whole thing, in the claim, as "the combination and arrangement of the gums and glass around the telegraphic wire." There is glass between two layers of gum, and these two layers of gum he calls "gums." So, too, the expression, "insulating the wire with the gums," is criticised, as showing that he intended two gums. But he speaks of the wire as insulated by the gutta percha before the glass beads are put on; and, clearly, the insulation thus spoken of is by the one covering of gutta percha. There would be the use of but one gum to insulate, even if that gum were not gutta percha.

But much light is shed on the meaning of Simpson by the second specification, which he sent to the patent office as being more "explicit" than the first one, and as supplying the "former deficiency," and as "embracing the whole principle" of his plan for which he had asked a patent. In the second specification the word "gutta percha" is used in describing the outside tube, in every place where the tube is mentioned. In three places it is spoken of as an "insoluble India rubber or gutta percha tube," and in two places as an "India rubber or gutta percha tube." In two places where the words in the second specification are "insoluble India rubber or gutta percha tube," the corresponding words in the first specification are "insoluble India rubber tube," in two places where the words in the second specification are "India rubber or gutta percha tube," the corresponding words in the first specification are "India rubber tube," and in the fifth place the expression is the same in both specifications, namely, "insoluble India rubber or gutta percha tube." The insulation spoken of as taking place before the glass beads are put on is spoken of, in both specifications, as being made by "insoluble India rubber or gutta percha." The globular rings filled with air, to buoy the structure, a feature not in the first specification, are described in the second specification as "made of India rubber" and "covered with the gum percha," thus distinctly showing that Simpson did not, by "insoluble India rubber," mean "India rubber," and that he regarded gutta percha as a distinct article from India rubber. A further very marked change in the second specification from the first is, that the claim in the second is "the combination and arrangement of the gums around the metallic wire, in such form as to secure the controlling power of the mysterious agent 'electricity,' as hereinbefore described," instead of, as in the first, "the combination and arrangement of the gums and glass around the telegraphic wire, in such form as to secure the controlling power of the mysterious agent 'electricity,' as hereinbefore described." The second specification, like the first, speaks of gutta percha as a non-conductor of electricity, but it claims the combination and arrangement of the gums, (that is, the interior insulating layer of gutta percha and the exterior tube of gutta percha,) around the wire, as the controlling power which confines the current of electricity to the wire and prevents its passing off, and it leaves out any claim to the glass beads in connection with the gutta percha, whatever operation the glass beads may have, as non-conductors of electricity.

It is shown, by the testimony of Mr. Barr, one of the two persons who signed their names as witnesses to both of these two specifications, that he knew Simpson at Cincinnati in the years 1846 and 1847; that Simpson experimented first with India rubber, as an insulating covering for wire, and found that it was not a perfect insulator; and that he then experimented with and adopted gutta percha. There is, also, evidence that, as early as the 10th of January, 1848, Simpson was making enquiry as to gutta percha, and receiving information in regard to it from Horace H. Day, who was acquainted with it and with some of its properties. The earliest date at which any other person than Simpson is shown to have announced in the United States the insulating and nonconducting property of gutta percha, is the 10th day of February, 1848, on which day Mr. French, the president of the Magnetic Telegraph Company, which had a line of telegraph between New York and Washington, stated, in a letter written by him from Washington to Mr. Clark, the secretary of the company, at New York, that he had just made an insulator of gutta percha, in a mould made for a glass insulator, as an experiment, and that it was a non-conductor. It also appears, that, on the same day, Horace H. Day, a dealer in gutta percha at that time, writes of it as a "new species of India rubber." In February or March, 1848, Simpson is found in Balti-

more, exhibiting to Professor Rogers, a gentleman extensively connected with telegraphy, a piece of wire covered with gutta percha, which he represented as intended to be used under water at draw-bridges in rivers, and it was then and there tested in water and found to be a good insulator. During the year 1848, Simpson is found in New York and in Baltimore endeavoring to attract attention to his invention. On the 6th of December, 1848, he made an agreement in writing with Horace H. Day, whereby he was enabled to prosecute the application for his patent. Up to that time he had not paid any fee at the patent office, or filed any model. The agreement in question states, that "Simpson did, in the winter of 1847 and '48, and as early as the month of November, '47, make invention of covering wires for telegraph purposes with gutta percha, and also with gutta percha and chain of glass, and with still an additional covering of rubber, and that he is desirous of taking out a patent for the same, or any portion of it which is patentable, and that he has not the means to take out a patent," and then Simpson "agrees to convey to Horace H. Day, and make over to him, one-half of all the right, title and interest which may result from the patent," "on condition of his paying the fees for patent office, and preparing model and papers," with this clause: "If no patent is granted, I promise to pay the twenty received back from the office to Day." In pursuance of this agreement, Simpson, on the 28th of December, 1848, made oath, at Baltimore, to a new specification, which, with a new petition for a patent, and a drawing and a model and $30 fee, were received at the patent office on the 2d of April, 1849. The office required other drawings and specimens, and suggested amendments to the specification, which were supplied on the 16th of June, 1849. The specification, as completed, states the invention to be "a new and improved mode of insulating electro-magnetic telegraph wire," and proceeds thus: "The nature of my invention is shielding the wire from contact with any or all conducting matter, by covering it with India rubber, glass beads and gutta percha, either together or separate. By this mode the covering, and also the wire, remain flexible, and can be conveniently and safely laid in the bed of rivers, or be buried in the earth, or be elevated on poles in the air, without liability to come in contact with water or other matter known as conductors of galvanic electricity. To enable others skilled in the arts to make and use my invention, I will describe it thus: The gutta percha must be softened by any of the well known processes, and, when in a malleable or plastic state, I spread it in any desired thickness around the wire. This operation, when well and carefully done, is sufficient of itself, without another coating, to insulate the wire, and, for all ordinary practical purposes, may be used without any other preparation. For further security and to guard against rough usage, I also cover the wire with a coating of India rubber in a plastic state, or with the well known metallic rubber in a plastic state, and, when the rubber is dry, the whole is to be covered with a series of glass beads, of convenient length and thickness. Each bead is perforated, so as to fit closely to the rubber, and fitted close to each other by a socket or knuckle joint, produced by having one end of the bead convex, while the opposite end is concave, and so placed over the rubber that the convex end of one bead shall fit into the concave end of the next adjoining bead. Over the beads I place a coat of gutta percha in a plastic state, and the whole thus forms a flexible shield, that renders the wire secure against all external influence from water or other conductors of electricity. What I claim as my invention and desire to secure by letters patent is, the application of gutta percha as a covering or shield for wire, to insulate it for electro-magnetic telegraphs, and also the application of India rubber, glass beads and gutta percha together, in the manner and for the purpose hereinbefore described. I do not claim the application of glass alone as a covering to insulate electro-magnetic wires, that having been in use before my discovery." On the 7th of September, 1849, the patent office rejected Simpson's application, by the following letter to him: "Upon examination of your application for letters patent for a mode of insulating telegraph wires, it is found that the invention is not new. You are referred to Messrs. Amos Kendall, Alfred Vail, Samuel F. B. Morse and others connected with the electro-magnetic telegraph, for information upon this subject. This method of insulating was claimed by some one of the above persons, and known at this office several years since. Irrespective of this fact, it is doubtful if the use of glass in this way could be considered a new and patentable invention or discovery." Simpson replied to this letter on the 15th of September, but his reply is missing. On the 19th of September the patent office wrote to him thus: "In reply to yours of the 15th inst., I have to state that it is not remembered exactly when wire covered with gutta percha was deposited in this office. It was left here by Alfred Vail, then of Washington, to whom you are referred for information. You may be able to reach him through Prof. Morse, of New York, or Hon. Amos Kendall, of Washington. The office does not consider that the form of your glass insulators presents any patentable novelty." Simpson replied to this letter on the 20th of September, but his reply is not produced. On the 25th of September, the patent office addressed him thus: "In reply to yours of the 20th inst., I will state that it is not known when Mr. Vail exhibited his specimen of wire covered with gutta percha to this of-

fice. He filed no papers at the time, but merely showed the article as a specimen of workmanship. There have been two applications for letters patent prior to yours, for covering wire with gutta percha, rejected upon the ground that the insulating property of gutta percha being known, its use to protect wires, &c., was not a patentable invention, in view of the fact that various other insulating materials had been employed for the same purpose." On the 27th of September, Simpson wrote to the patent office as follows: "Your letter of the 25th inst. came to hand last evening. As my discovery dates back to the 23d of November, 1847, I desire to ascertain positively whether the two applications referred to in your letter were filed prior to that date; also, if Mr. Vail's specimen was exhibited before or after that date; also, when and where the first application of gutta percha to telegraph wires as an insulator was made and exhibited." To this letter the patent office replied, on the 29th of September, as follows: "In reply to your letter of the 27th inst., I have to state that the application of James Reynolds, of New York, for covering wires with gutta percha, was filed in this office June 9th, 1848, and that, at present, no earlier definite information can be given upon this subject. The pressure of business upon this office is such that the investigation you desire cannot consistently be made." To this letter Simpson replied September 30th, but his reply is not furnished. On the 3d of October, the patent office wrote to him as follows: "I have to acknowledge the receipt of your letter of the 30th ult. Your application has received all the attention to which it is entitled, and you have the alternative of withdrawal or appeal from the decision of this office. In reference to the use of glass beads for insulation of telegraphic wires, I will remark that it has been found, since the last communication addressed to you, that the same invention was claimed under an application filed in this office by Alex Jones, of New York, on the 20th of February, 1847."

The specification of the application so rejected, made prominent and claimed "the application of gutta percha as a covering or shield for wire, to insulate it for electro-magnetic telegraphs," and stated that the wire would be sufficiently insulated if well and carefully covered around with gutta percha put on in a plastic state, and that the object was to shield the wire from contact with conducting matter. This is the same invention described in his first specification. The two prior applications for covering wire with gutta percha, referred to in the patent office letter of September 25th, were that of John J. Craven, filed May 12th, 1848, and that of James Reynolds, filed June 9th, 1848. There is no evidence that any one of the persons named in the patent office letter of September 7th had any knowledge of the insulating properties of gutta percha at an earlier date than January 31st, 1848, otherwise than as such knowledge may have come to them from Simpson, nor is there any evidence that a specimen of wire covered with gutta percha was deposited in, or exhibited to, the patent office, by Mr. Vail, or any other person, before January 31st, 1848. Simpson gave to the office the date of November 23d, 1847, as the date of his invention of applying gutta percha to a telegraph wire as an insulator. His application was rejected on the ground that he was not the first to make such invention. Yet he was told by the patent office that the pressure of business in it was so great that it could not investigate and inform him whether the things it referred to as anticipating him, were in fact before the date he gave, or when the invention, if made before he made it, was made, and that his application had received all the attention to which it was entitled, and that he could either withdraw it or appeal from the decision of the office. He conducted his application himself and not through an agent. During the year 1850, Simpson corresponded with two different patent solicitors in regard to his application, and evinced, by his letters, an intention to prosecute his application. On the 13th of January, 1851, he wrote to the patent office thus: "Please pay to the order of George B. Simpson, claimant for insulation of telegraph wire, twenty dollars balance of patent fee to be refunded on rejection of claim." The $20 was refunded by the patent office on the 21st of January, 1851. The application for the patent was not otherwise withdrawn. He did not make any further communication to the patent office until November, 1858, nor did he renew his application for a patent until the 24th of December, 1858. In May, 1851, he went to Missouri, and remained there until the spring of 1852. He then went over the plains to Oregon or California, or both, and went back and forth, engaged in various employments, poor and unsuccessful, until 1857. In the fall of 1853, he seems to have visited Washington, and to have had an interview with the commissioner of patents as to his rejected application, and, in January, 1854, he wrote a letter to Mr. Veitch, a gentleman largely interested in telegraphy, in which he says: "Telegraphing has interested me since the idea first burst upon the public mind, and, as regards insulation of the wire, I still claim precedence, having first used glass, India rubber and gutta percha as early as the fall of 1847. * * * The right to use the gutta percha belongs to me." On the 22d of December, 1858, he swore to the specification for a new application. The language of this specification and its claim was, with slightly verbal differences of no importance, like that of the specification and claim of the patent finally issued. This specification, with the new application, was filed in the patent office on the 24th of December, 1858, and, on the

same day, a new fee of $30 was paid. On the 29th of December, 1858, his application was rejected in a letter in which the patent office said: "Insulating electrodes in gutta percha is, you are aware, well known. The degree of elasticity is wholly optional, regard alone being had to practical results, to the particular end in each case to be obtained. The journals of France, England and this country, for several years back, fully treat the subject. Your claim is refused." On the 14th of January, 1859, Simpson wrote to the patent office as follows: "In reply to your note rejecting my application for letters patent for a 'submarine telegraph cable,' I have to ask a reconsideration of the case, inasmuch as the scientific journals of England, France and this country make no mention of the insulation of electrodes in gutta percha prior to the 1st of August, 1848, and that I have abundant proof of my discovery and insulation of the same as early as the 22d of November, 1847." This letter was accompanied by an affidavit sworn to by Simpson, on the 14th of January, 1859, to the effect that he believed himself to be "the original and first inventor of the insulation of the telegraph wire with gutta percha, or submarine telegraph cable, as set forth in his specification and drawings of the 24th of January, 1848, and of the 22d of December, 1858." On the 14th of January, 1859, the patent office, after receiving said letter and affidavit, informed Simpson, by letter, that his "alleged invention" had been "abandoned to the public." Thereupon Simpson submitted to the patent office a statement in writing, which he called "a history of the case," and also called attention to his former specifications and models and to various letters and affidavits which accompanied such statement. In this "history of the case," which was sent by him to the patent office on the 19th of January, 1859, he gives the 22d of November, 1847, as the date of the conception of his invention, and alleges that, in November and December, he made a model of metallic wire covered or insulated with cotton thread, wooden beads and India rubber hose, and drew his first specification. He recites the making of his first application, the making and filing of his second specification, the filing of his application of April 2d, 1849, its rejection and the withdrawal of the fee. He says: "On the 21st day of January, 1851, I withdrew the patent fee, all the models, drawings and papers connected with it remaining in the office. Thus the case remained till 1858." He also states, that, on the 12th of November, 1858, he withdrew his original specification from the patent office, for the purpose of renewing his application; that he was informed by the office that no drawings of his could be found earlier than those belonging to his application of April 2d, 1849, and that his original models could not be found in the office; and that the necessity of procuring evidence as to such drawings and models delayed for a time the making of his application of December 24th, 1858. He then recites the filing of that application, its rejection on the 29th of December, 1858, the contents of his letter to the patent office of January 14th, 1859, and the fact of the rejection of his application on that day, on the ground that his invention had been abandoned to the public. He states, that, on the 24th of November, 1849, he paid to Mr. Day the $20 which was to be refunded by the patent office. In reply to the allegation of abandonment, he adduces, as evidence that he did not abandon his invention, the fact that he wrote a letter to Mr. Day on the 24th of November, 1849, stating that his "decision" in that instance did not necessarily imply a total surrender of his claim, and asserting that his claim was valid. Day had written to him, on the 19th of November, 1849, regretting his "decision" in regard to his application for a patent, and he, in reply, tells Day that he had duly considered Day's letter, and that it offered nothing which would induce him to change his "decision." This "decision," even if it was a decision not to then take any further steps in regard to his application, by pressing it on the patent office, or appealing, or availing himself of other means of redress, was accompanied by the declaration that he did not abandon his invention or his claim. He further states that he was not able to defray the expense incident to a successful prosecution of his claim; that his correspondence with the patent office from November 23d, 1847, to the withdrawal of the patent fee in 1851, shows that his application of 1858 is not affected by the objections or decisions of the office; and that, if it should still be argued that his claim was abandoned to the public by the withdrawal of the patent fee, and that the public were not properly notified by him not to appropriate his invention to its use, he suggests that the newspaper publications in 1848 were a legal bar to such action on the part of the public, inasmuch as those publications asserted his claim and that he had taken the proper steps to secure a patent, and that the public had never since been notified to the contrary. Such were the contents of his "history of the case." As a consequence of Mr. Simpson's appeal or representations his application was examined by three officials in the patent office, who, on the 22d of January, 1859, made a report in writing upon it to the commissioner of patents. That report states, that Simpson first duly applied for a patent for insulating telegraph wires, by coating them with gutta percha, on the 2d of April, 1849; that the application was rejected on the 7th of September, 1849; that he took no appeal from the decision, as provided by law; that, on the 21st of January, 1851, the application was duly withdrawn; that, from that date, he took no steps to secure a patent, until

November 15th, 1858, when he wrote a letter to the patent office on the subject; that he afterwards filed his application of December 24th, 1858; that it was rejected on the 29th of December, 1858, for the reasons then assigned; and that it was again rejected by the letter of the office of January 14th, 1859. The report then says: "The ground of objection to the application now in question is, that the alleged invention had been in public and common use for more than two years (in fact for many years) prior to his present application; that, for years past, and before this application was made, the public journals in France, England and the United States have contained a record of the employment of gutta percha for insulating telegraphic wires; that such wires are now and have been, so insulated, notoriously in use in the United States, which use must, by reason of such notoriety, have come to the knowledge of the applicant; and that the fact that he has suffered for more than seven years, (from January 21st, 1851, to November 15th, 1858,) said invention so to be used without taking any steps to prosecute his claim to a patent, in law constitutes such use as having been made with his consent and allowance, thus, by his own act, working an abandonment of his invention to the public. The authorities in support of such ground of objection are abundant and need not here be cited. We think the application should be finally rejected, and so recommend." On the 2d of February, 1859, this report was confirmed by the commissioner of patents and the application was rejected, and on the next day Simpson was informed of the decision. On the 8th of October, 1859, he made another application to the patent office for a patent, on a specification like the one of December, 1858, and paid a new fee of $30. In a paper filed by him in the office on the 11th of October, 1859, and called "Reasons Why a Patent should Issue to Me," he states, that the fact that the decisions of the office in his case, in 1849, were made, entitle him to the benefit of the law as it would have been if the office had then granted his patent. On the 24th of October, 1859, the office advised him, that there did ont appear to be sufficient reason for reversing the decision of the office of January 14th, 1859; that the papers furnished by him did not "justify non-abandonment;" and that his claim was refused. On the next day he wrote to the office, acknowledging the receipt of its letter of the day before, and said: "Before appealing from your decision, I would inquire on what proof of abandonment to the public does the office base its decision." On the 4th of November, 1859, the office, in reply, referred him to the law and practice of the office, that, when an alleged invention had been completed, "and been in public use for more than two years, with the knowledge and consent, (i. e. not protesting,) the invention cannot be patented." It added: "Your mode of insulating electrodes with gutta percha has been in public use many years, and is, therefore, within the scope and meaning of the law referred to." On the 26th of November, 1859, the office, in a letter to Simpson, said: "There do not appear to have been just grounds for the rejection of your application, as per official letter of 1849, and, therefore, the patent was, as far as known to this office, rejected upon insufficient grounds, and, had the matter been pressed to the final decision then, it would have been granted, it is believed. But this office is bound to refuse it now, by virtue of a statute expressly prohibiting a grant, provided the invention has been more than two years in public use with the knowledge and consent of the inventor, which, in your case, is not denied. Your remedy, at the time of rejection, lay in an appeal, which was not taken. This would have set aside the decision of the commissioner, or, even if not, then, having exhausted the means given you by the law to obtain justice, it would have thrown the fault on this office, and it would be bound to correct its own error. There seems but one course left, and, unless a special act removes the aforesaid disability, the case must stand rejected." On the 4th of April, 1860, Simpson addressed a letter to the office, insisting that he had not abandoned his invention before he applied for a patent, that the mere withdrawal of the fee was not an abandonment, and that, as the office had acknowledged that the application was rejected in 1849 on insufficient grounds, it ought to correct its own error. Subsequently, a board of three persons in the patent office examined the application, and reported on it as follows: "The present application was filed October 8th, 1859, and, in our opinion, a patent should be refused upon it, for the reasons stated by us in regard to the application of 1858. On the ground, then, that this applicant has abandoned his invention to the public, we recommend that a patent on his application be refused." On the 9th of May, 1860, the commissioner confirmed that report and refused the patent, and Simpson was notified of such decision on the 15th of May, 1860. At that time, under the provisions of the seventh section of the act of July 4, 1836 (5 Stat. 119), as modified by the eleventh section of the act of March 3, 1839, (5 Stat. 354), and as further modified by the first section of the act of August 30, 1852 (10 Stat. 75), Simpson had a right to appeal from the decision of the commissioner rejecting his application, to one of the judges of the circuit court of the United States for the District of Columbia. He appears to have taken such an appeal to Judge Dunlop, of that court, for, the papers on his final application show, that, on the 9th of April, 1861, Judge Dunlop affirmed the commissioner's decision of May 9th, 1860, and overruled all the reasons of appeal. [Ex parte Simpson, Case No. 12,878.] During

the years 1861, 1862, 1863, 1864 and 1865, Simpson was persistent in urging his application upon the attention of the then commissioner of patents, both personally and by letter. He also applied to congress for relief. On the 11th of February, 1862, he presented to the house of representatives a petition for a patent for his invention. On the 7th of March, 1862, the committee on patents reported a bill authorizing the commissioner of patents to rehear his application and to grant it, as if it had never been heard or decided. The bill was passed by the house on the 2d of May, 1862. On the 5th of May it was sent to the senate and referred to the committee on patents. On the 10th of July, it was reported from that committee. On the 15th and 17th of July, 1862, it was considered by the senate, but was not passed. On the 4th of May, 1866, Simpson filed the application on which the patent was granted. He swore to the specification on that day. On the 15th of August, 1866, the application was rejected, in a letter from the office, which stated, that, as the ground theretofore taken by the office, of abandonment, had been sustained by the decision of the court, it was not competent for the office to go behind that decision, which must be regarded as final, so far as the office was concerned, so long as it remained unreversed by a higher tribunal. In reply, Simpson, on the 17th of August, wrote to the office, claiming that the office could revise the entire case and grant a patent, if it should find that the prosecution of the application had been continuous; that the withdrawal of the fee was not an abandonment of the claim; and that there was no proof of abandonment. On the 25th of August, the office replied, that it had no power to review the decision of Judge Dunlop; that, by the eleventh section of the act of March 3, 1839, it was provided, that his decision should govern the further proceedings of the commissioner in the case; that his decision was, that the rights of Simpson were forfeited by abandonment of the invention; and that, while such decision stood unreversed, it must govern, and the office must decline the further consideration of his claim. The application was then considered by the examiners in chief, on appeal, and they, on the 9th of April, 1867, affirmed the former action of the office, and decided that the application should be refused. The application was then examined by Mr. Hedrick, an examiner in the patent office, who, on the 7th of May, 1867, made the following report to the commissioner of patents: "I have examined the arguments and papers in the application of George B. Simpson, for improved insulator for submarine and other telegraphic lines. I have especially examined the question of novelty at the time of the first application to the office, and find that the invention was then new, and was sufficiently important to entitle the applicant to a patent. I have also examined the papers submitted by the inventor to show that he never abandoned his claim, and only withdrew his application under protest, and that, therefore, nothing more than constructive abandonment can be made out against him. The whole case is a very extraordinary one. There seems to be no doubt, that the invention was one that deserved a patent, and that the inventor did what should have entitled him to a patent, and the office has, at various times, held that opinion, but has always, either from mistake as to the character of the invention, as in the first instance, or from the idea that there was a constructive abandonment, refused it to him, whilst the inventor has at all times, and against all adverse opinions from official and unofficial quarters, asserted that he was entitled to and should receive a patent for his invention. This has been continued for near twenty years, until the invention is in general use and the public acting in the belief that the invention is public property." The patent was, on the 10th of May, ordered to issue, and was issued on the 21st of May, 1867. Simpson had become a paymaster in the United States army, and, while such, died at New Orleans, of yellow fever, on the 5th of October, 1867.

The principal defence pressed on the question of novelty, is the alleged prior invention of John J. Craven. I have carefully considered the evidence on this subject, and am of opinion that it does not show that Craven's invention was made earlier than at a date subsequent to the filing in the patent office by Simpson of a description of his invention. The publication in Dingler's Polytechnic Journal of 1848 gives an account merely of experiments then in progress and not of a completed invention, even if the part of it in question was published prior to Simpson's invention, and it does not set forth the insulating or non-conducting property of gutta percha, for use with a telegraphic wire under water. The patents of Cook and Brooman do not, either separately or together, show Simpson's invention. The patent of Wharton shows only the use of gutta percha as a substitute for leather, and makes no mention of its insulating or non-conducting property in reference to electricity. Nothing is adduced which anticipates Simpson's invention in point of time, as that invention has hereinbefore been construed.

The bill sets forth, that the improvement invented by Simpson "was not at the time of his application for a patent therefor in public use or on sale, with his consent and allowance." It also states, that Simpson, being the inventor, made application for a patent for his invention, and that such proceedings were thereon had, that the patent was issued. The bill does not set forth any date as the date of the application to which it refers. The answer denies that the improvement of Simpson "was not, at the time of his application for a patent therefor, in pub-

lic use or on sale with his consent or allowance." It also alleges, that the patented improvement has been, for more than two years before Simpson's application for a patent therefor, in public and common use in the United States, without any notice on the part of Simpson that he claimed to be the first and original inventor thereof, and without any objection on his part, but, on the contrary, with his knowledge of and acquiescence in such common use, and with his consent and allowance; and that, if he was the first inventor of such improvement, or ever had any right to a patent for it, he wilfully and without excuse and for many years delayed and forbore to apply for a patent for it, and abandoned it and his right to have a patent for it, and dedicated it to the public, and, meantime, it became known to the public and the defendant from other sources. The answer states no date as the date of the application. Its language, properly construed, sets up a loss of the right to a patent by acquiescence in use, laches, abandonment or dedication, before the application for a patent and not afterwards.

The patent in this case, being issued before the patent act of 1870 was passed, is to be adjudicated under the act of 1836, before cited, and the acts amending the same. The seventh section of the act of 1836 (5 Stat. 119) provides, that, if the commissioner of patents shall decide that the invention covered by an application for a patent is not new, he shall notify the applicant thereof, giving him such references as may be useful "in judging of the propriety of renewing his application," or of altering his specification, so as to embrace only what is new. The statute then proceeds: "In every such case, if the applicant shall elect to withdraw his application, relinquishing his claim to the model, he shall be entitled to receive back twenty dollars, part of the duty required by this act, on filing a notice in writing of such election in the patent office, a copy of which, certified by the commissioner, shall be a sufficient warrant to the treasurer for paying back to the said applicant the said sum of twenty dollars. But, if the applicant in such case shall persist in his claim for a patent, without any alteration of his specification, he shall be required to make oath or affirmation anew, in manner as aforesaid." The statute then provides, that if the specification and claim shall not have been so modified as, in the opinion of the commissioner, shall entitle the applicant to a patent, he may, on appeal, and on request in writing, have the decision of a board of three examiners, as to the propriety of the commissioner's decision, the board or a majority of them having power to reverse such decision, either in whole or in part, and it being declared that the commissioner shall be governed by the opinion of the board in the further proceedings to be had on the application. By the eleventh section of the act of March 3, 1839 (5 Stat. 354), the chief justice of the District of Columbia was designated as the officer to hear such appeals, instead of the board of examiners. By the first section of the act of August 30, 1852 (10 Stat. 75), it was provided that such appeals might also be made to either of the assistant judges of the circuit court of the District of Columbia.

The papers filed by Simpson in the patent office, January 31st, 1848, embraced a petition for a patent, a specification, an oath thereto, and a drawing. There was no model filed, or fee paid. Those papers remained in the patent office, continuously, until the 12th of November, 1858, when Simpson procured them from the office for the purpose of making his renewed application of December 24th, 1858. An applicant always had the privilege of amending his specification. Under that privilege, Simpson filed his amended specification of February 21st, 1848. His application of April 2d, 1849, consisted of a petition, specification, oath thereto, drawing, model, and a fee of $30, and was made complete on the 16th of June, 1849. The specification on that application was entirely sufficient in its description of the mode of preparing the gutta percha to cover the wire, and of the mode of insulating the wire with the covering of gutta percha, whatever may be said of the sufficiency, without amendment, of the prior two specifications. The specification of 1849 is not as detailed as those which followed it, but is substantially the same, as regards the preparation of the gutta percha, and the coating of the wire with it. There is no ground for any allegation, that Simpson's invention was in public use for more than two years before April, 1849, or even June, 1849, or that he abandoned or dedicated it to the public before either of those dates. His specification of 1849 is fairly to be considered, for the purposes of this suit, as an amendment of his two specifications of 1848, and the application of January, 1848, is to be regarded as an application completed in 1849, in such wise that the application made in January, 1848, is to be regarded as a continuous application, rejected in October, 1849. By the statute, as it stood at the latter date, the applicant, on the rejection of his application for want of novelty, which was the ground of such rejection of Simpson's application, had placed before him two alternatives. One was to elect to withdraw his application, whereupon, on filing a notice, in writing, of such election, he would be entitled to receive back $20. The other was to persist in his claim for a patent, whereupon, on filing a new oath, he could take an appeal. If he did not file a notice of his election to withdraw his application, he was to be regarded as persisting in his claim for a patent. In the present case, Simpson did not file any notice of his election to withdraw his application, or any notice that he with-

drew his application. He asked for the $20, without withdrawing his application, and, although the office was not authorized to pay him back the $20 unless he withdrew his application, it did so. The office may have regarded the request for the $20 as equivalent to a withdrawal of the application, but the statute is distinct, and a request to be paid "twenty dollars balance of patent fee, to be refunded on rejection of claim," cannot be construed as a withdrawal of the application, even though the $20 was refunded and accepted. The statute is plain, and the applicant may have intentionally refrained from withdrawing his application, while, if the office had informed him that the $20 would not be refunded unless he first filed a withdrawal of his application, he might have refused to file such withdrawal, lest it might prejudice his rights. He left all the papers in the patent office. According to his own statement, he had refunded to Day the $20 fourteen months before he received it back from the patent office. Therefore, when he asked the office for the $20, it must have been solely because of his need of money. There is no act or declaration of his, in connection with the refunding of the $20, that can be construed into an abandonment of his application, or of his invention.

Nor is there any evidence of any affirmative abandonment of his invention, between October, 1849, and December, 1858. There is nothing but the lapse of time. As to that, the evidence shows that he was poor, during all that time. He might have taken an appeal from the decision of October, 1849, but the treatment he had received from the patent office, afterwards acknowledged by it to have been wrong and unjust, and the array of distinguished names in telegraphy, presented by the office to discourage him, with statements showing how greatly the office relied on information received from them, might well have deterred him from entering, at the time, on a further contest. The evidence shows, that, from 1849 to 1858, he was always poor; that he went to the Pacific coast to better his pecuniary condition; and that he worked his way out there. Under all the circumstances, his application of 1858 must be considered, not as a new application, but as a continuation of his prior applications; and so must his applications of 1859 and 1866. From 1858 to 1866, the efforts of Simpson to procure the allowance of his claim to a patent were continuous and persistent, and no laches can be imputed to him, nor is any ground shown for holding that he abandoned his invention after 1858.

In Adams v. Jones [Case No. 57], Mr. Justice Grier says, that, by the application filed in the patent office, the inventor makes a full disclosure of his invention, and gives public notice of his claim for a patent; and that the delay afterward interposed by the mistakes or obtuseness of public officers, where gross laches cannot be imputed to the applicant, cannot affect his right. In that case, an application was made in 1850, and was never withdrawn, and the patent was granted in 1857, and was sustained.

The case of Dental Vulcanite Co. v. Weatherbee [Case No. 3,810] was decided by Mr. Justice Clifford, on the Cummings patent of 1864, reissued twice in 1865. The first application was made in 1855, and it was, after three examinations, finally rejected on appeal, by the commissioner of patents, in 1856. It was not further appealed, and was not renewed till 1864, when a new application was filed, on which the patent was issued. In the interval between the filing of the original application and that of 1864, the invention had gone into use to a considerable extent, with the knowledge and consent of the applicant. There was no withdrawal of the application, and no evidence of an intent to abandon the invention, except inference from the above facts. It was urged in opposition to the validity of the patent, that Cummings had abandoned his invention, because, after the rejection of his application in 1856, he did not appeal or apply anew until 1864. In deciding on this point, Mr. Justice Clifford says: "Strong doubts are entertained whether any new application was necessary; but, if it was, it is believed to be well settled, that the second application must be regarded as having been filed in aid of the first, on which the rejection took place. Godfrey v. Eames, 1 Wall. [68 U. S.] 317. Actual abandonment is not satisfactorily proved." The patent was sustained. The same judge made a like ruling on the same patent, in Goodyear Dental Vulcanite Co. v. Gardiner [Case No. 5,591], and so did Judge Shepley, in Goodyear Dental Vulcanite Co. v. Smith [Id. 5,598], and Mr. Justice Hunt, in Goodyear Dental Vulcanite Co. v. Root [Id. 5,597], and Judge Emmons, in Goodyear Dental Vulcanite Co. v. Willis [Id. 5,603]. The supreme court of the United States, in Smith v. Goodyear Dental Vulcanite Co., 93 U. S. 486, sustained the Cummings patent against the same objection, holding that the application of 1864 was to be regarded as a continuation of the application of 1855. The case of Cummings was, in all substantial features, like the present case. He did not withdraw any part of the fee originally paid, but it has been shown, that withdrawing part of the fee, in the case of Simpson, is not to be regarded as a withdrawal of the application. The whole matter is summed up by Mr. Justice Strong, in delivering the opinion of the court, in the case last cited, in these words: "We are not aware that filing a second petition for a patent, after the first has been rejected, has ever been regarded as severing the second application from the first, and depriving the applicant of any advantage he would have enjoyed had the patent been granted without a renewal of the application. The contrary was decided by the circuit court for the southern district of Ohio, in Bell v. Daniels

[Case No. 1,247], and in Blandy v. Griffith [Id. 1,529]; and these decisions are founded in justice and sound reason." It was proved, in the Cummings Case, that, between the rejection of 1856 and the application of 1864, his invention had come into general public use. In the present case, there is no proof that any use in public of Simpson's invention was at any time made with his consent, allowance, or acquiescence.

In the case of Johnsen v. Fassman [Case No. 7,365], an application made in 1856 was rejected in 1857, for want of novelty. The applicant took no further steps till 1866, when he took an appeal, which resulted in the granting of a patent. Meantime, patents for substantially the same invention were issued to other inventors. During four of the nine years the applicant was a citizen of a state in rebellion. There was no withdrawal of his application. It was held that no direct or implied abandonment was shown.

In McMillin v. Barclay [Case No. 8,902], an application was made in 1855, and was finally rejected in 1856, on appeal to the commissioner of patents. It was not withdrawn, but nothing more was done in regard to it until 1867, when the specification was amended, and, on further consideration, a patent was granted. Judge McKennan held that there was no abandonment, express or implied, and that the lapse of time was satisfactorily explained.

In Bevin v. East Hampton Bell Co. [Case No. 1,379], an application was made in 1852 and rejected two months afterwards. The next month the applicant took from the patent office his application and all the papers connected with it, except one drawing, but made no formal withdrawal. He never returned those papers. For ten years he did nothing more. During that time the invention went into open and notorious use, in his own neighborhood and under his own eyes, and so continued for ten years, without remonstrance from him. He was not poor, and was engaged in a successful business. In 1862, he made a new application, and a patent was granted in 1869. It was held that he had abandoned his application of 1852. Great stress was laid by the court on the fact of the taking of all the papers from the patent office, and withholding them, and on the fact of such use of the invention, and on the fact of the absence of poverty. The present case differs from the Bevin Case in the particulars just referred to.

The case of Marsh v. Sayles [Case No. 9,119] holds, that, where an application was rejected, and twenty dollars of the fee was refunded, and then there was a delay of eighteen years before the application was renewed, and no attempt is made to explain the delay, it will be held that there was an abandonment of the invention to the public. That is not the present case.

In Consolidated Fruit Jar Co. v. Wright, 94 U. S. 92, the invention was completed in 1859, and no application was made for a patent till 1868. It was held that the facts showed abandonment before the application. No sufficient reason for the delay was given. There was no proof of want of pecuniary means, and there was proof of use by the public for more than two years before the application. The case is unlike that of Simpson.

In United States Rifle Co. v. Whitney Arms Co. [Case No. 16,793], the answer is set up, as a defence, that the patent was applied for in 1868, and that the invention had for more than two years before that date been in public use and on sale with the consent and allowance of the inventor, Cochran, and that, prior to that date, it had been abandoned to the public. Cochran applied for a patent for the invention, an improvement in breech-loading guns, in 1859. It was rejected within a month. He took no appeal from the rejection by the primary examiner, and, one year and twelve days after the rejection, he withdrew the application and received a refund of $20. In 1868, he filed a new application, which was rejected on the ground of abandonment. The commissioner affirmed such decision, but it was reversed by the supreme court of the District of Columbia. The commissioner then declined to issue the patent, but, after the passage of the patent act of 1870 [16 Stat. 198], a new application was filed, and a patent was issued. During the eight years from 1860 to 1868, Cochran obtained 22 different patents, on his own application, 9 of which related to breech-loading fire-arms. He prosecuted his other inventions with constancy and energy. The court held, that no poverty was shown as a reason for not renewing and pressing his application; and that, if it were, it would tend greatly to dispel the idea of laches. Stress was laid in that case, by the court, on the withdrawal of the application, and the patent was held to be invalid. The decision in that case is not of weight in reference to the facts of Simpson's case.

On all the points in issue, it must be held, that the plaintiff has established his case, and there must be the usual decree for the plaintiff, for an injunction and an account, with costs.

[NOTE. For other cases involving this patent, see Colgate v. Gold & Stock Tel. Co., Case No. 2,991; Colgate v. Law Tel. Co., Id. 2,993a; Colgate v. International Ocean Tel. Co., Id. 2,993; Colgate v. Compagnie Française du Telegraphe de Paris, 23 Fed. 82; Colgate v. Gold & Stock Tel. Co., Case No. 2,992; Colgate v. Western Union Tel. Co., 19 Fed. 828; Colgate v. Western Union Tel. Co., Case No. 2,994.

[For a subsequent opinion on motion for an attachment for violation of the injunction herein, granting complainant's motion, see Case No. 2,994, next preceding.

[In January, 1879, complainant applied for a final injunction, which was granted as to any further use of the invention, but, as to certain uses to which it had already been applied, the question of perpetual injunction was postponed

to await an accounting and application for a final decree. Subsequently the parties entered into negotiations which resulted in defendant's taking a license, and paying $100,000 for a release. Thereafter defendant applied for a rehearing of the cause on the ground of newly-discovered evidence of the withdrawal of the application for the patent, and the application was denied. Colgate v. Western Union Tel. Co., 19 Fed. 828.]

Case No. 2,996.

The COLIMA.

[5 Sawy. 181.][1]

District Court, D. California. May 13, 1878.

SALVAGE.

The fact that both vessels belonged to the same owner furnishes no ground of exemption to a claim for salvage compensation by the master and crew of the salving vessel. Proof of a contract, usage, or understanding, that no such claim shall be made will defeat it.

[Cited in Re A Lot of Whalebone, 51 Fed. 924.]

In admiralty.

Edward Gray Stetson, for libellant.

Lake & McKoon, for claimant.

HOFFMAN, District Judge. At the hearing of this cause it was stipulated that the facts, as stated in the opinion of this court, in the case of Pacific Mail Steamship Co. v. Ten Bales of Gunny Bags [Case No. 10,648], should be deemed and taken to have been duly proved in this cause. The case referred to was a libel against the cargo of the steamer Colima, for a salvage service performed by the steamer Arizona. The facts were briefly as follows:

On the fifteenth of March, 1874, the steamer Colima, then on a voyage from Panama to this port, having become disabled by the loss of several blades of her propeller, sought refuge under Cerros island, where she came to an anchor. On the succeeding day, boats were dispatched to the north and south, with instructions to intercept and send to her assistance any steamer that might be fallen in with. After a navigation of several days, one of the boats met the steamer Arizona, bound for San Francisco, and her master on hearing the situation of the Colima at once proceeded to Cerros island, where he arrived on the morning of the twenty-fifth, and on the evening of the same day he started with the Colima in tow for this port, where she arrived on the thirtieth of March. The distance from Cerros island to San Francisco is seven hundred and thirty miles. The voyage of the Arizona was lengthened by reason of the service some two and a half or three days. Her deviation was not considerable, as the usual course of steamers along the coast is, in fine weather, not far from the island, and such was in fact the position of the Colima when the accident occurred. Both vessels belonged to the same owner, the Pacific Mail Steamship Company. The present libel is filed by the master of the Arizona, on behalf of himself and the crew, to recover a salvage compensation.

In the reported case above referred to, it was held that the fact that both vessels belonged to the same owners was no bar to a claim for salvage against the goods on board the salved vessel. The authority chiefly relied on in the opinion delivered in that case was The Miranda, 3 Adm. & Ecc. 561, in which the right of the master and crew of the salving vessel to a share of the compensation was recognized. In the case of The Sappho, 3 Adm. & Ecc. 142, the cause was instituted on behalf of the boatswain and seventeen seamen, part of the crew of the Nero. Both vessels belonged to the same owners. The claim was resisted, on the ground that it was commonly understood that where assistance is rendered to one vessel of a fleet belonging to a great company by another, salvage was never claimed by the crew; that the latter had not acted beyond the scope of their duties; they were bound by the articles to do what they did do, and were paid by wages for their time and labor. But the court overruled the defense, chiefly on the authority of Lord Stowell's judgment in The Waterloo, 2 Dod. 433. Sir Robert Phillimore after citing Lord Stowell's language in that case remarks: "It seems to me clear from this language that Lord Stowell intended to lay down the law that the general right to salvage reward could be ousted only by virtue of an express agreement framed in the clearest and most binding terms." The passage cited by the learned judge perhaps justifies the very strong statement of Lord Stowell's opinion contained in the above extract. But on perusing the whole judgment it will appear, that Lord Stowell seems to admit that an exemption from liability to salvage may be made out by adequate proofs of an usage and understanding to that effect. The grounds of exemption set up were: First. Written documents, viz., the charter-party and instructions; Second. The usage which was described in the argument as generally understood by all parties.

It was in reference to the written documents that Lord Stowell uses the language quoted by Sir Robert Phillimore. Where the claim set up is a discharge from liability to salvage under any circumstances whatever, and this claim is founded on written documents, the discharge should "appear in express terms, and in a contract that by the use of clear and explicit terms should remove all doubt respecting the common understanding of both parties." But with respect to the second ground of exemption, Lord Stowell observes: "It has been said, however, that there is an acknowledged understanding to this effect, and that this un-

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

derstanding is sufficiently proved by the usage as well as the instructions. As to the instructions they appear to be very limited in their application; in the first place they apply to associated ships only, and do not extend to other ships which are merely employed by the company, but if they did, they extend no further than to enjoin the duty of assisting other ships belonging to the company, but they do not express that this duty which it is very proper to enjoin, shall receive no remuneration, whatever be the active merit, whatever be the suffering incurred in performing it. It is the duty of all ships to give succor to others in distress, none but a freebooter would withhold it, but that does not discharge from liability to payment where assistance is substantially given. The company might possibly sustain their claim of exemption in cases of slight services rendered by ships in their employ, but it is quite another thing to sustain a sweeping claim of exemption in all cases whatever. But the usage is said to prove the existence of the understanding. I have already noticed that the usage is not described in any proper limitation of its extent." His lordship then proceeds to consider the nature of the alleged usage and the proofs in support of it. He finds the former to be indefinite and not described in any proper limitation of its extent, while the latter are insufficient and inconclusive. It may, however, be inferred that if the reverse had been the case, and the usage and common understanding satisfactorily established, the exemption would have been allowed. It is to be borne in mind that the case before Lord Stowell was a salvage service rendered by a ship chartered by the East India Company to a ship owned by the company. It does not appear that the master and crew of the chartered ship were in the employ, or in any respect the servants of the East India Company.

In the case at bar the claim is made by the master of a ship owned by the P. M. S. S. Co. for services rendered by him to another vessel owned by the same company and engaged in the same general business. No evidence whatever has been offered to show the nature of the contracts made by the company with the masters in their employ, or the existence of any usage or understanding with regard to compensation for assistance rendered to disabled vessels of the company. The court is not informed whether their appointments are general, and their services to be rendered on board of any ship to which they may be ordered, or whether they are special to serve as masters of a specified ship. The instructions under which they act have not been exhibited. They might perhaps have thrown some light on the question, whether taking a disabled vessel of the line in tow for a few hours or days is not within the scope of the duties required by their contracts; and in the contemplation of both parties to be rendered without extra compensation. The only fact in evidence from which a tacit understanding of this nature may be suspected is, that of six instances where similar services have been rendered, the present is the first where the claim to salvage compensation has been attempted to be enforced by the master and crew. And even in this case the libel was not filed until more than eighteen months after the service was rendered, and not until the libellant had ceased to be in the company's employ. But these facts are insufficient to establish an usage, understanding, or contract, by which the rights of the libellant are modified or controlled, and as the authorities are clear that the fact that both vessels belonged to the same owner furnishes to the latter no ground of exemption, I am obliged to recognize the claim of the libellant to a salvage remuneration. But it is a claim that cannot be reviewed with favor.

No proofs are necessary to show that the vessels of the company's line plying between this port and Panama are liable to become disabled and almost helpless from accidents to their machinery. That the aid of other vessels of the line is not unfrequently required and afforded is in evidence. It may reasonably be presumed that to render such assistance is a duty contemplated by the masters of the steamers as likely to arise, and the fact that so far as appears no claim has hitherto been made for a salvage remuneration for discharging it; and the circumstance that this claim was not made until long after the performance of the service, justifies the suspicion that it is an after thought, and was not contemplated when the service was rendered; a suspicion confirmed by the fact that in the suit by the P. M. S. S. Co. to recover a salvage compensation from the owners of the Colima's cargo, no claim was made on behalf of the libellant or crew to be allowed a share of the salvage. The service itself was of a low order of merit. It consisted merely in towing the Colima into port, and involved, so far as appears, no extra exertion or labor on the part of the master or crew of the Arizona. The only inconvenience to which they were subjected was that their voyage was lengthened some two and one half or three days.

In the case of The Sappho, one thousand seven hundred and fifty dollars were awarded to be divided among eighteen of the crew. The service lasted five days during tempestuous weather and was difficult and perilous. I shall award to the libellant the sum of two hundred and fifty dollars, being the amount of one month's pay. The crew on whose behalf he professes to sue are not represented in court. His proctor disclaims all authority from them to command the ship. He is ignorant of their whereabouts and does not even know their names. It is not

pretended that they have empowered or requested the master to act for them. They have probably long since dispersed to various quarters of the globe, and any sum decreed to them would remain unclaimed in the registry of the court. There can be no propriety in decreeing to them a compensation which they have not asked, and to which they probably do not consider themselves entitled.

COLLARD (INGLE v.). See Cases Nos. 7,042 and 7,043.

Case No. 2,997.

In re COLLATERAL LOAN & SAV. BANK.

[5 Sawy. 331.][1]

District Court, D. California. Dec. 2, 1878.

CORPORATION BY-LAW — RESOLUTION TO GO INTO BANKRUPTCY — PETITION BY DIRECTOR TO DISMISS BANKRUPTCY PROCEEDINGS.

A by-law of a corporation provided that, "in case any stock of the corporation is not represented at any meeting of stockholders, either in person or by proxy, such stock may be voted at such meeting by any director selected by the board of directors for that purpose, and such election shall be deemed by the stockholders of the corporation a power of attorney for such purpose." A meeting called for the purpose of determining whether the corporation should go into bankruptcy was attended by a small number of stockholders, but the vote of the absentees was cast under the provisions of the above by-law. A petition was thereupon filed by the president, and the corporation adjudged bankrupt. Nearly eight months afterwards a director, who had in the mean time been sued for negligence in the management of the company's affairs, filed a petition to have the proceedings dismissed as void ab initio. It appearing that the corporation was, at the time of the meeting, hopelessly insolvent, and that no difference of opinion as to the propriety of going into bankruptcy existed among the stockholders, and that the objection is now made after the lapse of nearly a year, by a director for the purpose of evading an alleged liability for negligence: *Held*, that the prayer of the petition should be denied.

In bankruptcy.

Bishop & Fifield, for assignee.

A. W. Thompson and L. D. Latimer, for Leander Sawyer.

HOFFMAN, District Judge. On the thirty-first of December, 1877, a petition was filed by Joseph S. Spear, Jr., president of the above-named corporation, praying that it be adjudged a bankrupt. The adjudication was accordingly made by the register, the first meeting of creditors duly called, and an assignee chosen on the twenty-third of January, 1878.

On the fourth of June a bill of complaint was filed by the assignee against Leander Sawyer and others, former trustees of the corporation, to enforce their liability for alleged negligence in the discharge of their duties as trustees. To this bill the defendants demurred, and on the twenty-seventh of August, 1878, the demurrers were overruled. On the fifth of September, 1878, Leander Sawyer filed a petition praying that the petition in bankruptcy be dismissed. On the eleventh of September, 1878, the assignee filed his answer to Sawyer's petition; and on the second of October, the application was argued and submitted on the petition, answer and affidavits filed in support of them.

On behalf of the petitioner Sawyer, it is contended that the petition in bankruptcy shows upon its face that the authority to file the petition was not given by a vote of a majority of the corporators at a legal meeting, "called for the purpose," as required by the bankrupt act [of 1867 (14 Stat. 521)]. But this objection, which rests upon what I must consider a forced and unnatural construction of the language of the petition, it is unnecessary to consider, for it appears that in fact the call for the meeting stated its purpose to be "to vote upon the proposition to put said bank into bankruptcy." The call was, therefore, in strict conformity with the act.

But the principal objection relied on in support of the petition to dismiss, is that it affirmatively appears that no legal meeting of the stockholders was held, and that no vote to authorize the president to file the petition in bankruptcy was legally passed by a majority of the stockholders. It is admitted that at the alleged meeting only fifteen shares, out of two hundred, were represented, either in person or by written proxy. The vote of the absentees was cast by a person selected for that purpose by the board of directors at a previous meeting. The authority to make this selection, and of the person so selected to vote the stock of the absentees, was supposed to have been conferred by the fifteenth article of the by-laws of the corporation. That article is as follows: "In case any stock of the corporation is not represented at any meeting of stockholders, either in person or by proxy, such stock may be voted at such meeting by any director selected by the board of directors for that purpose, and such selection shall be deemed by the stockholders of the corporation a power of attorney for such purpose."

It is contended that this by-law was never legally adopted by the stockholders; and, secondly, that if it had been, it would have been wholly void and inoperative.

It is not pretended that the by-laws of the corporation were adopted by "a majority of the stockholders at a meeting called by the president on a notice of not less than two weeks, specifying the object of the meeting," as required by section 301 of the Civil Code of this state, as originally passed. They were adopted under the provisions of that section as amended. The amended section enacts that "the written assent of the holders of two thirds of the stock, or of two thirds

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

of the members if there be no capital stock, shall be effectual to adopt a code of by-laws without a meeting for that purpose." The records of the corporation show that the written assent of the requisite number of stockholders was obtained.

The second objection presents more difficulty. But before considering the validity of the vote taken at the meeting held under the by-law in question, it is important to advert to the circumstances under which it was called. The corporation was notoriously and hopelessly insolvent. Its property had been attached by one creditor, and a receiver appointed at the suit of another. To secure the equal distribution of its assets among all the creditors, a proceeding in bankruptcy was indispensable. There is no reason to suppose that the propriety, if not the necessity of authorizing those proceedings was not unanimously recognized. The call for the meeting was published in a newspaper of extensive circulation. It may confidently be affirmed that the resolution adopted expressed the wishes of all the stockholders. If any error has been committed, it has been one of form, and not of substance, and it has arisen from supposing that legal expression might be given to the wishes of the stockholders by proceeding under the fifteenth article of the by-laws.

By the law of this state, corporations are authorized to provide by by-laws for "the mode of voting by proxy" (Civil Code, § 303), and to make by-laws not inconsistent with any existing law for the management of their property, the regulation of their affairs, and for the transfer of their stock (Id. § 354); and savings-banks may by by-laws "fix and define the privileges to be accorded to, and the obligations to be imposed upon its capital stock" (Id. §§ 572, 573). The language of these provisions is as comprehensive as could have been used. The only limitation is, that the by-laws "shall not be inconsistent with any existing law." No "existing law" is cited which prohibits or is inconsistent with the by-law in question. If it is to be treated as invalid, it must be on the general principle that by-laws must be reasonable and just, and not in contravention of public policy, or oppressive to stockholders or persons dealing with the corporation.

There can be no doubt that the power conferred by the by-laws in question might be grossly abused. If the board of directors of a corporation can represent and cast the vote of all the absentees at any meeting of stockholders, no matter how small the number actually present may be, the desire to perpetuate their own power, or to carry out their own policy, might induce them to increase the number of absentees by giving as little publicity to the call for the meeting as would be consistent with a formal compliance with the law, and at the meeting so called, by voting the unrepresented stock, take action in opposition to the wishes, or interest of the majority of the stockholders.

If a case presenting these or similar features should arise, it may well be that the courts would refuse to recognize the by-law as valid to authorize such an abuse of its provisions. But the case at bar presents no such features. As before observed, there is no reason to believe that the resolution taken by the meeting did not express the wishes, as it unquestionably fulfilled the duty, of the stockholders. It has been acquiesced in for a period of more than eight months. It is not now objected to by a stockholder as such. It is attacked by a defendant in a suit by the assignee for the mere purpose of defeating that action. There is no suggestion that the provisions of the by-law were not known to the stockholders; their certificates showed on their face that they were held "subject to the by-laws."

It may reasonably be presumed that as the propriety of going into bankruptcy admitted of no question or debate, the stockholders abstained from attending the meeting on the supposition that under the provisions of the by-law a meeting could lawfully be held, and the requisite authority given to the president, whatever the number in actual attendance might be.

These considerations have led me to the conclusion that although a by-law like the one under consideration might be held invalid and inoperative to give legality to proceedings which savoured of fraud, or abuse, or were in violation of the wishes of the stockholders, yet, under the circumstances of this case, it should not be held to be so absolutely void as to totally divest the meeting held under it of the character of a legal meeting of stockholders, and to render its action so nugatory that the proceedings in bankruptcy taken pursuant to its resolution must be pronounced void ab initio.

It may be observed, in addition, that even if this view be erroneous, and it be considered that the president of the corporation was wholly unauthorized to file the petition, it may well be doubted whether the court should, after the lapse of so long a time, entertain the inquiry. In the case of In re Jefferson Ins. Co. [Case No. 7,253], the petition was filed by an officer of the company by order of the board of directors. Four years afterwards one of the stockholders filed a petition praying that the proceedings be dismissed as void from their inception; but the court held that "after this lapse of time it would presume that the stockholders had authorized the petition to be filed, and that a stockholder who had remained silent for more than four years would not be heard to impeach the validity of the proceedings in bankruptcy." In the case of In re Baltimore Co. Dairy Ass'n [Id. 828], a motion to set aside proceedings, made on the same ground, by a stockholder who had remained silent for "nearly a year after the adjudication," was overruled. In both of these cases,

the language of the supreme court in Zabriskie v. Cleveland, etc., R. Co., 23 How. [64 U. S.] 398, is referred to. That court says: "The supreme court of Ohio has recognized the obligation of corporators to be prompt and vigilant in the exposure of illegality or abuse in the employment of their corporate powers, and has denied assistance to those who have waited till the evil has been done, and the interest of innocent parties has become involved."

The prayer of the petition is denied.

COLLECTOR (CAVAROC v.). See Case No. 2,529.

COLLECTOR (COTTON PRESS CO. v.). See Case No. 3,271.

COLLECTOR (GRAHAM v.). See Case No. 5,663.

COLLECTOR (PASSAVANT v.). See Case No. 10,790.

COLLECTOR OF CHARLESTON (GILCHRIST v.). See Case No. 5,420.

Case No. 2,998.

COLLENDER v. BAILEY.

[3 Ban. & A. 217;[1] 13 O. G. 277.]

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

PATENTS—"BILLIARD CUSHIONS"—CONSTRUCTION.

Reissued letters patent No. 2,511, granted to Hugh W. Collender, March 19th, 1867, for an "improvement in cushions for billiard-tables," *held* to be for the process or art of making the cushion, as described, and not for the cushion as an article of manufacture.

[In equity. Bill by Hugh W. Collender against Amasa W. Bailey.]

James E. Maynadier, for complainant.
Henry D. Hyde, for defendant.

SHEPLEY, Circuit Judge. Reissued patent No. 2,511, to Hugh W. Collender, dated March 19th, 1867, is for an improvement in cushions for billiard-tables. One of the questions presented in this case is, whether the patent is for an improvement in the mode of making the cushion or for the improved cushion thus made—in other words, whether the patent is for a "new manufacture," or a "new art" or process. The words of the claim clearly apply to a new art or process of making the cushion. The claim is as follows: "I do not claim in this application the use of two rubbers of different densities, as this is covered by a former patent of mine; nor do I claim a steel strip, a whalebone strip, or any other substances which are used with a view of producing a cushion which has an elastic foundation and a comparatively solid face; but what I claim as my invention, and desire to secure by letters patent, is: Uniting the parts employed in forming combination billiard-cushions by placing the harder or more dense and less elastic substances in a mold, and allowing the melted rubber to flow against, around, or into the harder or more dense and less elastic substances, or causing the plastic rubber, by pressure, to unite with the same, and then vulcanizing the India-rubber, substantially as and for the purpose set forth."

In the case of Collender v. Came [Case No. 2,999], decided by Mr. Justice Clifford, in this circuit, at the May term, 1876, it did not become necessary for the court to decide whether the reissued patent of the complainant was for an art or a manufacture, as the defendant in that case used the Collender process and made the Collender product. In this case it becomes necessary to decide that question, for only eight of the cushions proved to have been made by the defendant were made by the process described by Collender, while others made by a different process are claimed by complainant to be the equivalents of his product. In this case the patent is construed to be for the art of: "Uniting the parts employed in forming combination billiard-cushions, by placing the harder or more dense and less elastic substances in a mold, and allowing the melted rubber to flow against, around, or into the harder or more dense and less elastic substances, or causing the plastic rubber, by pressure, to unite with the same, and then vulcanizing the India-rubber, substantially as and for the purpose set forth." Under this construction of the patent, defendant is only liable for infringement, by reason of making eight sets of cushions by the Collender process.

The decree will be for the complainant for an injunction against the use of the Collender process, and for the profits from the use of the eight sets of cushions, and for one-half of complainant's costs.

[NOTE. For another case involving this patent, see Collender v. Came, Case No. 2,999.]

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

Case No. 2,999.

COLLENDER v. CAME et al.

[4 Cliff. 393;[1] 2 Ban. & A. 412; 10 O. G. 467.]

Circuit Court, D. Massachusetts. Sept. 2, 1876.

PATENTS—"BILLIARD CUSHIONS"—IMFRINGEMENT—EVIDENCE.

1. The claim of the complainant's patent was for "uniting the parts employed in forming combination billiard cushions by placing the harder, or more dense, and less elastic substances in a mould, and allowing the melted rubber to flow against, around, or into the harder, or more dense, and less elastic substances, or causing the plastic rubber, by pressure, to unite with the same, and then vulcanizing the India-rubber," &c. The defendant's patent, under which he manufactured, claimed "an India-rubber

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

billiard cushion, constructed with an embedded spring band, having woven about it a light and close-fitting casing or covering," &c. The defendant's band was entirely surrounded by rubber, and its location was secured by suitably fastening it in the rubber cushion before vulcanization. *Held*, the manufacture of the defendant was substantially the same as that of complainant.

2. If mechanical differences exist, but the two products and the general mode of construction are the same, as would appear by a comparison of the two manufactures, the court will hold that infringement is proved.

In equity. A patent, in due form [No. 19,-074], was granted to the complainant [Hugh W. Collender], on the 12th of January, 1858, for a new and useful improvement in uniting comparatively hard substances to elastic foundations of billiard cushions, and the same was surrendered on the 19th of March, 1867, on account of a defective specification, and reissued [on the same day] to the same patentee for the same invention [No. 2,511]. Due application was subsequently made for an extension, and the reissued patent was subsequently extended for the further term of seven years from the expiration of the first term. Gains and profits, it was charged, had been made by the respondents [John E. Came and others], by infringing the exclusive right secured by the complainant by the said reissued patent, and he prayed for an account and for an injunction. Process having been issued and service made, the respondents appeared and filed an answer. They denied that they had made, used, or sold cushions for billiard tables in accordance with the specification of the complainant's patent, or that they had made any gains or profits by infringing the exclusive right secured to him, as charged in the bill of complaint, and, for defence upon the merits, they alleged that the patentee was not the original and first inventor of the improvement, but that the same had been previously described in the specification of a foreign patent referred to in the answer, and that it was known to and had been used by the persons therein named, and at the places specified in the answer. Pursuant to leave given, they filed an amended answer, in which they alleged that the complainant never reduced the alleged invention to practice, and that it was not capable of being used or employed upon a billiard table, or of subserving any useful purpose or result, as alleged or suggested in the specification. Satisfactory description was given of the invention in the specification, from which it appeared that it consisted in uniting the comparatively solid substances which are employed at or near the front part of billiard cushions with the elastic foundations of the cushions, by placing the more solid substances in a mould, and allowing the melted rubber to flow against or around the same, so that it should surround the back and end of the edges, and thus securely confine it, or to allow plastic rubber, or fluid rubber, to come in contact with the back of the more solid substance, and to adhere to it by reason of said substance containing within itself a similar adhesive property to the rubber forming the foundation, so that it would adhere to the same by reason of its adhesive nature, aided, if need be, by holdfasts, or projections, on the back side or ends of the hard substances. By such means, the patentee stated that he was enabled to dispense with cement, nails, hinges, or any cloth covering to retain the hard substances in proper position on the elastic foundation. It also enabled him, as he stated, to overcome the disagreeable noise heard when the ball comes in contact with a steel strip fastened at its lower or upper edge. He also stated, that it enabled him, without the trouble of cementing, to face the front of the steel strip with a transparent facing of rubber, which would deaden the sound of the steel strip, and grip the ball sufficiently to give greater effect to twisting shots, and also to prevent the ball sliding off at an imperfect angle, instead of a proper angle, when played at a very obtuse angle against the cushion. He also added that his improvement enabled the manufacturer to save time, labor, and expense in adjusting and securing the hard substances to the softer ones, and enabled him to furnish a cushion, which, by being properly colored and finished, could be used without any woolen or cloth covering.

J. E. Maynadier, for complainant.

G. L. & R. L. Roberts, for respondents.

CLIFFORD, Circuit Justice. Patents may be granted for any new and useful art, machine, manufacture, or composition of matter, or for any new and useful improvement thereof, subject to the conditions specified in the patent act. 16 Stat. 201. Inventions, in order that they may be patentable, must be new and useful, and the improvement must be of such a character that it involved invention to make it, as the act of congress confers no right to obtain a patent except to a person who has invented or discovered what is declared to be patentable.

Patents in due form, when introduced by a party suing for an infringement, afford a prima facie presumption that the patentee is the original and first inventor of what is therein described as his invention. Other defences, however, besides want of patentability, if due notice of the same is given, are allowed by law. Three need only be mentioned: (1) That the improvement had been patented, or described in some printed publication prior to the supposed invention or discovery; (2) that the complainant was not the [original and first][2] inventor of the improvement; (3) that the improvement had been in public use, or on sale, in this country for more than two years before the application for a patent, or that it had been abandoned. Rev. St. § 4920, p. 960.

[2] [From 2 Ban. & A. 412.]

Three modes of applying the invention are stated in the specification, and they are severally sufficient to show to the court that the patentee complied strictly with that provision in the act of congress which requires the applicant for a patent, before he can receive it, to file in the patent office a written description of the manner of making, constructing, and using his invention, and also to show that the invention is capable of subserving some useful purpose, as claimed by the complainant. Construed in the light of these suggestions, it is quite clear that it is for a new and useful mode of making and constructing the described parts of a billiard table.

Unquestionably the invention relates chiefly to the cushion, but the true construction of the patent is that the invention is for a new and useful mode of constructing the described part of the table used in playing billiards. Much discussion of the defence that the invention was previously described in the foreign patent named is quite unnecessary, as the court is clearly of the opinion that the theory of fact involved in the proposition cannot be sustained, for the reason that the invention is not described in the specification of that patent. Justly compared, it is so clear that the two are essentially and substantially different, that it would be waste of words to pursue the inquiry. Defences alleged in the answer must be proved, which is all that need be said in response to the proposition that the invention was previously known to, and used by, the persons named in the answer, even if it be assumed that the defence, as pleaded, is sufficient to defeat the complainant's patent, which is by no means admitted. Nothing, therefore, remains to be considered except the question of infringement. Certain admissions in the answer, and in the proofs, aid very much in determining that question; as, for example, it is admitted in the answer that the respondents have made and sold, and are now making and selling, cushions such as are described in the specification of the Came patent, and the evidence proves that they manufacture cushions like Exhibit 19, which is admitted in argument. Carefully compared, the court is of the opinion that the manufacture of the respondents is substantially the same as that of the complainant. Differences exist in the description of the primary elements of the manufacture, but the patentee of the Came patent states, that in the manufacture of his cushion the compound band is to be entirely surrounded by rubber along the whole length of the cushion, and just within it, in a line parallel to the face against which, in the use of the table, the ball strikes; and he adds that the location of the compound band is obtained by suitably securing it in the rubber-cushion mould before vulcanization, and obviously, by vulcanizing the rubber, a union is made between it and the woven casing of sufficient strength to resist all strain at that point, resulting from the impact of the balls on the face of the cushion, the woven casing, under such strains, being held to the band by its tight and close fit, as therein previously explained. Support to the conclusion expressed is also derived from the claim of the patent, which is, "an India-rubber billiard cushion, constructed with an embedded spring band, having woven about it light and close-fitting fibrous casing or covering, as described, for the purpose specified." Mechanical differences, undoubtedly, exist, but the general mode of constructing the two cushions is the same, as more fully appears by comparing the manufacture of the respondents with the machine of the complainant, as described in the specification of his patent. Compared in that way, the conclusion must be, in the opinion of the court, that the charge of infringement is satisfactorily proved.

Decree for an account and for an injunction.

[NOTE. For another case involving this patent, see Collender v. Bailey, Case No. 2,998.]

Case No. 3,000.

COLLENDER v. GRIFFITH (two suits).

[11 Blatchf. 212;[1] 3 O. G. 689; Fent. Pat. 83.]

Circuit Court, S. D. New York. June 24, 1873.

PATENTS—"BILLIARD TABLES"—DESIGN—VALIDITY—SUIT FOR INFRINGEMENT—TESTIMONY AS TO PRIOR USE—INFRINGEMENT OF COPYRIGHT.

1. Under sections 61 and 76 of the act of July 8, 1870 (16 Stat. 208, 210), in a suit in equity for the infringement of a patent for a design, testimony as to the prior knowledge and use of the patented design by persons not named in the answer, is incompetent.

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

2. Billiard tables, and designs therefor, having the sides and ends bevelled, being old, a patent for a design having a greater bevel is void, as presenting no feature of invention or discovery.

3. A copyright of an engraving of such patented design cannot be used to prevent a person who has the right to make billiard tables in the way he makes them, from advertising them by publishing an engraving of them.

[Distinguished in Yuengling v. Schile, 12 Fed. 100.]

[In equity. Bills by Hugh W. Collender against William H. Griffith to restrain infringement of letters patent No. 145,787, granted to complainant December 23, 1873.]

William J. A. Fuller, for plaintiff.
Anthony R. Dyett, for defendant.

WOODRUFF, Circuit Judge. These two suits were submitted together upon the same proofs. The only question argued by counsel was, whether the testimony of certain witnesses called to prove the want of novelty in the alleged invention or new design, and who mention the knowledge and use thereof

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

by persons not named in the defendant's answer, is competent. On that question, I must hold, that evidence of the knowledge and use by persons not so named is incompetent, and must be rejected. The court has no discretion on the subject. Such knowledge and use is not a defence, under the statute (Act July 8, 1870, §§ 61, 76, 16 Stat. 208, 210), available to the defendant. It is, therefore, rejected.

The counsel, on the argument of the question above stated, submitted the cases upon the merits, on briefs then or afterwards submitted. One suit is founded upon a patent for a design for a billiard table; the other, upon a copyright of an engraving exhibiting a view of the same billiard table, with its ornamentation by carvings, &c.

As to the first, I am of opinion, that, in view of the state of the art, and the proof of the prior existence and use of billiard tables similar in form, there was no ground for such a patent. In truth, as a form of construction or configuration, it was not novel, in any such sense that its adoption constituted invention. This is proved without the testimony which I have above rejected as inadmissible under the pleadings. It is to be remembered, this is not a patent for the billiard table itself, or for any thing new in its actual construction, but only for a design, embracing its shape or configuration, by whatever means it is effected. The principal, if not the sole, feature claimed, is the form of bevelled sides and ends. Tables, and designs for tables, having such bevelled sides and ends, both straight and in the form technically called "ogee," are shown to be old and to have been in public use long before the complainant's alleged invention. This is so clearly established, that the argument in behalf of the complainant proceeds mainly upon the ground that the inclination or bevel is greater in the complainant's design than in the others. It is, at least, doubtful whether that is true as to some of such prior designs. But, in any view of that point, the subject was one of degree of inclination and bevel, to be determined as matter of judgment, in view of the purpose such bevel is adapted to serve, and not matter of new discovery or invention. It embraced no new idea. In either, the inward inclination of the lower part of the sides of the table, receding from the outer edge of the top or cushion bar, enabled the player to stand with one knee partially under the table, for convenience, in some part of his playing. The extent of such recess was mere matter of judgment in the manufacture, looking to the purpose for which it was desirable. Had the complainant invented something new in the mode of construction of the sides of the table, some new device by the use of which a table could be constructed with a greater bevel or inward inclination than was before practicable, or a new device by which a new result was produced in making any bevelled side, that might, perhaps, have been secured to him; but I think it clear, that a mere design which is practically a suggestion that a greater degree of inclination of the sides will make the table more convenient, when other tables already existed which, with a view to the same useful result in kind, were constructed with a similar bevel, is not invention, nor the proper subject of a patent. If it be possible, however, to include in the complainant's patent not merely the form or configuration of a billiard table, but its peculiar ornamentation, then the complainant must fail, because the defendant does not use the complainant's ornamentation. I state this hypothetically, because, unless the complainant be confined to the specific ornamentation which his design exhibits, then there is nothing new in that feature.

As to the copyright, these views are in a large degree applicable to that, also. And besides, the engraving claimed to be the subject of copyright is not a work of art, print, lithograph or engraving, having any value or use as such. It is a mere copy of what the complainant has patented as a design, and constitutes the mode in which the complainant advertises his tables. The defendant, having the right to make his own tables as he does make them, has an equal right to advertise them, by showing to the public their appearance, by engraving, lithograph or photograph.

The bills of complaint must be dismissed, with costs.

[NOTE. Complainant, on June 1, 1875, obtained a reissue of the patent (numbered 6,469), and brought suit against the same defendant for infringement, but the bill was dismissed. Collender v. Griffith, 2 Fed. 206.]

COLLERDS (FENTON v.). See Case No. 4,731.

Case No. 3,001.

COLLET v. COLLET.

[2 Dall. 294.][1]

Circuit Court, D. Pennsylvania. April Term, 1792.

NATURALIZATION—STATE AUTHORITY.

An individual state still possesses concurrent authority with congress upon the subject of naturalization; but this authority cannot be so used as to contravene a rule established by the latter.

[Cited in U. S. v. Villato, Case No. 16,622; Passenger Cases, 7 How. (48 U. S.) 533; U. S. v. Rhodes, Case No. 16,151.]

This was a bill in equity, which stated the complainant to be a subject of his Britannic majesty, and the respondent to be a citizen of Pennsylvania. The respondent in his plea averred, that the complainant was a citizen of Pennsylvania; and this plea, if true, deprived the court of its jurisdiction, as

[1] [Reported by A. J. Dallas, Esq.]

the federal courts cannot (unless in some particularly specified cases) take cognizance of controversies between citizens of the same state. The question was argued on the 21st of April by Randolph and Serjeant, in support of the bill, and by M. Levy in support of the exception to the jurisdiction. It then appeared, that the complainant was born in the Isle of Man, part of the British dominions; but it was certified, by the mayor of Philadelphia, that on the 30th of April, 1790, he had taken the oath of allegiance to the state of Pennsylvania, agreeably to an act of the general assembly, passed the 13th of March, 1789. 2 Dall. Edit. p. 677, founded on the 42d section of the old constitution. 1 Dall. Edit. p. 60, in App. It was likewise shewn by a certificate from the collector of the customs of the port of Philadelphia, that on the 5th of November, 1790, he was commander of the Pigou, an American ship; and the sixth section of the act of congress, for registering and clearing vessels (chapter 11, passed 1st September, 1789 [1 Stat. 56]) provides, that no registry shall be made of any American ship, until it is sworn (among other things) that "the present master is a citizen of the United States." In support of the plea, it was contended, that the power given to the United States, was meant as a guard against the narrow regulations that might, at any future period, be adopted by the individual states, to check the admission of aliens; and not as a security against the too easy extension of the rights of citizenship. This object would, therefore, be most effectually attained, by leaving the authority of the individual states unimpaired; and as there is nothing exclusive in the nature of the power, so neither is there anything exclusive in the manner of vesting it in the federal government. Though "congress shall have power to establish an uniform rule of naturalization" (article 1, § 8), it does not necessarily follow, that each state of the confederacy may not, likewise, exercise the power of adopting aliens upon its own terms. That an opinion prevails here, in favor of the state jurisdiction, must be inferred from the various laws, which Pennsylvania, even subsequent to the naturalization act of congress, passed 26th of March, 1790 [1 Stat. 103], has enacted, respecting the rights that aliens may enjoy within her territory. 3 Dall. Edit. 9, 183, 653. Nor is there any force in the argument that the jurisdiction in maritime and admiralty cases is exclusively vested in the federal government, without the use of exclusive words; for those in their nature are exclusive, belong appropriately to the national character, and arise extraterritorially of any state; whereas naturalization is merely a municipal and domestic concern. In opposition to the plea it was urged that contemplating the present situation of the United States, the birth of the complainant had made him an alien; and that in order to change the condition of alienage into that of citizenship, the interposition of a competent constitutional and legislative authority was indispensable. This authority, throughout the United States, resides in the federal government alone; for, the power of naturalization (which is given by the 8th section of the first article of the constitution) does of itself import exclusion. That one member of the Union should be able to disturb all the rest, by the introduction of obnoxious characters, was an evil to be prevented, and no effectual mode could be adopted to obviate the inconveniences of different systems and regulations in different states, short of giving to congress the exclusive power of establishing an uniform rule of naturalization. Exclusive words were not necessary in this case of admiralty and maritime jurisdiction, which is, nevertheless, allowed to be exclusively vested in the general government without the use of such words. If, therefore, congress had the exclusive power to admit citizens, that power being exercised by the act of the 26th March, 1790, the naturalization, under an act of the legislature of Pennsylvania, was a mere nullity, and the complainant remains a subject of the British crown.

Before WILSON and BLAIR, Circuit Justices, and PETERS, District Judge.

BY THE COURT. The question, now agitated, depends upon another question; whether the state of Pennsylvania, since the 26th of March, 1790, (when the act of congress was passed,) has a right to naturalize an alien? And this must receive its answer from the solution of a third question; whether, according to the constitution of the United States, the authority to naturalize is exclusive, or concurrent? We are of opinion, then, that the states, individually, still enjoy a concurrent authority upon this subject;[2] but that their individual authority cannot be exercised, so as to contravene the rule established by the authority of the Union. The objection founded on the word "uniform," and the arguments ab inconvenienti, have been carried too far. It is, likewise, declared by the constitution (article 1, § 8) that all duties, imposts and exercises shall be uniform throughout the United States; and yet, if the express words of exclusion had not been inserted, as in a subsequent part of the same article (section 10) the individual states would still, undoubtedly, have been at liberty, without the consent of congress, to lay and collect duties and imposts. Again, when it is said that one state ought not to be privileged to admit obnoxious citizens, to the injury of another, it should be recollected that the state which communicates the infection must herself be first infected; and in this, as in all other

[2] Quere? See 2 Dall. 373 [U. S. v. Parker, Case No. 15,992].

cases, we may be assured that the principle of self-preservation will inculcate every reasonable precaution.

The true reason for investing congress with the power of naturalization has been assigned at the bar. It was to guard against too narrow, instead of too liberal, a mode of conferring the rights of citizenship. Thus the individual states cannot exclude those citizens who have been adopted by the United States; but they can adopt citizens upon easier terms, than those which congress may deem it expedient to impose. But the act of congress itself, furnishes a strong proof that the power of naturalization is concurrent. In the concluding proviso, it is declared, "that no person heretofore proscribed by any state, shall be admitted a citizen as aforesaid, except by an act of the legislature of the state, in which such person was proscribed." Here we find that congress has not only circumscribed the exercise of its own authority, but has recognized the authority of a state legislature, in one case, to admit a citizen of the United States, which could not be done in any case, if the power of naturalization, either by its own nature, or by the manner of its being vested in the federal government, was an exclusive power. Upon the whole, the court think that the plea to the jurisdiction has been maintained; and, therefore, the bill must be dismissed.[3]

[3] It is remarkable that the argument in this case turned entirely upon the point whether the federal power of naturalization was exclusive or concurrent; and nothing was said by either side respecting the existence and operation of the act of Pennsylvania, which, as it depended in form and spirit on the old constitution, was virtually repealed when that constitution was abolished. The ideas of the reporter on that subject are contained in a note upon the naturalization laws of Pennsylvania in his edition of the acts of the general assembly (volume 1, p. 7a). It may be proper to add that there has since been a decision before Judge Biddle, in the common pleas of Philadelphia county, where the existence of the Pennsylvania law was the gist of the controversy; and in that case, as well as the case of U. S. v. Villato [Case No. 16,622], the act of assembly was adjudged to be obsolete.

Case No. 3,002.

In re COLLIER et al.

[12 N. B. R. 266.][1]

District Court, D. Kentucky. Nov. 25, 1874.

AGREEMENT OF PARTNER TO PAY FIRM DEBTS—TRANSFER OF FIRM ASSETS TO PARTNER—RIGHTS OF FIRM CREDITORS.

1. In the absence of fraud, joint debts may be converted into individual debts by one partner's undertaking, for a good consideration, to pay them.

2. If the partners, more than four months before the commencement of the proceedings in bankruptcy, transferred all their property, both separate and joint, to one partner, who undertook to pay the firm debts, all the assets will be treated as the separate assets of that partner.

3. A promise by one partner to pay all the firm debts may be enforced by the firm creditors, although they were not cognizant of the promise when made, and although the consideration did not move from them.

4. If there is no joint estate, the firm creditors may share pari passu in the separate estate.

[Cited in Re Lloyd, 22 Fed. 90; Re West, 39 Fed. 203.]

[1] [Reprinted by permission.]

[Opinion of Wilbur F. Browder, Register in Bankruptcy:]

A question having arisen, in the course of the proceedings in this cause, as to what debts were properly chargeable to the assets of the firm, and what to the assets of the separate members thereof, the assignee called a meeting of all the creditors, which meeting was accordingly held in the courthouse at Franklin, Ky., on the 28th day of March, 1874. It was unanimously resolved by this body that W. W. Bush, Esq., and Geo. C. Harris, Esq., were empowered and directed to "reduce to writing an agreed statement of facts" touching the issue above-mentioned. These gentlemen have executed this commission, and from the carefully-prepared statement and exhibits filed by them it appears that the copartnership of Collier, Taylor & Co., now bankrupts, was organized and went into operation in 1868, and conducted its business in Franklin, Ky., and elsewhere; that this company was composed of J. A. Taylor, Wm. F. Collier, and R. H. Collier; that it was an equal partnership, each member owning one-third thereof; that this firm continued its business operations until the 14th day of February, 1873, on which day it was by mutual consent dissolved. Prior to the dissolution, however, the partners had caused an invoice to be taken, from which it appeared that the liabilities of the concern exceeded its assets forty-six thousand four hundred and seventy dollars and twenty-four cents. W. F. and R. H. Collier owned very little property compared with the estate owned by their copartner, J. A. Taylor, which latter estate was of considerable size and value. The balance-sheet struck as hereinbefore-mentioned showed that the three partners, as between themselves, stood thus: in order to equalize them W. F. Collier would have to pay twenty thousand one hundred and fifty-seven dollars and thirty-nine cents; R. H. Collier would have to pay seventeen thousand and eight dollars and seventy-nine cents: J. A. Taylor would have to pay nine thousand three hundred and four dollars and six cents. In view of these facts it was agreed by and between the partners to dissolve the copartnership, and, further, that W. F. and R. H. Collier should transfer and convey to their copartner, J. A. Taylor, their undivided interest in and to the partnership property, and to transfer and convey to him all their separate property, personal, real and mixed, in order to help him the better

to bear the losses. To this arrangement Taylor assented, and in consideration thereof agreed to assume and pay off the firm debts, stipulating, nevertheless, that the two retiring partners should account to him for their respective shares of the joint liabilities outstanding, after having credited them by the value of the property conveyed by them to him as aforesaid. On the 13th day of February, 1873, pursuant to this agreement, R. H. Collier and wife conveyed to Taylor all the real estate owned by R. H. The consideration expressed in the deed is thus set forth, "for and in consideration of five thousand dollars, to be credited on R. H. Collier's indebtedness to Collier, Munday & Taylor and Collier, Taylor & Co." On the same day W. F. Collier and wife conveyed to J. A. Taylor all the real estate owned by said W. F. in consideration of said W. F. Collier's indebtedness to Collier, Taylor & Co. On the same day R. H. Collier and wife and W. F. Collier and wife conveyed to J. A. Taylor all their joint interest in and to the real estate owned by said R. H. and W. F. Collier as joint tenants and otherwise, in consideration of their indebtedness to Collier, Taylor & Co. On the 14th day of February, 1873, the partners, W. F. Collier, R. H. Collier, and J. A. Taylor, executed an instrument of writing, reciting (1) a settlement of all the partnership matters as between themselves; (2) an indebtedness of $——, due by W. F. Collier to J. A. Taylor on said settlement; (3) an indebtedness of $——, due by R. H. Collier to J. A. Taylor on said settlement; (4) the existence of outstanding liabilities of the firm of Collier, Taylor & Co.; (5) a dissolution of said copartnership; (6) an absolute sale and transfer by said W. F. and R. H. Collier to said Taylor of all the notes, accounts, assets, and property of all kinds belonging to Collier, Taylor & Co. This agreement also prohibits the use of said firm name thereafter for any purpose, except its necessary use by Taylor in winding up its affairs. The foregoing deeds and instruments were, immediately upon their execution, duly acknowledged and lodged for record and recorded in the office of the clerk of the Simpson county court. In none of these deeds do the grantors limit or restrict Taylor in the use or application to be made by him of any of the property, real or personal, conveyed by them to him. The only intimation on this subject found in any of the four conveyances is contained in the deed from R. H. Collier and wife, in which the grantor states that the property so aliened is to be used by Taylor in payment of the debts of the late firm, and that said Collier is to be credited by the proceeds of the sale thereof on his indebtedness to J. A. Taylor. With this exception these deeds are, on their face, absolute and unconditional.

On the said 14th day of February, 1873, J. A. Taylor entered upon and assumed charge of all the property thus conveyed to him, and exercised acts of ownership over the same. On said day Taylor issued printed invitations, addressed to all the creditors (1) of himself, (2) of Collier, Taylor & Co., and (3) of Collier, Mundy & Taylor, requesting them to meet him on the 20th day of February, 1873, in Franklin, Ky. In this general notice, mailed to the creditors, he asserts his ownership of all the joint and separate property hereinbefore alluded to; his assumption of all the partnership debts, and his willingness and ability to pay them all in full. In response to this invitation a large number of the creditors, joint and individual, assembled at the appointed time and place. Taylor stated to this meeting all the facts hereinbefore specified, and told the creditors that they must "look to him for satisfaction of their debts," and asked them to propose some policy by which he should be guided in accomplishing the desired results. He submitted an elaborate statement of his financial condition, showing a surplus of assets over and above the liabilities, amounting to fourteen thousand one hundred and ninety-two dollars and thirty-six cents. This meeting adjourned without any definite action, merely suggesting that Taylor should execute a deed of assignment to trustees for the benefit of creditors, but dispersing without carrying this idea into effect. From and after February 14, 1873, Taylor took possession, as before stated, of all the estate transferred to him, and treated all as his separate property, attempted to wind up his affairs, sold one item of joint property, and collected, including this sale, about five hundred dollars of the joint assets. This money was so mingled with his own that no definite history of its application can be ascertained. He applied part of it to the payment of a premium on a policy of life insurance, and does not account for the residue. This course was continued until May 13, 1873, on which day J. A. Taylor executed to G. W. Dickey and W. C. Montague a deed of assignment in trust for the benefit of the creditors afore-mentioned, making no distinction whatever between the joint and separate classes—desiring them all to be treated equally and alike. By this deed all the property owned by Taylor, embracing the real and personal property conveyed by W. F. and R. H. Collier, was transferred to Montague and Dickey, who accepted the trust, in writing indorsed on said deed. The deed and acceptance were duly acknowledged and recorded in the proper office. Taylor uses these words in this assignment: "It being my desire to make no distinction or difference between any of my creditors, but treat them all alike and equally in accordance with their priority, etc." The trustees executed no bond, but entered at once upon the discharge of their duties, and continued to act under the authority conferred in the deed up to the 15th day of August, 1873, on which day Page & Co., petitioning creditors, filed a petition in this court against the firm of

Collier, Taylor & Co., praying that said firm be adjudged bankrupt, on which petition they were in due time adjudicated bankrupts, an assignee was duly elected and received a complete surrender from Montague and Dickey of all the property and effects belonging to said copartnership and the separate members thereof.

It is admitted by counsel that at the date of the dissolution of the firm the estimated value of the assets of the partnership and its members was as follows:

J. A. Taylor's separate estate........	$50,000
W. F. Collier's separate estate......	3,000
R. H. Collier's separate estate.......	2,000
Collier, Taylor & Co.'s estate........	10,000
Total valuation..................	$65,000

From February 14, 1873, until the 15th day of August, 1873—the date of the deed of assignment of the bankrupts' effects to the assignee—the title to all the foregoing property was vested in J. A. Taylor and Montague and Dickey, trustees, and from the record there appears to have been, and is no other property, joint or separate.

The debts proven against the estate of the company and the separate members thereof are as follows:

Against Collier, Taylor & Co......	$58,290 21
" J. A. Taylor............	28,449 47
" Wm. F. Collier..........	281 44
" R. H. Collier............	127 40

On the foregoing facts the following questions of law arise: First. Shall the joint and separate creditors share pari passu in the distribution of the assets of the estate? or, shall the joint and separate assets be treated as the individual estate of Taylor, and the joint and separate creditors be treated as his individual creditors in said distribution? Second. Do the facts in this cause warrant the application of the rule contained in the 36th section of the bankrupt act? Third. Were the conveyances by W. F. Collier and R. H. Collier to J. A. Taylor fraudulent, and are they subject to review and rescission in this special proceeding? Fourth. Was the voluntary promise by J. A. Taylor to pay all the firm debts binding on him, and is it enforceable in this proceeding?

There is really but one question involved, and in stating it in the foregoing forms the object is to give prominence to the leading features of the inquiry. It is conceded that section 36 of the act of March 2, 1867 [14 Stat. 534], commonly styled the bankruptcy act, is simply declaratory of the formerly-established rule in equity. It is no innovation, but merely an expression, in peculiarly felicitous language, of the ancient equity practice of marshaling and distributing assets. It is equally true that the system of bankruptcy organized under the aforesaid act is mainly a system of equity jurisprudence, and that proceedings in bankruptcy are proceedings in equity. So that the matters involved in this controversy are to be determined by the rules and practice obtaining in chancery courts. The 36th section affords no field for discussion, and the issue raised is not a construction of this section, but whether the assets in the hands of the assignees shall be distributed according to the rule prescribed therein. We are confronted at the outset by the fact that Collier, Taylor & Co., as a copartnership, were proceeded against in bankruptcy and were adjudicated bankrupts under this particular section of the act; that the court obtained jurisdiction over them by the operation of this section, and that all the proceedings heretofore have been conducted according to its provisions. Some of the parties to this action, and the very parties, too, who instituted these proceedings against the firm by invoking this section, are now seeking to evade its provisions in the distribution of the assets of the estate. In the first place, was it necessary to proceed against the company under this section? Was there in existence on the 15th day of August, 1873, such a community of interest and such a community of indebtedness as justified proceedings against W. F. Collier, R. H. Collier and J. A. Taylor as partners doing business under the firm name of Collier, Taylor & Co.? We think not. This copartnership was dissolved by consent February 14, 1873, the two Colliers retiring, and at the same time conveying to their copartner, J. A. Taylor, all their joint and separate estates and effects. This was legitimate, and, in the absence of fraud, conclusive against all the world. They received good and sufficient considerations in exchange for the property transferred. None of their creditors have assailed these conveyances, nor do they appear in this special proceeding to object. The copartnership creditors have not attacked these transfers, but on the contrary insist upon upholding them. Notwithstanding this, the separate creditors of J. A. Taylor, whose ability to pay was thereby enhanced, insist that these conveyances are in derogation of their rights and should be treated as null and void. This pretension is too impalpable for further pursuit. If Taylor, who owned a large estate, had conveyed his property to the retiring partners, then perhaps some reason might appear justifying the opposition thereto by his separate creditors, but if any one is aggrieved by his receiving an additional fund with which to pay, it is certainly not his individual creditor. It is a well-settled rule that partners can convert joint property into separate property by transfers to a copartner, and it follows as a corollary that joint debts may be converted into individual debts by one partner's undertaking their payment. Of course fraud vitiates every transaction, and the absence of fraudulent intent is a condition to be annexed to the foregoing proposition. It is error to say that partnership creditors have

a lien on joint property, and separate creditors have a lien on individual property. While equity treats these two classes as holding preferences, and awards to them the priorities laid down in section 36 before mentioned, there is no principle of practice with which I am familiar under which a lien, as recognized by courts of chancery, can be enforced in such cases. This is clearly illustrated by the fact that if A and B are partners, owing firm debts, and each owing separate debts, and while these debts are outstanding, execute a joint note, which A indorses as surety, and the firm afterwards becomes insolvent, the separate creditors of A could certainly claim no preference, to the exclusion of the partnership creditor to whom A was bound as surety. If a lien existed on A's separate estate in favor of his separate creditors, whose debts were contracted before his indorsement of the firm paper, then it would be competent for them to claim and receive satisfaction in full before the joint creditor could collect his debt out of his separate estate. And this on the principle that the separate creditors were mortgagees holding his separate estate under a valid lien of mortgage. These classes only hold debts, which, by reason of the fact that one class trusted on the strength of individual estate, and the other contracted, primarily, on the strength of joint property, ought in equity to be paid out of the funds which originally received the credit; and to this extent, and no further, in our opinion, are these classes lien-holders.

In this case no actual or presumptive fraud appears upon the facts submitted. Indeed, it is clear that the utmost good faith prevailed during the entire period of gradual decay. Taylor, up to the date of his assignment to trustees, May 13, 1873, apparently believed that he would be able to pay all the debts in full and have a surplus of fourteen thousand dollars, or thereabouts. But assuming that there was fraud intended by the transfers of February 13 and 14, 1873, can it be reached in this proceeding? No one has yet attempted to vacate or set aside any of these conveyances. If the creditors desired to annul these transfers they should have proceeded within six months from the date of their execution, if they invoked the courts of the commonwealth, or within four months, if by proceedings in bankruptcy. They have done neither, and it seems to us that inasmuch as the title to this property is now in the assignee, holding directly under J. A. Taylor, through the medium of an assignment executed by an officer of this court, that the proceeds of the sale of this property must follow the title, and can only be divested by a diversion of the title. The fact of the assignee's being one person, in whom the titles all, irrespective of their previous lodgment, must vest, can make no difference, as he is expressly directed by the act to keep the estates distinct and separate, as well from the funds of one partner as from his own private funds. It results from the foregoing that, in our judgment, all the assets in the hands of the assignee, whether on account of J. A. Taylor, or W. F. Collier, or R. H. Collier, or Collier, Taylor & Co. are to be held and treated as the separate assets of J. A. Taylor alone; that at the date of the commencement of these proceedings there was no copartnership and no joint estate. This opinion is strengthened by the absolute and unconditional terms of all the conveyances made to Taylor, February 14th, by his late partners. Only one of these deeds expresses an intimation as to the object sought by the parties, and it virtually impairs the force of the intimation by stating that the grantor is to have credit by the proceeds of the sale of the property so transferred, on a settlement with J. A. Taylor. These deeds were not, on their face, trust deeds; nor does the conduct of the parties before and after their execution raise any reasonable presumption that they were so intended. They were made to reimburse Taylor, in part, for the large indebtedness which he was by law bound to pay. Taylor's assumption of all the partnership debts is the next step in this inquiry. It is now an elementary principle that the promise by one to another for the benefit of a third is binding and enforceable by and in the name of the third party. No principle is more deeply rooted in the American system of jurisprudence than this familiar rule. This doctrine is tenable, it seems, even where the beneficiary was not cognizant of the promise when made, and although the consideration did not move from him. To apply this rule to the case in hearing is perceptibly easy. Taylor, in consideration of certain transfers of property to him, agreed with the two retiring partners, to pay all the debts owing by the firm of Collier, Taylor & Co. By this promise he is bound, and the joint creditors can enforce it against him or claim the benefit of it, either before or after the bankruptcy of their debtor. The general promise of Taylor to pay all outstanding firm liabilities is as much a contract, and is to be treated with as much solemnity as though he had, in writing, indorsed his guaranty on the back of every existing obligation of the copartnership. In a case similar to this, In re Downing [Case No. 4,045], Judge Dillon uses this language, in reference to the creditors of the firm, "I look upon their rights in equity as being the same as if Downing had indorsed the pre-existing firm paper, in which case they could have proved their debts against either, if not both the firm and Downing."

It follows from the foregoing that, in our judgment, all the assets should be treated as the separate property of Taylor, and all the creditors should share pari passu in the dividends arising therefrom. This conclusion has been reached after a careful study of the 19th, 27th, 32d, 33d, 34th and 36th sections

of the bankruptcy act [14 Stat. 525], and the following leading cases, to wit: In re Downing [supra]; In re Goedde [Case No. 5,500]; In re Rice [Id. 11,750]; In re Knight [Id. 7,880]; In re Byrne [Id. 2,270]; Black's Appeal, 44 Pa. St. 503; Bank of Kentucky v. Herndon, 1 Bush, 359; Watson v. Gabby, 18 B. Mon. 658; Murrell v. Neil, 8 How. [49 U. S.] 426; Robb v. Mudge, 14 Gray, 534.

Thos. H. Hines, for joint creditors.

J. H. Rose, W. O. Dodd, and Muir, Bijur & Darie, contra.

BALLARD, District Judge. I concur in the opinion of the register.

BALLARD, District Judge. I have re-examined this case with great care, and I have considered the arguments and authorities submitted by counsel, but my opinion remains unchanged. There is ground for maintaining that the deeds made by the Colliers to Taylor created a trust in favor of the partnership creditors, but there is not, in my opinion, any ground for asserting that they are fraudulent. I do not understand that either of the parties to the agreement submitted insist that any such trust was created, and, therefore, I shall not pass upon the question suggested.

COLLIER (CAREY v.). See Case No. 2,400.

COLLIER, The (SRODES v.). See Case No. 13,272.

COLLIER (UNITED STATES v.). See Case No. 14,833.

COLLIER WHITE LEAD CO. (MINNESOTA LINSEED OIL CO. v.). See Case No. 9,635.

Case No. 3,003.

COLLINGS et al. v. HOPE.

[3 Wash. C. C. 149.][1]

Circuit Court, D. Pennsylvania. April Term, 1812.

CUSTOMS AND USAGE.

What is called the custom or usage of trade, is the law of that trade; and to make it at all obligatory, it must be ancient, so as to be generally known, certain, and reasonable. A usage, of so doubtful authority, as to be known only to a few, and where merchants in the trade differ as to its existence, can never be regarded.

[Cited in U. S. v. Buchanan, 8 How. (49 U. S.) 102.]

Mr. Claudius, residing in Philadelphia, the agent of the plaintiffs, merchants at Rotterdam, was in the habit of procuring consignments to his principals, and of making advances on the shipments, to the amount of two-thirds of the invoice value, by bills on a house in London. Copies of the invoice and bill of lading, he enclosed to the house in London, as well as to the plaintiffs. In November, 1807, the defendant proposed to ship a parcel of coffee to the house at Rotterdam, upon which Claudius agreed to make the usual advance, and drew a bill on the house in London, in favour of the defendant, for £260 sterling, which was duly paid. The vessel and cargo were lost; and this action was brought to recover back the advance thus made.

The defence was, that according to the usage at Philadelphia in similar cases, it was the duty of the agent to have had insurance effected on this property; and this not having been done, the plaintiffs were liable as if they had themselves been the insurers. To prove the usage, three or four merchants were examined; one of whom stated this to be the usage, but the others knew of no such usage. It appeared, that Claudius had sometimes made the insurance in similar cases, and in others that the shippers had; and upon the whole, it was pretty clear, that the one or the other effected the insurance, as was arranged between the parties. In this case, however, it was proved by Claudius, that he informed the defendant when the shipment was made, that it was too late for him to have it done, and that the defendant said he was about to do it.

WASHINGTON, Circuit Justice, charged the jury. What is called the custom or usage of trade, is the law of that trade; and to make it at all obligatory, it must be ancient, (sufficiently so at least, to be generally known,) certain, uniform, and reasonable. A usage of so doubtful authority as to be known only to a few, and where merchants engaged in the trade differ as they do in this case, as to the existence of it, can never be regarded. The one now set up, is an unnatural one; for, although the shipper may consent to let the agent make the insurance, yet in general, he would prefer making his own bargain; and though the agent may insure to the amount of his advance, for the safety of his principal, yet he may decline doing it, if he is willing to trust to the general credit of the shipper. Beyond the sum advanced, he certainly cannot insure, without an express authority from the owner of the cargo; and this circumstance is strong to prove, that wherever the agent insures, he obtains such an authority from the shipper. This appears to have been the practice of this agent. But even if the custom had been fully proved, this case would be an exception from it, as Claudius not only declined insuring, but the defendant undertook to insure. Verdict for plaintiffs.

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

Case No. 3,004.

In re COLLINS.

[8 Ben. 59.][1]

District Court, E. D. New York. March, 1875.[2]

CHATTEL MORTGAGE—TIME OF FILING.

A chattel mortgage executed and delivered without fraud for purchase money, not filed as required by the law of the state before the filing of a petition in bankruptcy, but filed prior to the appointment of an assignee, and when there were no judgments against the bankrupt, is sufficient to give a lien upon the mortgaged property which must be recognized by the bankruptcy court in disposing of the proceeds of the mortgaged property.

[In bankruptcy. In the matter of Charles Collins.]

F. E. Dana, for petitioners.
John Brodhead, for assignee.

BENEDICT, District Judge. The recent determination of the supreme court of the United States in regard to the effect of the bankrupt law seems to justify the position taken on behalf of the petitioners that their chattel mortgage, having been executed and delivered without fraud to secure purchase money, and, although not filed as required by the laws of the state prior to the filing of the petition in bankruptcy, having been duly filed prior to the appointment of an assignee, and when there were no judgments against the bankrupt, is sufficient to give them a lien upon the mortgaged property, which must be recognized by this court in disposing of the proceeds of the mortgaged property. Such right will therefore entitle the petitioner to be paid any sum justly due upon the mortgage out of any proceeds realized by the assignee from the sale of the mortgaged property.

[NOTE. From the order made in accordance with this opinion the assignee in bankruptcy, on behalf of Warner & Co., creditors, appealed to the circuit court, where the order was affirmed. Case No. 3,007.

[See, also, Case No. 3,005, for proceedings on the sale and resale of the mortgaged property.]

Case No. 3,005.

In re COLLINS.

[8 Ben. 328.][1]

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

RESALE—EXPENSES OF PURCHASER—COUNSEL FEES.

1. An assignee in bankruptcy sold at public auction two boilers on which there was a mortgage to their full value. The mortgagee had actual notice of the intended sale, but, by mistake, failed to attend, and the property was sold. On application of the mortgagee, who offered a higher bid, that sale was set aside by the court and a resale ordered, on condition that the mortgagee pay into court $300, to abide the order of the court as to the amount which he must pay to the purchaser and to the assignee. Proof of the facts was then taken before the register. *Held*, that the assignee could not be allowed the expenses of an attempted sale prior to the actual sale, nor for painting and cleaning the boilers.

2. A charge for auctioneer's fees must be disallowed. The mortgagee having objected to the employment of an auctioneer, the approval of the court should have been obtained before incurring the expense.

3. Nothing could be allowed for the expense of moving the boilers after a stay of proceedings had been ordered by the court, or for storage made necessary by such removal.

4. The assignee could not be allowed for services of counsel in opposing the resale, because it was plainly for the interest of the estate that a resale should be had; but he might be allowed for services of counsel to see that the estate was properly protected from loss in the order for resale

5. The purchaser must be allowed for services of counsel in opposing the resale, but not for such services in attending before the register to prove a bill of charges which were greater than he was entitled to.

6. The register's charges must be borne by the mortgagee.

[In bankruptcy. In the matter of Charles Collins.]

F. E. Dana, for bankrupt.
John E. Brodhead, in opposition.

BENEDICT, District Judge. Robert King, assignee in bankruptcy of Charles Collins, came into the possession of two boilers, upon which one Schoonmaker also claimed a lien, by way of mortgage, to their full value. The assignee determined to sell the boilers at public auction and such sale was made on April 24th, after public notice and actual notice to Schoonmaker. By mistake Schoonmaker omitted to attend the sale, and the property was struck off to one Cooney for $819. Schoonmaker then applied to the court for a resale of the boilers, offering to bid $1,500. The sale was thereupon set aside and a resale directed, upon the condition that Schoonmaker should deposit the sum of $300 in court to abide the order of the court in respect to the sum to be paid by him to Cooney, the purchaser at the sale, and to the assignee, for the expenses and costs of the sale and of these proceedings. It is now before the court to determine the proper sums to be paid by Schoonmaker, upon testimony taken before the register in respect to such expenses and costs.

From the items claimed by the assignee, there must be deducted all the expenses of an attempted sale, made on January 16th. The sale set aside was that of April 24th, and the expenses of that sale only are within the scope of the order made. The item of expenses for painting and cleaning the boilers must also be disallowed. These form no part of the expenses of the sale. The item of auctioneer's fees must also be rejected.

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

[2] [Affirmed in Case No. 3,007.]

The necessity for such an expenditure in this case is not apparent. The employment of an auctioneer was objected to by Schoonmaker, who then claimed to be, and who has since been adjudged to be, the real party in interest. After objection made from such a quarter, the approval of the court should have been obtained before incurring that expense. There is also an item of $75 for money paid cartmen for moving the boilers, which must be reduced to nine dollars. This work was not begun until it was known that an application would be made to set aside the sale, and most of it was done after proceedings had been stayed by the order of the court. The value of the labor performed before the stay was made may be allowed, being the sum of $9, as shown by the proofs. Seventy-five dollars is also claimed for the services of one Smith, a boiler maker. This, Smith says, is for his services and for storage. No storage can be allowed, as the removal of the boilers was forbidden before they could have been stored, and, for any services of Smith rendered before the stay, $10 is a sufficient compensation. A question is raised as to what shall be allowed to the assignee for services of counsel, and fifty dollars is suggested as a proper sum. Some considerable portion of the services supposed to be covered by this suggestion—and it is impossible from the proofs to say what portion—is for services rendered in drawing affidavits and opposing the order for a resale. But the assignee should not be allowed for opposing the resale, because it was plainly for the interest of the estate that the resale should be had. All that counsel for the assignee could properly be required to do, was to see that proper provisions for the protection of the estate from loss were inserted in the order. I consider that justice will be done if the assignee is allowed twenty dollars for his expenses of counsel. On the part of the purchaser who bought the boilers at the sale set aside, there is charged twenty-five dollars for the expenses of employing counsel to oppose the resale. The charge is not exorbitant and is properly payable by the person asking for a resale, when the necessity for the application was caused by his own neglect to attend the sale, and when, as it appears, the price bid by the purchaser was all that would be paid by any person except the mortgagee. The purchaser also charges for expenses in employing counsel to attend before the register to prove the purchaser's bill of charges. This service, however, was made necessary by the purchaser's demand of a greater sum than he was entitled to. It should be paid for by him, especially as the register's charges are to be borne by the mortgagee.

I have now, as I believe, disposed of all the points in controversy between these parties, so that an order can at once be made for the distribution of the sum in court in accordance with this opinion, allowing to the assignee and to the purchaser all the items proved which are not herein rejected, and paying the balance if any to the mortgagee.

Case No. 3,006.

In re COLLINS.

[3 Biss. 415;[1] 10 N. B. R. 335.]

District Court, N. D. Illinois. Jan., 1873.

BANKRUPTCY OF MARRIED WOMAN.

A married woman may be a voluntary as well as an involuntary bankrupt.

In bankruptcy. This was a motion by Charles Botto, a creditor of the bankrupt, a married woman, to set aside and dismiss the bankruptcy proceedings.

Wm. T. Burgess, for the motion, contended that a claim against a married woman is in the nature of a charge against her estate, not a debt against her, and that she has not the capacity to contract debts; citing Carpenter v. Mitchell, 54 Ill. 127; Parent v. Callerand [64 Ill. 97].

J. B. Leake, for bankrupt.

BLODGETT, District Judge. On the 28th day of November last, Harriet E. Collins, of this city, filed her petition before the register in bankruptcy for this district, asking to be adjudged a bankrupt. It was a voluntary proceeding on her part, setting forth that she was insolvent and unable to pay her debts, and bringing herself, as far as the petition appeared, strictly within the bankrupt law. The adjudication was entered and the proceedings went on under the usual pro forma course until the 14th of December, when Mr. Charles Botto appeared in this court and represented, by his petition and proofs, that he was a creditor of Mrs. Collins; that she was a married woman; that he had brought suit in the superior court of Cook county, Illinois, which had proceeded to a judgment, and that he was then in process of collecting his judgment when he was interfered with by the proceedings in bankruptcy, which had stopped him from enforcing his individual claim, and suggesting to the court that Mrs. Collins, being a married woman, could not avail herself voluntarily of the provisions of the bankrupt law [of 1867 (14 Stat. 521)], and be adjudged a bankrupt.

It is obvious that the principles I have already laid down in the Kinkead Case [Case No. 7,824] apply with equal force to this case. I can see no difference between the voluntary and involuntary proceeding, so far as the ability to adjudge a woman bankrupt is concerned. Mrs. Collins was engaged as a trader in this city. She had a husband, but he took no interest in the business; she was to all intents and purposes the sole trader, and

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

becoming insolvent and desiring to avail herself of the provisions of the bankrupt law, surrendered her property, which was quite considerable, to the jurisdiction of the court, and asked to be relieved. I think the principles I have laid down in the Kinkead Case, that a married woman could lawfully engage in business and incur liabilities, justify her in coming to this court, and the court in taking jurisdiction of the case. The motion of Botto to set aside these proceedings will be overruled.

That a married woman may be a voluntary bankrupt. In re O'Brien [Case No. 10,397]. This is also the English rule. Roche & H. Bankr. 357 et seq. Consult, also, In re Kinkead [Case No. 7,824], and In re Goodman [Id. 5,540], Sept., 1873.

Case No. 3,007.

In re COLLINS.

[12 Blatchf. 548;[1] 12 N. B. R. 379; 1 N. Y. Wkly. Dig. 78.]

Circuit Court, E. D. New York. June 21, 1875.[2]

RIGHT OF ASSIGNEE IN BANKRUPTCY TO ATTACK CONVEYANCE — VALIDITY OF CHATTEL MORTGAGE.

1. An assignee of a bankrupt represents creditors, and has the right to attack a fraudulent conveyance made by the bankrupt, wherever creditors could do so, even where the bankrupt, by participating in the fraud, has lost the right to attack the conveyance.

[Cited in Re Duncan, Case No. 4,131; Platt v. Matthews, 10 Fed. 281.]

2. By the statute of New York (3 Rev. St., 5th Ed., 222, § 9), a chattel mortgage, not accompanied by an immediate delivery and continued change of possession of the thing mortgaged, is declared to be void "as against the creditors of the mortgagor, and as against subsequent purchasers and mortgagees in good faith, unless the mortgage, or a true copy thereof, shall be filed," as directed. The creditors intended are those who have, by judgment and execution, obtained a specific lien on the thing mortgaged. Subsequent purchasers and mortgagees in good faith are those who pay or advance their money upon the security of the property, without knowledge of the previous incumbrance.

[Cited in Cady v. Whaling, Case No. 2,285.]

3. C. gave a chattel mortgage to S. on some boilers. Afterwards C. was adjudged a bankrupt. After that, the mortgage was filed. W. became a creditor of C. while the boilers were in the hands of C., and after the mortgage was given, and before it was filed, but had obtained no judgment for his debt. The assignee in bankruptcy of C. received the boilers as the property of C. S. obtained an order from the district court, in bankruptcy, declaring the mortgage to be a lien on the boilers, and directing the assignee to pay the mortgage out of the proceeds of the sale of the boilers. W. appealed from that order to this court. *Held*, affirming the order, that, as representing W., the assignee could not attack the mortgage; that he did not represent a judgment and execution, or a purchaser or a mortgagee in good faith; and that the assignment to the assignee under the bankruptcy act conferred upon him no greater right to attack the mortgage than the bankrupt had.

[Cited in Platt v. Stewart, Case No. 11,220; Re Gurney, Id. 5,873; Re Werner, Id. 17,416; Platt v. Preston, Id. 11,219; Douglass v. Vogeler, 6 Fed. 58.]

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

In bankruptcy. A petition was presented to the district court by Carston Schomaker, setting forth, that, in May, 1873, he sold and delivered to Charles Collins three locomotive tubular boilers, for the price of $1,500; that, on the 29th of October, 1873, said Collins gave to him a chattel mortgage on said boilers, for $1,448.40, a part of the purchase money of said boilers, which had not been paid; that said chattel mortgage was not filed for record until June 5th, 1874, and had not been paid, but said mortgagor was indebted for the whole amount secured thereby to the petitioner; that, on the 22d of April, 1874, a petition to have said Collins adjudged a bankrupt was filed in said court, and proceedings commenced by the service of a citation or order to show cause why he should not be so adjudged; that, on the 11th of June, 1874, said Collins was adjudged a bankrupt, and on the 26th of June, 1874, Robert King was elected and appointed assignee; that said boilers had come into the possession of said assignee, as the property of said bankrupt; that said chattel mortgage was payable on demand, and the petitioner had demanded payment of said Collins and said assignee, and said mortgagor was in default on said mortgage; that said mortgage was taken by the petitioner in good faith, without fraud, and in the full belief that said Collins was abundantly solvent; that the petitioner had demanded said boilers of said assignee; and that, on the petition of said assignee, a sale thereof had been ordered under section 25 of the bankruptcy act [of 1867 (14 Stat. 528)]. The petition prayed that said mortgage might be declared a lien upon the property therein mentioned; that the amount thereby secured might be allowed and paid to the petitioner by the assignee of the bankrupt; and that if, upon the sale of said property, by order of the court or otherwise, by said assignee, the petitioner should be the highest bidder, the assignee might allow and apply upon said bid the amount so secured by said mortgage to the petitioner. The district court made an order in accordance with the prayer of the petition. [Case No. 3,004.] From that order the assignee, on behalf of Warner & Co., creditors of the bankrupt, appealed to this court. The debt of Warner & Co. was contracted while the boilers were in the hands of Collins, and after the mortgage was given, and before it was filed. It did not appear

[1] [Reported by Hon. Samuel Blatchford, District Judge, and here reprinted by permission. 1 N. Y. Wkly. Dig. 78, contains only a partial report.]

[2] [Affirming Case No. 3,004.]

that judgment had ever been recovered upon this debt.

Tracy, Catlin & Brodhead, for Schomaker.
F. E. Dana, for assignee.

HUNT, Circuit Justice. The argument of the appellant is, that, by the statutes of New York (3 Rev. St., 5th Ed., 222, § 9) a chattel mortgage not accompanied by an immediate delivery and continued change of possession of the thing mortgaged, "shall be absolutely void as against the creditors of the mortgagor, and as against subsequent purchasers and mortgagees in good faith, unless the mortgage, or a true copy thereof, shall be filed" as directed in a section following; and that the assignee represents the creditors of the bankrupt, as well as the bankrupt, and, by the statutes of New York (3 Rev. St., 5th Ed., 226, § 1), as well as by the principles of the bankrupt act, may attack and set aside any mortgage or assignment that could be attacked by a creditor, if bankruptcy had not occurred. The appellant cites Thompson v. Van Vechten, 27 N. Y. 568, 581, 582, and Parshall v. Eggert, 54 N. Y. 18, to show, that the mortgage is void as against a debt contracted before it was filed, although judgment was not obtained upon the debt until after such filing; and that, while it is conceded that the mortgage cannot be attacked until the creditor's debt is put in judgment and an execution issued thereon, yet, when these requisites are met, the creditor may go back to the origin of the debt, and, if the mortgage was then unfiled, it is deemed to be fraudulent as against the judgment and execution thus subsequently obtained. This course of reasoning is entitled to great consideration. In the present case, the essential fact of a judgment and execution in favor of the firm of Warner & Co. is not set forth. There is no evidence or reason to suppose that up to this moment they are in a condition to attack the mortgage, if no proceedings in bankruptcy had been taken.

I think the position is a sound one, that the assignee represents the creditors, and that he is authorized and is bound to protect their interests. In the instance of a fraudulent conveyance, where, by his participation in the fraud, the debtor has lost the right to attack the conveyance, I do not doubt the power of the assignee, as representing creditors, to attack it, wherever creditors could do so. The difficulty here is, that the creditor has no such right. Has the assignee any other or greater rights than the creditor? The New York statute declares the mortgage, unless filed, to be void as against the creditors of the mortgagor, and as against subsequent purchasers and mortgagees in good faith. The creditors spoken of have been shown to be those having judgments and executions. Subsequent purchasers or mortgagees in good faith are those who pay or advance their money upon the security of the property, without knowledge of the previous incumbrance. Thompson v. Van Vechten, 27 N. Y. 581; Van Heusen v. Radcliff, 17 N. Y. 580. The assignee cannot claim to hold either of these positions. So far as it is obtained from state laws, the assignee would seem to have no power to attack the mortgage. He does not represent a judgment and execution, or a purchaser or mortgagee in good faith.

Does the bankrupt act of the United States give to the assignee, under the circumstances stated, the authority to set aside this mortgage as fraudulent? Section 14 (14 Stat. 523) enacts, that "all the property conveyed by the bankrupt in fraud of his creditors, all rights in equity," &c., "shall, in virtue of the adjudication of bankruptcy, and the appointment of his assignee, be at once vested in such assignee." It is also enacted, in the same section, that "such assignment shall relate back to the commencement of said proceedings in bankruptcy, and thereupon, by operation of law, the title to all such property and estate, both real and personal, shall vest in said assignee, although the same is then attached," &c. All rights at law or in equity to this property, possessed by the bankrupt when the bankrupt proceedings are commenced, belong to the assignee. The case of Allen v. Massey, 17 Wall. [84 U. S.] 351, is cited to show that the assignee has power to maintain this action. It does not appear, from the report of the case, that the law of Missouri makes it necessary that there should be a judgment and execution before a creditor can attack a fraudulent mortgage, nor that that point was presented in that case. If the creditor had or has a right in law or in equity, it passes to the assignee. If he has none, nothing passes to the assignee. I do not perceive how the transfer from the bankrupt to the assignee relieves from the necessity of obtaining that specific lien upon the property which is needed to authorize an attack upon the mortgage. The New York Reports are full of cases to the effect, that a simple debt, or a judgment even, will not justify a bill to set aside, as fraudulent, a conveyance of real estate. The creditor must first have a deed or mortgage from the debtor, a sheriff's certificate of sale on execution, or some equivalent right giving a claim upon the specific property conveyed. Frost v. Mott, 34 N. Y. 253; Lawrence v. Bank of Republic, 35 N. Y. 320; Meech v. Patchin, 14 N. Y. 71; Cramer v. Blood, 57 Barb. 155; Dunlevy v. Tallmadge, 32 N. Y. 457; Rinchey v. Stryker, 28 N. Y. 45. So, in the case of a fraudulent incumbrance upon personal property, a general debt will not authorize a proceeding to vacate it. There must be a bill of sale, or mortgage, or execution or attachment levy, or its equivalent, constituting a lien upon the specific chattel. The cases are all based upon the theory, that the party attacking the

fraudulent act must have an interest in, or lien upon, the specific property thus incumbered. This is an indispensable requisite. The assignee gains no additional rights over those possessed by the bankrupt, by a conveyance from him or by his authority. The bankrupt can transfer no lien upon the specific property, because he possessed none. The creditors can give to the assignee no such lien, for the same reason. Gibson v. Warden, 14 Wall. [81 U. S.] 248. As against the debtor himself, the mortgage was and is a good debt and a valid lien. Hale v. Sweet, 40 N. Y. 99; Smith v. Acker, 23 Wend. 653; Wescott v. Gunn, 4 Duer, 107. It is fraudulent as against the parties particularly named, viz., purchasers or mortgagees in good faith, or creditors who shall have obtained some specific lien upon the chattel mortgaged.

The non-existence of a judgment and execution in favor of Warner & Co. is a radical defect. It is not in the nature of a technical or formal objection, but one going to the essential merits of the case. The order appealed from must be affirmed.

[NOTE. The mortgaged property was subsequently sold by the assignee, and the mortgagee applied for a resale on the ground of inadequacy of price, which was granted upon payment of the expenses and costs of the sale. See Case No. 3,005.]

Case No. 3,008.

In re COLLINS.

[1 N. B. R. 551 (Quarto, 153); 2 Am. Law T. Rep. Bankr. 7.][1]

District Court, D. Kentucky. 1868.

EXAMINATION OF BANKRUPT—CONSULTATION WITH COUNSEL.

In the examination of a bankrupt, he may not consult with his counsel before answering interrogatories, except by permission of the register.

[On certificate of register in bankruptcy.]

I, James M. Fidler, one of the registers of said court in bankruptcy, do hereby certify, that in the course of proceedings in said cause before me, the following question arose, pertinent to the said proceedings: Facts. The bankrupt being duly under examination, was asked the following question by J. M. Fogle, counsel for Ben O'Neal, a creditor, namely: "Will you file the notes as a part of your examination?" John R. Thomas, attorney for the bankrupt, asked permission of the court to consult with and advise with the bankrupt before he answers the question, in which request the bankrupt joined. The attorney for the creditor objected to a consultation, which objection the register sustained. The attorney for the bankrupt insisted that the bankrupt had the right to consult his counsel, in relation to his answers to any, or all the interrogatories proposed to him, before answering the same, and requested that the question be certified to the judge for his decision thereon.

Opinion of the Register: This statement of facts does not, perhaps, fully justify me in submitting the first of the two following questions for the decision of the judge. But, as I am anxious to have some general rule for my guidance hereafter in examinations of bankrupts under section 26 of the bankrupt act, 1867 [14 Stat. 529], I do not doubt the propriety of submitting the general question. I conceive, then, that the two following questions arise for the decision of the judge, namely: First. May the bankrupt, during his examination, consult counsel, and have his advice, as to the answer to be given to such questions, as may be proposed to him in the course of his examination? Second. Was the register right, in this particular case, in refusing to permit the bankrupt to consult with his counsel before answering the question proposed? The question as to the right of the bankrupt to consult generally with his counsel is very fully discussed by Judge Lowell, United States district court, Massachusetts, in Re Tanner [Case No. 13,-745]. Judge Blatchford, of the United States district court for the southern district of New York, in the Case of Judson [Id. 7,562], has adopted or rather concurred in this opinion of Judge Lowell. The decision of Judge Blatchford in Re Patterson [Id. 10,816], also fully agrees with the opinion of Judge Lowell, above cited. It is agreed, I believe, in all of the cases cited, "that a bankrupt under examination has no right to consult with his counsel except when the magistrate, before whom the examination is conducted, has good cause for allowing it." Thus leaving the whole matter to the discretion of the register. Holding, as I do, that the bankrupt, when under examination, is a witness on the witness stand, "subject to the same rules and privileges as other witnesses," that the examination of the bankrupt before me at chambers must be conducted as if the cause was in progress of trial before the judge of the district court; and that to permit the bankrupt's counsel to advise him, as to the answers he should make to questions propounded to him in the course of his examination, would not only impede the case, but would make it anything but "full, fair, and searching," in that the counsel would in reality be examined instead of the bankrupt. Holding these opinions, I must, of course, hold that the bankrupt ought not to be permitted to consult with his counsel. The second question, was the register right, in this particular case, in refusing to permit the bankrupt to consult with his counsel? The question proposed by the attorney for the creditor, namely: "Will you file those notes as part of your examination?" could not have possibly involved any question requiring the

[1] [Reprinted from 1 N. B. R. 551 (Quarto, 153), by permission. 2 Am. Law T. Rep. Bankr. 7, contains only a partial report.]

advice of an attorney. The question was asked in regard to notes in the bankrupt's possession, spoken of no less than three times in the course of the examination, and could have been answered without any possible detriment to the interest of the bankrupt. To have permitted a consultation here would have greatly impeded the case, and would have been a virtual admission of the right of the bankrupt and his counsel to consult upon all occasions and at their own pleasure. It may not be improper to state that when this question was asked, the bankrupt had been on the stand under examination for about eight hours, and that the examination had been unnecessarily protracted by the verbosity of the bankrupt.

BALLARD, District Judge. I concur with the register in the conclusions which he announces, and I approve of nearly all that is said by him in enforcing the correctness of his conclusions. I have heretofore decided, in Re Leachman [Case No. 8,157], that a bankrupt cannot be denied the benefit of counsel; that he may be attended by his counsel while under examination, and that the counsel may propound to him questions for the purpose of explaining anything already testified to, or of developing any new material fact. But it is quite a different thing to allow the examination to be suspended that the bankrupt may consult with his counsel privately. The allowing of such suspension and consultation would destroy the whole virtue of an examination. It might give the bankrupt time and opportunity to elude the effect of every examination designed to expose his deceit and falsehood. In the courts of the United States and in the courts of the states in which parties to suits are competent witnesses, I have never heard of the trial being suspended that a party on the witness stand might consult with his attorney before answering a question propounded to him. There may be a case in which such a privilege might or should be allowed, as for example, where the examination might implicate the bankrupt in a criminal charge, or requires the disclosure of facts against which he is protected by law. But even in such case the presence of the bankrupt's counsel will generally, if not always, furnish all the protection needed without the allowing of a private consultation. Upon the whole, I think that no rule applicable to all cases can be laid down by the court which will enable registers to determine when a bankrupt under examination ought, or ought not, to be allowed to consult counsel, independently of the particular questions and the particular circumstances under which it is put. The solution of the matter must be left mainly, if not entirely, to the good sense and judgment of the register; generally he should not allow consultation, but if a case should arise in which its allowance would not seriously delay the proceeding nor tend to defeat the effect of the examination, I think it would be a proper exercise of the discretion of the register to grant it. Perhaps it is not proper to lay down here a rule for all cases, and I shall not further attempt it. The action of the register in this case is clearly right. True, the question propounded does not appear to me very material, and that it seems not very important what answer shall be made to it; but no question is submitted touching the materiality of the interrogatory, nor could I, upon the facts disclosed in the certificate, decide such a question. The only questions certified relate to the right of the bankrupt to consult with his attorney before answering, and I am clearly of the opinion that there is nothing in the question propounded, nor in any of the facts certified, which shows that there was the slightest necessity for allowing a consultation in this case.

Case No. 3,009.

COLLINS v. AETNA INS. CO.

[1 Chi. Leg. News, 202.]

Circuit Court, N. D. Illinois. Oct., 1868.

FIRE INSURANCE — ELECTION OF INSURER TO REPAIR—ESTOPPEL.

[1. When the insurer, after a fire, elects to restore and repair, the policy then becomes a contract to put the house as nearly as possible in its condition before the fire.]

[2. Refusal of the insured to furnish a plan of the original house, so that it may be restored according thereto, estops him from complaining that the new part does not exactly correspond with the original.]

[This was an action by one Collins against the Aetna Insurance Company to recover damages.]

In a case where one Collins had insured a house in the Aetna Insurance Company, and the house had burned down, and the company had elected under the policy to rebuild it, Collins claiming that it had not been rebuilt as before the fire, and the company that Collins had not furnished plans, and given the necessary information as to the size, etc., of the house insured, MILLER, District Judge, instructed the jury as follows:

Gentlemen: The policy of insurance is a contract of indemnity, not for speculation on the part of the insured. In case of loss by fire, the assured is entitled to be indemnified for the amount of his loss, in money, or to be made whole by the company rebuilding and repairing the house insured. In this case, the company made the election to restore and repair. It then became a contract for the consideration of the premium paid by the assured, to restore and repair his house. The law requires the company to restore and repair the house as nearly as possible to its condition before the fire. In this case there is a mass of contradictory evidence which the jury will have to reconcile.

In this case there is a survey of the house produced. Of the extent of the specifications of that survey we have no knowledge. Defendant sent their carpenter to examine the burnt premises and estimate the amount necessary to restore and repair, and made a contract for the work according to the report. It is alleged, on the part of the defendant, that application was made to plaintiff for a plan of the original house, before it commenced the work, which plaintiff refused to give, alleging that the house could not be repaired. This is denied by plaintiff, and that the work was proceeded with and no such demand was made. This matter the jury must settle. If plaintiff refused the plan as alleged, on demand, he cannot complain if the plan of the new part of the building does not exactly correspond with that of the original house. As to the materials and workmanship, the jury must settle between the parties, from the great discrepancy of testimony. My opinion is that if defendant, by its workmen, took possession of the premises and set men to work in restoring the building, defendant then waived the notice of the fire, and of the extent of the injury, etc., as required by the policy. If you find for the plaintiff, the measure of damages is the expense in putting the house in the condition it was in before the fire.

Case No. 3,010.

COLLINS et al. v. BELL et al.

[3 N. B. R. 587 (Quarto, 146).][1]

District Court, S. D. New York. 1870.

FRAUDULENT TRANSACTIONS OF BANKRUPT — BURDEN OF PROOF.

Where assignees in bankruptcy impeached a transaction involving a transfer by the bankrupts of a mortgage and promissory notes to holders of their check, if it be shown to have been made out of the ordinary course of business, it is prima facie evidence of fraud, and the burden of proof is cast upon the defendant to show the validity of the transaction.

[In equity. Bill by George C. Collins and Harvey Farrington, assignees in bankruptcy of John Murdock Mackay and John Neilson, against Richard Bell, Frederick Gundry, and the said bankrupts, to set aside the transfer of certain promissory notes and a bond and mortgage.]

T. C. T. Buckley, for plaintiffs.

G. C. Barrett, for defendants.

BLATCHFORD, District Judge. The first question of importance involved in this case is as to whether or not the transfer of the bond and mortgage and the promissory notes by the bankrupts to Bell and Gundry, was made in the usual and ordinary course of business of the bankrupts. If it was not, that fact is prima facie evidence that a fraud was committed on the bankruptcy act [of 1867 (14 Stat. 534)] by the transfer, and the burden of proof will be upon Bell and Gundry to show the validity of the transaction as respects a fraud on the act. If it shall be shown that the transfer was made in the usual and ordinary course of business of the bankrupts, it will then be for the plaintiffs to establish, in order to recover: 1st, That the bankrupts were insolvent or contemplated insolvency when they made the transfers to Bell and Gundry; 2d, That Bell and Gundry had, at the time such transfer was made, reasonable cause to believe that the bankrupts were insolvent or were acting in contemplation of insolvency, and that a fraud on the act was intended by the bankrupts. The inquiry as to such reasonable cause of belief would seem, from the papers now before the court, to be the vital one in the case, and its solution would seem to be dependent, in a very great measure, upon what actually transpired between the defendant Gundry and John Murdock Mackay, at the time the latter delivered to the former the bond and mortgage and the notes. Gundry's statement is, that the only information given to him at the time by John Murdock Mackay, was that the bankrupts were a little short of money that day, and wished him to substitute the bond and mortgage and the notes in place of the currency check. No account of the interview by John Murdock Mackay, is furnished on this motion. It is impossible to arrive at any satisfactory conclusion as to the merits of the case on the imperfect and ex parte statements given for this motion. I am free to say, however, that on the papers now before me, I should not originally have granted the injunction. The weight of them is rather with the defendants, Bell and Gundry. As it is not suggested that they are not abundantly responsible pecuniarily, and, as the security of the assets which the plaintiffs are seeking to reach is not shown to be in peril, I grant the motion to dissolve the injunction, and deny the motion for a receiver, leaving the case to go to a final hearing on proofs.

[1] [Reprinted by permission.]

Case No. 3,011.

COLLINS v. CHICAGO.

[4 Biss. 472;[1] 1 Thomp. Nat. Bank Cas. 191.]

Circuit Court, N. D. Illinois. Jan., 1867.

STATE TAXATION OF NATIONAL BANKS.

1. The capital stock of a national bank cannot be assessed, as such, by state authority.

2. The only way such stock can be reached is by assessment of the shares of the different stock-holders.

[Aaron L. Collins against the city of Chicago to set aside an alleged illegal assessment of national bank stock.]

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

DRUMMOND, District Judge. The material facts in this case are that the city caused to be assessed, for the payment of taxes, under the law of Illinois, the stock of the First National Bank of this city, as so much capital in the aggregate, with the intention of having the tax levied on the sum total of the capital stock of the bank. Plaintiff, a non-resident stock-holder, has applied to have the assessment set aside as illegal.

The assessment is in violation of the acts of congress authorizing the existence of national banks. The capital stock of the bank, as such, cannot be assessed under state authority. The only way that such stock can be reached is to assess the shares of the different stock-holders in the same manner that assessments are made in other cases against property owned by the citizens and inhabitants of the state.

NOTE [from original report]. For a full discussion of the right of states to assess corporations and corporate stock, consult Union Nat. Bank v. City of Chicago [Case No. 14,374], and cases there cited; State Tax on Foreign-Held Bonds, 15 Wall. [82 U. S.] 300; Delaware Railroad Tax, 18 Wall. [85 U. S.] 206.

It was held by the supreme court of Illinois in People v. Bradley, 39 Ill. 130, that where the state taxes the capital, and not the shares of stock, in state banks, it can also tax the shares of national bank stock. The New York court of appeals held the same doctrine in Van Allen v. Nolan, 33 N. Y. 161. These cases were both reversed by the United States supreme court, on the ground that the state can only impose a tax upon the share of national bank stock where it taxes the shares and not the capital of a state bank in the aggregate. Bradley v. People, 4 Wall. [71 U. S.] 459; Van Allen v. Assessors, 3 Wall. [70 U. S.] 573. See, also, Tappan v. Merchants' Nat. Bank [19 Wall (86 U. S.) 490.]

Case No. 3,012.

COLLINS et al. v. The FORT WAYNE.

[1 Bond, 476.][1]

District Court, S. D. Ohio. Oct. Term, 1861.

SALVAGE AGREEMENT—VALIDITY—COMPENSATION—WAGES—REPAIRS—SUPPLIES—DOMESTIC VESSEL—SUBROGATION OF INSURANCE COMPANY—PRIORITY OF LIENS.

1. A salvage service, in raising and preserving a steamboat sunk in the Mississippi river, has a priority of lien over claims for wages earned and supplies furnished before the accident.

[Cited in The Lady Boone, 21 Fed. 733.]

2. A salvor is favored in law, on the assumption that without his service the res might have been wholly lost.

3. If the salvage service is rendered under a previous special agreement, fairly made, stipulating for a compensation contingent on the success of the salvor's efforts, it will be recognized in admiralty as creating a valid lien.

4. But if there are prior lien-holders, not parties to such agreement, they are not concluded as to the amount of compensation agreed to be paid, and a court of admiralty may inquire into the reasonableness of the compensation, and make such allowance as may be equitable.

5. The lien of seamen for wages earned prior to the accident is not absolutely extinguished thereby, but continues subject to the salvor's lien.

6. The salvage agreement having stipulated for a compensation of twenty-five per cent. on the value of the boat, assumed in the policy of insurance at $18,000, and it appearing that the actual value did not exceed $9,000, the sum claimed for salvage is unreasonable, under the circumstances of the case, and subject to reduction by the court.

7. An insurance company having paid their quota for the salvage service, and having made advances for the necessary repairs of the boat after being raised, the owners having no means or credit by which to make the repairs, have a maritime lien at least to the extent of such repairs.

8. A due-bill given by the master in the name of the owners for the amount of such repairs, reciting that they were necessary, and that the advances therefor were on the credit of the boat, is conclusive on the owners, unless impeached for fraud, and constitutes a valid lien.

9. Claims for wages earned after the boat was repaired, have an equality of lien with that for advances made for repairs.

10. The Fort Wayne having been enrolled at Cincinnati as of that place, and two of the owners residing in the state of Ohio, one of whom was the managing owner, the boat was properly enrolled there, and that was the home port of the boat, although a majority of the owners resided in the state of Pennsylvania, and claimants, therefore, for stores and supplies furnished at Cincinnati have no lien on the boat therefor.

[Cited in The Rapid Transit, 11 Fed. 329.]

11. Debts incurred in building a boat are presumed to be based on the personal credit of the owners, and do not import a maritime lien. And this doctrine is not affected by the fact that such debts are declared to be a lien by the law of the state in which the boat was built.

In admiralty.

Lincoln, Smith & Warnock, for libellants.
Dodd & Huston, for respondents.

OPINION OF THE COURT: The status of this case, with the numerous and somewhat complicated questions involved, will be sufficiently intelligible from the following brief statement. On April 16, 1861, at the instance of Charles H. Collins, the libellant, the steamboat Fort Wayne, was arrested at the port of Cincinnati by process from this court. The claim of Collins, as set forth in his libel, is for stores and supplies furnished on the credit of the boat at Pittsburg, in the state of Pennsylvania, from June 20, 1859, to January 28, 1861. Subsequently to the seizure of the boat, numerous interveners have filed claims, which, without reference to any question of the priorities of their liens, may be classified under the following heads: (1) Wages earned before the sinking and repair of the boat; (2) wages earned subsequently; (3) stores and supplies furnished at Pittsburg, Cincinnati, Cairo, and St. Louis, both before and after the boat was sunk; (4) lighterage, and the hire of a tow-boat at Louisville; (5) building debts incurred at

[1] [Reported by Lewis H. Bond, Esq., and here reprinted by permission.]

Pittsburg; (6) salvage service by the Missouri Wrecking Company in raising the boat; (7) repairs by the Eureka Insurance Company after the boat was raised. By an interlocutory decree of this court, entered April 23, 1861, the boat was sold at public sale by the marshal, at Cincinnati, for $3,650, which sum has been paid into the registry, subject to the order of the court for its distribution. And by agreement of the proctors of the parties, the claims for wages accruing after the boat was raised, repaired, and fitted for navigation, have been paid. There yet remains in the registry about $2,500, for distribution to the claimants as their rights and priorities may be determined by the court.

The first claim to be considered will be that of the Missouri Wrecking Company. And one of the questions involved in it is, whether it has a priority of lien over claims arising prior to the salvage service rendered by that company. In their libel, they allege, in substance, that on February 20, 1861, the Fort Wayne, in a trip from New Orleans to Cincinnati and Pittsburg with a large cargo, struck a log in the Mississippi river, near the foot of Island No. 16, and was so injured thereby as to sink and become a total wreck; that the owners and underwriters, being unable to save the boat or cargo, requested the Missouri Wrecking Company to take possession of the wreck and the cargo as salvors, and, if practicable, to save the same, agreeing to pay the company twenty-five per cent. on the value of the boat, estimated in the policy of insurance at $18,000; that the company, by its agents, immediately repaired to the wreck with their boats and machinery, and began their operations the 24th of February, and on the 6th of March had succeeded in raising the boat and a good part of the cargo, and on the 18th of March delivered the boat at Mound City, near Cairo, for repairs. The libel of the wrecking company also alleges that the company is a corporation with a large capital invested in boats and machinery for saving wrecked boats and their cargoes; prepared, equipped, and manned for such service, and of little value for any other purpose; and that the Fort Wayne could not have been raised or saved by any other agency. It is also averred that the charge of the company is reasonable, and in accordance with their usage, and that there is now due them for their services the sum of $1,500, for which they ask a decree.

Without reciting the evidence proving the salvage service rendered by the wrecking company, it will be sufficient to say that it fully sustains all the material allegations of their libel. It is proved that one of the boats of the company, called the Submarine No. 7, fitted out with powerful pumps, diving-bells, and all other necessary appliances, with a full complement of officers and hands, repaired to the wreck of the Fort Wayne, upon the application of Capt. Barr, the master of that boat, and that a contract for raising the wreck, and saving the cargo, was signed by him in behalf of the owners and insurers, by which the company, if successful, were to be paid twenty-five per cent. on the value of the boat as estimated in the policy of insurance. It is also clearly proved that from the situation of the wreck there was danger of its immediate destruction, and the consequent loss of the entire cargo. The deck of the boat was badly twisted and strained, and there was a large hole or opening in its side; and as the current was swift, and the river rapidly rising at the time, the witnesses agree in saying the boat would have gone to pieces in a short time, and, with the cargo, would have been a total loss. It is also proved that the company were occupied in the service from the 24th of February until the 6th of March, and that the actual expense of raising the boat, and delivering it, with the cargo, at Mound City, was not less than $2,000. It also appears that the value of the cargo saved, from actual sale, was $6,761, and that by the contract the company were to receive thirty per cent. on the value, making $2,028, which, with the twenty-five per cent. on the estimated value of the boat—$18,000—made an aggregate for salvage service of $6,528. Of the $4,500 claimed by the company for raising the boat and taking it to Mound City, they admit the payment of $3,000, leaving a balance now claimed as unpaid of $1,500. These are all the material facts connected with the alleged salvage service which it is necessary to notice. On these facts, it is insisted by the proctor, who resists the allowance of this claim: 1. That this is not a salvage service, and that the wrecking company are not salvors in the sense of having a priority of lien, for the reason that the service was rendered under a special agreement between the parties. 2. That if there was a meritorious salvage service, the sum claimed is unreasonably large, and that the equity of the case requires its reduction. It may be remarked here that it does not admit of doubt, nor is it controverted in this case, that if there has been a salvage service rendered by the wrecking company within the meaning of the maritime law, it imports a lien in their favor which has priority over claims for wages earned, or supplies furnished, before the sinking of the boat. This is well-established law, and has its basis in obvious principles of justice and reason. Meritorious salvors stand in the front rank of privilege, and the rights of those having liens before the salvage service must be secondary to those having a salvage claim. This principle is well stated in Coote's Admiralty Practice. The author says, page 116: "The suitor in salvage is highly favored in law, on the assumption that, without his assistance, the res might have been wholly lost.

The service is, therefore, beneficial to all parties having either an interest in, or a claim to, the ship and her freight and cargo." And again, page 117, it is laid down, that "salvage is privileged before the original or prior wages of the ship's crew, on the ground that they are saved to them as much as, or eadem ratione qua, the ship is saved to the owners." This doctrine is so well settled, both by the English and American authorities, that it is useless to multiply citations.

I proceed, therefore, to notice the question whether there can be a salvor's lien or a salvor's compensation, if the service has been rendered under a special contract. There would seem to be no doubt on this point, but as it has been controverted in the argument, I will refer to some of the authorities bearing upon it. These clearly settle the doctrine, that it is not less a salvage service, if performed under an agreement to pay and accept a stipulated sum, if the service is successful. In Flanders on Maritime Law, page 331, it is said: "Where there has been a definite, distinct agreement, with ample time for the parties to consider what they are doing, and no advantage has been taken of the circumstances of distress in which one party is placed, such an agreement, so entered into, a court of admiralty will not disturb." And in Conkling's United States Admiralty (vol. 1, p. 351), the author says: "Neither is it important whether the service was rendered spontaneously or by request; or, whether in a case of a previous contract, the rate or amount of compensation for the labor and services to be performed was agreed upon, or left to be determined by the quantum meruerunt. The service, whether rendered spontaneously or by request, is a salvage service, and the contract, if there is one, is a salvage contract, and the compensation a salvage compensation." In the case of The Emulous [Case No. 4,480], Judge Story says on this subject: "I take it to be very clear * * * that when the service has been rendered under circumstances which establish that the parties have voluntarily, and without any controlling necessity on the side of the proprietors of the property saved, or their agents, entered into a contract for a fixed compensation, or upon the ordinary terms of a compensation for labor and services quantum meruerunt, in either case it does not alter the nature of the service as a salvage service, but only fixes the rule by which the court is to be governed. It is still a salvage service and a salvage compensation." The same doctrine is distinctly asserted in the case of The Independence, [Id. 7,014,] in which the learned judge says: "I do not intend to be understood, however, that a case, in which a contract exists, may not also be a case of salvage. The parties may agree on the amount of a salvage compensation, or on the principles on which it shall be adjusted; and such agreements fairly made, no advantage being taken of ignorance or distress, are readily upheld by courts." The exception to this rule, stated by the learned judge in the same case, is what it is stipulated in the contract, that the party rendering the service shall receive a fixed sum, whether the property is lost or saved. Such a contract will not be recognized by a court of admiralty as importing a maritime salvage service. And in the case of The True Blue, 9 Eng. Adm. R. [2 W. Rob. Adm.] 177, the court state the law on this subject as follows: "Now, I entertain no doubt whatever that an agreement of this description can be legally made between the master of a vessel in distress and persons affording salvage assistance: provided, there be a clear understanding of the nature of the agreement; that it is made with fairness and impartiality to all concerned; and that the parties to it are competent to form a judgment as to the obligations to which they are binding themselves. Such an agreement, I feel no hesitation to pronounce, would be a binding instrument, not to be disturbed by the judgment of this court."

Without referring to other authorities on this point, it seems to be well-settled law that a special agreement for a salvage service, under the conditions above stated, will be regarded as valid in a court of maritime jurisdiction. But it is still a question arising from the posture of this case, whether other persons not parties to the agreement, but parties in interest, are concluded by it in respect of the sum agreed on as the compensation for the salvage service. The agreement is signed by the master of the Fort Wayne for the owners and underwriters, and by the wrecking company. So far as their interests are concerned, in the absence of circumstances invalidating the entire agreement, the court might well hesitate to interfere with the amount of compensation stipulated to be paid. But there are seamen, not parties to that agreement, who have claims for wages earned prior to the accident to the boat; and as to these, equity requires they should not be placed in a worse condition than they would be if the salvage service had been spontaneous and not by special agreement. It is the obvious duty of the court to protect their interests as far as it may be practicable. They have an unquestioned superior lien for their wages prior to the sinking of the boat; and their lien, though suspended by that accident, revived and attached after the boat was raised and repaired, subject to the lien of the salvors, and those who made the advances for repairs. In other words, if the claims for salvage and repairs were less than the fair value of the boat after being raised and repaired, the prior lien-holder would have a legal claim to the extent of such difference. Now, the evidence is that in February, 1861, when this accident occurred, the Fort Wayne was worth from $8,000 to $9,000, and that after being raised and repaired, even in the depressed condition of the steamboat busi-

ness at that time, it would have sold at Cairo for about $6,000. This statement shows conclusively, that allowing a fair compensation for the salvage service and the repairs, there was something to which the prior lien for wages could attach.

The argument urged against this view is, that when the Fort Wayne rested as a mere wreck on the bottom of the Mississippi, it was wholly valueless, and could not therefore be the subject of a lien. True, the admitted doctrine of the maritime law is, that freight is the mother of wages; and where there has been a total destruction of a vessel, there is no res to which the seaman's lien can attach, and there can therefore be no proceeding in rem. But it is equally well settled, that if any part of the vessel is saved, this lien adheres to it, even to the last plank. And, if the wreck is restored and rendered valuable, the lien exists, subject to the superior lien of those by whose labor or money the value has been created. The following are some of the authorities which affirm this principle: 1 Hagg. Adm. 227; 9 Eng. Adm. R. 120; 7 Law Rep. 522 [The Massasoit, Case No. 9,260]; 1 Newb. Adm. 195 [Bruce v. The America, Id. 2,046]; 2 Pars. Mar. Law, 591; 2 Conk. Adm. 105, 106. I can not hesitate in the conclusion, that the accident by which the Fort Wayne was sunk, affected only sub modo the rights of those having prior liens, not being parties to the salvage agreement. So far as this agreement assumes a valuation of the boat, and fixes a rate of compensation based on such valuation, the court may inquire whether from the facts in proof, the compensation for the salvage service is fair and equitable. In this inquiry, I have no desire to deprive these salvors of a liberal reward for their labors in the rescue and preservation of this property. Meritorious suitors in salvage have a favorable standing in maritime courts, and it certainly has not been the error of those courts that their allowances for salvage services have been meted out with a stinted or niggardly hand. And it must be conceded, there are features in the service rendered by the wrecking company calling for a liberal allowance. It is worthy of remark, however, that the liberal spirit which has actuated judges and courts in their action on salvage claims had its origin in cases connected with the commerce and navigation of the ocean, which generally involves severe toil and exposure and great peril of life. Where these elements of the service are apparent, the great interests of commerce and a laudable appreciation of heroic actions often demand a rate of compensation bearing no proportion to the time occupied or the labor performed in the service. But in this case, these features of a salvage service do not appear. The service was performed on the Mississippi river, and did not involve the usual hazards of a service on the ocean. Yet it was effective and valuable, and in some of its aspects justifies a liberal allowance to the salvors. The Missouri Wrecking Company has been incorporated by an act of the legislature of Missouri. Their object is to save boats and other property in peril on the Ohio and Mississippi rivers for compensation. The company have a capital of $200,000, and have provided at a heavy expenditure of money the necessary boats and machinery for the prompt and effective prosecution of their business. It has been in existence some years, and has had a virtual monopoly of the wrecking business since it has been in being. Though the main object of the stockholders doubtless is their pecuniary profit, their operations have been greatly beneficial to the commerce of the west. Their expensive boats and machinery are admirably adapted to rescue property from loss and destruction; and in many cases they have been successful where all other agencies would fail. In the case of the Fort Wayne, the evidence makes it certain that the boat and cargo would have been a total loss but for the means used for their rescue. Ten days of arduous labor, involving doubtless some hardships and some peril of life, were occupied in raising the boat and securing the cargo. There was an actual outlay in the performance of the service of not less than $2,000. Added to this, it may be noticed that the compensation was contingent on the success of their efforts to save the property.

But giving due weight to these facts, I can not resist the conviction, that as between those having prior liens and the wrecking company, the amount claimed and due by the strict terms of the agreement exceeds a just remuneration for the service. The agreement, as before stated, assures to the company twenty-five per cent. on the valuation of the boat, which is assumed in the policy of insurance at $18,000, and thirty per cent. on the value of the cargo, ascertained by actual sale to have been $6,761. The result will appear from the following statement:

25 per cent. on $18,000 is............	$4,500
30 per cent. on $6,761................	2,028
Making an aggregate of..........	$6,528

This sum is unreasonably large for the service rendered. That its allowance is inequitable will clearly appear from the fact that the result produced by the literal terms of the agreement, is based on a false and fictitious value of the Fort Wayne. The agreement assumes the value of the boat to be $18,000, whereas the weight of testimony proves clearly that its actual value at the time of the accident did not exceed $8,000 or $9,000, and that when raised and repaired, the boat at Cairo would probably have sold for about $6,000. It thus appears that $4,500, claimed for salvage on the boat, is one-half of its highest estimated value, in ordinary times, and more than two-thirds the amount for which it would have sold after being

raised and repaired. If to this is added upward of $2,000, paid to the wrecking company for saving the cargo, it will be obvious that their claim for their service is greatly too large. And justice to the prior lien-holders will not sanction the allowance of the whole claim of $4,500 as salvage in raising the boat. Of this sum, it seems $3,000 have been paid by the underwriters, leaving a balance as claimed of $1,500. I might, perhaps, be fully justified in refusing to allow any part of this balance, but desiring to act in a spirit of great liberality, I will reduce the sum claimed one thousand dollars only, and render a decree in favor of the wrecking company for $500.

The next claim is that of the Eureka Insurance Company of Pittsburg, in the state of Pennsylvania, for $1,500. This claim is for money advanced for repairs to the Fort Wayne after being raised and taken to Mound City. The libel of the insurance company sets forth, in substance, that these repairs were indispensable, and without them the boat was useless; that the owners had no means to make them, and no credit on which they could have procured them to be made; that they advanced the money, not on the credit of the owners, but on the credit of the boat; and that the master gave a due-bill for the amount, expressly stating that they were made on the credit of the boat. The libellants claim that they have a lien on the boat for this money, and ask for a decree for the amount. The due-bill given for the repairs is one of the exhibits in the case. It bears date at Cairo, April 11, 1861, and recites that the $1,500, for which it was given, was "for money advanced for repairs to the boat after being raised; the same being necessary to enable her to reach Cincinnati, and advanced on the credit of the boat." It is signed, "Steamboat Fort Wayne and owners, by Samuel Barr, Jr., Master." It is insisted that this due-bill imports a lien on the boat, having priority next to that of the Missouri Wrecking Company, as a claim for repairs in the nature of salvage repairs, indispensable to the further service of the boat, made expressly on its credit in a state other than that in which its home port is situated. This is controverted on the ground: 1. That the funds were advanced and the repairs made without the assent of the owners, who are not, therefore, concluded by the due-bill signed by the master, and that the same does not create a maritime lien on the boat. 2. That the advances for repairs by the Eureka company were made for their benefit, and in discharge of their liability to the owners as insurers of the steamboat.

I do not propose to examine at length the first point. I suppose the proposition is incontrovertible, that he who lends or advances money at a port or place in a state, to which the boat or vessel does not belong, for repairs necessary to the successful prosecution of its business, has a lien, for the enforcement of which he may proceed in rem. A very respectable elementary writer says: "A person who lends money to be employed in the repairs of a vessel, or to furnish her with supplies, has the same privilege against the vessel and freight that material-men have. He is considered as giving credit both to the ship and to the owners. The ship is hypothecated to him for his security, and he may maintain in the admiralty, either a libel in rem against the vessel and freight, or in personam against the owner." Flanders' Mar. Law, § 239. The same doctrine is distinctly asserted in the case of Davis v. Childs [Case No. 3,628], and by other American cases, to which it is not necessary specially to refer. The due-bill given by the master, which has been already noticed, contains all the facts necessary to clothe this claim with the requisites of a maritime lien. It states explicitly that the repairs were not only necessary, but that the advances made for that purpose were made on the credit of the boat. Prima facie, the boat was bound for these advances. The due-bill may be impeached for fraud, but there is nothing in the evidence from which the inference of fraud can be deduced. If the oral evidence of the master were admissible to contradict the facts stated in the due-bill, it would not establish such a conclusion. On the contrary, all the proofs in the case sustain the fairness and validity of the due-bill. The Fort Wayne was so seriously crippled and injured, that it was with difficulty the boat could be taken to Mound City, the nearest point at which the repairs could be made. It would have been hazardous, if not impracticable, to have taken the boat to Cincinnati for that purpose. The interests of all parties required that the repairs should be made without delay. The owners resided in a distant city, and had neither means nor credit to make the repairs at Mound City. They were represented by the master, who made no objection to the repairs being made by the insurance company, but was present a portion of the time they were in progress, and gave directions as to the manner in which they should be made. Moreover, upon their completion, he took possession of the boat, for the owners, and gave the due-bill as their agent for the amount expended. This was clearly a legal assent by the owners to the making of the repairs. It is also worthy of remark, that the insurers of the boat had expressly reserved in the policy, in case of accident to the boat, and the neglect of the owners to have the necessary repairs promptly made, the right to make them "on account of the assured." That they were made judiciously, and with due regard to economy, clearly appears from the evidence. It is also distinctly proved, that after the repairs were made, the boat was delivered to the master with the express understanding that it was bound for the amount expended, and that

it would not have been put within the control of the master on any other condition. And it is also proved, that this was in strict accordance with the general usage on the western rivers.

I will now briefly notice the other objection to the claim of the insurance company, namely, that the advances for repairs were made for their benefit, and in discharge of their liability as insurers of the boat. This objection, if sustained by the evidence, must be fatal to this claim. But the facts, so far as they are developed in this case, negative the conclusion insisted on. The due-bill given by the master, on the settlement for the repairs, with the recitals which have been noticed, is a full answer to this objection. It is a distinct acknowledgment of the indebtedness of the owners to the insurance company, in the amount advanced for the repairs, without any reference to any liability of the company on their policy. The libel also, sworn to by the secretary of the company, and not contradicted by the evidence, distinctly alleges that the advances for repairs were justly due by the owners of the boat. As a further and conclusive answer to the objection urged to this claim, it should be stated that from the facts before the court it appears the insurance company had previously paid the wrecking company their full proportion of the claim for raising the boat, exclusive of the amount paid for repairs. It is possible that all the facts connected with these transactions are not before the court. I can only adjudicate on such facts as are in evidence in the case. From these it appears that the Eureka Insurance Company had a risk of $5,000 in the boat; and that the whole amount of insurance in that and other companies was $12,000; the assumed value of the boat being $18,000. By the terms of the policies the insurers reserved the right to repair the boat in case of accident or damage, and they were liable to the owners in the proportion that $12,000 bears to $18,000. The charge of the wrecking company, as already stated, was $4,500; and upon an adjustment made on that basis, the sum for which the insurers were liable was $3,000. The president of the wrecking company testifies that this amount was paid by the insurance companies, and was in full discharge of their liability for raising the boat. I can have no hesitation, therefore, in holding that the claim of the Eureka Insurance Company is established by the evidence, and is a lien on the boat, ranking in privilege next to the salvage claim of the Missouri Wrecking Company. This lien rests on the footing of money loaned or advanced for repairs to the boat, without which it would have been of little value, and could not possibly have prosecuted its business. The money so advanced and applied may be supposed, therefore, to have inured to the benefit of prior lien-holders. And according to the doctrine distinctly asserted by Dr. Lushington, in the case of The Aline, 1 W. Rob. Adm. 119, 120, the persons making such advances have a priority, to the extent of the repairs made, over all other lien-holders. But the case before me does not call for a more extended exposition of this principle.

The remaining questions arising in the case will now be disposed of. And here, I may remark, there is no controversy as to the claims for wages, and of material-men, accruing after the boat was raised and repaired. These claims are satisfactorily proved, and will have the same rank of privilege, in the distribution of the fund in the registry, as the claim of the Eureka Insurance Company. The claims thus having a priority of lien being satisfied, there will still be a remnant in the registry to be apportioned to other claimants. Of these, the claims for wages earned before the accident to the boat will stand next in the order of privilege, and will be paid in full, if the fund is sufficient for that purpose. If not, there will be a pro rata application of the balance of the fund. If, after satisfying the liens in the order stated, there should be a balance in the registry, it will be applied pro rata to the material-men, whose claims import a maritime lien. In this class are included the claims for stores, supplies, etc., furnished at St. Louis, Cairo, Louisville, and Pittsburg. The Fort Wayne being a foreign boat as to these places, the claimants have an undoubted maritime lien. But claims originating at Cincinnati, being the home port of the boat, do not imply a lien, and must be rejected. The proctor, representing these claims, strenuously insists that Cincinnati is not the home port of the boat, and that the claimants therefore have a lien. It is true a majority of the owners resided at Pittsburg, but the owners of six-sixteenths were residents of the state of Ohio, one of whom was the managing owner. The boat was enrolled at Cincinnati as of that place; and this affords, prima facie, the presumption that this was its home port. This presumption may be rebutted by evidence that all the owners notoriously resided elsewhere. But the evidence establishes the fact that a part of the owners, including the managing owner, resided in Ohio. The act of congress requires the enrollment to be made in the district "at or nearest" to which the owner or ship's husband usually resides. The managing owner, in the case of western steamboats, answers substantially to the ship's husband as used in the act of congress; and, as in this case, his residence was at Cincinnati, the enrollment of the Fort Wayne was properly made there, and that must be regarded as the home port. Newb. Adm. 176 [Dudley v. The Superior, Case No. 4,115]; 1 Pars. Mar. Law, 32 et seq.

The only remaining claim is that of Fulton & Son, being an original bill for building the Fort Wayne, at Pittsburg. As it is very clear that the fund in the registry will be exhausted in payment of the claims which

have priority over this, it can be of no importance to these claimants, whether theirs is allowed or rejected. It may be proper to state, however, that it is now the established law in this country that building debts do not constitute a maritime lien. In the case of the People's Ferry Co. v. Beers, 20 How. [61 U. S.] 393, the supreme court of the United States decide, that "the admiralty jurisdiction of the courts of the United States does not extend to cases where a lien is claimed by the builders of a vessel for work done and materials found in its construction." The ruling of that court is decisive of the claim in question. It proceeds on the theory that building debts are contracted on the personal credit of the owner, and do not, therefore, create a maritime lien. This result is not affected by the fact that these debts are declared to be liens by a statute of the state of Pennsylvania, within which state the Fort Wayne was built. Conceding it to be within the jurisdiction of the admiralty courts of the Union to enforce local liens under state laws, it is clear that state legislation cannot supersede or displace liens existing under the general maritime law. A decree may be drawn providing for the application of the fund in the registry in the order of priority, and on the principles indicated by the court.

COLLINS (GARDNER v.). See Case No. 5,223.

Case No. 3,013.

COLLINS v. GRAY et al.

[8 Blatchf. 483;[1] 4 N. B. R. 631.]

Circuit Court, N. D. New York. June 20, 1871.

PREFERENCE BY BANKRUPT—RECOVERY BY ASSIGNEE.

1. A preference to a creditor, to be void under either the 35th or the 39th section of the bankruptcy act [of 1867 (14 Stat. 534, 536)], must be made within four months before the filing of the petition in bankruptcy.

2. The general language of the 39th section in regard to the recovering back property by the assignee, must be construed in connection with the specific language of the 35th section, prescribing a four months' limitation to proceedings in respect to preferences to creditors; and there is, in fact, no inconsistency between them.

3. Under the circumstances of this case, the bill filed by the assignee in bankruptcy was dismissed, without costs.

[Cited in Cookingham v. Ferguson, Case No. 3,182.]

[In equity. Bill by George K. Collins, assignee in bankruptcy of Frank E. Gray, against Justus Gray and the said Frank E. Gray to set aside transfers by the bankrupt alleged to be in fraud of the bankrupt act.]

William C. Ruger, for plaintiff.
Silas L. Snyder, for defendants.

WOODRUFF, Circuit Judge. If the transfers sought to be set aside by the bill in this suit, which were made by the bankrupt to his father Justus Gray, were made with intent to hinder, defraud or delay the creditors of the latter, or with a view to prevent the application of the property transferred to the payment of his debts, or its coming to the possession of an assignee in bankruptcy for distribution to his creditors, or if such transfers were fraudulent as against creditors, upon the general principles governing the subject, then the assignee would be entitled to have the transfers declared void, and to recover the property from the defendant Justus Gray. But the proofs fail to satisfy me that the transfers were so made, or were, in that sense, fraudulent.

It is in some doubt, upon the proofs, whether, at the time when the transfers were made, Frank E. Gray, the bankrupt, believed, or had reason to believe, he was insolvent, and in still greater doubt, whether the father, Justus Gray, or his agent in the transaction, Martin S. Gray, either knew or believed, or had reasonable cause to believe, that Frank was insolvent at that time, and that the transfers were made in fraud of the provisions of the bankrupt act. Upon all the proofs, however, I should feel compelled to infer, that, at that time, they all acted under an apprehension that the money due to the father Justus Gray was insecure, and that, unless its recovery was secured by some transfer of property or security thereon, there was danger that it would be lost. This danger arose from the evident failure of Frank to manage his affairs successfully, and the evidence that his debts were increasing, and that he was in want of more money to carry on his business. Belief of this made the father and his agent unwilling to lend Frank more money, and created a desire to secure what was then due.

But, assuming that Frank was, in fact, insolvent, and that his father and brother had reasonable cause so to believe, I think the proof fails to show that they acted dishonestly in the matter, or that there was any design, purpose or intent, except to secure payment of what was justly due. Transactions of this sort between near relatives are to be closely scrutinized, because it is among relatives that arrangements are more frequently made to cover up and conceal property for the future benefit of insolvent debtors, or their families. Nevertheless, relationship of the parties is not, per se, evidence of fraud, nor should the kind and liberal treatment of a son by a father deprive the latter of a just view of his actual rights. The most favorable view to the plaintiff which, I think, can be justly taken of the transaction in question, is, that, the father having, from time to time, assisted his son, and finding that he did not appear to prosper, but was applying for still more money, became desirous of securing what was due,

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

and the transfers in question were made and accepted in satisfaction of the then actual indebtedness. In view of the right to occupy the hotel for one year thereafter, without paying rent, the consideration of the transfer was not inadequate, so as to raise any presumption of want of entire good faith.

Taking the transaction as a giving of preference to the father as a creditor, while the debtor was insolvent, or in contemplation of insolvency, and assuming that the father had reasonable cause to believe that his son was insolvent, the case exhibits no features but those described in the first clause of section 35 of the bankrupt act. By that clause, if such a transaction be made within four months before the filing of the petition whereon the debtor is declared bankrupt, the same is declared void, but not otherwise. Although the bankrupt law aims at an equal distribution of all the property of a debtor among his creditors, from the time he becomes insolvent or contemplates insolvency, and is intended to disallow preferences given by a debtor to favored creditors, it goes no further, when preference alone is the subject of complaint, than to avoid such as are given within four months before the filing of the petition. If, in all other respects, the transfer is free from fraud or illegality, the law allows no attack to be made upon it after four months have elapsed. On this point, the clause of the 35th section, above referred to, is special and specific; and, although, on a cursory perusal, section 39 seems to give a longer time within which to impeach such transfer, I concur in the decisions which hold that the 39th section must be construed in subordination to the specific language of the clause referred to, which defines the precise effect of an honest preference given to a creditor by his debtor, though insolvent. Hubbard v. Allaire Works [Case No. 6,814]; Bean v. Brookmire [Id. 1,168]. To hold that, under the 39th section, a transfer or conveyance giving a preference to a creditor is void, if made within six months before petition filed, and thereupon the assignee may recover back the property, is to render the specific provisions of the first clause of the 35th section wholly nugatory and inoperative. It is the duty of the court to so construe a statute that every part of it may have effect, if that can be done. There is, in fact, no necessary inconsistency between the two. The 39th section defines and declares the various acts which shall be deemed "acts of bankruptcy," and among them, the giving, by an insolvent debtor, of a preference to his creditor; and it authorizes an adjudication declaring one who is guilty of any one of the several acts a bankrupt, if the petition is filed within six months after the commission of the act. It is to this precise point that the limitation of six months in the 39th section is addressed. If a creditor seeks a decree adjudging his debtor a bankrupt, he must petition therefor within six months after the act of bankruptcy is committed; and the act of bankruptcy alleged may be any one of the numerous causes specified in the section. So far, there is nothing whatever inconsistent with the 35th section; for, whether the act of bankruptcy be absconding with intent to defraud creditors, or conveying property with intent to delay, defraud or hinder creditors, or giving a preference, when insolvent, to one or more creditors, in either case, if, within six months, a creditor file a petition, the debtor must be decreed a bankrupt. This may well be held to be the sole purpose for which the six months' limitation is introduced into this section, namely, to limit the time within which creditors must proceed upon an alleged act of bankruptcy, by filing their petition, if they would obtain a compulsory decree. They must file their petition within six months after the act.

The residue of the section does not, in terms, carry the six months into its operation. True, if the debtor is decreed bankrupt, the assignee may recover back the money, or other property, paid, conveyed, &c., contrary to this act; but, conveyed when? or paid when? Suppose the act of bankruptcy alleged in the petition, and on which the debtor is adjudged bankrupt, is a fraudulent suspension of payment for more than fourteen days—how far back can the assignee go to avoid transfers of property intended to give a preference in contemplation of insolvency? The answer to this question cannot be found in the previous clause of the section. It must be sought in the 35th section; and, by that section, preferences given to creditors by insolvent debtors within four months before the filing of the petition are void, and the property may be recovered back. The concluding sentence of section 39 is to be read and understood with reference to the previous provisions of the act, and will, therefore, be construed, in the particular now in question, just as it would if the words, "subject to the limitations and provisions of the thirty-fifth section," had been added thereto or inserted therein. In this view, the two sections are in entire harmony; and it is the duty of the court not to construe the latter as an abrogation of the former, when they can be so harmonized. The bill of complaint herein must be dismissed. But the circumstances of the case, the somewhat uncertain import of the provisions of the statute, and the doubt of the bona fides of the transactions, arising from the proceedings supplementary to execution and the examination before the register, made it reasonable that the assignee should file the bill, and the dismissal thereof should be without costs to either party.

COLLINS (GREEN v.). See Case No. 5,755.

Case No. 3,014.

COLLINS v. HATHAWAY et al.

[Olc. 176.] [1]

District Court, S. D. New York. July, 1845.

JOINT ACTION FOR SEAMEN'S WAGES—COSTS—TAXATION—RE-TAXATION.

1. The act of congress of June 20, 1790 [1 Stat. 133], in relation to seamen's wages, does not compel all the seamen suing in personam for wages earned on the same voyage, to unite in the action.

2. The peremptory provision in the act applies only to cases in rem. But the policy of the statute embraces suits in personam, and this court encourages joint actions to be prosecuted in that case also.

3. Costs are technically awarded to parties, but substantially they belong to the proctor to the suit, and the court will uphold his right to them against acts of the principal to his prejudice.

4. Where several seamen unite in an action in personam to recover wages, all of whom, except one, obtain decrees for $50 and over, which are appealed to the circuit court, and a decree is rendered in favor of the other libellant for less than $50, he can tax full costs in his own name, and perfect and enforce, by execution, his decree for wages and costs. The causes of action and the final decree are all separate, and the remedy is as in a separate action.

[Cited in Aiken v. Smith, 6 C. C. A. 414, 57 Fed. 425.]

5. The rule relieving seamen from stipulations for costs produces no unreasonable inequality as against ship-owners.

6. An irregularity in the taxation of costs may be corrected by the court, on motion, after final decree rendered.

7. The practice is liberal in allowing a re-taxation of costs, where, by mistake, misapprehension or other casualty, a party failed opposing the original taxation, particularly where the costs claimed are large.

[In admiralty. Libel by James Collins against Francis Hathaway and others for wages.]

Burr & Benedict, for libellant.

D. Lord, Jr., for respondents.

BETTS, District Judge. This case has been reserved a considerable time since the hearing, in order to ascertain whether the points involved in it have been before considered and decided in this court, and also to await an opportunity to confer with the circuit judge upon the question of practice common to both courts, which composes the gravamen of this application. No decision is produced bearing upon the question, and the continuing absence of the circuit judge will delay a conference with him on the point of practice for several months. At the request of the proctors of the respective parties, judgment will therefore be no longer suspended.

The libel was filed by several of the crew of the bark Florida, for wages. On the final hearing, wages were decreed the several libellants in distinct and different sums. The present libellant was awarded less than $50; and that decision not being appealable, the decree in his favor became final. His co-libellants each recovered above the sum of $50, and it appears, apud acta, that the respondents have appealed from that portion of the decree, and that the appeal is now pending in the court above. This libellant proceeded to perfect the decree in his favor. He made up a bill of costs, which embraced all the charges incurred in the joint action of himself and co-libellants, and had it formally taxed. Execution has since been issued to collect those costs, together with the amount of wages decreed to him. The respondents, by this motion, apply to the court to set the proceedings aside, because the taxation of entire costs was unauthorized and irregular, or that a re-taxation or appeal from the one made, if that was regular, may be granted them; but the motion rests more especially on the objection that a single libellant is not entitled to recover to himself individually the entire costs accruing in a suit of which he was only one of several promovents. The assumption that parties obtain, personally, the costs awarded on the decision of a suit in prosecution, is essentially erroneous. It is so only theoretically. The general decree gives the costs nominally to a party in the action, but in reality nothing passes by it into his hands, beyond the reimbursement of witnesses' fees, or advances actually made by him to other ends than the payment of his proctors' and advocates' fees. The taxed costs belong to them, and their rights thereto will be protected by the court against the exercise of any authority over them by the party himself to their prejudice. The bill of costs taxed in this case includes nothing which is payable to the libellant personally. It consists of proctors' fees, witnesses' fees and charges by officers of the court. These accrued, and were necessary alike for one as for all the suitors, and are incurred to the same amount, whether the recovery is fifty dollars alone or above that sum.

The facts upon which the action was maintained in this case were common to all the libellants, and were supported by the same testimony. The evidence in bar of the action was also the same against all the libellants. The diversity of proof, so far as there was a difference, related mainly to the defence, going to show that each libellant could not claim an equal amount of wages. But on the defence, alike as with the demand, the material inquiry was into the facts attending the wreck of the vessel, and whether those facts secured the libellants their wages, notwithstanding the loss of the ship. This party has, in the judgment of the court, maintained his right of action on the merits, and showed an unpaid amount of wages earned, for which he obtained a decree, and nothing brought forward on the part of the

[1] [Reported by Edward R. Olcott, Esq.]

respondents on this motion shows that if the suit had been in the sole name of the libellant, the items of legal charge would be at all different. Act Cong. 1790, c. 56, § 6 [1 Stat. 133], imposes the necessity on the crew to unite in an action against a vessel for the wages of a common voyage; but no individual seaman would be placed in a worse condition, in complying with that law of prosecution, than if he sued separately. He in no respects stands responsible for the right of his associates to recover, nor is the decree joint in case all recover, and each exactly the like sum. Notwithstanding such blending of parties, the judgment of the court is for or against each as an independent suitor. That regulation of actions does not in terms include suits brought by seamen for wages against the master or owner of a vessel. They may, undoubtedly, then exercise their common law right, and each sue for himself. They are, however, within the fair policy of the act, and this court, to secure simplicity and expedition in this class of actions, and avoid expense, encourages the junction of the crew, alike in suits in personam and in rem. Had the libellant brought his separate action in this instance, he would, as the common incident to the recovery of wages, also be entitled to full taxable costs. The act of congress would operate oppressively upon a seaman, if under it he is compelled to stand the risk of the right of action of those with whom he is associated, and thus be deprived of costs, or exposed to be charged with costs, on their being defeated. And the course of the court sanctioning this junction of causes of action, might, in such cases, become more injurious to them than if they sued as individual parties. By protecting, in this manner, the seamen who are successful in their portion of the suits, those proceeded against may also have their rights substantially preserved; because those libellants defeated on the hearing, or whose decrees may thereafter be reversed on appeal, may, at the discretion of the court, be compelled to satisfy the costs created against the adversary parties. Such compensatory costs is the only indemnity provided by law for litigant parties against each other, when one establishes no right of action or sufficient defence. This is in consonance with the rule at law, where no apportionment of costs is made in case of several prosecutors, some of whom obtain judgments, and others have judgments rendered against them. The successful party on each side recovers full costs against his adversary. 2 Rev. St. 616, § 18; 3 Wend. 326.

It is urged that the rule of court permitting seamen to sue for wages without filing stipulations for costs (rule 45) supplies no reciprocity to ship-owners, as they are compelled to contest unfounded claims put in prosecution by transient and irresponsible persons, without any indemnity by costs where such actions are defeated, and that because of such disfavor to ship-owners and masters in defence of those actions, the court, in allotting costs, should confine the allowance to the strictest share of each sailor, in the general bill of costs. I think there would be no difficulty in vindicating the provisions of the rule on general principles, and in showing that the preponderance of privileges in the matter of wages between the two classes, lies heavily against seamen and in favor of masters and owners. In case of the capture or total loss of the ship on the voyage, the mariner loses all wages (Abb. Shipp. 457), though the owner may cover wages in his policy on freight as part of the cost of earning it (3 Kent, Comm. 269, 271; 1 Phil. Ins. 316), and thus receive and pocket the entire amount. And the circuit court, in this district, has decided that in cases of abandonment by the owners for a technical total loss, although the ship and her cargo was navigated to port after her injury, yet the crew had lost their wages. The postponement of the payment of wages to ten days after the unlading of the vessel, and compelling a seaman, after the voyage is fully ended, to summon the master or owners, and prove a balance due him, before he is allowed to institute an action for its recovery, are all privileges protective to the merchant solely, and in derogation of the common law rights of sailors. The exemption in this court of seamen from giving security for costs is but a slight boon in comparison with the material privileges accorded owners of ships as against them, without including, in the enumeration, the abrupt confiscation of their earnings on the longest voyages, for a needless absence of 48 hours from their ship. The slender relief afforded by the rule is not peculiar to this court. It is sanctioned by the highest English authority (1 Hagg. Adm. 220), and is believed to be in consonance with the usage of admiralty courts in the United States (Dunl. Adm. Pr. 102, 303). I think, therefore, the libellant in this case is entitled to full costs of suit, without regard to the possible disposition of the case in respect to his co-libellants. The respondents may be reimbursed the payment in case the decree against them is reversed by the appellate court, by costs awarded them therein, if that court considers them equitably entitled to costs; and that court can also give adequate relief to the seamen who are separated from the joint action, by awarding them an indemnity in costs in that court.

The court cannot speculate upon a probable reversal in the circuit court of the principles of law or their application, which governed the decision of this court in favor of the libellant. That decision must stand as the law of the case until disaffirmed by the appellate court. If such reversal occurs, it does not follow but that the libellants may even there be awarded costs, for if an equitable and probable cause of action existed in

their favor, the court above may secure them their costs, although they fail in recovering wages. Dunl. Adm. Pr. 152. Moreover, an inferior court ought not to stay its hand in administering what it regards the law of a case, under apprehension that a superior tribunal may hold a different opinion upon it. There is nothing extraordinary in a cause experiencing alternations of affirmances and disaffirmances during its progress before tribunals of different grades. Nor is it at all without precedent, that solemn adjudications of courts of last resort are recalled, modified or annulled by their own subsequent action.

The proctor of the respondents alleges that the taxation of costs in his absence on the part of the libellant was irregular; or if the proctors of the libellant were justified in their practice, he lost his opportunity of renewing his objections to the charges, from misapprehending the times of hearing before the taxing officer, and also in being misunderstood by the taxing officer as to the reservation of his right of appeal. The proctors of the libellant put in a contradictory statement of facts touching the mistakes or misapprehensions set up on the other side, and insist their practice was regular; but irrespective of the question of strict regularity, the usage of the court is, whenever colorable grounds are shown for revision of taxation, to give to the parties interested an opportunity for review by re-taxation, although they may not, on their part, have scrupulously pursued the accustomed course of practice. The bill taxed in this case is large in amount, being $434.88, exclusive of clerk's charges, and the respondents ought not to be concluded from relief in the matter, even if laches may be imputed to their proctor, since the libellant is in no way prejudiced by the lapse of time.

The court is not disposed to infer any unnecessary delay or neglect in applying for a re-taxation, but considers the proctor acted in good faith, under the persuasion that he might have the bill of costs legally adjusted whenever the libellant should seek to collect it. It is accordingly directed, that the respondents may, at their election, take out an order for the re-taxation of the costs before the proper taxing officer, or accept the proposal of the libellant's proctors if renewed, to have the items objected to on the taxation and noted at the time by the taxing officer as appealed from, deducted from the bill. In case of such arrangement, the bill to be deemed taxed at the amount left after such deductions. But in case a re-taxation is had, each party will possess the usual right of appeal therefrom. The respondents, if they proceed to a new taxation, must give notice to the libellant's proctors of the time and place, and pay the costs thereof.

COLLINS (HOLDEN v.). See Case No. 6,-599.

Case No. 3,015.

COLLINS et al. v. HOOD.

[4 McLean, 186.][1]

Circuit Court, D. Ohio. July Term, 1846.

TRANSFER OF ASSETS OF INSOLVENT FIRM TO INDIVIDUAL MEMBER—DISTRIBUTION OF PARTNERSHIP ASSETS IN BANKRUPTCY.

1. Equity will not sustain an agreement between partners, if the firm be at the time insolvent, by which the whole property and effects of the firm, are transferred to one member; the effect being to defeat the equitable preference of the firm creditors, and to give the separate creditors of the partner accepting such transfer, a preference to the creditors of the company.

[Cited in Re May, Case No. 9,328; Johnston v. Straus, 26 Fed. 63.]

2. The provisions of the fourteenth section of the late bankrupt law [5 Stat. 448] directing the mode of settlement and distribution of estates in bankruptcy, in cases of partnerships, are in affirmance of the principles on which courts of equity proceed in the adjustment of the rights of a creditor of a firm, and the separate creditor of each partner.

[Cited in Mead v. National Bank of Fayetteville, Case No. 9,366; Re Johnson, Id. 7,369.]

3. The creditors of a firm are entitled to the preference of having their debts paid out of the partnership funds, before the private creditors of any of the partners.

4. The sale and transfer of the partnership property and effects to one partner in the case before the court, is condemned by the second section of the late bankrupt law, as made in contemplation of bankruptcy, and with a view to a preference of the separate creditors of the individual members of the firm, to the prejudice of the creditors of the firm.

In equity.

Mr. Hunter, for plaintiffs.
Mr. ——, for defendant.

LEAVITT, District Judge. This is a controversy between the complainants, as creditors of the late firm of Wing & Lamb, and the creditors of the individual members of that firm. The bill charges, that a certain agreement, executed by the members of said firm, the 22d of April, 1842, providing for the dissolution of the firm, and by which, all the partnership property and effects were transferred to Wing, as a purchaser, is fraudulent and void as to the creditors of the firm. The prayer of the bill is, that said agreement may be annulled, and the rights of the different classes of creditors settled, as if no such agreement had been made.

The facts which it will be material to notice, as bearing on the points presented for the decision of the court, are briefly as follows: William Wing and William Lamb, for some years prior to the said 22d of April, 1842, had been associated in business as mercantile co-partners, and at that time, the firm being greatly embarrassed, if not actually insolvent, they entered into the agreement, before noticed. By this agreement

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

in consideration of all the partnership property and effects transferred to him, Wing agreed to pay his partner the amount of capital invested by him in the concern, being $6,905 13; and also, the sum of $2,200, for his share of the profits; and, moreover, to pay all the firm debts, and to indemnify Lamb, on account of his liability for such debts. In the month of December next after this agreement of dissolution, Wing filed his petition in bankruptcy; and some weeks after, Lamb filed a petition for the same purpose. By the decree of the proper court, they were severally discharged under the late bankrupt law; and Thomas Hood, who is made a defendant in the bill, was appointed assignee for each. The assignee has taken charge of their property and effects, and has collected and paid into court about $4,000, leaving a large amount yet to be collected and paid over.

It is insisted by the complainants, that the agreement between these partners is fraudulent and void, and could not operate as a valid transfer of the property and effects of the firm to Wing. And the court is asked to decree accordingly, and that the rights of the different classes of creditors may be settled, as if no such agreement had been made. There can be no doubt as to the principle on which the rights of the creditors of the firm, and the creditors of the individual partners would have been settled, if the partnership had continued till dissolved by the applications of its members for relief under the bankrupt law, then in force. The 14th section of that law would have controlled the distribution of the proceeds of the property and effects of the firm, and that of the individual members of the firm. This section authorizes the creditors of the firm, and the separate creditors of each partner, to prove their debts, and directs the assignee to keep separate accounts of the joint stock or property of the company, and of the separate estate of each member thereof. And it provides, that "after deducting out of the whole amount received by such assignees, the whole of the expenses and disbursements paid by them, the nett proceeds of the joint stock shall be appropriated to pay the creditors of the company, and the nett proceeds of the separate estate of each partner shall be appropriated to pay his separate creditors." It is further declared, that if there is any surplus, after satisfying one or the other class of creditors, that surplus shall be applied to the satisfaction of the class in regard to which there is a difficulty. These provisions of the fourteenth section of the bankrupt act [5 Stat. 448] are in affirmance of the principles on which courts of equity have uniformly proceeded, in the adjustment of the conflicting rights of the creditors of a firm, and the separate creditors of each partner. That the creditors of a firm are entitled to the preference of having their debts paid out of the partnership funds, before the private creditors of either of the partners, is a doctrine well settled by courts of chancery. 1 Story, Eq. Jur. § 675. And any transfer or sale of the property and effects of a firm, which defeats and destroys the preference, can not be sustained in equity. That such is the effect of the agreement between Wing and Lamb, admits of no doubt. It transfers the entire property to Wing; making him the owner in his individual right, and thus prejudicing the rights of the creditors of the firm. It withdraws from them, and places beyond their reach, the property and means to which they have a just right to look for payment; and, if operative, causes such property and means to enure to the benefit of those who have no claim, in equity, beyond the surplus, if any, after the payment of the partnership debts. That the firm of Wing & Lamb, if not insolvent at the time of the execution of this agreement, was in a condition of great embarrassment, seems not to admit of a doubt. It is true, the master, in his report, arrives at the conclusion that Wing had a surplus of assets, beyond his debts, of about $10,000. But in this estimate, as the court understand it, no deduction is made from the value of the stock in trade transferred to Wing, for the amount of nearly $7,000, which he had agreed to pay the retiring partner for his interest in the stock, and the sum of $2,200 to be paid to him for his share of the profits of the concern. These sums deducted, there would still be a nominal surplus of upward of $1,000; but when it is considered that of the entire assets of the firm, including the individual property of Wing, the sum of about $16,000 is made up of outstanding claims due the firm, and necessarily subject to large deductions for uncollectible debts, the solvency of the partner Wing, and his ability to meet the claims against the firm, are more than questionable. In addition to this, it may be noticed, as a further evidence of the embarrassment of the partner Wing, that he was liable, as a member of the previously existing firm of Wing, Ruffner & Co., for a debt of about $11,000, which is not taken into the account by the master, but must be regarded as affecting the pecuniary standing of the firm at the time of the agreement of dissolution. The witness Black, who has been examined touching the affairs of the firm, and who had been a clerk in the employ of Wing & Lamb for two years previous to the dissolution, expresses the opinion that the firm would have been able to pay its liabilities, if time had been allowed them for that purpose. This is equivalent to an admission of the serious embarrassment of the company, and in one aspect, of its insolvency. This witness states, that during its existence, eastern debts at maturity, and when payment was urged, were not paid; and that it is within his knowledge that some of these debts have never been satisfied.

It may be noticed, as a fact warranting the

inference of the insolvency of this firm, if not of a design fraudulently to defeat the just rights of creditors, that a few days after the date of the agreement referred to, Wing sold and transferred to Black, who appears to have been without means, the entire stock in trade; and the business was for some time carried on in the name of Black, but as appears from his own admission, really for the benefit of Wing. This arrangement continued till within a few days prior to Wing's application in bankruptcy, when Black surrendered and transferred the property and effects to Wing. There is no explanation of this transaction, redeeming it from the suspicion which the facts so fully warrant. It seems to admit of no other construction, than that Wing, under the pressure of his embarrassments, made the pretended transfer to Black, with a view to defeat his creditors in their efforts to enforce the collection of their debts. The property thus transferred by Black to Wing, on the eve of his application in bankruptcy, was entered on his schedule of property and effects, as owned by him.

These considerations, in connection with the fact that in the autumn following the date of the agreement of dissolution, both Wing and Lamb filed applications in bankruptcy, and thus made the most solemn admission of hopeless insolvency, leave little doubt in the mind of the court, that at the date of the agreement, they were involved in difficulties from which they could have no hope of extrication.

Although, on the well settled principles of equity, for reasons already stated, the sale and transfer to Wing can not be sustained, it may not be improper to notice that it is clearly condemned by the second section of the bankrupt law; and that the present controversy between these parties is so far connected with a proceeding under that law, as to bring the transaction in question within its scope and operation, there is no room to doubt. By the second section of the act, all payments, transfers, etc., made when the party was in a state of insolvency, and which, in their operation, give a preference to particular creditors, fall within its prohibition; and, by a well settled construction, are regarded as made in contemplation of bankruptcy, and as possessing no validity. The transfer of the property and effects of the firm to Wing, under the agreement of the 22d of April, 1842, is clearly within the letter and the spirit of this section. It was made in contemplation of bankruptcy, and in its effect, gave a fraudulent preference to the separate creditors of the individual members of the firm, over the creditors of the firm, thus benefiting the one class, to the prejudice of the other. Such being the views of the court, they decree the cancelment of the articles of dissolution, and direct that the distribution of the proceeds of the partnership property and effects be made as if no such dissolution had taken place. And if, in carrying out the principles of this decree, a further reference to a master is necessary, that object may be embraced in the decree drawn by counsel.

COLLINS (JACQUES v.). See Cases Nos. 7,167 and 7,168.

Case No. 3,015a.

COLLINS v. JOHNSON.

[Hempst. 279.][1]

Superior Court, D. Arkansas. July, 1835.

ACTION OF DEBT ON ACCOUNT—WAIVER OF TORT—EVIDENCE—WITNESS—INSTRUCTIONS.

1. An action of debt will lie on an account, as well as assumpsit.

2. A party may waive a tort, and sue in debt or assumpsit; when indebitatus assumpsit is maintainable, debt is also.

3. Testimony rejected; witness called to explain testimony, and instructions to jury,—all proper.

4. The case of Janes v. Buzzard [Case No. 7,206a] cited and approved.

Error to Clark county circuit court.

[At law. Action of debt by Balda C. Johnson against Moses Collins.]

Before JOHNSON and YELL, JJ.

YELL, Judge, delivered the opinion of the court. This was an action of debt, brought to recover the value of 4,007 pounds of seed cotton, delivered by Johnson to Collins to be ginned. A demand was made for the cotton, and a refusal by Collins, and upon that refusal Johnson, the plaintiff in the court below, commenced this suit before Isaac Ward, a justice of the peace, in an action of debt on account. There was a judgment before the justice of the peace in favor of the defendant, Collins, from which judgment Johnson prayed an appeal to the Clark circuit court; and at the October term of that court, 1833, Johnson recovered a judgment against Collins for the sum of fifty-two dollars and fifty-nine cents and costs, to which judgment this writ of error is prosecuted.

The plaintiff in error set up various grounds to reverse the judgment of the court below. (1) Because an action of debt will not lie to recover the price of cotton delivered at a gin, and a refusal to pay or redeliver, unless the cotton had been converted to cash, when the tort might be waived, and assumpsit sustained for money had and received to plaintiff's use. (2) The court refused to suffer a witness to state what the defendant Collins said or answered, when the demand for the cotton was made. (3) The court refused the witness permission to answer as to the solvency of Allen H. Johnson about the date of this transaction. (4) The court permitted a witness to be recalled and examined after he had been fully examined and discharged. (5) Exception to the in-

[1] [Reported by Samuel H. Hempstead, Esq.]

structions of the court. The first objection taken by the counsel for the plaintiff in error presents a comparatively new question in this court for determination. But one adjudication in this court is to be found, to aid us in coming to a correct decision. A similar point has been settled this term, in the case of Janes v. Buzzard [Case No. 7,206b]. By reference to the English authorities (1 Saund. 133; 1 Chit. 94; 1 Torenton, 112) it will be found that assumpsit would lie. The plaintiff Johnson might have his election to waive the tort and sue in assumpsit, and a judgment in assumpsit would be a bar to any other action, and vice versa if he elected to bring a tort or trover. That the action of assumpsit would have been good, this court does not feel any doubt. Debt may be due by contract, either express or implied, but it is not essential that the contract should be specific, or that any particular amount be expressed. It may arise on an implied contract. The action of debt will lie where the sum to be recovered can be ascertained; as upon an account stated, or for goods sold to the defendant for as much as they are worth. Doug. 6. This doctrine is sanctioned by Washington, J., in [Hughes v. Union Ins. Co. of Baltimore] 8 Wheat. [21 U. S.] 311, namely, that when indebitatus assumpsit is maintainable, debt is also. 3 Com. Dig. 365. The principles settled by such high authority this court is unwilling to disturb.

The second exception is for the rejection of testimony. In looking into the bill of exceptions, we find that the defendant in error introduced Adam Stroud to prove the demand for the cotton. The witness related a partial settlement between plaintiff and defendant. In that connection, plaintiff in error asked defendant in error if he had any other demands against him; he was answered that he had a cotton receipt for 4,007 pounds of cotton, drawn in favor of Allen Johnson, and which the plaintiff in error then refused to pay. The witness was then asked by the counsel for Collins to state all the conversation that took place at the time of the demand of the cotton by Collins, which was objected to by defendant's counsel, and the objection sustained. This court has not been able to see any error in the rejection of the testimony. Collins could not make himself a witness in his own cause, as was here attempted, unless some confessions of his had been introduced, which we are unable to find. The whole conversation was not evidence. The witness Stroud had mainly testified as to the demand and refusal. The refusal to pay the cotton when demanded would not make the whole conversation evidence, unless a part of the statement or confessions of Collins had been related, which made it important that all his statements in that conversation should be taken together. The bill of exceptions does not present such a state of facts as to authorize this court to reverse the decision of the court below on this point. The third error assigned is for the rejection of testimony as to the solvency of Allen H. Johnson about the date of this transaction. We are unable to see the relevancy of the question. It could not affect the judgment between the parties litigant, and this court is not prepared to say there was error in rejecting such testimony. The fourth assignment was for re-examining a witness after he had been fully examined and discharged. The general principle of law would exclude a witness, except as to some new matters, and to some point not before examined. By reference, however, to the bill of exceptions, it will be found that the witness A. H. Johnson was called to explain some matter in relation to the cotton receipt referred to in Stroud's testimony, which made it important and perhaps material to be explained. It was drawn out in answer to some statement made by Stroud on his examination, and which was not examined into in the first examination. Under this state of facts, we believe there was no error in the examination. The fifth error assigned is to the instructions of the court. The jury were told, that "if they believed from the evidence that the cotton in controversy was the same embraced in the receipt of defendant to Allen H. Johnson, for 4,007 pounds, they should find for the defendant, unless the receipt was given and obtained by fraud or mistake; and in that event, unless the plaintiff by some act of his recognized it, it would be their duty to consider the case as if the receipt had never been executed." Under that instruction and the evidence, the jury found a verdict for the defendant in error for the sum of fifty-two dollars and fifty-nine cents. Nothing is more clear, than that the defendant in error ought not to recover in this action, if he held the receipt bona fide of Allen H. Johnson for the same cotton in controversy. In that event, he should have commenced his action on the receipt in the name of Allen H. Johnson for his use. The other proposition is also true, that if they believed the receipt was obtained by fraud or mistake, then they were bound to view it as a nullity, and find for the plaintiff. There were several other errors assigned, which we deem not important to notice. We are unable to find in any of the assignments of error enough to reverse the judgment of the court below. Judgment affirmed.

Case No. 3,016.

COLLINS v. NICKERSON.

[1 Spr. 126.] [1]

District Court, D. Massachusetts. Feb., 1846.

SEAMEN'S WAGES—WHEN PAYABLE—CLANDESTINE SETTLEMENT—REMEDY OF PROCTOR.

1. A seaman is entitled to his wages immediately upon his discharge; and if payment be refused, he may at once proceed by suit in personam therefor.

2. The proctor for the libelant in such suit, may have a decree for costs, notwithstanding a clandestine settlement with his client.

In admiralty. This was a libel for wages, promoted by Collins, a seaman of the brig Bell Marshal, against the owner, Nickerson. It appeared that the libellant had demanded his wages, upon obtaining his discharge, four days after the arrival of the vessel in port; but the respondent refused to pay him, relying upon the statute restricting seamen from libelling the vessel, until the expiration of ten days. On the same day, Collins brought this libel against Nickerson, personally; and then finding a vessel bound for his home in Nova Scotia, and the respondent offering to pay his wages, without costs, he took them, and gave a discharge, without the knowledge of his proctor, or repaying his disbursements.

F. W. Sawyer, for libellant.
R. Rantoul, Jr., for respondent.

SPRAGUE, District Judge. The first question is, was this suit brought prematurely? In The Commerce [Case No. 3,054], I expressed the opinion that the statute of 1790 (2d Sess.) c. 29, § 6 [1 Stat. 133], did not affect the right of a seaman to proceed in personam for his wages, but only postponed his right to process against the vessel, for ten days. I have seen no reason to change that opinion. A seaman is entitled to his wages immediately upon the completion of his service; and if payment be refused, he may proceed at once to enforce it by a suit in personam.

The second question, namely, whether a proctor who has commenced a suit for a seaman, upon a just claim, may proceed in it merely for costs, after a clandestine settlement with his client, has been several times decided by this court in the affirmative. The Planet [Case No. 11,204]; Brooks v. Snell [Id. 1,961]; Angell v. Bennett [Id. 387].

Decree for costs against the respondent.

NOTE [from original report]. The subject of clandestine settlements with seamen, has been considered in this district, in the cases cited in the judgment, and in Purcell v. Lincoln [Case No. 11,471]; and it has often engaged the attention of the court, in other districts. The Sarah Jane [Id. 12,348]; The Victory [Id. 16-937]; McDonald v. The Cabot [Id. 8,759]; Peterson v. Watson [Id. 11,037]; The Etna [Id. 4,542]. "In courts of civil law, the parties themselves have strictly no authority over the cause, after their regular appearance by an attorney, or proctor. The attorney, or proctor, is so far regarded as the dominus litis, that no proceeding can be taken, except by him, or by his written consent, until a final decree, or revocation of his authority." The Thetis, 2 Adm. & Ecc. 365. In our practice, the attorney or proctor does not become dominus litis, in the full sense of the civil law. Betts, Adm. 10; The Araminta, Swab. 81; Story, Ag. § 383; 2 Kent, Comm. 641. But in suits for seamen's wages, the costs, as well as the wages, are a lien on the ship; and there is this further distinction between the lien of an attorney and that of a proctor, that at law, as costs are dependent on the suitor's success, a settlement commonly extinguishes the claim for them, unless collusively made for the purpose of defeating costs. But in chancery, and in the ecclesiastical courts, costs are regarded as a distinct equity, and are treated as the exclusive right of the proctor, although nominally granted to the party. Courts of admiralty proceed upon analogous principles; and in regard to the incidental interests of proctors, do not consider their power controlled by any compromise between the parties, which does not appear apud acta. The Victory, ubi supra; The Thomas Handford, 2 Hagg. Adm. 41, note; The Frederick, 1 Hagg. Adm. 211.

A proctor, intending to proceed for costs only, must give notice of his intention to the opposing party; and if he proceed unnecessarily, or on insufficient grounds, may be personally mulcted in costs. The Sarah Jane, ubi supra.

In Peterson v. Watson, ubi supra, which was an action of tort, Judge Betts held, that the admiralty court "affords a party no peculiar remedy in actions of this character, nor is a seaman under any peculiar protection; nor does he enjoy any peculiar privilege in suits for torts. * * * The question rests upon precisely the same principles, as if it were to be decided in a court of common law, and as if the suit had been there settled between the parties, whilst in a course of prosecution; leaving the attorney to look to his client alone for the costs incurred." But the reason assigned for the privilege in suits for wages, viz., the double danger of the seaman being overreached by the master and owners, and the proctor forgotten, or defrauded, by the seaman, would seem as applicable in other suits as in that; and in many cases claims for damage by torts, would seem to be as well founded, legal assistance as necessary, and the seaman's inability to recompense his proctor as absolute, as in claims for wages. And see Angell v. Bennett [Case No. 387]; and Purcell v. Lincoln [supra].

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

Case No. 3,017.

COLLINS et al. v. PEEBLES.

[2 Fish. Pat. Cas. 541.] [1]

Circuit Court, S. D. Ohio. May, 1865.

LIMITATION OF ACTION FOR INFRINGEMENT OF PATENT—STATE LEGISLATION.

1. State statutes can not limit the time within which actions for the infringement of letters patent may be brought in the courts of the United States.

2. Congress having failed to legislate upon the subject, there is no limitation as to the time

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

within which suit may be brought to recover damages for the infringement of letters patent.

[Cited in Rich v. Ricketts, Case No. 11,762; Anthony v. Carroll, Id. 487; May v. County of Logan, 30 Fed. 257.]

At law. This was an action on the case for the infringement of letters patent [No. 1,396, granted to J. A. Roth, October 31, 1839] for an "improvement in the construction of furnaces extended for seven years from October 31, 1853, for a new and useful improvement in the construction of furnaces for smelting iron ore." The patent expired October 31, 1860, and suit was brought against the defendant November 12, 1864, to recover damages for the unlawful use of the improvement during the lifetime of the patent. The declaration was in the usual form.

The defendant [John G. Peebles] filed the following pleas: First. The general issue. Second. That the several supposed causes of action did not accrue at any time within four years next before the commencement of the suits, etc. Third. That the several supposed causes of action did not accrue at any time within six years next before the commencement of the suit, etc.

The plaintiffs [William Collins, Alfred M. Collins, and Isaac Collins, Jr.] demurred to the second and third pleas, and the cause came on to be heard upon the demurrer.

The provisions of the Ohio statute for the limitation of actions, under which these pleas were framed, were as follows (Code Civ. Proc. c. 3, §§ 12, 14, and 15): "Civil actions other than for the recovery of real property can only be brought within the following periods after the cause of action shall have accrued: Within six years: An action upon a liability created by statute, other than a forfeiture or penalty. Within four years: An action for an injury to the rights of the plaintiff, not arising on contract and not hereinafter enumerated." The plaintiffs' counsel argued that the state statutes of limitation did not apply to actions brought in the courts of the United States for the infringement of letters patent, and cited Act Cong. February 3, 1831, § 13 [4 Stat. 439]; Parker v. Hallock [Case No. 10,735]; Grier, J., Law Dig. p. 108, § 37.

The defendant's counsel argued that actions upon the case for the infringement of letters patent were subject to the statute of limitations enacted by the several states for the limitation of such actions, or those of analogous character, and cited McCluney v. Silliman, 3 Pet. [28 U. S.] 270; Parker v. Hawk [Case No. 10,737].

S. S. Fisher, for plaintiffs.

Collins & Herron, for defendant.

SWAYNE, Circuit Justice. Held: That the state statutes could not limit the time within which actions for the infringement of letters patent might be brought in the courts of the United States; that, congress having failed to legislate upon this subject, there was no limit to the time for bringing such actions, and that the demurrer must be sustained.

Judgment accordingly.

NOTE [from original report]. Judge Swayne delivered an oral opinion, and discussed the question submitted, and the cases quoted by counsel, at considerable length, but the words of the learned judge have, unfortunately, not been preserved. The above report has, however, been submitted to him, and has received his approval. The case of Parker v. Hallock [Case No. 10,735], quoted above, is reported only in the following paragraph from the Pittsburg Gazette, of May 22, 1857. The reporter, having been of counsel in the case, vouches for the substantial accuracy of the report:

"Zebulon Parker v. S. B. Hallock. Action for infringement of a patent right. In this case the defendant's counsel insisted that the plaintiff was barred by the statute of limitations: but Judge Grier held that, as no act of congress had been passed to meet the case, and the law of Pennsylvania did not apply to it, there was no statute limiting the time in which a suit might be brought for an infringement of a patent right. The jury found for the plaintiff, assessing his damages at $68. Fisher and Sweitzer for plaintiff. Selden for defendant."

COLLINS (RIGGS v.). See Case No. 11,824.

COLLINS (SERRELL v.). See Cases Nos. 12,671 and 12,672.

COLLINS (TENNY v.). See Case No. 13,833.

COLLINS (UNITED STATES v.). See Cases Nos. 14,834–14,837.

Case No. 3,018.

COLLINS et al. v. WHEELER et al.

[1 Spr. 188.][1]

District Court, D. Massachusetts. June, 1850.[2]

SEAMEN—EXTRA WAGES FOR SHORT ALLOWANCE—EFFECT OF RECOVERY OF PENALTY.

1. Under the statute of 1790, c. 29, § 9 [1 Stat. 135], if less than the statute quantity of all the three articles [water, meat, and bread] be put on board, and there be a short allowance of all, triple extra wages are given for each day.

[Cited in The Hermon, Case No. 6,411.]

2. The recovery of such penalty does not necessarily preclude the seaman from recovering damages, also, for a deficiency of other provisions.

In admiralty. The libellants were seamen of the ship Palmyra, owned by the respondents, on a voyage from Calcutta to Boston. The suit was for short provisions, under Act Cong. 1790, c. 29, § 9 (1 Stat. 135). The act is as follows: "Every ship or vessel, belonging as aforesaid, bound on a voyage across the Atlantic ocean, shall, at the time of leaving the last port from whence she sails, have on board, well secured under deck, at least sixty gallons of water, one hundred pounds

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

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

of salted flesh meat, and one hundred pounds of wholesome ship-bread, for every person on board such ship or vessel, over and besides such other provisions, stores and livestock, as shall, by the master or passengers, be put on board, and in like proportion for shorter or longer voyages; and in case the crew of any ship or vessel, which shall not have been so provided, shall be put upon short allowance, in water, flesh, or bread, during the voyage, the master or owner of such ship or vessel, shall pay to each of the crew, one day's wages beyond the wages agreed on, for every day they shall so be put to short allowance, to be recovered in the same manner as their stipulated wages." The libellants also claimed damages, under the general maritime law, for short allowance of other provisions, flour, rice, vegetables, &c. Under the statute, they claimed three days' extra wages, for each day on which they had a short allowance of the three statute articles. The respondents contended that only one day's extra wages could be given, for each day on which there was a short allowance, whether of one or more articles.

R. H. Dana, Jr., and G. P. Sanger, for libellants.

Wm. Sohier, for respondents.

SPRAGUE, District Judge. I shall not go into the details of the evidence, as I am satisfied, on the respondents' admissions, that they are liable. Putting the most favorable construction upon their answer and evidence, it is clear that they had not on board meat enough for more than two and one-seventh voyages across the Atlantic, and less than that quantity of bread, and a little over three times the quantity of water required for such a voyage. All the evidence shows that a voyage "across the Atlantic" is, in distance, about 3,000 miles, while a voyage from Calcutta is about 15,000 miles. If the proportion is to be taken from the average length of time, the Atlantic voyage averages about thirty days, and the voyage home from Calcutta about one hundred and twenty days. So that, without deciding which is the proper rule for ascertaining the proportion, either way, and on the most favorable construction, the vessel had not on board the requisite quantity of bread, meat, or water. Upon a comparison of evidence, there is reason to believe that there was considerably less on board than the amounts stated by the respondents; but it is not necessary to go into that inquiry. It is admitted, that none of these provisions were stowed under deck. It has been argued that this is not essential, and does not draw after it the penalty, unless the short allowance is traceable to this cause. But I think it is peremptory and essential, and for good reasons, which have been stated at the bar. Not only might these provisions spoil on deck, but they would be liable to be washed overboard and the crew reduced, at once, to a state of starvation.

The only remaining question of fact is, whether there was a short allowance, and for how long a time. On the first day of January, while off the Cape of Good Hope, and only about sixty days out, the allowance began. It was first one pound of meat, one pound of bread, and three quarts of water per day, to each man. There may be some doubt whether this would be a short allowance, if the crew had other provisions given them, which are usual in the merchant service, and required in the navy, such as flour, rice, &c. But not only the vegetables, but all the small stores allowed the crew, had given out before this time, except the beans, and a little meal, which was sour. In such a state of things, I have no doubt that the above-mentioned allowance was short. It is not necessary to follow the allowance in its stages of reduction, until the bread and beef were exhausted, and relief obtained from other vessels. I am satisfied that the crew were on short allowance from January 1st until April 1st, the time of the vessel's arrival, with the exception of four days. A question now arises on the construction of the statute. There being a deficiency in the quantity put on board, and a short allowance of all of the three statute articles, the libellants claim triple extra wages for each day. I am of opinion that this is the proper rule. The statute separates the articles, and treats them disjunctively; and it is reasonable to do so, otherwise a short allowance of all the articles, at the same time, would entail no greater penalty than of one only. Thus, if all three were deficient for a week, seven day's extra pay only would be recoverable. While if there was a deficiency of only one article, successively for three weeks, which might be a mitigation to the seaman, he would be entitled to twenty-one day's extra pay. The case of Coleman v. The Harriet [Case No. 2,982] has not been followed by other courts. A contrary decision has been made in this district,—The Mary Paulina [Id. 9,224],—and also by Judge Ware in The Mary [Id. 9,191]. In that case, there was no deficiency of water, but only of bread and beef, which are coupled together, and eighteen days' additional pay allowed for a short allowance, during that time. It is not said whether the quantity of beef served out would have been deemed insufficient, if the bread had been abundant. But whether the allowance of one or both those articles was deficient, the decision is inconsistent with that in Coleman v. The Harriet. The question now before me, was not made in the case of The Mary [supra].

The libel also claims damages, under the general maritime law, for deficiency of other articles. I do not think that a recovery under the statute is necessarily a bar to this claim; and in a proper case, damages might be given. But as the statute penalty amounts to a sufficient compensation, I shall not go beyond it.

Decree for triple extra wages to each man, for three months, with costs. The number of libellants was fourteen, and the extra wages amounted to about $1,500.

This decision was affirmed, upon appeal to the circuit court.

NOTE. See. also. Foster v. Sampson [Case No. 4,982]; The Elizabeth Frith [Cases Nos. 4,361 and 4,353]; Gardner v. The New Jersey [Case No. 5,233]; Ferrara v. The Talent [Id. 4,745]; Piehl v. Balchen [Id. 11,137]; The Childe Harold [Id. 2,676]; Mariners v. The Washington [Id. 9,086.]

Case No. 3,019.

COLLINS v. WHITE.

[3 App. Com'r Pat. 392.]

Circuit Court, District of Columbia. Oct. 17, 1860.

DISMISSAL OF APPLICATION FOR PATENT ON INTERFERENCE—NOVELTY—TOOLS OF IRON AND STEEL—CAVEAT — EVIDENCE — SUFFICIENCY—AMENDMENT OF CLAIM.

[1. On interference, the application should be dismissed where it appears that the claim has no patentable novelty, irrespective of the question of priority of invention.]

[2. A broad claim to the manufacture of tools of steel and iron by running such metal in a fluid state into mould form, is not patentable at this day.]

[3. A caveat embracing a broad claim as to casting tools in moulds from suitable metals, while not evidence of a claim to an invention for casting tools with iron bodies and steel edges, yet, being a document not required to be specific, it will not override the testimony of witnesses as to the previous discovery of the subordinate invention claimed.]

[4. Where there is no countervailing testimony or basis upon which to assail competent testimony as to priority of invention on the ground of bias or prejudice, it must be accepted as true.]

[5. A claim for an invention which is too broadly specified may be amended to conform to what, in the opinion of the patent office, and by the judgment on appeal therefrom, is considered as patentable.]

[Appeal from the commissioner of patents.

[On interference. Application by Samuel W. Collins for a patent for casting tools with iron bodies and steel edges. Interference declared with patent of William White. From a decision of the commissioner of patents rejecting the application, the applicant appeals.]

MERRICK, Circuit Judge. The first reason of appeal assigns for error that after the interference had been declared and the parties had gone to issue upon the pretensions set forth in their several specifications it was not competent for the office to narrow that issue by deciding that any part of the claims was not patentable for want of novelty, in either party, irrespective of the question of priority then agitating between them. In this I think the appellant is mistaken, and that it is not only competent for the office, but that it is its imperative duty, when in the progress of an inquiry before it a claim is found to be untenable, to lay hold of the objection and reject the application. Moreover, I am of the opinion that the course pursued by the office in this particular instance has not operated oppressively upon the applicant, but that, on the contrary, unusual facility has been given to present and vindicate his right to whatever is really meritorious in his application. The broad claim of the specification to the manufacture of tools, etc., of steel, or steel and iron combined by pouring or running such metal or metals in a fluid state into moulds of the form desired, is certainly not patentable at this day. The reference given by the office to Needham's patent of October, 1824, is too conclusive to admit of controversy on that point. But the office, in considering the more restricted invention involved in the broader claim, to wit, casting tools of proper form in moulds, of different metals so united in the casting as to obviate for moulding the edges of the tools to the bodies thereof which result is effected by first pouring into moulds the molten steel for the edge and then pouring in moulten iron immediately while the whole is thoroughly fused to compose the body of the tool, has determined that priority of invention rests with the appellee. This conclusion seems to rest upon two considerations, First, that the caveat filed by appellant in December, 1858, contains no allusion to this invention; and, secondly, that the witness mainly relied on by the appellant is interested and unworthy of credit. The caveat is very general and designed to embrace a claim broad as the art of casting tools in moulds from suitable material. Indeed the appellant, down to the present time, seems to persist in supposing himself entitled to a patent to that extent, and forasmuch as the caveat contains no allusion to the subordinate invention, it certainly is no evidence in favor of the present claim, but as he seems in good faith to have always insisted upon the larger invention I do not think that the silence of the caveat upon the subordinate is evidence which ought to override the positive testimony of witnesses to its previous discovery. It should be borne in mind that when a caveat is used as evidence to disprove a claim not embraced in terms that it is a document not required by the law to be specific in its terms, nor is it presumed to describe the whole invention of the party, but is filed in the office (in its terms; nor is it presumed to describe the whole invention) rather as a warning that the inventor is in the exercise of due diligence in the pursuit and perfection of his discovery, whereas the presumption arising from the matured specification of a patent is that he has fully described, as the law requires, every part of his invention, and has done so in clear and unequivocal language; and we know that even this presumption as to a specification may be over-

come by the weight of countervailing testimony in favor of the party upon the allegation of mistake or inadvertence, upon a claim for reissue.

The remaining objection of the office is that the witnesses relied on by the appellant are not to be believed on account of their interest in the result. This interest is deduced from the fact that the invention in question was first introduced and practiced by Samuel W. Collins at the establishment of the Collins Manufacturing Company, which is a corporate body having its place of business at Collinsville, in Hartford county, Connecticut; that Samuel W. Collins is a large, perhaps a principal, stockholder in that company; and the witnesses are also stockholders in that company. It being shown that one corporator, who has made an invention, has first introduced and allowed the use of his invention in the operations of a corporation whereof he is a stockholder, furnishes no proof whatever that the corporation has any right of property in the invention itself. At most it is an act of grace and favor in him towards the corporation, prompted perhaps by the personal advantage to himself resulting out of the increased general profit by the use of the invention, but still it is a privilege which he has a right to withhold at pleasure from the company, and to which they have no legal claim. It is his exclusive property, which he may sell if he pleases, or give to the company or to the world as he may any other property, and it is beyond the power of others to control his right except by force of some contract, an assignment, sale, or other obligation affirmatively shown to have been made limiting that right. In this case nothing of the kind is made to appear; and although witnesses circumstanced as the witnesses of the appellant are, may justly be suspected of bias and strong prejudices in his favor, which, if there were any conflict of testimony, would have weight in comparing, their credibility with the credibility of witnesses swearing to a different state of facts. Yet as there is no countervailing testimony in the cause, there is no basis upon which their testimony can be assailed. They are legal and competent witnesses in the eye of the law, and, having sanctioned their averments by judicial oath, a court is bound to accept their testimony. Now, one of these witnesses,—Charles Blair,—who was by trade a blacksmith, who had skill and knowledge in the particular business, swears that the matter of the invention was given in charge to him by Mr. Collins some time in the summer of 1858, at the Collins factory; that under Mr. Collins' instruction he cast tools in moulds of steel and of scrap iron, and in the month of September and in the early part of the autumn he cast axes and anvils by pouring into the moulds first melted steel and then pouring upon that and into the same mould melted iron, the iron being poured into the mould while the steel is yet in a state of fusion, in order to form a union between the iron and steel. (See his deposition from Interrogatory 8 to 19, inc.)

It is impossible to read the testimony of this witness and resist the conclusion that the invention in question was consummated by Collins early in the autumn of 1858, unless we determine that he is willfully perjured. No judge has a right to declare a witness perjured and unworthy of credit unless his testimony be inconsistent and flatly contradictory to itself or be contradicted by other facts in the case. But the general probabilities are all in favor of the statements of this witness. Several others speak to the fact that the invention was used and practiced at the factory certainly very soon after the time to which he deposes. It is not denied that Collins had directed his attention for some time before to the general subject of casting tools in moulds, and there is no suggestion upon the record that he gained his knowledge from Mr. White. Now Mr. White has no testimony of any sort. He has contented himself with relying upon the date of his own application, which is the 4th of December, 1858, and upon the weakness of his adversary's case. Under these circumstances I cannot escape the conclusion that Collins appears by the record (whatever may be the real truth not spread upon the papers, and of which therefore nothing can be judicially known) to be the first inventor, and that priority ought to be awarded to him. But before he can avail himself of his invention it will be necessary for him to amend his specification by narrowing the claim to that which in the opinion of the office and by the present judgment is considered as patentable. Now, therefore, I hereby certify to the Hon. Philip T. Thomas, commissioner of patents, that, having assigned time and place for hearing said appeal, and having heard the appellant by counsel and the appellee in proper person, and having read and considered the testimony in the cause and the reasons of appeal and the decision and response of the office to those reasons, I am of opinion there is error in its judgment in the matter assigned in the second, third, and fourth reasons of appeal, and said judgment is accordingly reversed, priority of invention is awarded to S. W. Collins for so much of his invention as is patentable, as hereinbefore set out, and the case is hereby remanded with instructions to allow an amendment of his specification in conformity with this opinion, and for such other and further proceedings as may be necessary to perfect his right to a patent for the same.

Case No. 3,020.

COLLINSON v. TEAL et al.

[4 Sawy. 241;[1] 9 Chi. Leg. News, 272.]

Circuit Court, D. Oregon. April 19, 1877.

SERVICE OF SUMMONS ON NON-RESIDENT.

A person temporarily residing or sojourning at Honolulu, as United States commissioner to the Hawaiian government, is a non-resident of the state, within the meaning of subdivision 3 of section 30 of the Oregon Code of 1854, authorizing the service of summons by publication, in certain cases where the defendant is not a resident of the territory.

[Cited in Woolridge v. McKenna, 8 Fed. 684.]

[Bill by Thomas Collinson against Joseph Teal and others.]

W. W. Page and G. W. Yocum, for plaintiff.

W. Lair Hill and W. H. Effinger, for defendants.

DEADY, District Judge. This suit is brought by the complainant, as a citizen of the state of California, against the defendants, as citizens of the state of Oregon, to have the latter declared to be the trustees of the plaintiff for the south half of lot 7 in block 2, in the town of Portland, and to execute a deed of release to him for the same. The bill alleges that on November 15, 1859, T. J. Dryer being "the owner of and in possession of" the premises in controversy, mortgaged the same to R. McFeely, to secure the payment of a note given by said Dryer to said McFeely for $2,000, with interest at the rate of three per centum per month; that on June 8, 1861, said McFeely commenced a suit in the circuit court for Multnomah county, against said Dryer, to foreclose said mortgage, at which time the said Dryer was "sojourning at Honolulu. in the Hawaiian kingdom, only and solely for the purpose of discharging the duties of his office" of United States commissioner to that government, "but had not then lost or abandoned his residence in the state of Oregon," which fact "was well known to said McFeely and his attorneys;" that an attempt was made to serve a summons in said suit upon said Dryer, by publication, notwithstanding his said residence in Oregon, but that said Dryer was not "served with process or summons in person, or by publication, whereby the said circuit court could or did obtain jurisdiction" of the defendant, or subject matter of said suit, "nor did the said Dryer enter his appearance" therein; that on November 16, 1861, said circuit court gave a decree, "without jurisdiction in the premises," against said Dryer for the sum of $1955 87, and for the sale of said mortgaged premises, in pursuance of which the same were sold on January 22, 1862, to John Green, who afterward conveyed to H. C. Leonard, who, on March 10, 1869, quitclaimed to the defendants, who by virtue of the premises, thereupon went into possession; and that on November 9, 1874, said Dryer conveyed the premises to the complainant.

A copy of the decree of foreclosure and sale is annexed to the bill and made a part of it, from which it appears that Dryer was "duly served with process by publication of notice and by mail, as the law directs." The bill also alleges that on March 11, 1869, the defendants commenced a suit, in the circuit court aforesaid, "against the lawful heirs of Daniel H. Lownsdale, deceased, to whom a patent for a tract of land," including the premises in controversy, "had been issued," in which they claimed that, by virtue of the aforesaid proceedings and conveyances, they had become the owners af the premises; that said Lownsdale had made such agreements with said Dryer and the latter's grantors "that neither he nor his heirs had any just or equitable claim to said lot;" that the claim of said heirs "was fraudulent and void," and "a cloud upon the title" of the defendants, derived from said sheriff's sale, and praying a decree quieting their title, and that the defendants be declared the owners of the premises in fee-simple, and that said heirs be enjoined from setting up any claim to the premises; that, upon the trial of said cause, said circuit court found the claim of the defendants to be true, and adjudged that said heirs had no interest in the premises, and that they should convey the same to the defendants, which was duly done; that thereupon said defendants "became the trustees of whatever right they acquired thereby, for the said Dryer and his grantees, and now are the trustees for this complainant, but wrongfully and unlawfully claim and set up a right in themselves as against this complainant in and to said real estate, which is of the value of $15,000; and that on November 9, 1874, said Dryer duly conveyed the premises to the complainant." The defendants demur to the bill, and upon the argument make the following points: (1) The bill is insufficient to entitle the complainant to any relief; and, (2) the suit is barred by lapse of time.

The claim to the relief sought by the bill rests ultimately upon the allegation that the court did not acquire jurisdiction of the person of the mortgagee in the suit for foreclosure. Upon this point, it appears from the bill that Dryer, while absent from this state, and residing at Honolulu as United States commissioner, was served in said suit, by publication, as a non-resident. It is also stated in the bill that, in fact, Dryer was only "sojourning at Honolulu" as such commissioner, "but had not lost or abandoned his residence in this state;" but this is the complainant's conclusion from the facts, rather than a statement of a fact.

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

Under the Code of 1854, section 30, which was in force until May 1, 1863, it was provided that service of the summons might be made upon a defendant by publication among others, in the following case: "When the defendant is not a resident of the territory, but has property therein, and the action arises on contract, and the court has jurisdiction of the subject of the action."

The suit of McFeely v. Dryer [Case No. 8,791], arose upon a contract, and the subject of it was within the jurisdiction of the court. If, then, Dryer was a non-resident of the state at the time of the publication, within the meaning of the act, the court acquired jurisdiction. Literally, a resident is one who sits, abides, inhabits or dwells in a certain place. A person sojourning—which is only a synonym for residing—at Honolulu, is prima facie residing there, and cannot be a resident of Oregon at the same time. The word is of a narrower signification than domicile, and, like the word "inhabitant," implies a bodily presence. Considered with reference to the purpose of the statute—the mischief to be remedied—its meaning is the same. It was enacted to give this class of creditors, whose debtors were absent from the state, and could not therefore be personally served with process within it, a means of enforcing their securities and so far collecting their debts.

In Roosevelt v. Kellogg, 20 Johns. 210, the court held that an averment in a plea of discharge under the insolvent act, that the insolvent was a resident of the county in which the application for the discharge was made, was equivalent to stating that he was an inhabitant of such place, saying: "These words signify the same thing; a person resident is defined to be one 'dwelling or having his abode in any place;' an inhabitant, 'one that resides in a place.'"

In Re Thompson, 1 Wend. 44, it was held that under the act, allowing an attachment against the property of a debtor who resides out of the state, that an attachment might issue against the estate of a debtor who was resident abroad permanently or temporarily, the court saying: "The object of the statute was to authorize creditors to prosecute their debts when their debtors were abroad; and whether their absence from the state is permanent or temporary, whether it is voluntary or involuntary, the reason for giving this remedy to the creditor is the same."

In Frost v. Bisbin, 19 Wend. 12, it was held that a person who had a domicile within the state, but carried on a business without, the same which he superintended personally, was liable to arrest on civil process as a non-resident. In Haggart v. Morgan, 5 N. Y. 428, a case arising under the attachment law, it was held that a person may be a non-resident of the state within the meaning of the statute, allowing an attachment against the property of non-resident debtors, although his domicile is within the state; and that actual non-residence, without regard to the domicile of the debtor, is what is contemplated by the statute. See, also, upon the subject of residence, In re Wrigley, 4 Wend. 603, 8 Wend. 134. It is not necessary to consider the other questions made in support of the demurrer. The want of jurisdiction alleged in the bill not appearing from the facts stated, but the contrary, the demurrer is sustained.

COLLIS v. The COERNINE. See Case No. 2,944.

COLLYER (SHAW v.). See Case No. 12,718.

COLLYER (UNITED STATES v.). See Case No. 14,838.

Case No. 3,021.

In re COLMAN.

[2 N. B. R. 562 (Quarto, 172).] [1]

District Court, N. D. New York. 1869.

SURRENDER OF SECURITY TO ASSIGNEE IN BANKRUPTCY—SUBSEQUENT PROOF OF DEBT.

A creditor, knowing the bankrupt could not pay his debts without help, loaned him money and left the matter of security to his lawyer and the debtor. The debtor confessed judgment on the debt, and subsequently gave a chattel mortgage of his entire stock of goods to secure payment of the judgment. The creditor surrendered the security to the assignee, and claimed to prove his debt under section twenty-three of the act [14 Stat. 528]. *Held*, that formal proof of a debt is prima facie sufficient; that under the provisions of section thirty-nine of the act, the chattel mortgage was a conveyance of property made to a creditor who had good cause to believe the debtor insolvent, and such creditor was not so entitled to prove his debt.

HALL, District Judge. The certificate of the register in this case presents for decision three questions; but the third is, in substance, included in the second, and only the first and second need to be separately considered. The first question is: "Was the debt of John Blain duly proven?" It is supposed that the formal proof of the debt is prima facie sufficient; and that the first question must be answered in the affirmative unless such proof is affected or avoided by the facts and circumstances presently to be noticed in the discussion of the second question. Indeed, it is not understood that any serious question is made in regard to such formal proof being prima facie sufficient in form and substance.

The second question is: "Is the said John Blain entitled to share in the distribution of the bankrupt's estate?" The evidence and concession accompanying the register's certificate (but not annexed to it, as stated in the certificate), in connection with the statements of the register, show that a petition against the bankrupt was filed on the 22d day of December, 1868, and that he was ad-

[1] [Reprinted by permission.]

judicated a bankrupt under such petition on the 29th of the same month; that he had previously been a merchant, and that just prior to the filing of the petition against him he had a stock of teas, sugars, coffees, spices, fruits, and confectionery in his store, at Seneca Falls, in this district; that he was then, and had been for several years, largely indebted to John Blain, his father-in-law, for money lent, &c.; that on the 25th day of November, 1868, the bankrupt confessed judgment in favor of said Blain for three thousand seven hundred and eight dollars damages, and seven dollars and seven cents costs, which was that day entered in the supreme court of this state, and docketed in the clerk's office of Seneca county; that on the 15th day of December, 1868, the bankrupt executed to Blain a chattel mortgage on his entire stock of goods, as security for the payment of the amount of this judgment; that at that time, or soon after, a suit was pending against the bankrupt in a justice's court, and was defended by him, and in which a judgment was soon afterwards rendered against him; that just before an execution was issued on the last mentioned judgment, an execution was issued on the judgment in favor of Blain, and a levy made upon the bankrupt's stock of goods by a deputy sheriff, who was directed by the attorney of Blain not to close the store under such levy; that soon after, the execution issued on said justice's judgment was levied on the same property, and that the store was then closed on some day of December, 1868 (but on what day does not appear), and within about one hour after said justice's judgment was recovered; that this judgment in the justice's court was rendered against the wishes of the bankrupt, who had defended the suit in that court. It also appears that the judgment in favor of Blain was confessed, and that the chattel mortgage to him was given under an arrangement between Colman, the bankrupt, and the attorney of Blain, who entered such judgment and took such chattel mortgage without any special direction from, or actual consultation with, Blain in regard thereto; and it is claimed that the judgment and chattel mortgage were therefore taken without his authority. This position cannot, however, avail the creditor, Blain, for the reason that his own testimony shows that he knew of the judgment and chattel mortgage in his favor, immediately after the levy on the execution issued on his judgment, and that he did nothing in disaffirmance of the acts of his attorney, but, as he says, "left it in the hands of Mr. Weed, his attorney;" and he also says, "I loaned Colman money and left it with Mr. Weed and Colman to see I was secured," which shows a general authority to take the judgment and mortgage, and a tacit assent to them afterwards. He also shows that he had taken a judgment against the bankrupt about April, 1868, for three thousand dollars, for money lent him to pay his debts, and he admits that he knew the bankrupt could not pay his debts without some one to help him. In short, it must be held that he took the judgment and chattel mortgage, knowing Colman to be insolvent, and with the intent to secure himself in preference to other creditors of the bankrupt. It is also shown that after the proceeding in bankruptcy had proceeded for some time, and on the 26th of January, 1869, Blain made a deposition in proof of his debt, and stated at the end thereof that he had been informed of the taking of a judgment and chattel mortgage, but that he did not regard them, or either of them, as any security whatever, and claimed no benefit by reason thereof or of either of them; and that, on the 11th day of February, 1869, he made another and similar deposition, stating that on the 6th of the same month he had surrendered to the assignee of Colman said judgment and chattel mortgage; and that nothing had been recovered by him, for his use, under either of them. And these surrenders, under the hand and seal of Blain, are annexed to the deposition.

It is claimed on behalf of Blain, the creditor, that under section thirty-two of the bankrupt act, this surrender entitles him to prove his debt and take a dividend; and this would be true if the question depended upon the provisions of that section. But the question depends upon the provisions of the thirty-ninth section of the act, which provides in respect to cases of involuntary bankruptcy, among other things, that any such involuntary bankrupt, who, being bankrupt or insolvent, or in contemplation of bankruptcy or insolvency, shall make any payment, gift, grant, sale, or transfer of money or other property, estate, rights, or credits, or give any warrant to confess judgment, or procure, or suffer his property to be taken on legal process, with intent to give a preference to one or more of his creditors, * * * shall be adjudged a bankrupt, and that if such person shall be adjudged a bankrupt, the assignee may recover back the money or other property so paid, conveyed, sold, assigned, or transferred contrary to that act, provided the person receiving such payment or conveyance had reasonable cause to believe that a fraud on the bankrupt act was intended, and that the debtor was insolvent; and such creditor shall not be allowed to prove his debt in bankruptcy.

Whatever might be considered in respect to the judgment and execution in favor of Blain, it is certain that the chattel mortgage must be considered a conveyance of property; and it was, in legal effect, a conditional sale, grant, and transfer of the property mortgaged. It was not made in the ordinary course of business, and must therefore be presumed fraudulent, under the thirty-fifth section of the act. And it is certain that it was made with the intent to give Blain a preference over other creditors, and when Blain himself, and the attorney who acted in his

behalf, had reasonable and abundant cause to believe that the debtor was insolvent, and that such a preference as the law adjudges to be a fraudulent preference against the provisions of the bankrupt act was intended. Indeed, such was the obvious as well as necessary effect of the transaction, if allowed to be carried out according to the intent of the parties. And the giving of such judgment and chattel mortgage and the procuring of his goods to be levied on under said execution on the 17th day of December, 1868, were the acts of bankruptcy upon which Colman was adjudged a bankrupt. Under the provisions referred to it would seem that the first and second questions presented by the register must be answered in the negative; and the third, which is substantially the reverse of the second, must be answered in the affirmative. The decision of the learned judge of the Wisconsin district, in the Case of Princeton [Case No. 11,433], accords with this view of the question presented. The decision of the register is therefore overruled; the proof of debt by John Blain is disallowed, and his claim made upon the proofs submitted by the register is rejected.

COLMAN (BALCH v.). See Case No. 791.

COLMAN (WILSON v.). See Case No. 17,-798.

COLOMBO, The. See Case No. 3,040.

Case No. 3,022.

The COLON.

[8 Ben. 512.][1]

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

COLLISION IN SLIP — STARTING SCREW OF STEAMSHIP—LOOKOUT.

A canal-boat loaded with coal was lying in a slip in which a steamship lay, discharging her cargo. It became necessary to turn her around in the slip and she was cast loose for that purpose. A line was got out from the stern of the canal-boat to the pier, on which the master of the canal-boat was pulling, with his back to the steamship, when the screw of the steamship was started, and the suction pulled the canal-boat over till she was struck by the screw and so injured that she sank. It was the regular sailing day of the steamship, and the screw was put in motion before starting, as was customary, for the purpose of seeing if the machinery was in order. Before putting the machinery in motion, the officers of the steamship had examined to see if there was any vessel which might be injured by the action of the screw, but some little time had elapsed after that examination, before the screw was put in motion. When the master of the canal-boat found that his boat was being drawn over towards the screw, he called to the steamship to stop her screw, but there was no one on the lookout on board of her and the screw was not stopped: *Held*, that the steamship was in fault in not keeping a watch on her stern and in setting her screw in motion when she did, and was liable for the damages

[Followed in The City of Macon, 20 Fed. 159.]

In admiralty.

E. D. McCarthy, for libellant.

W. R. Beebe and H. S. Bennett, for claimants.

BLATCHFORD, District Judge. The libellant, as owner of the canal-boat Charles McCaffrey, files this libel against the steamship Colon, to recover damages for the loss of said boat and her cargo of coal and her furniture, caused by her being sunk in consequence of her being struck by the screw of the steamship, in the slip between piers 41 and 42, in the North river, in the city of New York. The steamship was lying with steam up, and her bow towards the river, at the south side of pier 42. The occurrence took place on the 19th of December, 1874. The steamship was about starting on a voyage to sea and was working her screw at the wharf, to see that her machinery was in proper working order. The canal boat had been lying at the south side of pier 42, between the steamship and the bulkhead at the inner end of the slip, with her stern towards the stern of the steamship, having coal discharged from her forward end, and had been removed from her position with a view to place her rear end at the point of discharge, which would have brought her bow towards the stern of the steamship. While this movement was in progress, the canal boat, having been pushed away from pier 42 and over to near pier 41, was moved by some agency, during the revolution of the screw of the steamship, over towards the latter, so that the screw struck the bottom of the canal boat under her port side, some feet forward of the stern of the canal boat, and broke in a hole through which the water entered, so that the boat sank in the slip.

The libel alleges that the stern of the canal boat had been pushed off from pier 42 so far that it lay not more than 3 or 4 feet from pier 41, and the boat lay diagonally athwart the slip, her bow towards pier 42 and her stern towards pier 41, she being about 75 feet distant from the stern of the steamship, when the screw of the steamship began to revolve, and the suction produced thereby drew the canal boat towards the stern of the steamship; that the libellant, who was in the canal boat, seeing the danger to which she was exposed, shouted loudly to those in charge of the steamship to stop the screw; that no attention was paid to such call, and the boat was drawn up against the stern of the steamship and was struck five or six times by the screw; that the screw was then stopped, and was afterwards again started, and struck the blow which made the hole; that the occurrence took place solely through the negligence of those in charge of the steamship; and that everything was done

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

that could have been done by those in charge of the canal boat to prevent a collision.

The answer is put in by the Pacific Mail Steamship Company, as owners of the steamship. It avers, that, for many years, one of the company's steamers had left pier 42 at noon on Saturday of each alternate week; that this fact was well known to the public and to the libellant; that the day of this occurrence was one of the regularly appointed days for the sailing of the company's steamers; that, on that day, at noon and for about an hour previous thereto, it was apparent to every one in the vicinity that the Colon was about to depart; that, about noon, and just previous to the departure of the Colon, her officers, in accordance with their duty and custom, started her screw, to ascertain if her machinery was in working order; that, previously thereto, the officers of the Colon had examined all the boats in her vicinity, to ascertain whether her screw could be made to revolve with safety to herself and to other craft in her vicinity; that, on such examination, all the boats in the vicinity of the Colon, including that of the libellant, were found to be, and were, lying quietly, and were fastened to the docks, and there was then no craft within fifty feet of the Colon; that, thereupon and thereafter, steam was applied to the screw of the Colon, which caused it to revolve, and there was thereby created a succession of currents which flowed directly aft from the stern of the Colon and towards the dock where the canal boat lay; that the libellant, perceiving said currents, and desiring to wind his boat around, and for the purpose of saving himself time and trouble, and to avail himself of the aid and force of said currents, unfastened the stem of his boat from pier 42, and pushed her into the current, by which her stern was driven away from the Colon towards pier 41 and nearly into the position which he desired, and he had attached her stern to pier 41 by a rope; that then, finding there was not room enough for him to turn, he directed his assistant to unfasten the bow, which was done, and the bow was hauled toward the Colon by such assistant, while the libellant unloosed the rope which attached the stern to pier 41, and pushed the stern also towards the Colon, in order to get into a larger space to turn the boat around; that the bow of the boat was thus brought within a few feet of, and right aft of, the stern of the Colon, from which the currents created by the revolving screw were flowing, by which the bow of the boat was swept back towards the bulkhead, and the stern was thrown around against the other side of the revolving screw, by the flanges of which it was struck; that the injury was caused solely through the negligence of the libellant, and without any fault or negligence on the part of the officers of the Colon; that the screw had been in motion fully five minutes before the libellant had unfastened his boat or made any attempt to wind it; that the whole object of the libellant in unfastening and attempting to wind his boat at that time was to avail himself of the assistance afforded by the currents created by the revolutions of said screw; that no suction was produced in the water by the revolutions of the screw, and the canal boat was not drawn towards the stern of the Colon by any suction, but the currents created by the revolutions of the screw drove all floating craft directly aft and away from the Colon, instead of drawing them to her; and that the canal boat came against the side of the screw by being pushed there by the libellant, while he was in the act of shifting his boat.

One of the principal issues raised by the pleadings is, as to where the canal boat was when the screw of the Colon was put in motion. The libel alleges, that, at that time, the canal boat had been moved from her original position at pier 42 and was lying diagonally in the slip, with her stern only a few feet distant from pier 41 and her bow towards pier 42, thus presenting her port side towards the Colon. The answer avers that the canal-boat was not moved from pier 42 until after the screw of the Colon was put in motion. The testimony is very clear the canal-boat had been moved away from pier 42 before the screw of the Colon was set in motion, and that, when the screw was started, the canal-boat was in the position set forth in the libel, and was in the course of her transit from her original position at pier 42 with her stern towards the Colon, to a position, at pier 42, in which her bow should be towards the Colon. The reason why it was necessary that the canal-boat should be brought down nearer to the Colon, and have her stern pushed over to the vicinity of pier 41, in order to turn her bow, was that the landward end of the slip was filled up near to the bulkhead, by boats lying parallel with each other at pier 41, while the space between the screw of the Colon and pier 41, in a line at a right angle to pier 41, was open, and afforded room for the stern of the canal-boat to approach pier 41 near enough to enable her bow to swing clear of pier 42 while being drawn towards the stern of the Colon. At some time during the transit of the canal-boat, and, as I think, from the evidence, at the time the screw of the Colon was put in motion, there was a line out from the stern of the canal-boat to pier 41, on which line the libellant, who was on his boat, was pulling, his back being towards the Colon. The weight of the testimony is, that the stern of the canal-boat was down the slip so far as to be below a line at a right angle from the screw of the Colon to pier 41, and that her stern was thus within the range of the sucking or drawing power of the screw, and was drawn towards the screw by the working of the screw. In this state of things, it is contended for the Colon, that the libellant must have been

guilty of negligence, in failing to keep his boat away from the screw by holding on to the line which extended from his boat to pier 41, or else that he designedly pushed his boat towards the screw. The libellant testifies that the suction was such that he could not hold the boat by the line, and all the circumstances go to show that he would have held her if he could, after he saw the effect of the suction; and that he intentionally pushed her towards the screw is not to be credited. But, it is quite apparent, that if, after the screw began to work, and while it continued working, some proper person had been stationed on the stern of the Colon, the canal-boat and her movements would have been under observation from the Colon, and the screw could have been stopped and the collision avoided. When the libellant found that his boat was being drawn towards the screw, he cried out loudly to the Colon to stop the working of the screw, but there was no one on the lookout to respond. Officers of the Colon testify that, before the screw was set in motion, they took the precaution to look from the stern and port side of the Colon into the slip, to see whether there was any boat in a position to be injured by the working of the screw, and saw none. Some little time, however, elapsed, after that, before the screw was started; and it was not enough for the officers merely to observe the state of things before starting the screw. A watch should have been kept from the stern of the Colon all the time the screw was in motion. Moreover, a careful observation at the moment the screw was put in motion, would have shown that the canal-boat was in transit and was in a position of danger, if the screw should be started. All this shows negligence on the part of the Colon, and I see no contributory negligence on the part of the canal-boat. There must be a decree for the libellant for the damages sustained by him by the sinking of the canal-boat and her furniture, of which he was the owner, with a reference to a commissioner to ascertain such damages. The libel contains no allegations sufficient to authorize a recovery by the libellant for any loss of or damage to the cargo of coal. He is not alleged to have owned it or to have been carrying it on freight.

Case No. 3,023.

The COLON.

[9 Ben. 354.][1]

District Court, S. D. New York. March, 1878.

BILL OF LADING — STOWAGE — LIABILITY OF CARRIER FOR NEGLIGENCE OF SERVANTS.

1. A bill of lading contained a clause excepting "any act, neglect, or default whatsoever" of the master or mariners, and a clause against liability for leakage or breakage, "when properly stowed." The effect of these clauses, taken together, was not to exempt the vessel from responsibility for leakage and breakage occurring as the result of bad stowage by the master or mariners.

2. A carrier cannot, by contract, relieve himself from responsibility for the negligence of his servants, because such a contract is unreasonable and contrary to public policy.

[Cited in The Montana, 17 Fed. 379.]

In admiralty.

Benedict, Taft & Benedict, for libellants.
Boardman & Boardman, for claimants.

BLATCHFORD, District Judge. This is a libel against the steamship Colon, to recover for the value of the contents of certain packages of brandy and wine shipped on board the steamer Colon at Aspinwall, to be carried to New York. When the vessel arrived at New York the contents were gone and the packages were reduced to loose staves. It satisfactorily appears that the packages, which were half barrels and a keg, were broken loose from their positions during the voyage, and, as a result, broken in pieces. This, on the evidence, was the result of negligent stowage on the part of the ship. The packages were brought from San Francisco under a bill of lading issued by the Pacific Mail Steamship Company, which owned the Colon. By the bill of lading the company agreed to transport the goods, by one of their steamers, from Aspinwall to New York, and there deliver them in the same apparent good order and condition in which they were stated by the bill of lading to have been shipped. The answer sets up that the damage was caused by the shifting of a portion of the cargo of the vessel caused by stress of weather, and not from any negligence on the part of the vessel, and that the goods were properly stowed. The bill of lading excepts disasters or dangers of the seas; but the evidence establishes that the stress of weather was not such that it is reasonable to think it would have caused the packages to break away if they had been properly stowed.

There is a clause in the bill of lading which excepts "any act, neglect, or default whatsoever" of the master or mariners; and a clause which states that the company is not accountable for leakage or breakage, "when properly stowed." The effect of these two clauses taken together is not to exempt the company from responsibility for leakage and breakage occurring as the result of bad stowage by the master or mariners. But, aside from that, the company cannot, by contract, relieve itself from responsibility for the negligence of its servants, because such a contract is unreasonable and contrary to public policy. Railroad Co. v. Lockwood, 17 Wall. [84 U. S.] 357; Bank of Kentucky v. Adams Exp. Co., 93 U. S. 181. There must be a decree for the libellants, with costs, with a reference to ascertain the damages the libellants have sustained.

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

Case No. 3,024.

The COLON.

[10 Ben. 60; 14 Am. Law Rev. 84.][1]

District Court, S. D. New York. Aug., 1878.

SALVAGE — DAMAGE TO CARGO BY DETENTION — COSTS—PARTIES—BURDEN OF PROOF.

1. The steamer C., while on a voyage from New York to Colon, became disabled on the 20th of August, 1876, by the breaking of her crankshaft. She was otherwise tight and staunch, was provisioned for several months, and could make some progress under sail. She was then about 200 miles from Nassau, N. P., and about 731 miles from New York, for which port her master determined to make. The weather was fine and the sea smooth. During that afternoon the steamer E., bound from Kingston, Jamaica, to New York, in answer to a signal from the C. came alongside, and an agreement was made between the masters of the two vessels that, the C., having requested to be towed by the E. to New York, the compensation for the assistance rendered should be settled by the companies in interest in New York. Each vessel furnished its hawser for the service, and the E. reached New York in safety with the C. in tow on the morning of August 26th, the weather during the voyage being fine, and the winds favorable. The C. was worth about $230,000, and her cargo was worth about $250,000, and she had 140 passengers. The E. was worth about $120,000. Her cargo was worth about $100,000, and she had thirty-nine passengers. She was detained about two days and a half in rendering the service. No agreement as to the amount of compensation for the services of the E. was arrived at between the owners of the two vessels. Two days after their arrival the owners of the E. demanded $150,000 salvage, and the next day filed their libel and attached the C. and her cargo for that amount. There was some delay in furnishing security, and the transhipment of the cargo of the C. to another vessel of the line to which she belonged, and the sailing of that vessel, were delayed thereby. Part of the cargo of the E. consisted of fruit, and its consignees intervened in the suit, claiming to recover the damages caused to such part of the cargo by the delay. It had been shipped under bills of lading which in terms authorized the E. to tow and assist vessels in all situations. On behalf of the E. it was claimed that she had been put to expense, amounting to $2,340, and that she had lost $2,500 freight on her next trip, but this latter claim was abandoned on the trial: *Held*, that the service rendered was a salvage service, but that the claim of the E. was exorbitant.

[Cited in Brooks v. The Adirondack, 2 Fed. 391; The Persian Monarch, 23 Fed. 822; The Wells City, 57 Fed. 319.]

2. The dangers to which both vessels were exposed during the service had been exaggerated.

3. The policies of insurance on the E. and her cargo not having been produced, the presumption was that by their terms the E. was authorized to render such services.

4. $10,000 was a reasonable compensation to the E. and her ship's company for the service rendered, $500 of it to be paid to the owners of the E. for expenses, $750 to the master of the E., and the rest, half to the owners of the E. and the other half to be divided among the officers of the E., including the master and her crew, according to their wages.

[Cited in The Benison, 36 Fed. 797.]

5. The owners of the cargo of the E. who had intervened might also recover the damages which they had sustained by reason of the detention, such damages being the difference between the value of their cargo when delivered and what would have been its value if delivered without detention; and that their right to recover such damages was not affected by the above mentioned clause in the bills of lading under which the cargo was shipped.

6. The libellants should not recover costs, except that the costs of the reference to ascertain the damage to cargo should abide the event.

In admiralty.

E. P. Wheeler and C. S. Souther, for owners of Etna.

W. R. Beebe, for crew of Etna.

S. H. Olin and J. H. Montgomery, for shippers of cargo by Etna.

T. E. Stillman for claimants.

CHOATE, District Judge. This is a libel brought by the owners, master and crew of the steamship Etna, against the steamship Colon and her cargo, claiming compensation as for a salvage service in towing her into the port of New York, when disabled by the breakage of her machinery at sea. Some of the consignees of cargo by the Etna have joined as co-libellants, claiming for damage through detention in the voyage to their goods, which being fruit, it is claimed became worthless or damaged by decay, before arrival, and which, but for the detention, would have arrived in good condition.

The Colon is an iron steamship of 2,686 tons burden, belonging to the Pacific Mail Steamship Company. She left New York on the 17th of August, 1876, with a hundred and forty passengers, and a crew of seventy-four men, including officers, and a general cargo of merchandise not perishable, valued at $250,000, bound for the port of Colon, by way of Crooked Island passage. On the 20th of August, at eleven o'clock in the forenoon, she broke her low pressure crank shaft in the crank. The effect of the accident was, that her machinery was wholly disabled, and her propeller rendered useless. By the accident two men were killed, the four columns that supported the cylinders were broken, and other parts of the machinery badly damaged. She was then in latitude 28° 17′ north, and longitude 74° 4′ west, about 731 miles from New York, and 200 miles from the nearest port, which was Nassau, New Providence. In all other respects, except as to her machinery, she was tight, staunch and strong. She had on board an ample supply of provisions to keep the sea for several months. She was a two-masted steamer, brig-rigged and furnished with two top-gallant sails, two upper top sails, two lower top sails, two courses, one fore stay sail, one fore top mast stay sail, one fore spencer, one gaff top sail, one main stay sail and one main spencer. At the time of the accident, the sea was smooth, the weather fine and the wind light from the W. S. W.

[1] [Reported by Robert D. Benedict, Esq., and Benj. Lincoln Benedict, Esq., and here reprinted by permission. 14 Am. Law Rev. 84, contains only a partial report.]

About half an hour after the accident, the ship was got under all sail. The damage to the machinery was such that it could not be repaired at sea and the master decided to make for the port of New York. He then expected the Etna to pass within speaking distance, on her regular trip from Kingston or Port au Prince to New York, and the Acapulco, a steamship of the same line with the Colon, would be also due in that vicinity, in about three days, on her passage from Colon to New York, in case she took the Crooked Island passage. She sometimes took another route, which would have carried her a hundred miles further to the westward. Having got all sail on the ship, the master attempted to wear, but the wind being light and the propeller not being disconnected, he was unable to do so, and the ship made headway to the southward, about a knot and a half an hour, and drifted to the eastward, at about the same rate. After attempting to wear for about an hour, she made a French brig, and lay to, spoke and boarded the brig, and sent despatches by her. She then continued her efforts to wear, with the same result as before, until she made the Etna, which was at three o'clock and forty-five minutes in the afternoon. The course of the Etna was to the westward of the Colon, and she was bound to New York. The Colon set a signal which indicated that she wished to communicate close with the Etna, and soon after the Etna, in response to the signal, bore down upon her, the Colon bein then nearly abeam, and distant from six to eight miles. The Etna having rounded to under the lee of the Colon, the master of the Colon came on board the Etna and he and the master of the Etna had an interview, in which the master of the Colon told the master of the Etna that his machinery was disabled, and that he wished the Etna to tow him back to New York. After some hesitation on the part of the master of the Etna, it was agreed that he should do so. The subject of compensation was mentioned, and, at the suggestion of the master of the Colon, it was agreed that that should be left to be determined by the parties in interest in New York, and an agreement in writing was drawn up and signed by them, as follows: "At sea, August 20th, 1876. Lat. 28° 17' N., Long. 74° W. On board S.S. Etna. We, the undersigned, do hereby agree as follows: The P. M. S. S. 'Colon' being disabled as to her machinery, but in other respects tight, staunch and strong, asks the Atlas S.S. 'Etna' to tow her the 'Colon' to New York. The undersigned, Capt. S. P. Griffin, of the 'Colon,' stipulates that compensation for the assistance to be rendered shall be settled by the companies in interest in New York; and the undersigned, Capt. J. W. Sanson, of the 'Etna,' accepts the stipulation of Capt. S. P. Griffin, and for his part will render the assistance mentioned upon the terms stated."

The Etna was furnished with only one hawser, suitable for the purpose of assisting in towing the Colon. It was a ten-inch hawser, which had been in use on the Etna for two years or more, but was in good condition. The Colon had a larger hawser, new, that had never been used. Before the captains separated, it was arranged that both hawsers should be used in towing. The agreement having been made, the master of the Colon returned to his ship. The hawser of the Colon was passed on to the Etna, and that of the Etna onto the Colon. This service was performed by the crew and the boat of the Colon. The hawsers were made fast to the after bitts on the quarter deck of the Etna on either side, and the Etna resumed her voyage for New York with the Colon in tow. They got under way about seven o'clock in the evening of the 20th of August, and arrived off Sandy Hook shortly before midnight, on the 25th, and came up the bay early in the morning, on the 26th. From the 20th to the 26th, the weather was fine, and the winds for the most part light and favorable, and during most of the time, the ships carried sail. They arrived in safety and without accident, except the stranding of the hawser of the Etna, on the 21st, which does not appear to have been caused by any defect in it. In consequence of the inequality in the strength of the hawsers, they were so arranged that that of the Colon bore a greater part of the strain of the towage than that of the Etna.

The Etna is an iron steamship of 1,274 tons burden, belonging to the Atlas Steamship Company (limited), running regularly between New York and ports in the West Indies, usually between Port au Prince and New York, but on this trip she stopped at Kingston, for the mails. On the 17th of August, 1876, she left the port of Kingston, Jamaica, with thirty-nine passengers and a general cargo of merchandise, valued at about $100,000. She also carried the mails from Kingston to New York. Her cargo consisted in part of fruit, bananas and limes, shipped green and liable to decay before arrival, if detained on the voyage. The value of the Colon and her stores was about $230,000. The value of the Etna was about $120,000. The regular and usual length of the Etna's passage, from Kingston to New York, is seven days, and but for the detention, she would have been due in New York early in the morning of the 24th. She was therefore detained two days. Her master claims that he was ahead of his time when he bore away for the Colon, and might have arrived on the afternoon of the 23d. So that the detention was at the utmost two days and a half.

All the cargo of the Etna was shipped under bills of lading which permitted the Etna to tow and assist vessels in all situations. All the cargo of the Colon was shipped under bills of lading, which exempted the Colon from liability for damage arising from ac-

cidents to the machinery. There is evidence that the defect in the crank, which resulted in the damage to the machinery, was a latent defect which could not have been discovered by examination prior to the breakage.

On the 26th of August, after the arrival of the ships at New York, Mr. Clyde, the president of the Pacific Mail Steamship Co., called on the agents of the Atlas Steamship Company, the owners of the Etna, and asked them to fix a sum for the service, as he desired to transfer the cargo and passengers of the Colon. No agreement was come to, nor any definite proposition made, but the same day the agents of the Atlas Company wrote to Mr. Clyde: "After conversation with Capt. Sanson, we find the matter of importance, and will require consideration; but on Monday, we hope to communicate definitely regarding the salvage of the steamship Colon." The transfer of the passengers and cargo of the Colon to the Crescent City, another steamship of the same line, was immediately commenced. On Monday, August 28th, the agents of the Atlas Company called upon Mr. Clyde. They stated to him that they should claim $150,000 at least; that that was their view of what the service was worth. Mr. Clyde replied that his views differed entirely from theirs; that he regarded it as a towage service only; that he thought it was not worth anything like that sum, that he would pay a fair compensation for it as a towage service. This was the substance of the conversation. And the interview ended without any definite proposition on the part of Mr. Clyde, and without any arrangement for further negotiation. Mr. Clyde had informed the agents of the Atlas Company, on the 26th, that the transfer of the cargo to the Crescent City would go on without delay, unless they interposed to stop it. On the 29th of August the Atlas Company filed their libel and attached the Colon and her cargo, thereby stopping the further transhipment of the cargo. They claimed in the libel $150,000 for a salvage service, and there was some delay in procuring the necessary bonds for the release of the ship and cargo, so that the Crescent City, which would regularly have sailed on the 29th, was delayed until the bonds were furnished. The libellants knew that the cargo was being transferred, and that, if not stopped, the Crescent City would leave port with it on Tuesday, the 29th, at noon.

The weight of testimony is that the part of the sea where the Colon's machinery became disabled, is not very much frequented by vessels, the vessels passing there being mostly small sailing vessels going between New York and the West India ports, by way of Crooked Island passage, and certainly that the Etna and the Acapulco were the only vessels capable of helping her to proceed on her voyage, which were likely to come near enough to assist her; and as to the Acapulco, the chance of her falling in with the Colon was subject to several contingencies. The current at that time and place was setting to the eastward, and before the Acapulco reached that part of her voyage, the Colon might have drifted so far to the eastward as not to be made from her. Although the master of the Colon believed he could have kept upon the track of the Acapulco, yet his success in doing so would depend greatly on the wind and weather. The drift to the eastward was about a knot and a half while she was attempting to wear. If she were lying to, it would, of course, be much less, and this easterly drift of the current was unusual at that place. The preponderance of the evidence also clearly is, that the Colon, by the aid of her sails alone, could be navigated at sea without danger, except on a lee shore; that with her screw disconnected she would make headway under canvas, with a moderate breeze, and that she could sail under canvas on a wind. Her screw was stationary, that is, it could not be raised out of the water, but could be disconnected from the shaft. The expectation of the master that if necessary he could make the port of New York under canvas, was not an unreasonable one.

It is claimed on the part of the libellants, that the service rendered was a salvage service of great merit; that the Colon was rescued from great and imminent perils by the Etna; that the Etna encountered great risks and incurred great expense and loss in rendering the service, and it was insisted upon the trial that the libellants were entitled to $150,000. That the service rendered is one that ranks as salvage, and not as a mere towage service, was conceded by the learned counsel for the Colon; but it is insisted that the alleged dangers to which the Colon was exposed, and those which the Etna encountered in aiding her. are mostly imaginary and that the expense and loss claimed to have been incurred and suffered are greatly exaggerated.

The first danger to which the Colon is claimed to have been exposed was from the condition of her machinery. By the breaking of the columns supporting the cylinders, great masses of iron, it is said, were left unsecured in the ship which in case of a storm might have shifted and rolled about and sunk the ship. The evidence is not very clear or satisfactory as to whether by the rolling of the ship the broken parts of the machinery would have endangered her safety, or to what extent this was so, or within what time this danger could have been guarded against, or what if any precautions could have been taken, in case of the sea rising, to secure these dangerous parts of the machinery temporarily. This particular danger was not referred to in the libel, nor does it appear to have been referred to in the conversation between the masters of the two ships on board the Etna. The only evidence

from which it can be inferred, is the nature of the breakage as before described, and the testimony of Captain Griffin, who said that it would take but an hour or an hour and a half to disconnect the screw and yet that he did not disconnect it till the night of the 22d, although it offered a considerable impediment to the progress of the ships while connected. And he gave as the reason for not disconnecting it sooner, that the men were at work securing the engine; that that was a most important thing to do at that time; that the heavy parts of the engine were adrift. From this evidence and from the nature of the damage it may I think be reasonably inferred that the ship was in some danger from this cause during the two days and some hours, and that the work was so important that the men in the engineer's department could not be spared to uncouple the screw, but this element of danger would be entitled to greater consideration if the libellants had shown more fully, by testimony, its nature, extent and duration. It is consistent with Capt. Griffin's testimony that his apprehension of the effect of the existing state of the machinery in case of a storm, may not have extended so far as the actual sinking of the ship thereby, and it is noticeable that while he was in company, on the 20th, both with the Etna and the French brig, there is no evidence that this danger to the lives of his passengers was referred to in either case as a reason for their lying by him, and that, while the master of the French brig offered to do all in his power, Capt. Griffin made no request that she should lie by him till this danger was passed. It does appear by the evidence that that part of the ocean is occasionally visited in July, August and September by hurricanes or circular storms lasting for about twelve hours.

But the Colon was not rescued from this danger, assuming it to have existed, by anything which the Etna did. The Etna furnished no men, nor was she asked to furnish any men, to aid in securing the machinery. Nor could she, if the bad weather had come before the machinery was secured, have saved the Colon or her cargo from this danger. The most she could have done would have been to stay by her and take off her passengers and crew. Her presence was undoubtedly a security to the lives of those on board the Colon against this somewhat remote, but on the evidence possible, danger.

The next danger to the Colon relied on arises from her location in a part of the sea little frequented by steamers and where, as is insisted, she would have certainly drifted to the eastward, out of the track of such ships as were likely to pass that way. This, however, appears to be an imaginary rather than a real danger. The infrequent chances she would have in those waters to find a suitable vessel to tow her, of course increased the chances of detention at sea, and so may be said to have enhanced the value to her of the Etna's service; but she was in no danger at sea, and she was not so far from port and from the other routes of ocean steamers as to be in any sense lost or beyond the reach of help, if she found it impossible for want of favoring winds to make her port. She was tight and staunch and navigable at sea, and could have made some port, and she was well provided with boats, which she could have sent to some port or ports from which aid could be obtained. The prevailing winds of that season in that part of the sea are shown to be light and variable, and, if she had missed the Etna and the Acapulco, she simply would have run the risk, so far as her location is concerned, of being kept longer at sea and of being compelled to make or approach New York under canvas. She could hardly have failed, in approaching New York, to have fallen in with some steamer which could have towed her in.

The next danger insisted on is, that she was unmanageable under canvas on a lee shore. This also is mostly an imaginary danger. It is true, doubtless, that these long steamers are far less manageable under canvas on a lea shore than sailing ships. Generally they cannot tack, and in bad weather in that position are in greater peril, and they cannot sail by the wind as other vessels can, so that if they are caught with a heavy gale on a lee shore, with disabled machinery and not on soundings affording anchorage, they are in great peril; but the Colon was not in this position and in no danger of getting into such a position. If she had not been taken in tow but had proceeded under canvas, she would not have been on a lee shore until near the port of New York and the chances of her being caught there with a heavy gale blowing on shore were certainly very remote, and the chances of her being lost by this danger without possibility of anchorage or rescue altogether too remote to enter into the calculation of the value of this service. At the same time it is of course to have due weight in valuing the service rendered that the Colon was not as manageable as a sailing vessel, that her canvas was designed to aid her steam power and not to propel her independently of it. It is also claimed that the Colon was in danger of getting out of provisions, but this is not sustained by the evidence.

In fact, the principal value to the Colon of the service rendered by the Etna was that her passengers and her cargo, which were bound for Colon, were brought to New York at least nine days and perhaps a much longer time sooner than they would have reached that port but for the assistance so rendered; but that she was in any great or impending peril from which the Etna rescued her or her cargo, or in any danger, tending in any considerable degree to increase the value of the service of bringing her promptly into port, is not established by

the proofs. But with all these deductions from the extreme claim of the Etna, the service thus rendered to the Colon and her cargo, of being thus promptly towed into port, was a salvage service of great value, and its value is not diminished by the fact that the shippers of cargo by the Colon may have had no claim for damage growing out of the breakage of the machinery. The amount and value of the property rescued is not changed by this fact.

The risks run by the Etna have also been greatly exaggerated. She had taken on board at Kingston seventy-five tons of extra coal as ballast. Of this she used in getting to New York only twenty tons, leaving her about four days' supply on her arrival. She was therefore in no appreciable danger of exhausting her fuel. The supposed danger of collision with the Colon while towing her is too remote to be worth considering. It could arise only from bad management. It is a bare possibility of danger merely which exists in all towage services. It appears that there was some insurance on the Etna, but how much does not appear. The policies are not produced. In view of the nonproduction of the policies it would seem that the libellants have failed to prove a possible loss of insurance by deviation in towing the Colon, since it is a common provision in policies of insurance to permit the rescue of vessels in distress. The burden here is on the libellants, and the evidence is exclusively within their own control. The danger to the Etna chiefly relied on was that by the extra strain put upon her machinery it was in danger of becoming disabled. The attempt, however, to prove by the witnesses Petrie and Roberts, that her machinery was unduly strained and in fact injured by towing the Colon, failed; and upon the whole evidence I should not be justified in finding that she incurred any appreciable danger of disabling her machinery from the service rendered. And it is admitted by the master of the Etna, that the towing of the Colon imposed very little extra labor on the crew of the Etna. The Etna presents a bill of expense and damage amounting to $2340.65, besides the claim of $2500 for loss of freight on the next trip, which last item, however, was abandoned on the trial after considerable testimony had been taken on the subject. Of this claim for damages, the testimony sustains but a small part. The claim of $600 for a new shaft is clearly not proved. Long afterwards and after one or more intervening voyages, a new shaft was put in, but it is not shown that the necessity for it was caused by the extra work done on this voyage. Seventy-five dollars for injury to hawser, $100 for repairs to the deck, $200 for extra work on the engine, $125 for extra coal used will more than cover all damages and expense proved to have been incurred by the Etna. The sum of $484, claimed as paid in fines for detention of the mails, was not shown to have been paid. The engineer's log does not sustain the claim that after taking the Colon in tow the Etna was run under any increased pressure of steam or with any considerably increased consumption of fuel, and the entries in the log indicating greater trouble from heating of the machinery were shown to have been interpolated pending the trial.

While it is properly conceded by the learned counsel for the claimants that the service rendered is to be treated as a salvage service and not merely as a towage service, and is to be compensated accordingly, yet it is very manifest that it was for the most part wanting in those elements of danger, both to the property saved and to that rendering the salvage service, which have led to the giving of a large part of the value of the property saved. The rule as to the compensation is perhaps stated with as much certainty, by Sir John Nicholl in the case of The Clifton, 3 Hagg. Adm. 118, as the subject admits of, as follows: "The ingredients of a salvage service are: First. Enterprise in the salvors in going out in tempestuous weather to assist a vessel in distress, risking their own lives to save their fellow creatures, and to rescue the property of their fellow subjects. Secondly. The degree of danger and distress from which the property is rescued, whether it were in imminent peril and almost certainly lost if not at the time rescued, preserved. Thirdly. The degree of labor and skill which the salvors incur and display and the time occupied. Lastly. The value. Where all these circumstances concur, a large and liberal reward ought to be given, but where none or scarcely any take place, the compensation can hardly be denominated a salvage compensation; it is little more than a mere remuneration pro opere et labore."

It is unnecessary to discuss in detail the recent cases of salvage where the service rendered consisted of towing a disabled steamer into port, which serve in some sort as precedents and guides to the court in fixing the amount of the compensation. No two cases are exactly alike. The cases most nearly like this, though each of them differing from it in important particulars are: The City of Berlin, 37 Law T. [N. S.] 307; Pacific Mail SS. Co. v. Ten Bales of Gunny Bags [Case No. 10,648]; The Herman Ludwig, Vice Admiralty Court of Nova Scotia, unreported; The Saragossa [Cases Nos. 12,334 and 12,335]; The Rebecca Clyde [Id. 11,621]; The Emily B. Souder [Id. 4,455]. The case of the Amerique, L. R. 6 P. C. 468, being a case of derelict, has little analogy to the present.

The principle is, "that the compensation should be such that it will offer a proper inducement to the rendering of these extraordinary services at sea, and yet not so great that it will deter the parties in need of aid from the acceptance of the service. Taking into account the large number of the Colon's

passengers and crew and the value of the two vessels and their cargoes, the distance from port at which the Colon was taken in tow, and the character of that part of the sea as being remote from the usual track of steamers, and the great value to the Colon of the service rendered in bringing her passengers and cargo into New York so quickly, with all the other elements of the question disclosed by the evidence, I think that the sum of ten thousand dollars will be a fair and liberal compensation to the Etna and her ship's company for the service rendered, and risks and expenses incurred in the service, out of which is to be paid to the owners of the Etna $500 for the damage to ship and hawser and for extra coal, and $750 to the master of the Etna, and one-half of the residue, $4,375, is also awarded to the owners of the Etna. The other half of the residue is to be apportioned among the officers and crew of the Etna, including the master, in proportion to their wages.

Upon the trial it was agreed that the amount of the claim of the consignees of the part of the cargo of the Etna should be determined by a reference, in case it should be decided that they were entitled to any compensation. Enough appears upon the proofs to show that by the lengthening of the voyage this fruit or some of it, which would otherwise have arrived in New York in sound condition, became damaged or worthless by decay. Two questions arise: First, whether the consignees, who are shown to have been the owners of the fruit, are entitled to any compensation, and secondly, if entitled to any compensation, on what principle the amount to which they are entitled is to be computed. That they are justly entitled to compensation is, I think, clear. The Colon requested, for her own benefit and the benefit of her cargo, the Etna to tow her into port, and for this purpose to lengthen her voyage two days or two days and a half. If in order to do so it would have been necessary for the crew or the passengers of the two vessels to consume any part of the cargo of the Etna which was eatable as food, no question would probably be made that the Colon must compensate the owner of that part of the cargo for the same, whether the shipper had agreed in that case not to hold the Etna liable for the loss or not. I see no reason why, in the suit of the owners of the Etna for the salvage, such a claim in such a case should not be included and adjusted. It grows out of the same transaction and is immediately connected with the service rendered, and the Etna as carrier, though absolved from liability, would still have been bailee of the property, with all other rights, duties and obligations of such bailee and carrier. So if it became necessary for the salving ship to throw overboard part of her cargo in order to render the service, the justice of the case would be the same, even though the ship were protected by a similar stipulation in the bill of lading. Now, instead of consuming the fruit or throwing it overboard at the request and for the benefit of the Colon, the Etna kept it at sea two days longer than it would otherwise have been kept at sea, and thereby its value was lessened. It is just as truly sacrificed at the request of and for the benefit of the Colon in this case, to the extent of the loss in value suffered, as it would have been if consumed or thrown overboard; and the fact that the fruit was shipped under bills of lading, permitting the Etna to take other vessels in tow, does not affect the question, except that in the one case the ship would be entitled to the damages because liable over to the shipper, and in the other case the shipper would himself be entitled to them. The bill of lading was a waiver of all claim of damage arising from this cause to the consignee as against the Etna, and as against her and her owners alone. The stipulation was not made for the benefit of other vessels, except so far as permitting the Etna to rescue them may be necessarily a benefit. Releasing such other vessel from such liability was not within the purview of the contract so made between ship and shipper. That stipulation was therefore no waiver of any claim for damages which the consignees or shippers might have against another vessel at whose request and for whose benefit their property might be with their consent taken or sacrificed. Nor would this clause in the bill of lading disable the Etna, as a carrier of the consignee's goods, to claim and recover such damages in this suit. Here, however, the consignees have joined as co-libellants, and by the course taken on the trial, their claim has been severed from that of the ship, their carrier. It will be observed that this is a claim for damage growing out of the salvage, not for salvage compensation properly so called, and there is nothing in the cases cited by the claimants' counsel which prevents the allowance of such a claim. While those cases establish the general proposition that cargo of the salving ship is not entitled to share in the salvage, yet they do not deny but recognize the right of the salving ship, being liable over to the shipper, to recover the resulting damage to cargo as one element of the salvage award, unless the ship has been released from this liability to the shipper; and, if the shipper has so released the ship, they also recognize the right of the shipper to recover what the ship would otherwise have recovered on that account. The Nathaniel Hooper [Case No. 10,032].

The only remaining question is as to the rule of damages to be applied to this case. It is insisted by the claimants that the ordinary rule of damages in case of damage to property lost or destroyed at sea, should be applied in this case; that according to that rule the amount of damage, recoverable for

that part of the fruit which became worthless, is its cost in Jamaica, with the expense to the owner of shipping it and getting it to the place where it was lost. It is true that this rule of damage is firmly established in cases of property lost or destroyed before it reaches port. It is held that the value it would have had if it had reached port in safety, cannot be considered in determining its value at the place of loss, because it is a mere possibility that it would have ever reached port, even if it had not been lost as it was lost. The rule has been adopted as excluding merely speculative profits, and as furnishing a convenient and in its general application a fair measure of the value of property lost or destroyed at sea. But there is no reason for applying the rule in this case. The goods did arrive. They were not lost at sea. The question is, what damage the owner has sustained by receiving them in the condition, in which they were delivered on the day of their arrival, instead of in the condition they were in on the day when they would have arrived but for the detention. It is of course a question of fact to be determined whether on Thursday morning, Aug. 24th, they were still sound, and how far they had deteriorated in value when actually delivered. To allow this difference in value to the owners, is not to allow them speculative profits. It is simply to allow them the amount of loss which, at the request and for the benefit of the Colon, the owners have suffered. The rule alluded to has, it is believed, not been applied where goods have arrived, after suffering injury at sea. It has been customary in cases of salvage to make a liberal allowance for expense and damages incurred; but independently of that consideration, these consignees are entitled to their damages actually sustained, and it must be referred to a commissioner, if the parties do not agree, to compute the amount on the basis of this opinion.

The interview between Mr. Clyde and the agents of the Atlas Company, on August 28th, disclosed such a total diversity of views as to the claim which is the basis of this suit, that either party may properly have inferred that no further negotiation was desired, unless asked for; and as no suggestion of the kind was made, I think that the immediate bringing of a suit would not have been oppressive, or a ground for withholding costs from the libellants, if the claim made in the libel had not been exorbitant. But the claim was exorbitant, and made in a way which subjected the claimants to unnecessary trouble, expense and annoyance. The amount of security exacted was unnecessarily large. The libellants also subjected the claimants to the expense and trouble of producing evidence and defending against a claim for loss of freight, which was afterwards abandoned, but which the agents of the Etna should have discovered to be unfounded before coming into court. The libellants will therefore recover no costs, except that the costs, as between the consignees of the fruit and the claimants from the time of the order of reference, will abide the event. Decree accordingly.

[NOTE. For decision overruling claimants' exceptions to the commissioner's report, see Case No. 3,025, next following.]

Case No. 3,025.

The COLON.

[10 Ben. 366.] [1]

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

DAMAGES TO CARGO—MARKET VALUE—EVIDENCE—EXPERTS.

Bananas, forming part of a cargo of a steamer, were injured by her detention in performing a salvage service, and the owners of it were held to be entitled to recover the amount of the damages in a suit brought to recover salvage for the service. The evidence showed that the fruit was freshly cut when it was shipped on the 17th of August, and that such fruit usually stood a voyage of seven days, and that as far as it was seen before the 24th of August, on which day it would have arrived in New York but for the detention, it was in good condition. Evidence was given that the market was bare on the 24th, and that there were no sales on that day. Experts in the trade testified to values ranging from $2.00 to $2.50 per bunch for that day. Evidence was given that similar fruit which arrived on August 31st netted $1.83 per bunch for the consignment. The commissioner fixed the damages, taking the sound value of the fruit on the 24th of August at $1.98 per bunch, and exception was taken to his report. *Held*, that the evidence was properly admitted and that the weight of it sustained the report.

[Cited in The Boskenna Bay, 31 Fed. 613.]

See 10 Ben. 60 [The Colon, Case No. 3,024].

[In admiralty. Libel by the owners, master, and crew of the steamship Aetna for salvage service. There was a decree for libellants, and a reference to a commissioner to compute the damages. Case No. 3,024. On the coming in of the report, the claimants filed exceptions thereto.]

Stephen H. Olin, for libellants.

Butler, Stillman & Hubbard, for claimants.

CHOATE, District Judge. In this case the salvage service rendered by libellants to the steamship Colon involved damage by detention to a part of the cargo of the Aetna, the salving vessel, consisting of bananas, and the co-libellants, the owners of the fruit, having been held to be entitled to recover in this suit the loss sustained by them on account of its detention from the 24th to the 26th of August, this part of the amount due the

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

libellants was at the trial, by consent, reserved to be determined by a reference to a commissioner, instead of being determined by the court on the trial. The commissioner has reported the amount of loss, basing his conclusion on the facts found by him, that if the fruit had arrived on the 24th, it would have then been in a sound and merchantable condition, and that its market value on that day would have been $1.98 per bunch. To this report the claimants have excepted, on the ground that upon the evidence the fruit was not sound on the 24th of August, and that the estimate of market value was excessive. I think the report of the commissioner is fully sustained by the evidence. As to the condition of the fruit, it was shown to have been green and freshly cut on the 17th, when shipped. The evidence is that such fruit stands a voyage of seven days, and so far as it was actually observed before the 24th, it was in good condition. It is not a just conclusion from the testimony of those who saw it on its arrival and who gave their opinion as to its prior condition, that it had become unsound or unmerchantable on the 24th. As to the value fixed by the commissioner, the testimony of several experts in the trade gave prices ranging from two dollars to two dollars and a half per bunch for the 24th. This evidence was clearly competent, there being no sales in the market fixing the price on that day. The commissioner very properly took into consideration the actual prices realized for fruit of the same quality, which arrived on the 31st of August and which netted for the entire consignment $1.-83. The other consignments, which claimants insist should also be considered, were too remote in time or unlike in quality, and afforded no proper standard of comparison. The testimony justified the conclusion that the market for the Aetna's bananas on the 24th and a few days next thereafter, would have been better than the market was for the fruit that arrived on the 31st, and that on the 24th the market was bare. This circumstance was not of that extraordinary character that it should be considered as beyond the purview of the parties, or a circumstance affecting the damages which could not have been foreseen as likely to happen in this particular trade in perishable fruit, supplied, as it was, at intervals to the market of New York through pretty regular shipments by steamer and irregular arrivals by sailing vessels. The Aetna and the Colon being both in this trade the parties are clearly to be held to be familiar with the peculiarities of the market. The damages were therefore properly placed somewhat in excess of the prices realized from the next succeeding consignment, and the price of $1.98 adopted by the commissioner did no injustice to the claimants, the excepting party. Exceptions overruled, with costs to the co-libellants, from entry of order of reference.

Case No. 3,026.

The COL. HOWARD v. HAYDEN.

[17 Betts, D. C. MS. 70.]

District Court, S. D. New York. Nov. 30, 1850.

EXTENSION OF EXECUTION AGAINST CLAIMANT—DISCHARGE OF STIPULATORS.

[Under Act March 3, 1847 (9 Stat. 181), after final judgment against sureties of a claimant in an admiralty proceeding, they become principal debtors, and are not discharged by an extension of the execution against the claimant.]

[In admiralty. Libel by Levy Hayden and others against the brig Col. Howard. Cameron—one of the stipulators for the claimant—moves to set aside or stay the execution issued on a decree for the libellant.]

BY THE COURT. Cameron—a stipulator for the claimant—moves to set aside or stay the execution issued against him because the libellants have given the principal (the claimant) sixty days' delay on the execution out against him. The facts appear to be that on the arrest of the vessel in this action the claimant bonded her, and Cameron and another became stipulators on that bond. It was taken by the marshal under the act of congress, and the sureties became liable to an immediate decree or judgment against them upon the bond, for the amount decreed against the principal debtor. Act Cong. March 3, 1847, c. 55 [9 Stat. 181]. Such evidence was rendered in the case that, after execution delivered the marshal, the claimant paid $500, with a privilege of having the execution delayed sixty days as to the residue. The balance not being paid, the libellants proceeded to collect it upon their execution against the stipulators.

These stipulators, since final judgment against them in the suit, do not stand in the relation of sureties to the libellants for the claimant. They have become principal debtors, and the contingent or secondary liability on the stipulations is merged in the judgment recorded against them. La Farge v. Herter, 3 Denio, 159; Bay v. Tallmadge, 5 Johns. Ch. 305. In a case with features very similar to the present, the United States supreme court decided that, after judgment against an endorser of a promissory note, he was not entitled to be protected as a surety, and that a stay or countermand of execution against the principal did not exonerate him. After the creditor has proceeded to judgment against both, he is at liberty to issue execution or not, as he pleases, against the maker, without affording cause of complaint to the endorser, or, if he issues an execution, he is at liberty to make choice of the one which he thinks will be most beneficial to himself, without any consultation whatever with the endorser on the subject; nor ought he to be restrained by any fear of exonerating the endorser from

countermanding the service of any execution he may have issued, and proceeding immediately, if he chooses, on the judgment against the endorser. These authorities are conclusive upon the point now raised, and the motion must be denied, with costs. Order accordingly.

Case No. 3,027.

The COLONEL LEDYARD.

[1 Spr. 530.][1]

District Court, D. Massachusetts. Nov., 1860.

LIABILITY OF CARRIER FOR INJURY TO CARGO — CUSTOM AND USAGE—DUTY OF SHIPPER — MEASURE OF DAMAGES.

1. A general ship at New Orleans, took 354 barrels of flour for Boston, and also took on board 190 barrels of spirits of turpentine, the effluvium from which injured the flour: *Held*, that the carrier was responsible.

2. If he had shown an established usage to carry those articles, as parts of the same cargo, on such a voyage, he would have been exonerated.

3. It is incumbent on the shipper to see that his goods are of such character and condition, as to bear the ordinary and usual treatment of such articles, in the voyage on which he sends them.

4. The measure of damages is the difference between the fair market value of the flour, as delivered to the consignee, and what would have been its fair market value, if it had not been injured.

In admiralty.

A. A. Ranney, for libellants, cited Gillespie v. Thompson, cited on page 477, 6 El. & Bl. note; Brousseau v. The Hudson, 11 La. Ann. 427; Alston v. Herring, 11 Exch. 822; Baxter v. Leland [Case No. 1,124]; 1 Blatchf. 526 [Baxter v. Leland, Case No. 1,125]; Clark v. Barnwell, 12 How. [53 U. S.] 273.

Mr. Peabody, for claimants, cited Nettleton v. The Fanny Fosdick, decided by Judge Betts, in New York, and the same case [Case No. 4,641], decided by Judge Nelson, in the circuit court in New York.

SPRAGUE, District Judge. This libel, in rem, seeks to recover for damage done to a quantity of flour, by the effluvium of spirits of turpentine. In June, 1859, this vessel was at New Orleans, taking freight for Boston, as a general ship. The libellants, on the 24th of that month, put on board of her 354 barrels of sound flour, and took a bill of lading, by which the carrier was bound to deliver the same to the libellants at Boston, in like good order as when received, "the dangers of navigation and fire only excepted." The flour was stowed between decks, aft. There were 190 barrels of spirits of turpentine in the forward part of the lower hold. The cargo seems to have been, in other respects, properly stowed, and the hatches of the lower hold well secured; and during the passage, the hatches of the upper deck were taken off during the daytime, for ventilation. On arriving at Boston, the flour was found to have been penetrated by the effluvium of the spirits of turpentine, and its market value thereby diminished.

It is not contended, on behalf of the claimants, that this damage arose from the perils of navigation, or of fire, so as to come within the exception in the bill of lading. But it is insisted, that there is an established usage to take spirits of turpentine and breadstuffs together, as portions of the cargo of a general ship, from New Orleans and elsewhere, and that, in this instance, the carrier took all proper care, and performed his whole duty. It is incumbent upon the shipper, to see that his goods are of such a character, and in such condition, that they will bear the voyage upon which he sends them, if conducted in the usual and accustomed manner. If, therefore, his goods are deteriorated, because they will not bear the established mode of stowage, or the companionship of other articles, which, from the known usage of trade, he may reasonably suppose may constitute a part of the cargo, the shipper must bear the loss, and not the carrier. If, therefore, the claimants had succeeded in proving the usage which they set up, it would have been a good defence; but their proof has wholly failed. The evidence does not show that it has been usual, on any voyages, to take spirits of turpentine, and breadstuffs, as parts of the same cargo, and as to New Orleans, it is but recently that spirits of turpentine have been shipped from that port, in any manner. The carrier has not shown any usage which would warrant him in putting spirits of turpentine on board of his vessel, with the flour, if the former would be deleterious to the latter, and the evidence shows conclusively that it was.

The numerous witnesses for the libellant testified positively that the flour was injured by the spirits of turpentine, and the scientific witness called for the claimant, on that point, rather confirmed than impaired their testimony. The flour having been damaged on the voyage, and it not appearing to have arisen from any inherent principle of decay, or from its character or condition being such as not to bear the voyage, as usually conducted, nor from the danger of the seas, the carrier must be responsible.

The only question remaining is, the amount of damages to be awarded. This vessel arrived in Boston in the latter part of July, and soon after began unloading. This injury to the flour was discovered as it came out of the vessel. It was piled on the wharf, and the libellants informed the carrier that it would be sold at auction, and that he would be held responsible for the loss; it was sold at auction, on the 29th of July. The libellants now claim the difference be-

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

tween the price thus obtained, and what would have been the fair market price of the flour, if it had been delivered to them uninjured. This auction sale was in every way properly conducted. Due previous notice was given. There was a good company of dealers, and the ship's husband himself was present. The prices obtained were better than the previous appraisal by experts, who had examined the flour for the purpose.

The claimants have proved that the purchaser at this sale subsequently sold the flour for more than he gave; but it was by retailing it, one, two, or three barrels at a time, and in one instance, ten barrels, and to persons who were kept in ignorance of its damaged condition. Such a sale does not furnish a criterion by which the court can be guided. The claimants also introduced the testimony of Dr. Hayes, an eminent chemist. He testified, that such was the volatile character of spirits of turpentine, and so pervading its effluvium, that it might injuriously affect this flour, in the relative situation in which they were on board of this vessel, and with the hatches between decks well secured; that he had been making experiments for the last six weeks, to ascertain, for his own instruction, the effect of spirits of turpentine on flour; that there was no chemical affinity between them, but that the flour absorbed the fumes; that this mixture was not injurious to health; that the effluvium might be removed by sifting the flour in the open air, or subjecting it to a dry heat of 150 degrees, or sometimes, at least, in the process of making and baking it into bread. I did not understand him to say that this would always be successful; and it is in proof, that bread made of this flour, had the taste of turpentine.

This scientific evidence undoubtedly shows, that the effect of spirits of turpentine upon flour, is less injurious than has generally been supposed, and that it may be removed by care and labor. But if all this were, in fact, known at the time this flour arrived, still, the necessity of bestowing this care and labor, in order to relieve it from impurity, and restore it to its sound condition, would materially detract from its value. But it does not appear, that the facts stated by Dr. Hayes were known, even to him, until demonstrated by his experiments, within the last six weeks. The importer was entitled to have this flour delivered to him in as good condition, for his wholesale business, as it was when put on board of the vessel at New Orleans. It was not so delivered, and the carrier is responsible for the deterioration. The measure of damages must be the difference between its market value and the price it would have commanded, if it had arrived in a sound condition. From all the evidence, it appears that the auction sale is satisfactory proof of the market value. The testimony of experts has clearly shown, what it would have been worth, if it had arrived uninjured; and the difference is the amount of damages to be awarded.

Decree for $567.42, damages and costs.

See Lamb v. Parkman [Case No. 8,020].

Case No. 3,028.

The COLORADO.

[Brown's Adm. 393.] [1]

District Court, E. D. Michigan. July, 1871. [2]

COLLISION IN A FOG — SPEED — LOOKOUT — SUFFICIENCY OF WATCH — INEVITABLE ACCIDENT.

1. A propeller of 1,400 tons burden, navigating Lake Huron in the usual track of vessels, in a dense fog, should have at least two men at the wheel, and two competent lookouts, experienced in the navigation of those waters.

2. A steamer should adopt such a rate of speed in a fog as will place her headway under such easy and ready command that she can be stopped within such distance as other vessels can be seen from her, on the assumption that such vessels will do their duty in apprising her of their proximity.

[Cited in Ellis v. The Katy Wise, Case No. 4,404; The City of Panama, Id. 2,764; The Pennsylvania, 12 Fed. 917; The John Hopkins, 13 Fed. 188; The Rhode Island, 17 Fed. 558.]

[See note at end of case.]

3. The chief officer of a steamer running in a fog should be so placed that he can have instant access to and command of the signals to the engineer.

4. An erroneous order, given in the midst of confusion and consternation incident to sudden peril, is not a fault.

5. A crew cannot be held in fault for abandoning a vessel when her injury is of such a character as to afford reasonable apprehension that all efforts to save her will be unavailing and perilous.

In admiralty. Libel for collision by Elon W. Hudson, owner of the bark H. P. Bridge.

The collision occurred between eleven and twelve o'clock at night, on the eleventh day of May, 1869, on the westerly side of Lake Huron, opposite Saginaw bay, and about midway between Point aux Barques and Thunder Bay lights. The bark was bound down, on a voyage from Milwaukee to Buffalo, with a cargo of about 30,000 bushels of oats and 65,000 brick, and the propeller was bound up, on a voyage from Buffalo to Chicago, with about one-third of a cargo of general merchandise. The wind was about south, and for some time before the collision the bark had been sailing by the wind on the starboard tack, close-hauled, her course being about southeast by east while on that tack. She kept that course till a moment before the collision, when her wheel was put hard a-starboard. The course of the propeller was about north northwest, which course she kept

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

[2] [Affirmed by the circuit court. See note at end of case. Decree of circuit court affirmed by supreme court in The Colorado, 91 U. S. 692.]

until a very short time before the collision, when her wheel was ordered hard a-port. Before that order had been fully obeyed, however, it was countermanded, and the wheel was ordered hard a-starboard, which latter order was fully obeyed, and the collision occurred almost immediately after. The propeller struck the bark near the mainmast, on the starboard side, at an angle variously estimated by the witnesses from forty degrees from the bark's stem to a right angle. The truth was somewhere between these extremes, and probably nearer forty-five degrees. At the time of the collision there was a fog, which was then and for about an hour before had been so thick that it was difficult to distinguish a vessel's lights at any considerable distance. From the time the fog set in, and up to the collision, the bark had blown her fog-horn, and the propeller had blown her steam whistle, regularly, as required by law; and just as those in charge of the bark saw the propeller coming down upon her, the bark's fog-bell was rung.

By a custom adopted and used by sailing vessels on the lakes, and well understood by experienced mariners, and competent to navigate those waters, a single blast of the fog-horn, at proper intervals, signifies a vessel on the port tack, close-hauled, and a double blast, at like intervals, a vessel on the starboard tack, close-hauled. By these signals and the direction of the wind, with the exercise of reasonable diligence, the location and course of approaching vessels can always be determined with reasonable certainty before the vessel or her lights can be seen. In this case, the bark being on the starboard tack, close-hauled, sounded her fog-horn in double blasts, pursuant to the custom. The bark had taken in her light sails and her fore-sail, and at the time of the collision was proceeding at a slow speed. The propeller's speed had also been slackened when the fog set in down to three to five miles an hour, as variously estimated by the witnesses on the part of the propeller. The proof showed that the bark's fog-horn could be heard against the wind at least a half a mile. The propeller's whistle was heard on the bark for several minutes—nearly an hour, according to the testimony of the master of the bark—before the collision. The bark's horn was not heard on the propeller, or, if heard, was not distinguished from other horns in the vicinity; or, if heard and distinguished, was not reported or noticed on the propeller, until a very short time—not more than one minute and a half, by the highest estimates, and probably not to exceed one minute—before the collision. When the bark's horn was first heard on the propeller, it was apparently dead ahead and very close by. When first heard it was understood on the propeller as a single blast, indicating, as we have seen, a sailing vessel on the port tack, close-hauled. It was then that the order hard a-port was given on the propeller, which was correct if the horn had been correctly understood, but wrong according to the true state of the case. Before this port order had been fully obeyed, however, the horn was again heard on the propeller, and correctly understood. It was then that the order to port was countermanded, and the order hard a-starboard was given and executed. When the bark's horn was first recognized on the propeller, the officer in charge of her navigation was standing in front of the pilot house, and where he had no means of signaling the engineer. As he gave the order to port, he started and ran upon the pilot house, the nearest place where he could signal the engineer, and at once signaled that officer to stop the engines, which was done as soon as the order could be obeyed. So the engines were stopped between the times the order to port and the order to starboard were given. Immediately upon giving the order to starboard, the signal was given to back the port engine, but just at this moment the green light of the bark being seen from the propeller, right under her bows, or not to exceed fifty to seventy-five feet off, the signal was given to back both engines, both of which signals were obeyed. The time between the signals to back with both engines and the collision is variously estimated by the witnesses, some putting it immediately and some as long as one minute. But taking into consideration all the circumstances, especially the close proximity of the vessels when the order was given, and the headway the propeller evidently still had when the collision occurred (judging from the severity of the blow), it must have been almost immediately, or but a very few seconds at most. The officers and crew of the bark got on board the propeller at once, and the latter stood by the bark for about an hour, during which time she remained afloat. The bark then drifted away from the propeller and passed out of sight, either in the fog or by sinking, it being uncertain which, and has never been seen since.

As to the extent of the injury there was considerable conflict. Those on board the bark estimated the extent of the cut into her side at from eight to ten feet. But in the alarm of the moment, and in their hurry to leave what they considered a sinking ship, it was argued they would be quite likely to make an overestimate. It was insisted it was not probable that the bark would have remained afloat as long as she did with so extensive a breach in her side, notwithstanding the buoyancy of a portion of her cargo. The court held it abundantly proven that the injury was considerable, and sufficient to cause the bark to sink. At all events, the bark and her entire cargo were lost; and that such loss was directly attributable to the collision was not seriously questioned. The damages claimed are $33,625.

The libel charged the propeller with the following specific faults: 1. Not properly manned. 2. Officers and crew not at their

proper places and attentive to their duty. 3. No competent lookout. 4. Too great speed. 5. That she did not take timely and efficient precautions to avoid the bark. The only denials and allegations of the answer, by way of defense, were the following: "The said respondents allege that the said collision happened without any fault or negligence, or want of care or want of skill on the part of the said propeller, or any of her officers or crew; and they allege that the same was caused (if any fault existed on the part of either vessel) from the fact that, as appears from the said libel, the fog signal of the propeller being heard on the said bark, and both vessels being in a fog, the said bark might have avoided and kept out of the way of the said propeller, which she did not do; or from the fact that the said bark had no proper lookout, or did not have a proper fog signal, or did not properly use and sound the same; or from the fact that the said bark was (as in fact she was), at and before the time of said collision, unseaworthy, overloaded and unmanageable. The said respondents allege, however, that they are ignorant of and as to what was done on board the bark, but expressly charge, as aforesaid, that if any fault existed on the part of either vessel, such fault was upon the part of the bark, her officers and crew."

After detailing the circumstances of the propeller standing by the bark, and the latter remaining afloat so long as she did, and alleging offers of assistance on the part of the propeller, the answer concluded as follows: "That the said officers and crew of the said bark neglected and refused to return to said bark, and neglected and refused to take any steps to save the said bark and her cargo from loss, and that by reason of such abandonment of the said bark by her officers and crew, and their aforesaid refusal and neglect, and by reason of the said bark being, as aforesaid, unseaworthy, overloaded and unmanageable, and by reason of fault heretofore charged on the part of said bark, and not by reason of any fault, negligence, or any other matter in the said libel alleged upon the part of said propeller, her officers and crew, said bark and her cargo were lost, as the said respondents are informed and believe." Most of the matters set up in the answer were insisted on at the hearing as defenses, but the defense which was mainly contended for, and the most strenuously urged, was one not specifically claimed in the answer, viz., that the collision was the result of inevitable accident.

H. B. Brown and J. S. Newberry, for libellant.

W. A. Moore, for claimant.

So far as the propeller is concerned this was an inevitable accident. 1 Pars. Shipp. 525; The Virgil, 2 W. Rob. Adm. 201, 205; Union S. S. Co. v. New York & V. S. S. Co., 24 How. [65 U. S.] 307, 313, 319; Stainbach v. Rae, 14 How. [55 U. S.] 532, 536, 538; Peck v. Sanderson, 17 How. [58 U. S.] 178, 182; The Morning Light, 2 Wall. [69 U. S.] 550, 554, 560; The Grace Girdler, 7 Wall. [74 U. S.] 196, 203.

Geo. B. Hibbard, on the same side.

The watch on the propeller's deck was complete. (1) In cases where inevitable accident is claimed as a defense, as in all others, the burden of proof is on the libellant to show a fault. The Bolina, 3 Notes of Cas. 208, 210; The Marpesia, L. R. 4 P. C. 212. (2) A fault cannot be established unless it be made to appear the propeller violated some law, regulation, rule, or custom. This the libellant has not shown. (3) It is not within the province of courts to establish rules or standards by which liability can be determined. The steamboat act of 1852 (10 Stat. 72) gave the inspectors power to pass rules and regulations. They might have adopted a rule with reference to the sufficiency of a watch in a fog, as they actually have done with respect to steam whistles. 1 Pars. Shipp. 590. They regarded "great caution" necessary only in crowded channels or the vicinity of wharves. To permit the court to make the rule would be to determine there was no rule, as judges would differ in opinion as to the sufficiency of a watch. (4) No adjudged case requires a greater watch than the propeller had, or that the watch should be doubled in a fog. (5) When the horn was heard, it was reported to and understood by the first officer, and then the function of the lookout ceased, and he was at liberty to do as he did—aid the wheelsman. The Maria Martin, 12 Wall. [79 U. S.] 31.

The bark changed her course before the collision. The round assertion of the crew that the course was not changed will not be allowed to prevail against conceded facts, which indicate that such change must have been made. The Wenona [Case No. 17,411].

H. B. Brown, in reply.

With regard to the sufficiency of the watch, the fact that the propeller violated no express law, rule, regulation, or custom is not the proper criterion. The question is not what these require, but what does good seamanship require under article 20. The practice of carrying any lookout at all upon the lakes was not in obedience to any law or custom to that effect, but solely in consequence of the decision of admiralty courts that good seamanship required one. Before the act of 1864 none was required by statute, and shipmasters fought against it till the courts compelled them to carry one. The court must determine what a proper lookout is, and in the case of The Europa, 2 Eng. Law & Eq. 557, five seamen were adjudged insufficient.

LONGYEAR, District Judge. I shall consider first the fifth specification of fault against the propeller, viz.: That of her fail-

ure to keep out of the way of the bark. The solution of the question of fault here presented depends upon article 15 of the act of April 29, 1864 (13 Stat. 60), as applied to the facts of this case: "Article 15. If two ships, one of which is a sailing ship and the other a steamship, are proceeding in such directions as to involve risk of collision, the steamship shall keep out of the way of the sailing ship." Article 15 is general in its application. The duty it imposes attaches all the same, whether it be in the day time or in the night, in clear weather or in a fog. Its requirements are in no manner affected or modified by the provisions of article 16. Those provisions merely impose additional preliminary duties. Hence, the fact of a collision between a steamship and a sailing ship must be held prima facie evidence of fault on the part of the former, in a fog as well as in clear weather. The steamship must, of course, be apprised of the existence of the conditions upon which her duty under article 15 attaches, and she must be so apprised as to be enabled to act intelligently and effectually. These conditions are: 1. The fact that there is another ship in her vicinity. 2. That such other ship is a sailing ship; and, 3. The position and course of the latter. In the day time this is accomplished by actual observation of the vessel. In the night, it is by means of the lights every sailing vessel is required by law to carry. In a fog, whether by day or by night, it is by means of a fog-horn blown at short intervals, if under way; or the ringing of a bell, if not under way. Article 10, Act 1864, above cited. The difference is in the mode or means merely, and not in the result. In the one case, it is by the sense of sight, and in the other by that of hearing. In the eye of the law, the result in both cases is precisely the same; and the legal obligation of a steamship to see in the one case, and to hear in the other, and to govern herself accordingly, attaches precisely the same in the one case as in the other. Therefore, unless it appears that the bark did not do her full duty, and that such failure on her part contributed to the collision, there is no occasion to inquire into the details of the conduct and manoeuvres of the propeller because, in such case, the fault of the latter consists in the fact that she did not keep out of the way of the former. The first inquiry, therefore, is as to the conduct of the bark.

There is no dispute but that the bark kept her course, as she is required to do by article 18 of the act of 1864, up to the time she put her helm hard a-starboard. This was done in the midst of the confusion and consternation incident to the sudden peril in which the bark was placed by the propeller, the latter then being almost upon her. Even if the starboard order was an error, it was therefore not a fault to which any responsibility can be attached. That the bark's lights were properly set and brightly burning, that she was properly manned and equipped, that her officers and crew were properly placed and attentive to duty, and that her fog-horn was properly sounded, are fully made out by the proofs, and are in fact undisputed. It is said, however, that the bark being apprised, as she was, of the approach of the propeller by hearing the signal blasts of her steam whistle a considerable time before the collision, she ought to have got out of the way of the propeller, and also ought to have rung her fog-bell sooner than she did, in order the more effectually to have notified the propeller of her presence and position. By article 18 the bark was required to keep her course. By article 10 she was required to use her fog-bell only when not under way. Here she was under way. The claim, therefore, is that the bark should have departed from those rules, both as to course and as to signals, and consequently that the case comes under article 19, which provides as follows: "In obeying and construing these rules, due regard must be had to all dangers of navigation, and due regard must be had to any special circumstances which may exist in any particular case rendering a departure from the above rules necessary in order to avoid immediate danger."

The danger of navigation which was then present—the fog—was one that was expressly provided for by articles 10 and 16, and with reference to which, as well as article 18, the bark was acting. This she had a perfect right to do, unless some of those special circumstances mentioned in article 19 should have arisen and come to her notice, requiring a departure from the rules. The special circumstances in this case, to which the collision is directly attributable, are the failure of the propeller to hear, and when she did hear, at first to rightly understand the bark's signal, and her failure to stop her headway in time to avoid a collision after she did correctly understand those signals. There is not, and cannot be, any pretense that the bark had any notice or intimation whatever that the leviathan which was in her vicinity was not provided with ears to hear her warning signals, or having ears, would fail to put them to their proper use, or would approach so near before taking any measures to avoid her, that when taken they would be ineffectual. Neither is there any ground to claim that she could have known the propeller was coming down upon her sooner than she did know it. And when she was made aware of it, it was clearly too late for any effective action on her part. She did what, in the alarm incident to the suddenness of the peril thus brought upon her, and without her fault, was thought best, but to no avail. For her to have changed her course before this would have been in violation of article 18; and for her to have rung her bell sooner that she did would have been in violation of article 10, either of which would

have constituted a fault for which she might have been held responsible if a collision had still occurred. It is true, after the danger had become imminent, and in fact the collision was inevitable, her wheel was put to starboard, and her bell was rung, but, as we have already seen, these acts, even if erroneous, cannot be attributed as faults under the circumstances.

It is also claimed that the injury was but slight, and that the bark was unnecessarily abandoned by her officers and crew. The proofs clearly show that the injury was of a serious character and sufficient to sink the vessel, and that the loss of the vessel and cargo were directly attributable to that cause. It is true she remained afloat for an hour at least, but she was a long distance from shore and on very deep water, and her injury was of such a character as to afford reasonable apprehension, to say the least, that all efforts to save her would be unavailing, and could only result in peril to those who should undertake it. It would be unreasonable to require the crew of a vessel to remain upon her under such circumstances.

The bark, then, being in no manner in fault, the only defense that remains to be considered is that raised upon the argument, viz.: That the collision was the result of inevitable accident; and this, as we shall see, involves a consideration of the particular conduct and manoeuvres on the part of the propeller, including the question of speed. "Inevitable accident" is defined by Dr. Lushington to be "that which the party charged with the offense could not possibly prevent by the exercise of ordinary care, caution and maritime skill." The Virgil, 2 W. Rob. Adm. 201. Our own supreme court defines it to be "where a vessel is pursuing a lawful avocation in a lawful manner, using proper precautions against danger, and an accident occurs." "The highest degree of caution," say the court, "that can be used is not required. It is enough that it is reasonable under the circumstances." The Grace Girdler, 7 Wall. [74 U. S.] 203; see, also, The Pennsylvania, 24 How. [65 U. S.] 307, 313; The Washington, 14 How. [55 U. S.] 532, 536; The Morning Light, 2 Wall. [69 U. S.] 550, 554, 560. It becomes necessary, therefore, next to inquire whether reasonable care, caution and maritime skill were exercised on the part of the propeller under the circumstances.

The propeller was a large vessel, being of upwards 1,400 tons burden. She was in waters frequented by other vessels, and was in fact in the vicinity of other vessels at the time, as indicated by the fog-horns heard on board of her. She was so proceeding in a fog, in which other vessels could be seen but a short distance, on which account emergencies were likely to arise, in which a sudden change of course would become necessary to avoid accidents, which, as the proof shows, would require two men at the wheel to accomplish with reasonable celerity. She was so proceeding, too, with fog-horns sounding from vessels on nearly all sides of her, requiring close scrutiny to distinguish any one of them from the others. With a full knowledge of all these facts on the part of those in charge of her navigation, we find the propeller proceeding at a rate of speed which I think the proof clearly shows to have been not much, if any, less than five miles an hour, and with a watch of only four persons, consisting of the mate in charge, one man at the wheel, one man on the lookout forward, and one engineer—a watch barely sufficient on such a vessel on the clearest night—and, we may add, the master, although notified of the peril, calmly reposing in his stateroom.

And then, when the crisis comes, and seconds assume the magnitude of minutes in estimating the time within which the headway of the propeller must be stopped in order to avoid the catastrophe, we find the officer in charge of the deck out of reach of the means provided for signaling the engineer to stop and reverse.

Let it be borne in mind that the care and caution used must be reasonable under the circumstances. The watch on the propeller may have been a reasonable one (it certainly could have been no less and be a reasonable one), and the position of the mate in front instead of on top of the pilot house may have been a reasonable position on a clear night.

But it certainly needs no argument to show that what is barely sufficient on a clear night would fall far short of being such in a fog, with the attendant circumstances above stated. Upon a vessel of that size reasonable care and caution, under the circumstances, required two men at the wheel to insure celerity in that regard, and two competent lookouts, experienced in the navigation of those waters, to insure close scrutiny of the many signals from vessels in the vicinity, and that the officer in charge should have been where he could have instant access to, and command of, the signals to the engineer. I think this much, at least, was absolutely necessary to answer the law requiring reasonable care and caution under the circumstances. It cannot be said that those omissions did not contribute to the collision. I think it quite clear from the proofs that they did.

1. According to the proofs, the propeller came within the sound of the bark's fog-horn when at least half a mile distant. Why was it not heard, or, if heard, why was it not distinguished from the other horns until the two vessels had arrived in such a fatal proximity that a collision was inevitable? It certainly cannot be attributed to the fog, because sound will travel as well in a fog as in a clear atmosphere, and, as is well known, is often intensified by it. It was unquestion-

ably owing to the insufficiency of the lookout, both in number and in the competency of the one on duty. An additional lookout would at least have afforded another chance of escape. And when we take into consideration the fact, as shown by the proofs, that the lookout who was then on duty was on his first trip on the lakes, and that, although an old sailor on the ocean, he was confessedly unacquainted with the use of fog-horns, the necessity of an additional lookout assumes a vastly greater importance.

2. The want of a second man at the wheel made it necessary to call the lookout from his post before the necessity of a lookout forward had ceased to exist, as the exact position of the bark had not then been made out.

3. The propeller kept her headway just as much longer than she would have done if the mate had been at his post on top of the pilot-house, as it took him to get there from where he was, which was several seconds. While the accident might not have been entirely avoided if this time had been saved, it certainly would have made the blow less severe.

4. I think, also, that reasonable care and caution were not exercised on the part of the propeller in regard to her speed. The words "moderate speed" are used in article 16 in a specific and not in a general sense. It is moderate speed in a fog that is meant. Therefore, within the meaning of the article, what would be moderate speed on a clear day or night is not necessarily such in a fog, and what would be moderate speed in a light fog, one in which objects can be seen at a considerable distance, would not be such in a denser fog in which objects can be seen at a less distance. "Moderate speed," therefore, as used in article 16, is a relative term, and whether or not it be such, must be determined, not by any certain fixed number of miles per hour, but by the particular circumstances of each case in which the question arises. By what criterion, then, shall the rate of speed be judged? The object and purpose of the rule requiring moderate speed in a fog is to avoid collisions. That object can be accomplished only by each steam vessel adopting such a rate of speed in a fog as will place her headway under such easy and ready command that she can be stopped within such distance as other vessels can be seen from her; on the assumption, however, in all cases, that such other vessels will do their full duty in apprising approaching vessels of their proximity. If the speed of a steam vessel in any given case is greater than this, it is too great, and, in case of collision, she must be held in fault, no matter what her rate of speed per hour actually is. It is believed that there is no other safe criterion by which the object of the rule can be insured. This criterion substantially has been recently adopted and applied by both the circuit and district judges in the southern district of New York, in three cases of considerable importance, and to which, to say the least, it applies with no greater force than to the present case. See The Western Metropolis [Case No. 17,441]; The D. S. Gregory [Id. 4,099]; The Louisiana [Id. 8,537]. See, also, McCready v. Goldsmith, 18 How. [59 U. S.] 90, 91.

The practical application of the rule above indicated certainly cannot be difficult in actual practice. A fog is never of sudden occurrence, or, at least, never so sudden as not to afford ample time for deliberation in regulating speed. The pilot of every steam vessel ought to know, and every competent pilot, of course, does know practically within what distance his vessel can be stopped at any given rate of speed. He can also judge with practical certainty about how far off in any case in hand he can see another vessel in a fog. Here, then, he has all the data by which to regulate his speed with practical certainty, so as to insure safety to his own and to other vessels.

Now, to apply the rule to the present case: The mate testifies that upon the first intimation he had of the proximity of the bark—this, it must be remembered, was by hearing her fog-horn, and before she had yet been seen from the propeller—he instantly, or as soon as he could get to where he could do so, signaled the engineer to stop. That on hearing the two horns, which was almost immediately after, he signaled the port engine to back. That immediately after this, and for the first time, the bark's green light was seen from the propeller, when he immediately signaled both engines to back. The engineer testifies that all these orders were promptly obeyed, and that both engines continued to back, and to back strong up to the time the propeller struck the bark. Notwithstanding all this exertion, the speed of the propeller was still such, when she reached the bark, as to crush in her side, inflicting a serious and fatal injury, which shows that her speed must then have still been very considerable. Under the rule above stated, therefore, the speed of the propeller was not that moderate speed meant by article 16, as applied to the circumstances of this case.

It will not avail the respondents anything to attempt to excuse the failure of the propeller to stop in time to avoid a collision by saying that those in charge of her did not learn of the bark's proximity and position in time to do so, because, as we have already seen, that excuse itself constitutes a fault. The propeller, therefore, being in fault in the particulars above specified, the defense of inevitable accident is not admissible. It is true that fogs constitute one of the great, perhaps one of the greatest, perils of navigation, especially upon those waters constituting, as in this case, great highways of commerce, and courts should no doubt deal leniently with vessels charged with fault in cases of collision where this great peril is a contributing cause, but not so leniently as to encourage a

letting down from that reasonable degree of care, caution and diligence due in such circumstances to the safety of life and property, and the general interests of commerce.

In view of the importance which the case assumes, as well in regard to the greatness of the calamity to the libellant in the loss of his property, and the pecuniary loss to respondent if held liable, as to the general interests of navigation and commerce in having the rules as well defined as is practicable—an importance which was fully realized and ably met by the exhaustive and instructive arguments of counsel on both sides—I have given the case my closest attention and scrutiny, and endeavored to apply to it the rules of law in such a manner as not only to do simple justice between the parties, and no more, but at the same time to inflict no injury, but perhaps to be of some service to the interests of navigation and commerce generally. So applying these rules, however, I am clearly of opinion that there was such a letting down on the part of the propeller from that due and reasonable care, caution and diligence above mentioned, as to constitute a gross fault on her part, and on account of which she is responsible for the damages done by the collision complained of. Decree for libellant.

[NOTE. The cause was referred to a master to ascertain the amount of the damages, and on the coming in of his report exceptions were taken thereto by the respondent, some of which were sustained and others overruled; and the district court entered a final decree in favor of libellant for $33,675.26, with interest and costs. Case No. 3,029, next following.]

NOTE [from original report]. On appeal to the circuit court [not reported] the decree in this case was affirmed by Judge Emmons, in an oral opinion, substantially as follows:

Construing the opinion of the district judge as it should be understood, not as adjudging that each criticism made upon the management of the Colorado, pointed out faults each per se sufficient to condemn her; but considering several of them as only just observations, pointing out irregularities in addition to the leading faults for which the libel was sustained, he could fully adopt its conclusions, and the grounds both of fact and law upon which they were based. Had there been lookouts sufficient in number and character, her speed such as that her progress might have been arrested within the distance at which a light might have been discovered, with a sufficient number of men at the wheel, and all officers diligently doing their duty, he could have agreed with the learned counsel for the respondents, that it would have been an "inevitable accident." In such conditions, he would not have measured too closely the three of four seconds necessary for the officer in charge to make the bell signals, and condemn the ship owners for an error so slight as standing in front instead of upon the top of the pilot house. The latter, however, was in the opinion of experienced pilots, in the condition proved, his better place. He fully agreed with them, and mentioned this, with other minor matters of management he had referred to, only to suggest that this court did not intend to set up severe and impracticable standards in advance of precedents, and in opposition to the opinions of able seamen. The satisfactory judgment rendered by the district court in this cause clearly demonstrated this was necessary in order to sustain the libel. Owners whose liberality furnishes full crews instead of four men, upon such a steamer, in such a night, and officers whose duty was performed in that degree which long experience has shown to be compatible with general safety, will not meet upon the bench here theories which long service never would suggest, or breakers not laid down on the charts. To the rational general views, in this regard, of the respondents' counsel, and which he so well sustained, alike upon principle and authority, assent was most fully accorded.

It was said no better rule could be declared by which lawful speed in a fog could be measured, than that laid down by the district judge. The recent cases referred to in his judgment, put into specific terms, applicable to the precise exigencies of this case, a general principle only, which numerous prior adjudications had fully established. That a steamer may run in a fog so thick as to preclude the discovery of an approaching light in time to avoid it, is a proposition which no interested owner of marine property, or any seaman not reckless of life, would ask a court to assert. With much emphasis, it was said that a lookout who did not understand the indications of the lights, horns and bells demanded by the regulations was incompetent. Various hypothetical cases were stated, illustrating the necessity of this knowledge. It was little less extravagant to say that any man with two eyes constituted a lookout, than that any other with two hands was a competent surgeon. It would be oftentimes a question of much difficulty, whether new conditions would make it the duty of a lookout to reannounce a light. Judge E. said, he had not very carefully considered whether, in the present case, the want of knowledge on the part of the lookout was a "contributory fault," and therefore, although being clearly of the opinion that he was incompetent, he nevertheless preferred to put his agreement with the district court, in this part of the case, upon a ground by which he was willing hereafter to abide. That upon a steamer of this magnitude, and in such circumstances, one was not sufficient, nor was he prepared, without further inquiry, to lay it down as a rule, that two, even in a fog, were universally necessary. Ample manning in all other particulars might render one sufficient. No intimation was given which would in future preclude the inquiry when it arose.

Although the proof was not full in this case by experts that another wheelsman was needed, he deemed such evidence unnecessary. It was one of those conceded matters, of which, like the necessity of a lookout, a competent officer of the deck, and other evidently necessary seamen, the court will take cognizance. In this very case the lookout was called from his post to assist the wheelsman, showing the necessity for his presence. In two other cases, now before the court, the same fact appears. The testimony in all is full, that when a sudden movement may be necessary, two men at the wheel are necessary. The absence of the second man was a fault.

It is not entirely clear that the incompetence of the one lookout, the absence of a second, or the want of another wheelsman contributed to this disaster. The argument that all or some of them did so is highly persuasive. The law, however, presumes they did so until the contrary is proven. It cannot be said that such proof is made by the respondents in this case. He thought the learned counsel wholly mistaken in reference to the onus probandi, after it appeared that the ship was a steamer, bound to avoid the libellant's ship, and more especially when specific faults existed. Then the presumption was they did produce the calamity. This whole question, however, was deemed of less practical importance in view of the other leading fault—too great speed—which beyond doubt was the leading cause of the calamity.

Regret was expressed that the condition of business in the court, and a temporary inability to labor save through the reading of others, precluded the preparation of a written judgment. The desire to do so, however, sprang more from a wish to consider some interesting points, learnedly discussed by counsel, and sufficiently germane to invite their consideration, than because the court was not abundantly satisfied with the mode in which the cause was disposed of in the opinion already pronounced.

This case is now awaiting argument in the supreme court.

[NOTE. Charles Ensign and others, claimants of the propeller, appealed to the supreme court, where the decree of the circuit court was affirmed for the reasons, as stated by Mr. Justice Clifford, that the evidence clearly established the freedom of the bark from fault, and conclusively showed that the disaster occurred because of the negligent navigation of the propeller. The rulings of the court on the exceptions to the master's report were likewise sustained. The Colorado, 91 U. S. 692.]

Case No. 3,029.

The COLORADO.

[Brown, Adm. 411.][1]

District Court. E. D. Michigan. May, 1872.

DAMAGES—MARKET VALUE — EXPENSES OF EARNING FREIGHT.

1. In case of total loss by collision, the market value of the vessel just before the collision is the measure of damages.

[Cited in Leonard v. Whitwill, 19 Fed. 548.]

2. The market value is not what she would have brought at forced sale, but in the ordinary course of the sales of such property.

3. From the gross freight should be deducted the probable future expenses of earning the same.

In admiralty. The propeller Colorado was libeled by Elon W. Hudson, owner of the bark H. P. Bridge, for collision. The bark was sunk by the collision, and became a total loss, together with her entire cargo, which consisted of 65,000 bricks and 34,000 bushels of oats. The Colorado was held in fault, and it was referred to a commissioner to ascertain the damages. [Case No. 3,028.] The commissioner having made his report, the respondents except to the same: (1) as to the amount allowed for the value of the bark; and (2) because in the allowance for freight, no deduction was made for future expenses in earning the same, and that the amount allowed for freight was too large.

Wm. A. Moore, for exceptions.

H. B. Brown, opposed.

LONGYEAR, District Judge. First—As to the value of the vessel. The vessel being a total loss, her value just before the collision is the measure of damages. The difficulty is to ascertain the value. The criterion is, what she would have brought in the market, not under the hammer, at a forced sale, but in the ordinary course of sales of such property. Lowndes, Coll. 141–146; 1 Pars. Shipp. & Adm. 542. The commissioner estimated the value of the vessel on the opinion of the libellant and eight other persons, owners, dealers in and builders of vessels. No question is made as to the competency or ability of these witnesses to testify, except that some of them had not seen or been on board the Bridge recently before her loss; nor but that the commissioner's allowance of $25,000 as the value of the bark is correct, as based upon those opinions. It is true that none of these witnesses, except the libellant and one or two others, had any knowledge of the condition of the bark just before the collision; but those who did know, particularly the libellant, described the condition in their testimony, and it is to be presumed that the commissioner applied the testimony of the other witnesses with reference to that description. To say the least of it, the testimony on the part of the libellant made a fair prima facie case for the allowance, and the question is now, was that case rebutted? To rebut the case thus made by libellant, respondents produced the testimony of several vessel builders, showing the cost of building a vessel of the description of the one in question, and what is the estimated annual rate of depreciation in value, and upon that basis succeeded in reducing the value of the bark considerably below the amount allowed. In the case of The Clyde, Swab. 24, Dr. Lushington said, upon this subject: "The value is the market price at the time of the destruction of the property, and the difficulty is to ascertain what would be its market price. * * * In order to ascertain this (the value) there are various species of evidence that may be resorted to; for instance, the value of the vessel when built. But that is only one species of evidence, because that value may furnish a very inferior criterion whereby to ascertain the value at the moment of destruction. The length of time during which the vessel has been used, and the degree of deterioration suffered, will affect the original price at which the vessel was built. But there is another matter infinitely more important than this—known even to the most unlearned—the constant change which takes place in the market." And in another case (The Iron-Master, Id. 443), the same learned judge says: "The best evidence is the opinion of competent persons, who knew the ship shortly before she was lost. The second best evidence is, the opinion of persons conversant with shipping and the transfers thereof. In addition to testimony of this description, many other circumstances may be called in aid, as the original price of the vessel, the amount of repairs done her, the sum at which she was insured, and other circumstances of a similar nature. It is manifest that facts of this kind, though not to be wholly excluded, have a slighter bearing upon the case; for, after a lapse of years, the amount of

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

price, from a change of circumstances, might have little bearing upon the question." And in Dobree v. Schroder, 2 Mylne & C. 489, Lord Cottenham also held that the market price was a better test of a ship's value than the prime cost, with a deduction for wear and tear. The learned judge said: "The other mode has this disadvantage, that it can never be applied with certainty to any two cases. In one case, a ship may have been purchased advantageously, and employed disadvantageously; and in another the reverse may have taken place." The correct rule upon this subject, when the vessel is a total loss, seems to be, that the market value of the vessel just before the collision is the proper measure of damages; that the best evidence of such value is the opinion of competent persons who knew the vessel shortly she was lost; and that the next best evidence is the opinion of persons conversant with shipping and the transfer of vessels. There are, of course, exceptions to this rule, as when the vessel lost, from some peculiarity of construction in order to adapt her to some special purpose out of the usual course of shipping, precludes there being any market value for her. An instance of this may be when a vessel is built for a special trade requiring peculiar and unusual conditions in her construction. In such a case, for want of a better criterion of value, cost of construction or purchase price, with a deduction for depreciation by ordinary wear and age, may be resorted to. See Lowndes, Coll. 141–146. But the present case does not fall within the exception. The commissioner had before him both classes of evidence stated in the rule, and although the evidence may be open to criticism in some respects, I think it was amply sufficient to justify his finding. The exception to the allowance of $25,000 for the value of the vessel is, therefore, overruled.

Second—As to the amount allowed for freight. This exception was in part submitted to at the hearing, and it was conceded that there should be deducted from the amount allowed by the commissioner $457, for future expenses in earning the freight. The freight upon the 65,000 bricks was allowed by the commissioner at the rate of $5 per thousand. Respondent contends that this is more than the testimony warrants. Hudson, the libellant, testified that the freight on the brick was either four or five dollars per thousand—that he was quite sure it was five dollars. This was a fact to be made out by libellant, and it ought not to be left uncertain, especially where, as in this case, it is susceptible of certainty of proof. The most that can be made of Hudson's statement is, that the freight on the brick was not less than four, nor more than five dollars per thousand; and I think that, at the most, the allowance ought not to be more than a medium between the two sums, or four dollars and fifty cents per thousand. Fifty cents per thousand, amounting in the aggregate to $32 50, must therefore be deducted from the allowance made by the commissioner, in addition to the $457 before mentioned, making the whole amount to be deducted $489 50, to which interest must be added. The exception to the amount allowed for freight is, therefore, sustained.

Amount to be deducted	$489 50
Interest from May 11, 1869, the date of the collision, to April 8, 1872, the date of the report, at 7 per cent	99 94
	$589 44

This amount must be deducted from the aggregate amount of the commissioner's report, viz., $34,264 70, and a final decree must be entered in favor of libellant for the remainder, viz., $33,675 26, with interest from April 8, 1872, the date of the commissioner's report, and costs of suit. Ordered accordingly.

[NOTE. The claimant appealed to the circuit court from the final decree herein, and the decision was affirmed. An appeal was then taken to the supreme court, where the decree of the circuit court was affirmed. See note to Case No. 3,028, next preceding.]

COLORADO CENT. R. CO. (AMES v.). See Cases Nos. 324 and 325.

COLORADO CENT. R. CO. (WHITE v.). See Case No. 17,543.

Case No. 3,030.

COLT v. MASSACHUSETTS ARMS CO.

[1 Fish. Pat. Cas. 108.][1]

Circuit Court, D. Massachusetts. Aug., 1851.

CONFLICTING PATENTS — USE OF IMPROVEMENT — PRIOR INVENTION — DATE OF INVENTION — INFRINGEMENT.

1. Where two patents conflict, the more recent must give way to the elder.

[Cited in Webb v. Quintard, Case No. 17,324; Monce v. Woodworth, Id. 9,706.]

2. The patentee of an improvement can not take possession of the invention improved upon. He must obtain the license of the prior patentee to use his improvement, or await the expiration of the elder patent.

3. If the prior invention relied upon to defeat a subsequent patent existed and was used, it is of no consequence whether it was patented or not, or whether it was abandoned or not. The defense of prior invention is not the same as that of prior use.

4. The date of the invention is the date of the discovery of the principle involved, and the attempt to embody that in some machine—not the date of the perfecting of the instrument.

[Cited in National Filtering Oil Co. v. Arctic Oil Co., Case No. 10,042.]

5. The law of infringement explained and illustrated.

[Cited in Norton v. Jensen, 1 C. C. A. 452, 49 Fed. 863.]

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

At law. This was an action on the case, tried before Mr. Justice Woodbury and a jury, for the infringement [by the Massachusetts Arms Company] of letters patent for "improvement in fire-arms," granted to Samuel Colt, February 25, 1836, reissued October 24, 1848 [No. 124], and extended in 1849, for seven years, from February 25, 1850. The claims of the patent are as follows:

"I. Combining a rotating chambered breech with the lock, in manner substantially as herein described, so that by the operation of lifting the hammer to cock the lock, the said breech shall be rotated to the extent required to bring a located chamber in the line of a barrel, preparatory to the discharge, substantially as described.

"II. Combining the rotating breech with the lock, by means of a key catch-lever, or the equivalent thereof, substantially as specified, so that, by the act of lifting the hammer to cock the piece, the said breech shall be liberated to admit of its being rotated, and then relocked, that it may be held in the proper position during the discharge, substantially as described.

"III. Placing the nipples of the rotating breech in recesses made in the rotating breech, or between partitions, substantially as described, as a protection to the caps, or touch-holes, from the effect of lateral fire, as described.

"IV. Connecting the barrel with the recoil shield, by means of the lock-plate below the rotating breech, substantially as described, in combination with the arbor or spindle connection, as described, whereby the parts are held together firmly, while, at the same time, they admit of a quick and easy disconnection."

C. L. Woodbury, E. N. Dickerson, and G. T. Curtis, for plaintiff.

R. A. Chapman, G. Ashmun, and Rufus Choate, for defendants.

WOODBURY, Circuit Justice, charged the jury as follows:

You have already understood, gentlemen of the jury, that the claim of the plaintiff against the defendants is founded upon a supposed violation, by the defendants, of the patent-right of the plaintiff. I trust you come to the consideration of this case with a due regard to the rights and privileges of both sides. They both claim under patents. They both have a right to have these patents protected, so far as they can be, without conflicting with each other; and when they conflict with each other, the more recent, of course, is to give way to the elder, because the one who patents an invention first, is entitled to the protection of the principle in it, over everybody else that patents it afterward. In the nature of things and common sense, this must be so. But that does not preclude—and that is the source of the difficulty in this case—any person subsequently from making an improvement on that patent, by way of addition to it, or making it better and more useful.

But all that the person who does that—who makes an improvement—can protect under his letters patent, his subordinate patent, is that which is new, that which he has added; because if, by making an addition, or improvement, to an old patent, a party could get possession of the old patent itself, and use it without paying for it, no patent that was of any value would last a year—for such is the progress of science and of the arts, that some kind of improvement or other can be made upon everything. A party has a right to make an improvement, but all that he can patent is that which he improves—his own invention. He, therefore, must be careful, before using an addition, to get the license of the old patentee to use the old patent in combination with his improvement; otherwise, he must use his improvement alone, if he can, or, as he may often do with great safety, wait a year or two, until the old patent expires, when he would be free to use it in connection.

I recommend to you, gentlemen, to commence the investigation of this controversy, looking at this aspect of it, with a feeling of no hostility or prejudice against the defendants, because they happen to be a corporation, or happen to be a probable overmatch for any single individual; and you should not let your sympathies go beyond the rule of law and duty, because the plaintiff stands alone, and because he has evidently been struggling for fifteen or twenty years on this subject, to do something which might confer a benefit upon his country, and reward his own exertions. He can properly recover a verdict, if he is entitled to it; but if he is not entitled, he can not, however great may have been his sacrifices. You, therefore, should have no prejudice on the one side, or sympathies on the other, which could divert you from doing what is just and legal between these parties.

In the first instance, the plaintiff must make out his right—that he has a patent for a particular subject, which, he says, the defendants have violated; and then he must make out the violation of that patent by the defendants. In order to do that, he has laid before you letters from the patent office, dated as early as February, 1836, in which he undertakes to describe a certain improvement which he has made by several combinations. At a subsequent time, in 1848, he amended his specification so as to describe his improvement with more clearness, or fullness, but the same invention; and then again, in 1849, he applied for and obtained an extension of seven years. The reason for conferring extensions, generally, by the officers of the government who are authorized to do it, is to reward the party, in some degree, for his skill and genius, when he has not, to appearances, been already re-

warded. It should not be granted, except in cases of valuable patents useful to the country, and where the parties have been unfortunate, and have not reaped from them the advantages they anticipated.

The government first authorizes some officers connected with the patent office to make the extension, and then congress interferes and makes further extensions, when they think the party has not been sufficiently rewarded. That is the whole controversy, in relation to extensions, about which you have heard so much. An extension being granted, whenever the party appears to have a valuable improvement, and has not realized from it sufficient to indemnify him, parties may object to that first, on notice being given: the controversy, then, is, whether the patentee has or not realized what is sufficient to constitute a reward.

In this case, the plaintiff amended his specification, and he has had it extended, so that it prima facie covers the time when this infringement is alleged to have taken place. I speak of this making out a prima facie case, notwithstanding any proof that, on the records of the country, there is a subsequent patent, for a similar subject, to the defendants. The plaintiff's patent overrides the defendants' entirely, when they are for the same subject, because it was granted earlier by the government, and therefore, no one who comes afterward, and gets a patent for the same thing, can take away his rights.

The government, by giving another patent, can not take away that of a prior patentee. They can no more take it away than you can take away the property of your neighbor. He has vested rights in it until the term expires; and, therefore, the government, when they give a subsequent patent which may cover a prior one, can not, in law, take away the rights under the prior patent. Whatever may have been the accident or mistake in granting it, and, although it may have covered other things which belong to a prior patent, yet the prior patent stands until the term expires; otherwise the government might take away any private property which exists, which a man had acquired, and give it to some person afterward by a mere arbitrary transfer. But that would not do. When a man obtains a grant from the government, he holds it as much as when he gets a grant or deed from an individual; and he can not be divested of it by a subsequent grant, unless he assents to it. Therefore, the law says, when a prior patent is offered —as in this case—it prima facie covers what it describes, and must stand, notwithstanding a subsequent patent may have been granted, which covers a portion of the same thing. It stands for what it is worth—for what it covers.

But there is another step to be taken in this case; and that is, notwithstanding the plaintiff's patent, so far as it goes, is to continue in full force until it expires, and until the extension expires, yet he can not recover of the defendants, unless it contains a principle which they have encroached upon. They may have done a great many other things, they may have made a great many other improvements, but the plaintiff must show that his patent contains a principle which the defendants (among other things) have adopted and used.

He has put a great many experts on the stand—and some who may not be called exactly experts in scientific matters, though they may be experts in the use of fire-arms —and proved by them that the arms made by defendants do contain a principle, among other things, which is involved in his. I do not propose to go into the details of the evidence, but you will recollect that several testified to the effect that the operation of the defendants' and plaintiff's pistols is the same in substance. It is conceded that they differ in form, in proportions, and in what are called mechanical equivalents. You understand what that means as well as the court; it has been explained to you by the experts.

I can only tell you as a principle of law, that where the difference is only in form or proportion to bring about similar results, or where it is only by using a mechanical equivalent, instead of what is used by the other, there is, in point of law, not that considerable difference in principle, or in operation, or in results, which the law holds not to be a violation of what preceded it; but, if it differs in something beyond mechanical equivalents—if it differs in something beyond form and proportions—if the difference in the parts of a pistol where it is charged is very considerable—the plaintiff can not claim that as similar to his.

Look a little at this in a practical point of view, and as practical men. Although there may be, for instance, in a subsequent patent, two things which differ from the prior patent in something beyond mechanical equivalents, form and proportions—and though they may be improvements, and, therefore, are not to be treated as violations of the other— yet, at the same time, it is to be considered, that if there is a third thing introduced in the defendants' which is covered by the plaintiff's patent, the party is liable for that third, although not for the other two.

Therefore it becomes important, in considering the subject throughout, that you consider these five claims of the plaintiff. They are separate combinations. They are not five things combined into one. They are five, constituting one patent, but each of them is a separate combination, as you will see by the patent. If they were all one combination simply, and not set out as, and not in substance, different combinations, the defendants, in order to infringe, would have to violate the combination as a whole. But where there are five separate combinations,

as there are in this case, the first may be violated, the second may be violated, but the third need not; because they are separate combinations, and the language of the claims is, first, combining the rotating chambered breech with the lock, etc., third, placing the nipples, etc. They are each distinct, and do not all go to form a whole as a combination. I am instructed to request you to consider them separately, and I do so. If the defendants use one of them it is enough; and it is of no consequence to this result whether they use more than one, or more than two, except in respect to damages. When you come to that subject, it may be of some importance to discriminate how many of them they violate, because, according to the importance of that one combination, and according to the various combinations they may encroach upon, may be the amount of damages to be recovered.

I have said that I am going on to see how far the plaintiff makes out his prima facie case, because the defendants have offered the testimony of experts, who swear that their pistols are unlike the plaintiff's in principle, and that, in their opinion, they do not encroach. All that is to be considered when you come to make up your verdict. But, if the plaintiff has shown a patent which the court considers legal; if he has shown an extension which is prima facie valid; if he has shown, by other experts, that the defendants' machine, patented ten or eleven years after his, however much more it may cover in some particulars, encroaches upon his, and that his machine is useful—he lays the foundation for damages, prima facie.

As to the utility, which is the only other point to be considered under this aspect of the case, there has been but one opinion expressed upon both sides—that Colt's firearms have been regarded by those most skillful in the use of them, for many years, since 1836, as very valuable and very effective; that their utility, in this respect, has not only been tried in different wars and different services, but it has been examined by the government and favorably acted upon; and that, in a controversy between the defendants, or the person under whom they claim, and Colt, where the former interposed against the plaintiff having a contract for a considerable number of these arms, the most experienced and intelligent officers reported decidedly in favor of the plaintiff's arm. If the prima facie case is thus made out, all that will remain on that prima facie case would be the damages; and, as I remarked to you, they would be influenced by the number of the combinations violated, and their importance.

(Mr. Curtis remarked that the question of damages was not to be considered by the jury.)

That is so much easier, gentlemen, for you and for me. The question of damages the parties have settled among themselves; it is much better that they should be so settled. I was about to repeat, what I had occasion to say lately in this very district, in relation to damages; that I am determined, so far as regards myself, that if a party has clearly violated the patent of another, he shall not pay less than he would if he had contracted to use the machine during the time he had been using it. The idea can not be tolerated in a civilized community, that a man, by trespass, shall use a machine for a less sum than he would have to pay for its license. Notwithstanding all this, the defendants say, and they have a right to say, that, conceding their patent to be of more recent date than the plaintiff's, and, therefore, bound to yield to it, as between them, on the records of the patent office, yet that the plaintiff was not the original inventor of those improvements which he has covered by his patent.

It is true they are right in thinking that, if they support it by facts; and it is true that although the government gives the patentee a patent which he supposes is original, it is open, by the act of congress of 1836 [5 Stat. 123], and all other acts which preceded it, to be impugned and impeached. A patentee is exposed to have his patent shown not to be the first in date of that character: and then, however wrong or right the defendant is in his course, yet the foundation is struck from under the feet of the plaintiff as having been the original inventor, if the defendant is able to show that there were prior machines used, containing in substance the principle involved in the plaintiff's. It is no matter whether those prior inventions were patented or not, if they existed, if they were discovered, if they were used.

The only effect of patenting, as regards this aspect of the question, is, that it rather evinces an idea on the part of the person who made this invention, that there was something in it, that it was valuable, and that he did not mean to abandon it to the community; therefore, he protects it by a patent; supposing it valuable, he intends to reap some benefit from it. Whereas, if he set up an invention many years ago, and did not patent it, but let the world use it, there is some indication that he supposed he had nothing very valuable or important. But it goes as far to impeach the plaintiff's machine, if it existed, as if it existed and was patented. And it is of no consequence, if it existed, that the party did not choose to patent it. In some aspects of the patent law, it might be important to show that it had been abandoned; that is, when the party undertakes to rely on priority of use to defeat the plaintiff. But here the reliance is not on prior use; therefore, it is of no consequence whether it is abandoned or not, but whether it was the prior invention. When I say "it," I mean a machine involving the same or a similar principle.

A great many other considerations have been pressed in connection with this view of the subject, but I believe there is no way in which you will be able to comprehend more clearly whether there was a prior invention, similar in substance to Colt's than to see what Colt's was, before you compare it with others, or others with Colt's. What did Colt do? He undertook, undoubtedly, from all that appears in the case, and from the specification, to get the power, through a revolver, of having more discharges in a short space of time than by a single barrel. That is one great essence of this principle of revolving fire-arms. He introduced revolvers, undoubtedly, which might be fired oftener within the same space of time. Another object which he seems to have developed in his specification is, that he should do this with as much safety as possible, by means of nipples, placed between partitions, or in recesses, so that the fire should not communicate from one barrel to the other. In doing all this, you will perceive (as revolvers can not be had conveniently, without a pretty large magazine and barrel besides), that, for a pistol, it would necessarily make the arm heavy; one of the general objects connected with a revolver would be to have it no heavier than was necessary for security. With five or six barrels, it would be necessary to have more weight than with one or two. He must see, therefore, as a general principle, to make these arms effective, that they contain weight and strength enough for security, but at the same time that they should not be more cumbersome than necessary to accomplish the object pointed out. All these general principles, Mr. Colt seems, from his specification, to claim.

He seems to have sought, in his combinations, some way to cock, uncock, turn the revolver, and hold it in its place, while the discharge was going off. If he could not do that, although he had the cylinder with six chambers, it would be a mere child's toy. He, therefore, sets out, in his first claim, that he combines the breech with the lock, so that by lifting the hammer to cock the lock, the cylinder shall be turned; and he goes on to enlarge upon that in the second claim; the cylinder must be held firm for a time, in order to effect the discharge; and then, after the discharge, he wants to turn it again, and therefore there must be some way to liberate it, which is the second combination. These are the two leading combinations that he sets out in his specification; then there is a third in regard to the nipples and partitions; the fourth and fifth are subordinate matters.

The first inquiry, after seeing what his combinations are, is whether there were any arms, preceding his, which involve and unite these different improvements which he sets out that he had made, and which were the same in principle. A great deal has been said here about "methods" in the specifications. The patent is not for a method, merely, but for a machine operating in that method or mode, or form, which the patent covers. Now, was there a former fire-arm which contained this first combination in substance, and the second in substance, and the third? or, was there one which contained any one of them? If there was a machine which contained any one of them, it would precede him on that one, but only on it. If there is any one of the five which did not exist before him in that form, he is entitled to recover on that. You are now prepared to take up the different fire-arms which, it is said, existed before, and were similar in substance to the plaintiff's. The only gun, according to my minutes, which is contended to be of an earlier date than Colt's invention, provided he made it in 1831, as he contends he did, is what is called the French or Coolidge gun, about which you have had a good deal of testimony—some from the person who manufactured and sold it pretty extensively, and was interested in the use of it. That was patented abroad about 1818, and published in 1825, so that it is early enough in date; and the only question is, whether the combination and the machinery used there, to effect the object, was the same in substance or principle with that in Mr. Colt's.

It is contended, on the one hand, that it was similar, and experts have been put on the stand to prove it, some of whom speak of a spring in it for revolving the chamber, as different from the common spring which is used in fire-arms, being acted upon, and making a movement by that action, and by the inherent power of the spring; in other words, it was a coil spring, wound up by hand. On the part of the plaintiff, experts say that this kind of a spring, and the mode of operating it, was different from the mode of operating in Colt's by drawing up the hammer, and in that way causing the chamber to revolve without any coil spring.

On that subject, I am requested to charge you whether in point of law that coil spring is the same with the common spring which is often put into fire-arms. I must confess my inability to do it, unless you first find the fact for me, and that fact I submit to you. Whether it is the same in substance or principle, depends on whether it is the same kind of instrument or not, and whether it acts in the same way in substance, and produces the same result in substance. If it does, you may consider it, in law, the same in principle. But, on the contrary, although called a spring, if it operates on a principle different from springs usually employed, if the results are not the same, if it does not act in the same manner, if it is to be wound up by hand in order to make it continue to operate, I should tell you it is not the same in point of law.

Things may go by the same name, and not be the same in substance or principle. We talk about the main spring of a watch,

but it is a very different thing from some springs; yet it is a spring. Whether it is like others in substance or not, is a question for the jury to determine, and not the court; it is a question of fact. But I would recommend you to look at this question, as to the similarity of the French or Coolidge gun, in another view. Was that gun, or rifle, made so that it could operate as Colt's does? Is the hand used in it no more than in Colt's? In Colt's the hand is used to draw the hammer and cock the piece, and for nothing else, so that you can go on revolving it ad infinitum; of course, some one must use the hand to reload. Did the Coolidge gun operate in that way? Must you, or must you not, in that gun, use the hand to wind up the spring, as well as to draw back the hammer, before your can turn the cylinder? Must you not use the hand there again, and wind up the spring?

But there is another consideration connected with this which possesses some importance, and that is—whether it was different or not —did it succeed like this of Colt's? If it was the same in substance—if it was the same in principle—would it not have succeeded as well, and did it succeed as well? On that you must go to the testimony of Mr. Collier. He said, that after making a small number, compared with the whole, he became satisfied, as all others who used the arm did, that this spring was inefficient and unnecessary in his gun, and that it was flung aside entirely, and the barrels have ever since been turned by the hand at every discharge. These are considerations to be weighed in connection with the opinion of experts. If you believe that that spring was the same in substance as Colt's—that it operated as well as Colt's—that it was not flung aside, and still continues to operate—if you believe it could be used originally with no more employment of the hand in connection with it than in Colt's, you are at liberty, and ought, probably, to come to the conclusion, that it contained in substance all that is in Colt's. But, if you do not believe these things—if you believe the reverse was true, then this should not be considered as taking away from Mr. Colt his merits as the original inventor.

I say this is the only gun which is pressed upon you earlier than 1831, the supposed date of Colt's invention. As to that date, however, there seems to be conflict, to a certain extent. As I stated, in your hearing, in the progress of the case, while the testimony was being put in, the date of the invention is the date of the discovery of the principle involved, and the attempt to embody that in some machine—not the date of the perfecting of the instrument. It was on that account that I did not consider it pertinent to go into the testimony as to the progress of the perfecting of the machine. If the invention was made —if it was set forth in a machine which would, and did discharge a fire—that is all which is necessary to constitute the invention. But the party can not get a patent until he perfects it in some sense of the word—that is, until he goes on and makes improvements to render it practical and useful—for it is one element of a machine, necessary to sustain a patent, that it is useful. It is a very different thing to sustain a patent, when it is attacked by another patent, from what it is to show the invention compared with a prior invention; for invention is the discovery of the main principles of the machine, and embodying it in wood or iron, or of whatever it is to be composed, and making it act. Perhaps I go quite too far in requiring all these things; but such is the state of society, and such is the pirating principle which governs many, that it is necessary. I have tried a case here in which, when a party was perfecting a machine, another man stole into the workshop, examined the principle, got the dimensions, and pirated the principle before the inventor had an opportunity to perfect the machine in any sense of the word. He could not get out his patent until he got his machine made, and so it would work; but he could protect himself against a pirate who encroached upon him.

In order to settle the point of invention here, before you go any further, you have the testimony not only of Mr. Chase, but some half-a-dozen who saw this invention, and saw two specimens in iron or steel, as early as 1831. Those specimens and drawings are produced, and the witness (Mr. Chase) swears that they have been in his possession ever since, until a few months ago. To contradict that, I do not remember any testimony.

There are some circumstances which ought to be weighed, as far as they should be, against this positive proof, coming from a variety of sources. One is, that although Mr. Colt considered his machine then perfected so as to entitle him to a patent for it, and started for Washington with drawings and models, he did not get it patented until 1836; and that this delay is a circumstance which would go to raise some probability that he had not made his invention perfect. If there was not positive testimony that he had made it, this would be entitled to some consideration; as it is, you must give it such weight as it deserves.

For, in addition to this, the plaintiff produces the testimony of Mr. Elliott, that in 1832 Mr. Colt went to Washington with his fire-arm, and with drawings, for the purpose of taking out a patent. In 1831 the transaction took place at Hartford, and the invention in 1832 had made such progress as that he thought he was entitled to take out his patent; and Mr. Elliott then thought it a beautiful machine, and that it would be useful, and recommended the delay, in one sense of the word showing that the circumstance about the delay is not entitled to the weight it might usually have. Mr Elliott recom-

mended the delay, and that he should go to Europe and take out a patent abroad, because fire-arms are unfortunately needed all the world over, and needed more in Europe than here, although we use them pretty freely sometimes; and also that he should file a caveat here, setting out, substantially, his claims, and warning the patent office against issuing a patent to anybody else for a like thing; that caveat, they say, was burned in the patent office in 1836.

If you believe that the plaintiff's invention was made in 1831 or 1832, all the others, except the French gun, seem to be of a subsequent date. The Smith gun, which is the one pressed most strongly as to date, was not finished, according to the mass of the testimony, until 1833—some considered that it was in 1834—but it was not finished, so as to be an operative piece, until 1833; and if so, it is wholly immaterial to go into any consideration as to how near it resembled the plaintiff's, for if it was of subsequent date, it does not impair or impeach his.

Mr. Colburn admits that his gun was not made until 1833; his patent is dated in 1833. It had a double trigger. But, if it was not until 1833, there is no use of going over these various considerations, traveling to Michigan, to Auburn, and back again, and seeing all these processes and contrivances alleged to have been resorted to, to color, and rust up, and fit the gun for the trial, and the explanation which has been made why this was done, and that no fraud was contemplated, and no improper agency was exerted about it; all these are of no consequence, if it was as late as 1833, and Colt's was invented in 1831 or 1832.

You see why the point of invention is so important, and not that of patenting; because if Colt's was invented in 1831 or 1832, and was known to several persons in Hartford, although he attempted to keep it as quiet as he could, he was probably pirated upon by these persons, rather than they pirated upon by him, especially if Colburn was at Hartford. The importance of showing that these other improvements and machines, similar to Colt's, were before, is, that if they existed before, he may have copied them; but if all which were similar in principle existed after, he did not copy from them, but they were likely to have copied from him. But it often happens that they do not copy at all; that they are a sort of independent original inventors; yet such is the law that the date of the invention becomes very material, because it is the earliest in date that is then to succeed. The Ohio gun was as late as 1834 or 1835; and if you believe it was several years after Colt's, it is not important to go into the differences.

I do not propose to say anything more on this subject, except to have you put to your brethren, Mr. Foreman, when you return to your room, after reviewing the evidence, this general consideration: Did any of these guns succeed as the plaintiff's did? If they did, it raises a strong presumption, in addition to any testimony, that they were similar. As I said about the French gun, did they operate as Colt's did? as successfully? did they continue to operate? If they were the same in principle, another question occurs in connection with that fact, and which you will consider, and to which you will give its due weight, and no more; whether you have heard on the stand, in the progress of this case, or anywhere else, of the power and effectiveness of Smith's rifles in the world; have they crossed the Atlantic, or penetrated the wilds of America? Coolidge's guns—used now without any thing to turn them but the hand—do you hear or read of them as circulated through both hemispheres? The Ohio gun—the Colburn gun—have they succeeded? are they known? do the experts, the men of science here, speak of them as displaying something new, beautiful and successful? All this is to be considered.

On the other hand, it is true, things may fail for a time, and not eventually—not entirely; the parties may not choose to patent them, even if they gain something valuable. But what is the presumption? If these great improvements were made before Colt made them, what became of them; why did they disappear any more than his, if they were the same in principle and in substance? That is to be considered and weighed with the other testimony, and that importance given it which seems rational under all the circumstances of the case.

I hasten to another consideration connected with this subject—as to the extension, in the procurement of which the defendants aver that there was some moral fraud, and that it should, therefore, vitiate a recovery here by the plaintiff. As you heard in the course of the trial, the commissioner, in acting on this subject, acts under a law of congress; and it is his business to conform to the law; it is his business not to make the extension until he is satisfied that the party has not been sufficiently rewarded, and when he is so satisfied, it is his duty to grant the extension, making it in conformity to the law.

It is not the case of a suit between A and B. It is a proceeding pending between the patentee and the government; but, with abundant caution, the government says, in its law, that when this application is made, the commissioner shall give notice to the world, that they may come in and show why it should not be extended. In this case, notice was given, and a certain time fixed for the purpose. Nobody appeared.

Probably some opposition was expected, from the adjourning of it; and the adjournment may have been made for the purpose of receiving other testimony, the testimony not having been prepared until it was ascertained whether there would be opposition testimony, as to expenditures and receipts, to see how the balance stood. Notice of the

day had been given; anybody disposed to make opposition could do so; no one chose to go; I do not know that the commissioner does wrong, after that, whenever he has evidence that the party was not remunerated, in making an extension. It ought to be made seasonably, that the party may know whether he is to have seven years more; and I do not know that anybody has a right to complain, if he does not choose to go there and make opposition, at the time mentioned.

But, whether he did right or wrong, the extension is legal; it is valid as regards the original patentee, and nobody has a right to complain, in a moral, or any other point of view, who got notice and did not choose to go and attend to it, whether because he did not intend to show that Mr. Colt had made a great deal out of it at that time, or because he thought it more liberal to let the extension take place, or that it was very likely to take place if he did oppose it, on account of the great merit of the machine. Whatever may have been the cause, he did not appear at the proper time, and the commissioner made the extension; it is, therefore, in point of law, valid, and I see in it no evidence of fraud. If there was any fraud at all, it would be in the commissioner, rather than anybody else. The jury can not find fraud without evidence. It is said, too, there was an assignment, and therefore Mr. Colt could not recover. Counsel have not dwelt upon it, in the close, on either side.

It appeared, in a subsequent stage of the case, that the interest which was assigned has been reassigned, in conformity with the laws of New Jersey; and therefore he is entirely justified in recovering, if he makes out his case in other respects. I would not instruct you that the agreement produced here would, of itself, revest the title in Mr. Colt; because, I think that the meaning of the agreement is, that if the Patent Arms Company ceased to make these arms, they licensed Mr. Colt to go on and make them, instead of themselves. It is rather a license than a revesting of the interest. But I do instruct you that this reassignment is in law, valid, and is enough without going to the other.

There is one other consideration which has been suggested in the progress of the trial—that the plaintiff claims all modes for doing the thing, and therefore he claims too much. In point of law, the claim must be construed to mean the modes which he points out for his operations, and not any and all modes. It is true the operation of the law is such, that any mode which is equivalent to the one he points out—which is similar—is covered by his patent, when he claims a particular mode; but in his patent he claims only what he points out, and that covers all which are similar and analogous, or which vary only in form.

Having made this suggestion, I come now to the last consideration, which is considered by the defendants of considerable importance —the point of infringement. I have already suggested to you what are the leading principles which would govern in an infringement. The defendants must use something which is one of the combinations of the plaintiff's, in order to infringe; they must have taken some one of the combinations, and used it. Adding and improving as much as they may, if they have taken one, they are liable for the use of that one.

It is true that there may be a distinction of another kind; if a defendant does not add, but makes a change—improves one part of the machinery used—he may do that, and not be liable in the common acceptation of the term, and it might not be considered as a separate and additional improvement, but a change which is made by itself. If there be improvements, for instance, of the bevel-gear and ratchet, that has nothing to do with Mr. Colt's mode of moving the cock, and fastening the revolver, and all that. There is a cog put in there which is new; it is there, in and of itself, whether it is an improvement or not. If it is an improvement, it can be protected as such; but it does not enable them to use other portions of Mr. Colt's patent—other portions, which they never invented, and never got a license to use.

Experts throw some light upon this point, as to whether the defendant's pistol does not use, in substance, what is in Colt's. It may use more or less in some particulars, but does it use what Colt's uses, and what he invented in substance—some efficient part of the machinery? Messrs. Mapes and Blanchard swear that it uses the same in substance as Mr. Colt's, with a variation of form, and of mechanical equivalents. On the contrary, witnesses on the part of the defendants seem positive that it is not similar in substance.

There is another consideration in connection with this—and where you can find general considerations to advert to, perhaps they are safer than contradictory testimony. Do you, or do you not, believe that Wesson invented the machine or pistol—that he would ever have made it, if he had not seen and profited by Colt's in doing it; and was he not trying to defeat the renewal of Colt's patent in 1850? He was there by his counsel. He had had Colt's to see for twelve years or more—could he have made his unless he had seen and profited by it? Does not that raise the presumption? That is for you to consider. If not, why did he want to defeat the extension of Colt's? Why, if Colt's had not been extended, it would have expired, and he and everybody else could have used it with impunity!

I do not know that there is much in the consideration pressed on the one side or the other about which is superior. That is not the question; it is whether they operate upon a similar principle. Though, on that subject, if you think right to advert to it, you

can take not only the testimony upon both sides, but that of the board of ordnance, which examined both, to see which was superior, and decided, for reasons which have been laid before you, that Colt's was superior to the defendant's. I do not consider that a question of great magnitude; though, if the jury choose to go into it, in connection with other matters, they have a right to do it. I believe I have suggested to you every thing which it is proper for me to say on the subject. Doubtless other considerations will occur to yourselves. I have no wish, in this case, but that you should examine it carefully, and render such a verdict as your sense of duty dictates.

The jury found a verdict for the plaintiff.

[NOTE. For other cases involving this patent, see Colt v. Young, Case No. 3,032; Young v. Colt, Id. 18,155.]

Case No. 3,031.

COLT et al. v. ROOD et al.

[6 McLean, 106.][1]

Circuit Court, D. Michigan. June Term, 1854.

LIABILITY OF PRINCIPAL FOR UNAUTHORIZED ACT OF AGENT—PROVISIONAL CONTRACT—CONFLICTING TESTIMONY—DUTY OF JURY.

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

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

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

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

Mr. Lathrop, for plaintiffs.
Vandyke & Grey, for defendants.

OPINION OF THE COURT. This action is brought on two promissory notes. The signatures on both notes were erased, and they were offered in evidence without proof of their execution, as by the pleading they were not denied. But the court held that the notes could not be read without accounting for the erasures. A witness was called who stated that the notes were sent to him as also the account, as counsel, for collection. Being unwell, he sent the notes to Matthews and Taft, counsel at Niles. At that time, the signatures to the notes were not erased. On this evidence, the notes and the account, were again offered in evidence. The account was receipted, and, as before stated, the signatures of the notes were erased. But the court refused to admit them, because it was not shown under what circumstances the signatures were erased, and the receipt of the account given. A deposition was then read, showing that a settlement was made, and that the defendants agreed to pay fifty cents on the dollar; that on this agreement being entered into, the signatures on the notes were erased and the account was receipted. The agent, Smith, alleged that the counsel at Niles, never having been so instructed, had no power, as counsel, to compromise on the payment of a part of the debt. And this is undoubtedly the true view. Counsel may refer suit to arbitrators, but they have no power to discharge the debt on the payment of a part of it, unless specially authorized. Smith, the agent, was dissatisfied with the compromise, as the payment of the notes of the defendants was not secured. He proposed to take one-half the debt on certain payments, and to retain these notes until half of their amount was paid. The defendants refused to sign the agreement. This suit was then brought. Mr. Smith, agent of the plaintiffs, was called as a witness, he being contradicted by another witness. Objection being made, the court said the witness might be examined as to any matter of explanation; but that he could not be called to reaffirm what at first he stated.

The counsel for the plaintiffs contended that the defendants knew that Smith acted as agent, and must have known that if he went beyond his authority he could not bind his principal. And that the acceptance of a security for a less sum would not discharge a debt for a larger amount. This principle is undoubted, unless the agent acts under a special authority 5 East, 230; 10 Adol. & E. 121. A payment of a part, and an acquittance under seal in full satisfaction of the whole is sufficient, as the deed amounts to an acquittance. Accord and satisfaction cannot be pleaded unless executed. As an accord there must be an acceptance. 7 Blackf. 582.

The court instructed the jury, that if the principal have knowledge of the agent's acts and do not repudiate them in a reasonable time, they will stand. If the contract be repudiated, the parties must be placed in the condition in which they stood before it was entered into; the notes given on the compromise should have been returned. Where an agent does an unauthorized act, as the compromise of a debt, and the acts of compromise are known to the principal, who makes no objection, this acquiescence will bind him. Story, Ag. § 255. This presumption of the acquiescence of the principal does not arise, unless it be shown that he had full knowledge of the transaction. It is laid down in many authorities, that money or notes for a less sum discharges the debt, if

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

received in payment. 1 Smith, Lead. Cas. 391–394; 15 Mees. & W. 22–30. It was held, that negotiable notes may be pleaded in payment, when given in payment of a larger amount.

The original agreement of compromise was as follows: "Whereas, H. W. Rood & Co., of Niles, Michigan, being indebted to Messrs. Gilbert, Prentiss & Tuttle, of New York, in the sum of $1,245.57; and they are also indebted to Messrs. Abbe & Colt of said city, in the sum of $1,263.54; and also to the late firm of Colgate, Abbott & Co., in the sum of $2,111.56; and, whereas, the said Roods being unable to pay the sum in full, I have agreed in behalf of said firm to settle and compromise said debts for fifty cents on the dollar, twenty per cent. thereof, N. P. Stuart agrees to pay in cash, for which I have taken his note, payable in thirty days, at the Michigan State Bank of Detroit, with interest; and the balance of thirty per cent. said Roods are to give other notes in equal parts payable in one, two, and three years, with interest. If said twenty per cent. be paid, and they give their notes for the balance as above, then I agree to deliver up to them the notes for the said sums above specified, and the fifty per cent. to be in full therefor. Dated at Toledo, Nov. 10th, 1852, signed by E. J. Smith,"—who put also the other signatures to the agreement, all in his handwriting. The notes were forwarded to Mather & Taft, lawyers of Niles, for collection, and they made the above arrangement, which Smith repudiated, having given them, as he alleges, no authority to make. The notes taken by Mather & Taft were returned to them by Smith. Mr. Smith states that when he entered into this writing he informed the debtors that he was not authorized to make it; but that he would enter into it, and see whether his principals would sanction it. Mr. Stuart, witness called by the defendants, stated that he heard no reservation made by Smith, as to any want of authority; and that he was present when the arrangement was made. As these witnesses contradict each other, gentlemen, you are to judge of their credibility. And in doing this, they being respectable persons, you will consider who had the best opportunity of knowing what transpired at the time of the supposed compromise. And in this view it must be admitted, that Smith had a better opportunity of knowing and consequently of recollecting the facts which transpired. He was the agent of the principals, and he entered into the compromise; and he swears that he informed the parties that he was not authorized to make it, but would submit it to his principals for their approval. This condition was not heard by Mr. Stuart. The statement of the one witness is that a fact did transpire, and of the other, that he did not hear the condition stated. This one is positive, the other negative. Now, where the witnesses are equally respectable, and one swears positively to a fact, and the other negatively, that he did not hear the condition, the weight of evidence will be with the one who affirms the fact, as his statement may be true and the statement of the other also; for though the condition was spoken of, the other witness may not have heard it.

On the supposition that the statement of Smith be true, and the jury should so find, then their enquiry will be, did the principals repudiate the agreement of their agent within a reasonable time after they come to a full knowledge of it. The jury will first enquire whether the agreement set up in defense was made by competent authority. The agent who made it, says he had no such authority. The paper purporting to contain the agreement is all in the handwriting of Smith, and he received Stuart's check for $940 as part performance of the agreement. This check was payable some thirty days or more after its date. Under this paper, it is presumed that Mathers and Taft made the arrangement or compromise with the defendants. This paper did not authorize these counsel to make the adjustment. But Smith ordered to confirm the compromise, if the defendants would consent that the original notes should remain in his hands. When first informed of the compromise, Smith objected to it, returned the new notes given and the agreement.

Upon the whole, gentlemen, if you shall find that Smith was not authorized to make the compromise, as he has sworn, and also that his principals were dissatisfied with it, and that this fact was made known to the defendants, it will be your duty to find for the plaintiff on the original causes of action, and assess their damages accordingly. The jury found for the plaintiffs—for the original notes and interest—and also on the accounts. As the plaintiffs recovered on the original ground of action, and not under the compromise, the money paid by Stuart in part performance of the compromise, should be returned to him, by Smith, the agent, unless it shall be made to appear that the money so paid is the money of the defendants. And the court orders that no execution shall be issued on the judgment until said sum of money shall be returned to Stuart, or satisfactory proof adduced that it is the money of the defendants; and if so shown, it should be entered as a credit on the judgment.

COLT (UNITED STATES v.). See Case No. 14,839.

Case No. 3,032.

COLT v. YOUNG et al.

[2 Blatchf. 471.][1]

Circuit Court, S. D. New York. Nov. 18, 1852.

EXTENSION OF PATENT—CONCLUSIVENESS OF COMMISSIONER'S DECISION—FRAUD — ENJOINING INFRINGEMENT.

1. Where an application for the extension of a patent under section 18 of the act of July 4, 1836 (5 Stat. 124), was pending at the time of the passage of the act of May 27, 1848 (9 Stat. 231), which conferred upon the commissioner of patents alone the same authority to extend patents which had previously been confided to the board created by the act of 1836: *Held*, that it was not necessary to renew the application, but that the commissioner was authorized to go on with the proceedings, as having been properly instituted, and complete them by granting the extension.

2. Where the commissioner of patents has jurisdiction over an application for the extension of a patent, his decision is conclusive as to the regularity of the proceedings on the extension. The only exception to the conclusiveness of his decision is, perhaps, the case of fraud.

[Cited in Goodyear v. Providence Rubber Co., Case No. 5,583.]

3. The defendant was enjoined, before final hearing, from infringing two of the claims of a patent, although it was not held that another claim in the same patent, the novelty of which was disputed, was valid.

In equity. This was a motion [by Samuel Colt] for a provisional injunction, to restrain the defendants [Hiram Young and Edward Leavitt] from infringing the first, second, and third claims of letters patent granted to the plaintiff, February 25th, 1836, for an "improvement in fire-arms," as re-issued to him, on an amended specification, October 24th, 1848 [No. 124], and extended by the commissioner of patents on the 10th of March, 1849, for seven years from the 25th of February, 1850. There were five claims in the amended specification. The bill set out a recovery by the plaintiff in a suit at law on the patent, in the circuit court for the Massachusetts district, which was strongly defended, and in which the jury found specially the novelty of the plaintiff's patented combination, and the infringement of the first three claims of his patent. In opposition to the motion, the defendants set up want of novelty in the plaintiff's patent, illegality in its extension and non-infringement. The affidavits were principally directed to the point of showing a want of novelty in the first claim.

[The defendants herein had heretofore filed a cross bill, denying invention, setting up the illegal reissue and extension of the patent, and averring that the complainant had assigned his interest therein to the Massachusetts Arms Company. Complainant demurred to the cross bill, and the demurrer was sustained. Young v. Colt, Case No. 18,155.]

Edward N. Dickerson and Charles M. Keller, for plaintiff.

Seth P. Staples, Francis B. Cutting and Robert Emmet, for defendants.

Before NELSON, Circuit Justice, and BETTS, District Judge.

NELSON, Circuit Justice (after holding that the evidence produced on the part of the defendants in no manner affected the plaintiff's second and third claims, and that the defendants had infringed those claims). The next question in the case is as to the validity of the extension made by the commissioner on the 10th of March, 1849. By the 18th section of the patent act of July 4, 1836, (5 Stat. 124), the power to hear and determine applications for the extension of patents was conferred upon a board composed of the secretary of state, the commissioner of patents and the solicitor of the treasury. That act required public notice to be given of the application a certain number of days previous to the hearing. By the act of congress of May 27, 1848 (9 Stat. 231), it is enacted, that "the power to extend patents now vested in the board composed of the secretary of state, commissioner of patents and solicitor of the treasury," "shall hereafter be vested solely in the commissioner of patents;" and it is further provided, that the said commissioner shall exercise the powers "upon the same principles and rules that have governed said board."

The application for an extension of the patent before us was pending when the act of 1848 was passed, and the commissioner, after its passage, went on with the proceedings, as having been already properly instituted, and completed them by granting an extension. The argument against its validity is, that the proceedings fell with the modification of the board by the act of 1848; and, therefore, that it was necessary to begin them anew, observing the preliminary steps necessary in such cases. The obvious answer is, that this was not a repeal of the section providing for the extension of patents, and the enactment of a new system for the purpose; in which case, the principle of construction contended for would have been applicable (U. S. v. Boisdore's Heirs, 8 How. [49 U. S.] 113), but simply a repeal of so much of it as related to the action of the secretary of state and the solicitor of the treasury in the matter, leaving the commissioner alone to go on in the execution of the duty. This is the legal as well as the common-sense understanding of the change produced by the act of 1848. The amendment seems guardedly worded, for the purpose of avoiding the great inconvenience, if not injustice, that might result to applicants, if the construction contended for by the defendants should prevail, namely, the necessity of renewing the applications, with sixty days' public notice. It, therefore, simply devolves upon the commissioner, after its passage, the whole of the duty which was previously di-

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

vided with the secretary and the solicitor, and directs that he shall be governed by the same principles and rules that had governed the board composed of the three. This, as we understand, was the construction given to the act by the commissioner, and is the one upon which he has acted, and we think it is right and should be upheld.

The jurisdiction of the commissioner over the application being established, his decision must be regarded as conclusive as to any informalities or irregularities that may have happened in the course of the execution of the duty, and cannot be the subject of examination and review on this motion, the same as if the case was before us on writ of error or appeal. The act intended to make the decision of the commissioner conclusive, except, perhaps, in the case of fraud, which is an exception to the general rule.

We are satisfied, therefore, that the plaintiff is clearly entitled to an injunction against the defendants, enjoining them from using, in the manufacture of fire-arms, the arrangements embraced in the second and third claims of his patent. Under the circumstances of the case, and in view of the affidavits produced in opposition to the motion, we shall refrain from passing upon the question raised in regard to the first claim, until the case shall come up for hearing upon the pleadings and proofs, when we shall be more fully in possession of the facts bearing upon that question.

[NOTE. For another case involving this patent, see Colt v. Massachusetts Arms Co., Case No. 3,030.]

COLT (YOUNG v.). See Case No. 18,155.

COLTMAN (McCLOUD v.). See Case No. 8,-703.

COLTON (NATIONAL BANK v.). See Case No. 10,034.

COLUMBET (FIELD v.). See Case No. 4,-764.

Case No. 3,033.

The COLUMBIA.

[Nowhere reported; opinion not now accessible.]

Case No. 3,034.

The COLUMBIA.

[6 Ben. 398.][1]

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

SEAMAN'S WAGES—DISCHARGE—DOUBLE PAY.

Seamen shipped on a vessel in New York, for a voyage to Havana and back to New York. On the return of the vessel to New York, they were discharged without payment of any portion of their wages. There was no dispute as to the amount due them. Within ten days after their discharge, they filed a libel against the vessel to recover the wages and ten days' double pay, under the 35th section of the act of June 7, 1872 (17 Stat. 262). *Held*, that they were entitled to recover double pay for ten days, although the suit was brought before the expiration of ten days from their discharge.

This was an action [in admiralty] by seamen to recover wages, and also ten days' double pay, under the 35th section of the act of June 7, 1872 (17 Stat. 262).

The men shipped in New York, and signed articles for a voyage to Havana and back to New York. She arrived in New York on January 11, 1873, and the men were discharged on January 14th. They were not discharged before the U. S. shipping commissioner, nor was any portion of their wages then paid them, and on the 22d of January this libel was filed.

Goodrich & Wheeler, for libellants.

B. F. Tracy and John J. Allen, for claimants.

BENEDICT, District Judge. Under the provisions of section 35 of the act of 1872 [17 Stat. 262] the libellants in this case were entitled to be paid one-fourth of their wages at the time of their discharge, but they were discharged without any payment whatever, and no cause is assigned for the failure to pay them the amount of wages then payable; nor is it claimed that any dispute existed as to the balance then due them. Under such circumstances, they are also entitled to be paid a sum equal to two days' pay for each day, not exceeding ten, dating from the time of their discharge. Failure, without sufficient cause, to pay a seaman, on his discharge, the portion of his wages then payable by law, entitles him to recover double pay for each day's delay thereafter. I was at first inclined to the opinion that the double pay should stop upon the filing of the libel, but, upon reflection, and after examining the practice under the merchants' shipping act of England, of section 187, of which the 35th section of our act of 1872 is a copy, I incline to the opinion that in a case like this, when there is no dispute, and no reason assigned for the failure to pay the amount due, the right to double pay does not terminate by the commencement of an action to recover the wages earned.

In some cases, at least, such as where the ship is about to leave the port, a seaman will be compelled to commence his suit without delay. Moreover, delay of payment by the owner, made after the commencement of the suit, without any cause, is as prejudicial to the seaman as delay before suit, and should be discouraged. It is always in the power of the owner, as well after as before suit, to terminate the double pay by payment of the wages due. The practice, under the English act, appears to be in accordance with these views. See The Princess Helena, 1 Lush. 190.

Let a decree be entered in accordance with this opinion.

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

Case No. 3,035.

The COLUMBIA.

[9 Ben. 254.][1]

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

DAMAGES—LOSS OF A SEINE—CHANGE OF COURSE IN EXTREMIS—LOOKOUT.

1. Where an excursion steamer, coming from Rockaway to New York, overtook off Coney Island a schooner on her return from a catch of menhaden and towing behind her two boats holding her seine, and the steamer struck one of the boats and carried off the seine, which was lost: *Held*, that the steamer was liable for the damages.

2. The change of course made by the sloop to avoid the steamer was in extremis and not a fault.

[Cited in The Aurania and The Republic, 29 Fed. 125; The Britannia, 34 Fed. 559.]

3. Where a large and swift steamer without sufficient cause attempts to pass dangerously near to a sailing vessel, one of the risks the steamboat takes is that the man at the helm of the sailing vessel shall not lose his presence of mind, or form a different estimate from that of the steamboat pilot, as to the danger of collision.

4. Such a steamboat is in fault for undertaking to pass a sailing vessel in a channel so narrow that in order to pass she must come within 15 feet of the sailing vessel, when by stopping a short time she could have passed in a wider channel.

[Cited in The City of Springfield, 29 Fed. 926; The Raritan, 32 Fed. 848.]

5. The necessity of a stationed lookout in the daytime considered.

In admiralty. The steamboat Columbia, running between New York and Rockaway Beach, and then on an excursion having about 1,500 sewing-girls from New York City on board, overtook the schooner Ella Robbins, which was coming in to Barren Island with a catch of menhaden for the fish-oil factory there, and having her seine in two boats towing astern. As the steamboat came up astern of the sloop without slackening speed, the master of the sloop, who at first held his course, fearing to be struck, luffed twice; and the effect was to bring the boats astern of the schooner diagonally across the track of the steamboat. One of the boats was struck and broken up, the seine torn to pieces and carried off, and the steamboat went on, having cleared the stern of the schooner by about thirty feet. This action was brought to recover damages for the loss of the seine. Upon the reference ordered, evidence was taken to show the probable amount of menhaden the schooner would have caught in the three days' delay that was necessary to get another seine and boat, it being just at the height of the fishing season. Exceptions were taken to the report of the commissioner, allowing the seamen who libelled for their share one-sixth of the catch so estimated, and overruled.

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

Beebe, Wilcox & Hobbs, for libellants.
D. & T. McMahon, for claimant.

BENEDICT, District Judge. This is an action to recover of the steamboat Columbia the damage caused by the running over by that steamboat of some boats attached to the stern of the sloop Ella Robbins.

The place of the accident was off Coney Island. The Columbia is a large passenger steamboat engaged in regular trips between New York and Rockaway beach, and was at the time of her collision on her way to New York. The Ella Robbins is a fishing sloop that was returning from fishing at Rockaway shoals, having in tow her fishing boats with the net in them. The "purse" boat was next to the sloop, and the "mate" boat astern. The net was partly in one boat and partly in the other. The distance from the stern of the sloop to the stern of the mate boat as they were towing was about fifty feet. The steamboat and sloop were bound in the same direction, the sloop being ahead sailing close hauled at a speed of some five miles an hour, with the wind north-west. The ordinary speed of the Columbia is some eighteen or twenty miles an hour. When under one bell she goes about ten miles an hour with wind and tide such as it was on this occasion. The weather was fair and there were no other vessels near enough to obstruct the navigation of the steamboat or the sloop.

While the Columbia was passing along by Coney Island on a west course she came up with the sloop ahead, and in passing her ran over the fishing boats attached to the sloop's stern, destroying one, injuring the other, and carrying off the net upon her bow, which is the injury here complained of.

The theory of the defence is that where the Columbia overtook the sloop the water is shoal for such a steamboat and she was for that reason running under one bell. That moreover she was in a sort of channel or gut not over 125 feet wide, in which it was necessary for her safety that she should keep, to enable her to pass in safety an obstruction in the channel caused by a wreck, sunk where the room on either side of the obstruction was not over 200 feet, and which she was approaching. That she intended to pass to southward of the obstruction and to southward of the sloop, and would have done so in safety had the sloop held her course; but the sloop, instead of holding her course, first luffed, then bore away, then luffed again and finally bore away a second time just under the bows of the Columbia, thereby drawing her boats directly ahead of the Columbia and so causing their destruction. The statement of those on the sloop is that they held their course without any variation whatever, and that the Columbia came up directly astern until close upon them, when she passed to the northward of

them at a short distance, and in sheering to pass ran over the boats.

The evidence discloses many contradictions. Five witnesses from the sloop testify that no change of the course of that vessel occurred, while two witnesses from the steamboat are equally positive that the sloop changed her course as averred in the answer. As to the change of course by luffing, the pilot of the steamboat exaggerates into a change of course what is described by a passenger on the Columbia, called in her behalf, as no more than keeping up close to the wind, not amounting to a change of course and not calculated to mislead the steamboat or in any way to embarrass her in her movements.

As to the bearing away, several from the sloop say that the sloop went off some three points when the Columbia caught the boats fastened to her stern. Upon this point, therefore, the only difference between the witnesses is as to when it occurred. Those from the Columbia say it was before she came up to the sloop, and caused the collision. Those from the sloop say it was after the boats had struck, and was caused by the collision. I incline to the opinion that the sloop was allowed to fall off before the boats struck. The conceded fact that the stern of the Columbia passed between the purse boat and the mate boat, tends strongly to confirm this conclusion, and the fact is more consistent with the probabilities. But I do not agree with the conclusion drawn by the claimant that if the sloop fell off, she alone is responsible for the collision, for the reason that this movement of the sloop was caused by the too near approach of the steamer. The passenger called in behalf of the steamer says that the course taken by the Columbia would not have carried her more then ten or fifteen feet from the sloop to port. Under such circumstances it would not be very surprising if those on the sloop, seeing a steamer of the size of the Columbia approaching so near, and coming almost directly for them, should, at the last moment, attempt some movement to get out of her way. When such a steamer, without sufficient cause, attempts to pass dangerously near to a sailing vessel, one of the risks the steamboat takes is that the man at the wheel of the sailing vessel shall not lose his presence of mind, or form a different estimate from that of the steamboat pilot as to the danger of collision. This sloop, therefore, cannot be held to be in fault for keeping away at the moment of collision, although the result shows that if she had not done so the steamboat would have just cleared her. The fault that caused the collision was that of the pilot of the steamboat in attempting to pass so close to the sloop.

An effort has been made to show that it was impossible for the steamboat with safety to herself and her large cargo of passengers to give the sloop a wider berth at the particular place where the steamboat came up to her. I must confess that I am not entirely satisfied that the experienced pilot of the Columbia does not exaggerate the narrowness of the channel as he does the luffs of the sloop. But if it be true that at the place where this sloop was when the Columbia approached her there was no room for him to pass at a greater distance than ten or fifteen feet, then it was the duty of the steamboat to stop and allow the sloop to reach a place where there was more room, before attempting to pass her. That the Columbia could have stopped a little sooner than she says she did is not to be denied, and as the narrow place her pilot speaks of is not claimed to have extended any considerable distance, a safe passage would have been secured with but little delay. Upon her own showing, therefore, the Columbia is in fault for attempting to pass the sailing vessel as she did.

I add a word upon the subject of lookout, although unnecessary for the determination of this case, because it is clear that this collision was not caused by the absence of a lookout upon the bow of the steamboat.

The propriety of having a lookout in the daytime under some circumstances has been adverted to in several adjudged cases. In the case of The Young America [Case No. 18,179], the collision occurred about noon. The court says, "There was no lookout on duty and the master was acting as wheelsman. These are positive faults." In the case of The Marcia Tribon [Case No. 9,062], the collision occurred about noon, and Judge Sprague says, "If a proper lookout had been kept, which is always requisite in going out of a harbor where other vessels are generally lying at anchor, the collision ought to have been avoided." In the case of The A. G. Brooks [Id. 98], the collision occurred about 4 o'clock p. m., and Judge Lowell says, "the very fact of want of a lookout is evidence against the brig until it is shown that no harm came from the neglect."

It cannot therefore be claimed that a stationed lookout can be dispensed with in the daytime under all circumstances.

In the present case—in which, by the way, the sworn answer avers that the Columbia had a lookout stationed—I do not say that the having of such a lookout on the Columbia was so necessary a precaution that the failure to have a lookout renders her liable, for it is entirely clear that good judgment and caution in the pilot-house would have prevented the occurrence of this collision without aid from a lookout forward, and, as before stated, I hold the Columbia liable because of the error of her pilot in running unnecessarily close to the sloop.

But the case has forcibly reminded me of the remark made by Judge Betts—that most experienced man in cases of this description—in determining a collision case, that one

of the advantages of having a stationed lookout was, that a lookout properly stationed, who is in no way responsible for any action taken in the pilot-house, is likely to be not only able but willing to testify to everything that may occur in connection with the accident. The remark is illustrated by this case. The Columbia had no stationed lookout, but the necessity of having some one forward who saw the accident and could testify intelligently as to what occurred was felt as soon as this action was brought; and by good fortune a person was found of maritime experience who happened to be forward, and who was watching the courses of the two vessels. The testimony of this volunteer lookout, although not sufficient to exonerate the Columbia, has furnished controlling evidence as to the facts, and caused the case to turn rather upon a question of law than of fact. If the owners of steam vessels were in all cases able to furnish such a witness so stationed, mistakes in deciding as to the facts would rarely occur.

Let a decree be entered in favor of the libellant, with an order of reference to ascertain the amount.

Case No. 3,036.

The COLUMBIA.

[13 Blatchf. 521.][1]

Circuit Court, E. D. New York. Aug. 16, 1876.

COLLISION—LACHES—SUBORDINATION OF CLAIM.

A collision between a schooner and a steamer occurred in July, 1868, whereby the schooner and her cargo sank and were totally lost. The steamer carried the master and crew of the schooner to New York. The libel was verified in July, 1870, but was not filed until February, 1873. In January, 1872, a mortgage on the steamer and three other vessels was executed, payable two years after date. It did not appear that any part of it had been paid. No excuse was shown for the delay in bringing the suit: *Held*, that the collision claim must, on account of its staleness, be postponed to the mortgage.

[Cited in Fitzgerald v. The H. A. Richmond, Case No. 4,839; The Bristol, 11 Fed. 163; The Martino Cilento, 22 Fed. 861.]

In admiralty.

Beebe, Wilcox & Hobbs, for libellants.

John J. Allen, for mortgagee.

Tracy & Catlin, for vessel.

HUNT, Circuit Justice. On the night of July 2d, 1868, the steamship Columbia ran into and sank the schooner Tabitha S. Greer, the said schooner with her cargo, and all the property on board, becoming an immediate and total loss. Said loss occurred without the fault of those on board of the schooner, but by the fault and negligence of those in charge of the steamship, to wit, in going at the speed of eight miles an hour in a dense fog, and in not hearing the fog-horn which was kept constantly sounded by the schooner. The libel was filed on the 4th of February, 1873. It purports to have been verified on the 15th of July, 1870. No reason is shown why it was not filed at an earlier day. On the 20th of January, 1872, the owners of the Columbia executed a mortgage for $250,000 upon that and three other vessels, to Myers and others, which mortgage was, on the 22d of the same month, assigned to the respondent Butterfield, and is now held by him. The mortgage was payable in two years from its date, and there is no evidence that any part of the same has been paid. At the time of the collision, the Columbia was on her way to New York, and she immediately proceeded to that port and landed the captain of the Greer and his crew at the quarantine near New York. The schooner was on her way from a port on the North river to the Delaware capes.

The libel was dismissed by the district court on the ground that the claim made by it was stale. The collision occurred on the 2d of July, 1868. The libel was not filed until February 4th, 1873, nearly five years after the accident. There is no reason shown, in the evidence, for this delay, and no proof is given of the reason for the lapse of nearly three years between the time of verifying the libel and the time of filing it. The steamer was in New York immediately afterwards, as was the master of the schooner. The schooner sailed from Stony Point, North river, where, or near by, we may well suppose that her owners lived. There is no evidence that the steamer was not repeatedly and regularly in New York on her return trips, and the documents showing the transactions in New York and New Jersey afford ground to suppose that those interested in her lived in one or both of those states. These circumstances, unexplained, show an unwarranted delay in the proceedings to enforce the lien against the steamer arising out of the collision. In the mean time, before the libel was filed, the mortgage for $250,000 was put upon four vessels, of which the Columbia was one, and was assigned to Butterfield. So far as we know, this debt exists to its full amount, and it must take precedence of the collision lien. If this debt has been collected from other sources, or if it should be collected from the other vessels in preference to the Columbia, it rests upon the party so alleging to produce the evidence and to take the proper measures to adjust his equities. The present case does not present any evidence on the subject. All we here know is, that, as to Butterfield, the claim is stale, and must be postponed to his mortgage. Griswold v. The Nevada [Case No. 5,839]; The Dubuque [Case No. 4,110]; The Key City, 14 Wall. [81 U. S.] 653.

As to the owners of the vessel, no defence of staleness is set up by them, nor do I see any reason why the claim should not be enforced as to them. They defend upon the

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

merits only. The merits are against them, and, as to them, the claim is a good one, and should be allowed. The decree of the district court is affirmed, subject to the modifications above set forth. Let a decree be entered accordingly.

Case No. 3,037.

Ex parte COLUMBIAN INS. CO.

In re L. A. SURETTE.

[2 Lowell, 5.][1]

District Court, D. Massachusetts. March, 1871.

PROOF OF DEBT AGAINST BANKRUPT GARNISHEE.

1. A. was sued; and B., who owed him a debt, was summoned as his trustee (or garnishee), and defaulted, and afterwards went into bankruptcy, and A. proved the debt. Afterwards the attaching creditors obtained judgment and issued execution against A., and against his funds in the hands of B., and made demand on B. and on his assignees in bankruptcy to pay them the debt towards the satisfaction of the execution, which was refused. They then proved the supposed amount of the debt owed by B. to A. against B.'s estate in bankruptcy. *Held*, they had no provable debt, and were not creditors of B. at the date of the bankruptcy.

2. Whether the lien which they held upon the debt by virtue of their attachment was absolutely dissolved, or might have been availed of in some way by applying to the equitable powers of the court, quaere?

3. Whether the first judgment alone, before scire facias brought, would have made them creditors of B., if recovered before the bankruptcy, quaere?

LOWELL, District Judge. The receivers of the Columbian Insurance Company, a corporation established in the state of New York, petitioned the court for the dividend which had been declared upon the debt proved by them. The assignees, in their answer, set up that the debt ought not to have been proved, and pray that it may be expunged. The assignees should have moved to expunge as soon as they discovered that the debt was proved. It is no answer to a demand for the dividend that the debt was improperly allowed. But as all the facts have been brought to my notice, and the case has been argued, I may treat the answer as a motion to stay the dividend until the assignees can have the question properly passed upon.

Surette owed the insurance company a large sum of money for premium notes overdue; and before his bankruptcy the company was sued in the superior court at Boston by John S. Hall & Co., and Surette was summoned as trustee. He entered no appearance, and was defaulted; but the receivers of the company came in, and claimed the funds, on the ground that the proceedings in New York to dissolve the corporation took precedence of the attachment in Massachusetts. This point having been decided against them in one of the cases involving the same considerations, they withdrew their claim, and Surette was charged as trustee of the company, and judgment was obtained against the company and against their funds in the hands of Surette; but this was some months after the bankruptcy. Upon the execution, demand was duly made upon Surette and upon his assignees in bankruptcy to pay the debt to the judgment creditors. After this, John S. Hall & Co., the judgment creditors, proved against Surette's estate here the supposed amount of his debt to the company. The latter, acting by the receivers, had proved the same debt long before that time; so that this debt has been twice proved.

According to the decision of the supreme judicial court in Pingree v. Hudson R. Ins. Co., 10 Gray, 170, Surette might plead his discharge, if he obtained it, as a bar to the suit as against him; and the reasoning of the court is, that the bankruptcy works a virtual release of the attachment, and authorizes the creditor whose debt has been attached to prove in bankruptcy, notwithstanding the trustee process. It follows that the receivers had the right of proof, and must hold the dividend. I see no other result which can be worked out in this case. The attaching creditors had no debt against Surette which they could prove at the time of the bankruptcy; and, though they have obtained a judgment since, yet that cannot relate back, because it was not founded on a provable debt. All that Hall & Co. had at the date of the bankruptcy was a lien upon the debt which Surette owed to the insurance company; but there is no decision or principle of law by which they had, as matter of right, the power to prove the debt in the name of the company. It may be that the bankrupt court could work out an equitable remedy if applied to in time; or perhaps the state court in which the attachment was pending might do so,—a remedy, I mean, by which the lien should be preserved and applied to any dividend that might be paid upon the debt. No application was made to either court, and both parties stand on their legal rights.

I cannot hold that a judgment creditor obtaining his judgment, and making demand on the garnishee long after the bankruptcy, has a debt provable ex parte against the garnishee's estate in bankruptcy. It is doubtful whether he would have had such a debt, even if the judgment had been entered up before bankruptcy, because his next step is scire facias, to ascertain the amount for which the garnishee shall be his debtor; the first judgment merely being that the latter holds something which, upon due demand, he must pay over to the judgment creditor. After demand, he might, perhaps, be considered a debtor for an amount which the bankrupt court would be capable of liquidating.

In this case, reserving my opinion whether

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

an equitable remedy could ever be worked out, and in what mode, I hold that the proof made by the receivers must stand, and that of Hall & Co. must be expunged.

COLUMBIAN INS. CO. (CATLETT v.). See Case No. 2,514.

COLUMBIAN INS. CO. (DONNELL v.). See Case No. 3,987.

COLUMBIAN INS. CO. (GARDNER v.). See Cases Nos. 5,224 and 5,225.

COLUMBIAN INS. CO. (SANDERSON v.). See Case No. 12,298.

COLUMBIAN INS. CO. (STUART v.). See Case No. 13,554.

COLUMBIAN INS. CO. (UNITED STATES v.). See Case No. 14,840.

COLUMBIAN INS. CO. (VOWELL v.). See Case No. 17,019.

COLUMBIAN INS. CO. (WEST v.). See Case No. 17,421.

Case No. 3,038.

COLUMBIAN INS. CO. OF ALEXANDRIA v. ASHBY.

Circuit Court, District of Columbia.

[Nowhere reported; opinion not now accessible. For decisions of the supreme court on appeal in this case, see Columbian Ins. Co. v. Ashby, 4 Pet. (29 U. S.) 139, 13 Pet. (38 U. S.) 331.]

Case No. 3,039.

In re COLUMBIAN METAL WORKS.

[3 N. B. R. 75 (Quarto, 18).][1]

District Court, S. D. New York. June 16, 1861.

BANKRUPTCY—SALE OF ENCUMBERED ASSETS.

1. The bankruptcy court has full power to order the sale of encumbered assets in such manner as it chooses to direct.

[Cited in Giveen v. Smith, Case No. 5,467; Re Brinkman, Id. 1,884; Sutherland v. Lake Superior Ship Canal, Railroad & Iron Co., Id. 13,643.]

2. Where assignee had commenced suit in the United States district court against lien-holders, the bankruptcy court ordered the sale jointly by the assignee and the referee, of certain mortgaged property, and the deposit of proceeds in the treasury of the court to await the determination of the suit against the said lien-holders.

BLATCHFORD, District Judge. In so far as Strauss, Bianchi & Co. have a lien by mortgage, judgment, or decree, on any real or personal property of the bankrupts, there can be no doubt of the power of this court, under the 20th section of the bankruptcy act [of 1867 (14 Stat. 526)], to sell such property in such manner as it chooses to direct. The property has passed to the assignee in bankruptcy, subject, at most, to the lien. In view of the suit instituted in this court by the assignee in bankruptcy, against Strauss, Bianchi & Co., I think that the proceeds of any sale on the judgment or decree recovered on the mortgage, ought not to be allowed to be applied thereon until the determination of the suit. At the same time the property claimed to be covered by the mortgage, and embraced in the judgment or decree of foreclosure, ought to be sold at once, in such manner as to produce the largest possible amount, for the benefit of whoever may be entitled to it. To that end, an order will be entered, permitting and directing the sale at auction, by the referee and the assignee in bankruptcy, jointly, of so much of the property of the bankrupts as is claimed by Strauss, Bianchi & Co. to be covered by the mortgage and embraced in the judgment or decree; so much thereof as is claimed by the assignee in bankruptcy not to be covered by the mortgage or embraced in the judgment or decree, by the terms thereof, to be sold separately from the residue, and a separate report of the sale price thereof to be made. The letters patent, owned by the bankrupts, and claimed to be pledged to Strauss, Bianchi & Co., to secure the debt due to them, will, under the authority of the said 20th section, be sold jointly by the assignee in bankruptcy and by Strauss, Bianchi & Co., at auction, at the same time and place, and a separate report will be made of the sale price thereof: provision will be made for assignment of the letters patent by the vendors. The net proceeds of the above-named sales will be brought into this court, with a view to their being deposited on interest in the United States Trust Company, to await the determination of the said suit against Strauss, Bianchi & Co. The deductions to arrive at net proceeds will not include the fees of the referee or of the assignee for their services, or any expenses, fees, or costs, except those properly attending the sales; namely, printing, advertising and auctioneer's fees, and minor disbursements, to be enumerated by items in the report of sale. The fees of the referee and assignee will be adjusted afterwards by this court on proper application. The assignee will also sell at auction, at the same time and place, all property now in his possession, on the premises formerly occupied by the bankrupts, which is not embraced in the other sales above authorized and directed. The details of the necessary order, if not agreed to by the parties, will be presented for settlement. The injunction heretofore issued will be modified by the order, in so far as may be necessary to allow the foregoing sales to be made.[2]

[1] [Reprinted by permission.]

[2] In re Stewart [5 Abb. Pr. (N. S.) 68]; In re Barrow [Case No. 1,057]; In re McClellan [Id. 8,694]; In re Alabama & F. R. R., 1 N. B. R. 100; In re Salmons [Case No. 12,268]; Foster v. Ames [Id. 4,965]; In re Rhodes [Id. 11,746].

Case No. 3,040.

The COLUMBO.

[3 Blatchf. 521;[1] 35 Hunt, Mer. Mag. 449; 19 Law Rep. 376; 13 Leg. Int. 361.]

Circuit Court, S. D. New York. Sept. 15, 1856.[2]

BILL OF LADING — PROOF OF EXECUTION—"GOOD ORDER AND CONDITION" — "WEIGHT AND CONTENTS UNKNOWN"—BURDEN OF PROOF—VISIBLE DAMAGE.

1. The proper mode of proving the execution of a bill of lading, considered.

2. Where a bill of lading acknowledged the receipt, in good order and condition, of casks containing bristles, which were covered with matting, and well secured by cords around the body and ends, and engaged to deliver them in like good order and condition to the consignees, and also contained the clause, "weight and contents unknown:" *Held*, that there was no admission by the master, in the bill of lading, as to the condition of the goods, beyond that visible to the eye, or apparent from handling the casks or their outside protection.

[Cited in The Olbers, Case No. 10,477; The California, Id. 2,314; Vaughan v. Six Hundred and Thirty Casks of Sherry Wine, Id. 16,900; The Vincenzo T., Id. 16,948.]

3. When a question arises as to the condition of the contents of such casks, in a case where such a clause is found in the bill of lading, the burden rests on the shipper, in the first instance, to prove the condition of the goods at the time of shipment; and, in the absence of such proof, the carrier is not properly chargeable for the condition of such contents.

4. If the external covering of the goods is damaged when they are delivered, so as to account for an injury to the contents, the evidence may be dispensed with, the admission in the bill of lading being prima facie sufficient.

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

In admiralty. This was a libel in rem, filed in the district court, against the bark Columbo, to recover damages for injury to one of thirteen casks of bristles, shipped by that vessel from Hamburg to New York. The libel averred that the goods were shipped under a bill of lading by which the master acknowledged the receipt of the goods on board of the vessel in good order and condition, and engaged to deliver them in like good order and condition to the consignees. The answer denied the allegations of the libel. After a decree in the district court in favor of the libellants [Case No. 3,910a], the claimants appealed to this court.

Alanson Nash, for libellants.

Charles Donohue, for claimants.

NELSON, Circuit Justice. The casks containing the bristles in this case were slightly made, in the form of barrels or hogsheads, covered with matting, and well secured by cords around the body and ends. The cartman who carried the goods from the ship, went into the hold of the vessel, to assist in taking them out, and, when he pressed his foot upon the cask in question, he discovered it was broken. It did not appear to be injured till he put his foot on it, and it could have been raised from the ship without discovering the break. It was found broken at the bilge, when the matting was removed, after it was delivered at the store.

The bill of lading was not proved, either in the court below or in this court, and I entertain strong doubts if it should be regarded as a part of the case. The clerk who testifies that it was received in a letter from the shippers at Hamburg to the consignees at this port, speaks only from hearsay, and not of his own knowledge; and, even if he did, his evidence can hardly be regarded as proof of its execution by the master. The delivery of the goods by the master to the consignees named in it, may raise an implication in favor of the genuineness of the instrument. But the evidence is very loose, and it might lead to abuse if such evidence were to be allowed as generally satisfactory. I do not mean, however, to put my opinion upon this part of the case.

The bill of lading produced contains the clause, "weight and contents unknown." When the matting and ropes were removed, the bristles in the cask were found to be very much deranged, and the bunches were broken and in confusion, so as to make it difficult to assort them. Now, as I understand the effect of this clause in the bill of lading, there is no admission by the master as to the condition of the goods, beyond that visible to the eye, or apparent from handling the casks or boxes, or their outside protection, whatever it may be. If the clause does not mean this, I am not aware that any effect can be given to it. Clark v. Barnwell, 12 How. [53 U. S.] 272.

It is observed by Mr. Abbott (Abb. Shipp. 216), that "if there is any dispute about the quantity or condition of the goods, or if the contents of casks or bales are unknown, the words of the bill of lading should be varied accordingly." As far as my experience goes, I think this effect of the clause is in accordance with the general understanding of those concerned in the carrying of goods—shippers and owners. When, therefore, a question arises as to the condition of the contents of casks or bales, in a case where this clause is inserted in the bill of lading, the burden rests upon the shipper, in the first instance, to prove the condition of the goods at the time of shipment; and I remember several cases before me in which commissions were executed on his behalf abroad, and an elaborate inquiry made for the purpose of establishing the fact. If the external covering of the goods is damaged when they are delivered, so as to account for an injury to the contents, then the evidence may be dispensed with. The admission in the bill of lading would then be prima facie sufficient.

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

[2] Reversing Dill v. The Columbo, Case No. 3,910a.

It was said, on the argument, that the external covering or protection, in this case, was damaged, and that if it was in that condition at the time the goods were shipped, the master must have known it, or at least is chargeable with knowledge of it. But I am not satisfied that this is a just or reasonable conclusion from the evidence. The cartman states that the cask was apparently externally uninjured, and that it might have been raised from the hold without discovering the break; and, if so, it might have been stowed there without discovering the fact. Indeed, it appears, from the evidence, that the covering of the cask with the mat, well secured with cords both around the body and ends, would prevent any discovery of the break, unless there was some special examination. It seems to me, therefore, that the case is one in which effect should be given to the clause in question, and in which the burden lay upon the libellants to prove the condition of the contents at the time the goods were delivered on board of the ship; and that, in the absence of such proof, the carrier is not properly chargeable for the condition of the contents. It would be very unjust to charge him, if they were delivered to the consignee in the condition in which they were received on the ship; and, for aught that is stipulated in the bill of lading, I think they were. The decree must be reversed, with costs.

The COLUMBO v. DILL. See Case No. 3,040.

Case No. 3,041.

The COLUMBUS.

[1 Abb. Adm. 37.][1]

District Court, S. D. New York. July, 1847.

OBJECTION TO COMMISSIONER'S REPORT—SALE OF CARGO—SEPARATION OF GOODS.

1. An objection to the regularity of a commissioner's report cannot be brought forward by exception to the report; but should be raised by motion founded upon the irregularity.

2. An exception to a commissioner's report draws in question only the reasons upon which the report is founded.

[Cited in The Rhode Island, Case No. 11,743; The E. C. Scranton, Id. 4,272.]

3. A cargo of goods, being in part damaged and in part sound, was sold at auction by the consignees, without separation of the sound from the unsound. *Held*, that it was the duty of the master, not of the consignees, to make such separation, if requisite to obtain a favorable sale; and that the want of it did not prevent the consignees from relying upon the auction price as showing the value of the goods as damaged.

4. How far sales at auction are sanctioned in such cases.

[Cited in Crosby v. Grinnell, Case No. 3,422.]

In admiralty. This was a libel in rem by Gustavus Loenig and Charles Schneider against the bark Columbus, to recover damages for injuries received by goods shipped on board the bark to the libellants as consignees.

A large quantity of corks, amounting to nearly ten thousand gross, were shipped at Bordeaux, on board the Columbus, consigned to the libellants, at the port of New York. The usual bill of lading was signed by the master. As is usual with such goods, the corks were packed by the consignees in small packages, called pockets, containing about fifty gross of corks each, and these pockets were again packed in bales, in a stouter covering. For convenience of stowage, the master of the vessel cut open the bales, and, taking out the pockets, stowed them in the hold. In consequence of this, a large portion of the corks were found, upon unlading, to be much damaged by wetting, &c. They were taken into the libellants' warehouse; and, after some negotiation with the master of the vessel respecting the liability of the vessel for the loss, they were sent by the libellants, with the assent of the master, to auction, and sold as damaged. The libellants then instituted this action to recover for the injury.

The cause having been referred to a commissioner, to report the amount of libellants' damages, he made his report, dated April 5, 1847, estimating those damages at $232.

The cause now came before the court upon exceptions taken to the report by both libellants and claimants. The grounds of these exceptions sufficiently appear in the opinion.

Francis B. Cutting, for libellants.
E. C. Benedict, for claimants.

BETTS, District Judge. The claimants take two exceptions to the report of the commissioner in this case, dated April 5, 1847, and they have set the cause down for hearing upon those exceptions.

The libellants also except to the report upon the ground that the commissioner had already on March 29, 1847, made and filed his report in the cause, a copy of which duly certified by the clerk, had been delivered to them; and that the subsequent report made April 5, was unauthorized and void. They have set this exception down for hearing.

In respect to the latter exception, it is clear that the regularity or irregularity of the report of April 5 cannot be determined in this manner. An exception to a commissioner's report goes to the merits of his decision, and reaches no further than to bring before the court for consideration, the adequacy of the grounds in law or fact, upon which the report is founded.

For the purposes of such investigation, the report must be assumed to have been made within the scope of the order of reference. An exceptive allegation to a proceeding in a cause has, in the civil law, the character of a plea (Wood, Civ. Law, bk. 4, c. 3; 2

[1] [Reported by Abbott Brothers.]

Browne, Civ. & Adm. Law, 361, 362; Betts, Adm. Pr. 48), and cannot properly be employed in the admiralty practice to determine the regularity of the acts of an officer of the court, not incorporated in and constituting a substantive part of the proceeding excepted to (Betts, Adm. Pr. 38).

The objection raised by the libellants, being extraneous to the merits of the case, should have been brought forward by motion founded upon the alleged irregularity. Upon such motion the facts upon both sides would be brought out, and the court would be enabled to determine whether the fact was as the exception charged, or was unjustifiable or injurious.

The exception taken by the libellants must be overruled, because it does not, as I understand it, touch the matter reported upon by the commissioner.

The first exception taken by the claimants is to the allowance of $232 by the commissioner as the amount of damages sustained by the libellants. It is urged that the proofs do not warrant an allowance for the injury the corks received on shipboard, or during their transportation, exceeding one cent and a half the gross; at which rate the amount would be less than $150.

A witness, experienced in the trade, gave it as his opinion that the corks could have been picked over by hand, before the sale, and the damaged ones separated from the sound, at an expense of about one cent per gross. If this course had been pursued, the corks would doubtless have sold to better advantage, and the loss sustained have been considerably reduced. It appears, on the evidence, that this would have been a tedious and troublesome process, and I do not think it devolved upon the libellants to assume the hazard or cost of the undertaking. It was the duty of the master if of any one, to separate the sound from the unsound, and deliver to the libellants that portion of the cargo which was sound, and compensate them for that which was deficient or deteriorated. In default of his so doing, the vessel must make good the damages ascertained by the testimony of competent witnesses, or determined by an actual sale of the merchandise.

Sale by auction is in the great marts of commerce so commonly resorted to by merchants to ascertain the value of deteriorated merchandise, that it may almost amount to an usage of trade. It furnishes, cheaply and promptly, all the accuracy which can be expected in any known measure of damages, and it is peculiarly fitting, in cases of this character, that the court should sanction and sustain it as the method best adapted to protect the interests of all parties concerned.

The present case, however, does not afford an occasion rendering it necessary to pronounce upon the sufficiency in law of the public sale to determine the value of these goods after the injury was received, because the witnesses who appraised the corks in their damaged condition, testified that they considered the prices brought at the auction sale to have been fully equal to their value. That value would show not only that the deficiency or damage was equal to $232, but, as I understand the evidence, that it may probably have considerably exceeded that sum.

The first exception of the claimants is accordingly overruled.

The second of the claimants' exceptions relates to the form of the report, and does not appear to have any practical bearing or effect, or to be entitled to weight.

The exceptions upon both sides are accordingly disallowed, without costs to either party.

The case came before the court again in January, 1848, upon exceptions to a further report of the commissioner, when the effect of the sale by auction, in fixing the value of the goods in their damaged state, was further discussed. See the report of the case [Case No. 3,042].

Case No. 3,042.

The COLUMBUS.

[1 Abb. Adm. 97.][1]

District Court, S. D. New York. Jan., 1848.

INJURY OF CARGO—ASCERTAINMENT OF DAMAGE.

Where goods were damaged during transportation on board ship, and were received by consignees upon an understanding that the depreciation was to be made good to them, and they were sold by auction by the consignees, but with the assent of the master,—*held*, that for the purpose of making adjustment of the amount due from the vessel for the injury, the sum realized at the sale should be regarded as the value of the goods in their damaged state.

[Cited in Magdeburg General Ins. Co. v. Paulson, 29 Fed. 533.]

In admiralty. This was a libel in rem by Gustavus Loenig and Charles Schneider against the bark Columbus, to recover damages for injuries received by goods shipped on board the bark to the libellants, as consignees. The facts of the case are stated in the report of the proceedings had upon exceptions heretofore taken to a commissioner's report. [Case No. 3,041.] After the decision disallowing those exceptions, an order was entered in July, 1847, referring the cause back to the commissioner to re-examine and state the account between the parties. He reported a balance due to the libellants of $267.51. The cause again came up upon exceptions to this further report of the commissioner. There was an exception upon the ground that the commissioner's estimate of the original value of the corks, which were the subject of the action, at their port of shipment, was higher than was supported by the evidence; and this exception was sustained by the court, the valuation adopted by the commissioner being reduced from $696.08 to $677.87. There was

[1] [Reported by Abbott Brothers.]

another exception taken on behalf of the claimants, upon the ground that the commissioner had improperly received evidence of the sum realized by the sale of the damaged corks at auction, as fixing their value in their damaged condition. It is to the question raised by this exception that the opinion of the court principally relates.

E. C. Benedict, for libellants.
Francis B. Cutting, for claimants.

BETTS, District Judge. The quantity of corks, for the injury to which the libellants seek to recover in this action, is differently stated by the libellants and by their witnesses. By the account of sales and estimate of damage rendered to the claimants by the libellants, June 23, 1846, they charge for 192 bags, containing 50 gross in each bag, valued at 7¼ cents per gross, which gives the product $696. But the auctioneer's account of sales, returns only 187 bags sold, which, on a like computation, would amount to $677.87. The variation is of no great moment, yet the owner is entitled to every legal allowance. Taking the latter sum as the proved original value of the goods, and rectifying the computation of the commissioner accordingly, the balance reported due to the libellants should be $249.38, instead of $267.51.

The libellants clearly proved by the testimony of their cartman and clerks, that the corks were in a damaged condition when landed here; and the fair purport of all the testimony before the court and commissioner may well be taken to be, that the libellants never accepted the corks as their property, except upon the understood condition that the damage should be made good to them. It appears that an arbitration was at first agreed upon between the libellants and the master to ascertain the injury or depreciation, but the master being advised that by so adjusting the matter, he might be embarrassed in his remedy abroad, he declined to do so, and the libellants then gave him notice that they should send the goods to auction. On the first hearing, I thought the proofs not very distinct that the captain assented to the auction sale; but a review of the evidence then taken, in connection with the proofs since put in before the commissioner, satisfies me that the sale was fully approved by him. He did more than merely acquiesce in it. He sent men from his vessel to put up the corks, and arrange them for an advantageous sale in that manner.

The exception by the claimants rests upon the positions that the consignees, after receiving the goods, had no rightful authority to send them to auction at the risk of the vessel; and second, that at any rate they could not sell them, sound and unsound together, as a means to ascertain their value. And it is contended that it was at least their duty to select the sound and retain them at the invoice value, and to allow the damaged ones only to be sold at auction. The latter branch of the argument was sufficiently adverted to in the opinion pronounced upon the original hearing, and the views of the court upon that point will not be again stated.

It does not appear to me that the case comes up in a manner which requires an opinion upon the general question, whether the owner or consignee of goods accepted from a carrier in a damaged condition, may, of his own authority, make auction sale of them, and charge the carrier with the difference between their sound value and the prices obtained for them at public sale. The libellants did not undertake to act upon their own authority, but a sale at auction was proposed by them to the master, as a means of determining what damage or deterioration the goods had sustained, and the sale made was made with the sanction and acquiescence of the master. To all reasonable intents, this method of fixing the amount of injury or loss is just as obligatory on him and the vessel, as a submission to arbitration, or an adjustment by mutual agreement between the parties. It does not appear that any witness, knowing the condition of the goods, considered the sale-prices at all below their marketable value. The sale at auction, under such circumstances, was properly admissible as evidence of the value of the goods when landed; and fortified as it is by the estimate and judgment of witnesses, it becomes a reasonably satisfactory measure of the loss sustained. In my opinion, therefore, the commissioner properly received proof of the auction sale as evidence to determine the measure of damages, and I also think that, independent of that particular, the weight of evidence is that the corks were not worth more than the amount reported by the commissioner.

The exceptions are disallowed without costs, and a decree is to be entered for the libellants for $249.38, with interest at six per cent. from June 11, 1846, the time of filing the libel herein, together with the costs to be taxed.

Case No. 3,043.

The COLUMBUS.

[1 Abb. Adm. 384.][1]

District Court, S. D. New York. Dec. 22, 1848.

COLLISION—DUTY OF FERRY-BOAT—PROOF BY LIBELLANT—EMERGENCY.

1. A ferry-boat plying across a navigable river is bound to remain in her slip, notwithstanding her appointed time of departure has arrived, if any vessel is seen or is in a position to be seen from on board her, with which she will be in danger of coming in collision if she goes out. But she is not compelled to lie waiting the expected arrival of another vessel.

[1] [Reported by Abbott Brothers.]

2. In order to prevail in an action for damages occasioned by a collision, more must be done by the libellant than to show his vessel clear of blame; he must make it manifest that the loss was occasioned by the fault of those in charge of the colliding vessel.

3. Where a vessel comes suddenly and without warning into imminent peril of a collision—e. g., where two vessels approaching are concealed from each other by intermediate objects until they are close upon each other,—the necessary uncertainty and confusion created by the surprise is to be taken into account in determining whether the management of the respective vessels is proper or blameworthy.

[Cited in Gilman v. The Tyler, Case No. 5,-446.]

In admiralty. This was a libel in rem, filed by the Hoboken Land and Improvement Company, owners of the steam ferry-boat Fairy Queen, against the steamboat Columbus, to recover damages for a collision between the two boats. The collision in question occurred in July, 1848, on the New York side of the river, off the slip of the Fairy Queen, then engaged in plying from New York City to Hoboken. The ferry-boat was so much injured that she sunk immediately. The pleadings upon each side imputed the accident to the negligence, want of precaution and culpable conduct of the other boat. The circumstances of the case are stated in the opinion.

Cambridge Livingston, for libellants.

H. B. Cowles, for claimants.

BETTS, District Judge. I am not satisfied, upon the proofs or arguments adduced by the claimants, that the libellants were guilty on the occasion of the collision of any misconduct or negligence which led to the disaster, or which ought to screen the claimants if a fault is established against their vessel. The Fairy Queen left her berth on the south side of the slip at the foot of Christopher-street, at half-past 4 p. m., that being the fixed time for her departure to perform her trip to the opposite landing at Hoboken. At this time, the Pioneer, another ferry-boat, run by the libellants, was lying to, out in the river, opposite the slip, prepared to enter as soon as it should be vacated by the Fairy Queen. Although the Pioneer was not the consort of the Fairy Queen upon the same ferry, yet the two boats were in the habit of occupying the New York slip alternately, each having a fixed period for leaving it, and usually coming into it also, at a known time. The Columbus, the steamer proceeded against, plied daily up and down the river, having regular places of stoppage at docks above and below and in the vicinity of the landing and starting-place of the Fairy Queen; and her stated time of passing that point was half-past 4 p. m.

The tide was ebb and nearly at low water. The Fairy Queen was a small low boat, and was thus, at the time in question, brought so far down below the surface of the pier that vessels north of it and near the docks could not be seen from on board her until she moved outside the wharves. The wind was northwest, and the Fairy Queen came out of her berth, heading N. W., in order to pass astern of the Pioneer, and another vessel anchored nearly abreast of the pier, a distance of one hundred yards off. Immediately after leaving the pier, it was discovered upon the Fairy Queen that the Columbus was opening from Hammond-street pier above, about two hundred feet out from the docks, and was apparently coming directly upon the Fairy Queen. The engine of the latter boat was then immeditely stopped and backed, and she receded a short distance towards the slip, with intent to get back into it; that being found impracticable, in order to lessen the peril of the collision, her engine was again reversed, and an attempt made to move ahead, when the stem of the Columbus struck and perforated the Fairy Queen, and caused her to sink immediately. The number of steam craft in this harbor, running in and out of its various slips at all hours, some at fixed times and others indefinitely, renders it important to the common safety of navigation along the wharves, that the law regulating their movements, in approaching and leaving the slips, should be well understood and strictly enforced. That consideration calls for a fuller notice of this case than its special difficulties would demand.

A steamer, although appointed to go out at fixed periods, is bound to remain in her slip, notwithstanding the time of her departure has arrived, if a vessel is seen, or is in a position to be seen outside, which she will be in danger of striking if got under way at the time. But she is not compelled to lie waiting the expected arrival of another vessel, whose period of return to the same point or known time of passing it is about to expire. The evidence goes no further here than to fix about the usual time the Columbus passed that point daily, and shows that a variance of ten or fifteen minutes in her arrivals was not unusual. It also proves that two minutes would be sufficient time to carry the Fairy Queen out of her way, after she reaches the place where she may be seen approaching.

The Columbus was not discovered in that interval of time on this occasion, because a vessel, loaded with hay, lying at the end of Charles-street pier, intercepted the view from the Fairy Queen in that direction. When the Columbus came out from behind that vessel, and the ferry-boat had passed out of her slip sufficiently far to bring the Columbus in sight, the two boats were found in such hazardous proximity, and the danger of collision was so imminent, as naturally to create uncertainty and confusion on board the ferry-boat, and in my opinion, the collision cannot rightfully be charged to any culpable misconduct of hers, if an hypothesis may be framed

upon which a different course would have freed her from the danger. She did what in the exigency seemed to offer a chance of rescue, and whether any thing else could in reality have better served to that end, must be only matter of conjecture.

The claimants have not, therefore, in my judgment, succeeded in protecting themselves, by showing that the collision was produced by any blamable omissions or acts of the Fairy Queen. But to throw upon the claimants the consequences of this disaster, more is incumbent upon the libellants than to prove themselves clear of blame;—they must make it manifest that the loss was occasioned by the fault of the Columbus. This steamboat made daily trips between New York and Sing Sing, landing both ways at Hammond-street dock, a distance of one thousand feet north of Christopher-street pier. The landing had that afternoon just been made, and she was under way towards her berth at Chambers-street, moving at a slow rate, about two hundred feet out from the docks. Two or three vessels were lying at anchor below Hammond-street, and one hundred yards or more from the docks. The steamboat Pioneer was running a few yards ahead of the Columbus, on her starboard side, and close outside of the anchored vessels. About opposite, or slightly above Christopher-street, and just astern of the vessel anchored lowest down, the Pioneer changed her course to come into the slip, when the engine of the Columbus was immediately stopped and reversed, and worked back with all its power till the collision occurred.

The witnesses differ in opinion as to the exact place the Columbus had reached when the collision took place. The pilot of the Pioneer thinks it was opposite Charles-street. The pilot and engineer of the Fairy Queen place her below Amos-street; whilst witnesses on the Columbus suppose her at Charles-street, or between that and Amos, or against the Amos-street cross-pier. No witness supports his estimate by any collateral fact which gives certainty to it. The differences in estimates may arise from looking at and from different parts of the Columbus, (she being one hundred and eighty feet long, and nearly or quite extending over the space between the two slips,) or from oblique ranges of vision, or from a few seconds difference of time in observing her, when the impetus given by the wind and tide would necessarily urge her forward with considerable rapidity. Either of these circumstances might reasonably account for the disagreements of the witnesses in this particular. The Columbus was managed in this respect solely with regard to the movements of the Pioneer, and to avoid coming in contact with her. The Fairy Queen was first noticed from the Columbus, after the order had been given to back the latter, and when the former was just showing herself beyond the end of the pier, and moving out of her slip.

Upon this evidence there is no ground for imputing blame to the Columbus, in the measures taken or omitted by her, after she and the Fairy Queen came in sight of each other. The measures she took in order to avoid the Pioneer were those which would have been demanded of her had she been acting in respect to the Fairy Queen, also, and for the supposed omission of which, her coming upon the latter is imputed to her as a fault. Nor is the Columbus chargeable with want of precaution in advancing so near to the Fairy Queen without discovering her. The reasons assigned by the libellants as an adequate excuse to the Fairy Queen for not discerning the Columbus, equally enure to the protection of the Columbus. The sloop lying between the two boats interposed the same obstacle to the view of each. The Columbus was not called upon to notice the position of the Fairy Queen, or her probable purposes, until she showed herself in motion; and it is clearly proved that did not occur until the engine of the Columbus was already reversed, and she was in the act of working back to avoid the Pioneer. This was the appropriate and only means in her power for protecting the Fairy Queen also. The Columbus was on a track safe for her to run, and the most prudent watchfulness would exact no more from her than to guard against vessels under way or lying at anchor outside the slips. She had a right to rely upon the presumption that her position and direction would be observed by any vessel desirous to get under way, and that such vessel would not put out to cross her track without being sure of sufficient distance and speed to render such movement safe. It would have been gross remissness in each boat to have pressed ahead in their relative nearness to each other, had no accidental impediments prevented their discerning those movements at the moment. The Fairy Queen would have been culpable in leaving her fastenings before the other was clear of her track, and the Columbus guilty in continuing her headway when it must have been dubious whether she had room to pass the ferry-boat safely.

Upon the testimony, I regard the collision as a pure casualty, so far as the agency of the Columbus was concerned, attributable to no fault or negligence on her part, and that she is, therefore, not liable to respond for the damages arising from it. The matter of costs is undoubtedly very much under the discretion of the court. Canter v. American Ins. Co., 3 Pet. [28 U. S.] 307; U. S. v. The Malek Adhel, 2 How. [43 U. S.] 210. The general principle is, as at law and in equity, that costs, in causes of damage, in this court, follow the decision. The Ebenezer, 7 Jur. 1117; The Athol, 1 W. Rob. Adm. 374. In cases of collision, however, the usage is to charge them upon the party most to blame. The Celt, 3 Hagg. Adm. 321. If neither party is found culpable, each pays his own costs. The Washington, 5 Jur. 1067. In the English

admiralty, where both vessels are to blame, it would seem that the costs are imposed on both in common. Id. No fault is fastened upon the Fairy Queen in this case, and accordingly each party must pay his own costs. Decree accordingly.

Case No. 3,044.

The COLUMBUS.

[5 Sawy. 487.][1]

District Court, D. California. May 12, 1879.

DOMESTIC MATERIAL-MEN—MARITIME LIEN.

No lien exists in favor of a domestic material-man who has supplied a vessel in her home port at the request of her master, after having been notified by the owner that she had been let to the master to be run on shares and to be manned and victualled by him, and that if supplies were furnished her, it must be exclusively on his personal credit.

[Cited in The S. M. Whipple, 14 Fed. 357; The William Cook, 12 Fed. 920; The Hattie Low, 14 Fed. 880; Stephenson v. The Francis, 21 Fed. 726; The Samuel Marshall, 49 Fed. 759.]

In admiralty.

D. T. Sullivan, for libellant.

Milton Andros, for claimant.

HOFFMAN, District Judge. The question to be determined in this case is—Does a lien exist in favor of a material-man who has supplied a vessel in her home port at the request of her master after having been notified by the owner that the vessel has been let to the master to be run on shares, and to be manned and victualled by him, and that if supplies are furnished to her it must be exclusively on his personal credit?

The supreme court has decided in the case of The Lottawanna, 21 Wall. [88 U. S.] 585, that under the general maritime law, as received in the United States, no lien exists in favor of a material-man who supplies a vessel in a port of the state in which her owner resides; but, that where the state laws create a lien for such supplies, it may be enforced in the admiralty courts of the United States. The inquiry, therefore, in the present case is, does the statute of this state create such a lien? Section 813 of the Code of Civil Procedure provides: "All steamers, boats and vessels are liable: 1. For services, etc. 2. For supplies furnished in this state for their use at the request of their respective owners, masters, agents, or consignees. * * * Demands for these several causes constitute liens upon all steamers, vessels and boats, and have priority in the orders herein enumerated over all other demands; but such liens continue in force for the period of one year."

In the case of The Young Mechanic [Case No. 18,180], Mr. Justice Curtis considered very carefully the nature and effect of a similar lien created by the laws of Maine. He held that it was a maritime lien, conferring a jus in re and constituting an incumbrance on the property, and existing independently of the process used to execute it. He further held that the statute conferred on mechanics and material-men such a lien on domestic vessels as the general admiralty law had previously allowed to them on foreign vessels. Of course it was not intended by this decision to hold that the liens were identical in every respect. The state laws may prescribe the mode in which the lien they create may be acquired or perfected. They may also limit their continuance to a specified period. But, except where the state laws otherwise in terms provide, the lien is to be regarded as maritime, and to be subject, as to its origin and incidents, to the same rules by which liens on foreign vessels are governed.

It is well known that these state lien laws were passed after the decision in the case of The General Smith [4 Wheat. (17 U. S.) 438], which declared that the existence of liens in favor of material-men in the home-port of a vessel depended on the local law. The case was generally regarded, however (and, it would seem from the case of The Lottawanna [supra], justly), as deciding that by the general maritime law, as received in the United States, demands of that kind were not attended by any lien on the vessel. The statutes in question were passed to remedy this defect, and to give to domestic material-men the same protection which the maritime law afforded to foreign material-men. There is no reason to suppose that they were intended to do more, or that it was sought to withdraw the demands of domestic material-men from the operation of the general rules and principles by which maritime liens are governed. Tested by those rules and principles, I think it clear that the lien claimed in this case cannot be sustained.

The authority of the master to bind the vessel, or her owner, results from his office. At the present day he has in general ceased to be, as formerly, the gerant, or active partner of a societe en commandite, and has become the stipendiary agent or prepositus of the owner. As such he is, of course, bound to obey the instructions of the latter. But the law attaches to his office certain powers and rights within the limits of which his acts, though in violation of his instructions, will bind the vessel and her owner in favor of third persons, who deal with him in good faith, and in ignorance of his instructions, and are unable, by reasonable diligence, to ascertain that he is exceeding his powers.

The limitations on the master's authority to bind the ship for supplies and necessaries have, in some instances, been enforced with great strictness, and the principle is firmly established, "that the supplies must appear

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

to be reasonable, or the money advanced for the purchase of them to have been wanting, and there must have been nothing in the case to repel the ordinary presumption that the master acted under the owner's authority." 3 Kent, Comm. 212. But if it be made to appear that the credit to the ship was unnecessary, either by reason of the master having funds in his possession applicable to the expenses incurred, or credit of his own, or of his owners, upon which funds could be raised by the use of reasonable diligence; and that the material-man knew, or could, by proper inquiry, have readily informed himself of the facts, the lien will not be supported." The Grapeshot, 9 Wall. [76 U. S.] 137; The Lulu, 10 Wall. [77 U. S.] 192.

Thus, where the master's authority to raise money on the credit of the vessel was by the written instructions of the owner limited to a pledge by way of bottomry, and he attempted to hypothecate the vessel in another form, it was held, that no lien was created in favor of a material-man who knew that he was acting in violation of his instructions. The Woodland [Case No. 17,976]. In this case, Mr. Justice Benedict observes: "The master has no power to bind the owner of the vessel, or the vessel herself, beyond the authority given to him by the owner, and the extent of such authority must be limited to the express instructions of the owner, or to instructions to be implied from the law of the country to which the vessel belongs, and where the owner resides. Private instructions, unknown to the person who advances money for necessaries, cannot affect the rights of such person, when he knows that the general maritime law of the country to which the vessel belongs imports authority in the master to make the contract relied on. But, even where such law, in the absence of instructions, would import such authority, instructions which limit such authority will, if made known to the party who contracts with the master, before the contract is made, operate to prevent such party from claiming against the owner of the vessel anything which does not fall within the scope of such limited authority."

Debts due for work and materials furnished to a vessel are regarded by the maritime law with great favor, and Valin and Emerigon both agree, that workmen employed by a master carpenter or caulker, who has contracted with the owner, have a lien on the vessel for the sums due them, unless notice has been given to them in order that they may not be deceived. Emer. Contr. a la Grosse, 229. See Francis v. The Harrison [Case No. 5,038]. A portion of the elaborate brief, filed by the learned advocate of the libellant, is devoted to showing, that a charterer to whom a vessel is hired in such a way as to make him owner for the voyage, or a master who is navigating the vessel, under an agreement to victual and man her, can bind her by their contracts for supplies and materials. But this position is not disputed.

It may also be conceded, that the lien for supplies may be supported, although the furnisher knew that, by the terms of the charter, the charterer was to supply the coal for a steamer, or that the master, by his agreement, was to victual and man the vessel, let to him to be run on shares. The City of New York [Case No. 2,758]; The Monsoon [Id. 9,716]. But in both these cases the supplies were furnished to the vessel in a foreign port, and in the course of a voyage. In The City of New York [supra], Mr. Justice Nelson thus states the reason of the rule: "Upon any other rule the master or agent of a vessel, in distress in a foreign port, would oftentimes find himself unable to procure the necessaries essential to his relief. The voyage might be broken up for want of supplies, or the vessel might go to decay for want of proper repairs. I have found no case where it has been held that this knowledge on the part of the persons furnishing the supplies, or making the repairs, under the circumstances stated, affects the right to charge the vessel as security for the payment."

In the case of The Monsoon [supra], the head note, prepared, it is presumed under the direction of the judge, expressly limits the rule to cases of supplies furnished to a vessel "not in her home-port." In these cases necessity calls into activity the extraordinary powers of the master, and the owner may reasonably be presumed to have contemplated and consented in advance to their exercise, and even to the violation of his own instructions, when indispensably necessary for the safety of the vessel, or the prosecution of the voyage. But these considerations have evidently no application to a vessel in her home port, where her owner resides, and where the supplies have been furnished, not merely with full knowledge of the agreement between the owner and the master, but after express notice that if furnished it must be on the credit of the master exclusively. See The John Farron [Case No. 7,341].

The material-man, who, after such a notice, persists in furnishing supplies to the master, which are to be a charge upon the vessel, in effect aids the latter in violating his contract, disobeying his instructions and committing a virtual fraud on his owner. It would not, perhaps, be going too far to say that under these circumstances the material-man is estopped to assert that he colluded with the master to violate the rights of the owner; and that he must be conclusively presumed to have dealt with him on his personal credit exclusively.

It is urged that the statute confers the lien in absolute and unqualified terms, and that the owner cannot, by any act of his, withdraw his vessel from its operation. But this is clearly a petitio principii.

The question is, does the statute confer the lien in all cases where the supplies are fur-

nished at the request of the owner, master, or consignee, or agent of a vessel? or is not the question, whether the lien has been created to be determined by applying to it the rules and principles of the maritime law and the law on the subject of agency? Unless this latter view be accepted the consequences would be anomalous and absurd. Would it be contended, that where the owner himself attended to the supplying, repairs or equipment of the ship, the consignee could, without authority from him, bind the vessel for supplies furnished by a material-man, fully apprised of the facts? Must not the "agent" spoken of in the statute be an agent actually or apparently authorized by the owner to represent him? And yet, the statute if it creates, in absolute terms, a lien for supplies furnished at the request of the master, does the like, when they are furnished at the request of the "consignee" or "agent." Again, the statute creates the lien in general terms for "supplies," and for "services rendered on board" the vessel. It will not, I think, be disputed that the supplies must be reasonable in quantity and kind, and apparently, at least, necessary and proper for the service in which the vessel is engaged. The phrase, "services rendered on board," must be construed with a similar qualification. It would not include the services of musicians hired for the master's amusement, or those of a nurse or physician to attend his child, who might happen to be on board.

I mention these illustrations to show that the words of the statute cannot be taken in an absolute or literal sense, and that they must be read by the light of the established principles and rules which are applicable to the subject to which they refer.

For these reasons I am of opinion that the lien conferred by the statute is essentially a maritime lien, that it is subject to the same rules and to be tested by the same principles as those which apply to liens for supplies furnished to a foreign vessel, and that it was not intended to confer upon a "master, agent or consignee" an irrevocable power to hypothecate the vessel for supplies in the port where the owner resides, contrary to his instructions, and in spite of his protest, and that the material-man, who, with full notice of the circumstances, furnishes supplies to the master, must look to him personally, and not to the owner or the vessel for repayment.

It is suggested that the establishment of a fixed, certain and inflexible rule, as to the rights of material-men, would promote the interest of commerce. But those interests have not been found to require the adoption of such a rule in the case of supplies furnished in foreign ports. In those cases good faith and reasonable diligence are exacted of the material-man, while the master is strictly confined within the limits of his actual or apparent authority. I should, moreover, be inclined to fear that the practice of letting vessels to persons of inconsiderable pecuniary responsibility to be run on shares, would fall into disuse if the owners were informed, that by no notice, agreement, or other acts of theirs, they could prevent the vessel from being mortgaged for debts for which, by the agreement between them, the master was to be exclusively responsible. A useful and meritorious class of men of energy and enterprise, but of small means, would thus be deprived of the opportunity of bettering their condition by sharing in the fruits of their own exertions, and be driven to accept a purely stipendiary employment.

With regard to the facts of this case, it is sufficient to say, that the proofs seem to me to substantially sustain the allegations of the answer.

COLUMBUS, The (SANDERSON v.). See Case No. 12,299.

COLUMBUS (UNITED STATES v.). See Case No. 14,841.

COLUMBUS, C. & I. C. RY. CO. (PITTSBURG, C. & ST. L. RY. CO. v.). See Case No. 11,197.

COLUMBUS, The CHRISTOPHER. See Cases Nos. 2,705 and 2,706.

COLUMBUS, ETC., R. CO. (DIXON v.). See Case No. 3,929.

Case No. 3,045.

COLUMBUS INS. CO. v. CURTENIUS et al.

[6 McLean, 209.][1]

Circuit Court, D. Illinois. Oct. Term, 1853.

OBSTRUCTION TO NAVIGATION BY STATE AUTHORITY—INJURY TO VESSEL—PLEADING.

1. The whole legislation from the ordinance of 1787 to the present time, clearly indicates that congress has intended that the Mississippi and its navigable tributaries should remain free from all material obstruction to their navigation.

[Cited in Hatch v. Wallamet Iron Bridge Co., 6 Fed. 333; Huse v. Glover, 15 Fed. 297.]

2. A state cannot authorize any material obstruction to be placed in the channel of a navigable tributary of the Mississippi.

3. The declaration alleged that the defendants had placed piers in the principal channel of the river Illinois, so as essentially to obstruct its navigation, and that in consequence of such obstruction a loss was sustained. The defendants pleaded that in placing the piers there they had complied with an act of the legislature of Illinois, authorizing a bridge to be constructed. *Held*, that the plea was not a good defense to the action, but that it must go further, and deny that the bridge was a material obstruction to the navigation of the river.

[Cited in Missouri River Packet Co. v. Hannibal & St. J. R. Co., 2 Fed. 290.]

At law.

Lincoln & Chumasero, for plaintiffs.

Logan & Powell, for defendants.

DRUMMOND, District Judge. This is an action brought by the plaintiffs as insurers of a canal-boat and cargo of wheat, which

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

were lost by the canal-boat's striking the piers of the bridge built by the defendants, near Peoria, while on the passage from Peru to St. Louis, and which loss the plaintiffs have been obliged to pay. The canal-boat was towed by the steamer Falcon at the time of the loss, 19th March, 1849. The declaration alleges that the defendants placed piers in the principal channel of the Illinois river, a navigable river free to all the citizens of the United States, so as essentially to obstruct the navigation of the same, and that in consequence of such obstruction the loss above mentioned occurred. There are different counts, varying the form of the statement, but this is the substance in each. There are several pleas put in by the defendants which rely upon the following defense. That by an act of the legislature of Illinois, of 26th January, 1847, they were authorized to erect the bridge, and place as many piers in the bed of the river as might be necessary for the support and construction of the bridge, provided a space of at least seventy-five feet from pier to pier, and embracing the principal channel of the river be left and always kept open for the passage of all craft navigating the river, and they aver that the demands of the law have been complied with, and particularly that they have in the precise language of the above proviso, left and kept open the proper space, embracing the principal channel, for the passage of all craft navigating the river. A demurrer has been interposed to these pleas, and the question for the court to determine is, whether the matters stated in the pleas constitute a defense to the action. In other words, had the state of Illinois the power to authorize the construction of such a bridge? This is the only question which has been argued.

The allegation by the plaintiffs is, that the piers which have been placed in the principal channel of the river by the defendants, essentially obstruct its navigation. The only way in which this is met by the defendants, is by the statement that they have kept open a space of seventy-five feet, embracing the principal channel, for the passage of all craft navigating the river. If, therefore, under the law as it stands and the pleadings in this case, the defendants should establish that they had left a space of seventy-five feet, embracing the principal channel, for the passage of river craft, that would be a complete defense to the action, though it might be true that the piers were so placed as to constitute an essential obstruction to the navigation of the river, and by reason thereof the plaintiffs suffered the damage complained of. And as a necessary deduction from this we must admit that if the legislature should declare that a certain space left in a navigable river was sufficient for the free navigation of the same, that declaration would be binding and conclusive on all the world. And, in fact, that is the ground assumed on the argument by the defendants' counsel, and they have even gone further, if this indeed is going further, and insisted that the state had the right totally to obstruct the navigation of the river. It will be seen, therefore, that the question, as it is now presented, is not whether Illinois had the power to authorize the construction of a bridge across a navigable stream, provided it did not essentially impede the navigation of the river; neither is it, whether this particular bridge, built by the defendants, is an essential obstruction, because that is a question of fact to be determined by evidence; but whether the court will presume that it is not an obstruction, because the defendants have left open a passage of seventy-five feet, in opposition to the assertion placed upon the record that it is.

The first point to be determined is, whether the river Illinois, over which this bridge has been erected, is in law a navigable river free to all citizens. The tide does not ebb and flow there, and technically, according to the common law, it is not navigable, though it is so in fact. But, even if it is considered navigable, and if in this respect it stands upon the same footing as rivers where the tide ebbs and flows, it does not follow that the power of the state is not plenary over it, because, as we shall see hereafter, the states have in some instances totally obstructed navigable streams. The question is, is it navigable and is it free? By the ordinance for the government of the territory northwest of the river Ohio, of 1787, it was provided (article 4) that the navigable waters leading into the Mississippi and St. Lawrence should be common highways, and forever free to all the citizens of the United States. It is said that this provision of the ordinance is not in force. This seems to be the doctrine now established by the supreme court of the United States, contrary to what has been the general understanding for many years, in the states carved out of that territory. Permoli v. First Municipality, 3 How. [44 U. S.] 589; Pollard v. Hagan, 3 How. [44 U. S.] 212; Strader v. Graham, 10 How. [51 U. S.] 82. It was never doubted but that any provisions of the ordinance which were contrary to the constitution of the United States, and the laws passed in pursuance thereof, or to the constitutions of the states formed out of that territory were abrogated, because the "common consent" mentioned in the ordinance was then presumed. But it seems certain that congress did not exactly regard the ordinance as at an end, by the adoption of the constitution of the United States, as is plain from the very first law on the subject adapting it to the constitution (1 Stat. 50). And in allowing the various states which were formed out of that territory to adopt state governments, provision was made that they should not do anything repugnant to the ordinance,

with certain specified exceptions. As to Ohio, act of April 30, 1802, § 5 (2 Stat. 173). As to Indiana, act of April 19, 1816, § 4 (3 Stat. 289). As to Illinois, act of April 18, 1818, § 4 (3 Stat. 428). And the same is true of the states since admitted, Michigan and Wisconsin. And congress extended the provisions of this ordinance, except the introductory clause, over some of the southwestern states. But without dwelling upon this part of the subject, which is only mentioned for the purpose of showing how fully this ordinance was followed up by congress, let us see how the question stands upon acts of congress passed from time to time since the organization of the government. The government started with the declaration that the navigable waters leading into the Mississippi should be common highways and forever free. It is said by the court in the case of Strader v. Graham, already referred to, that the new government (constitution and laws of the United States) secured to the people of the northwestern states all the public rights of navigation and commerce which the ordinance did or could provide for. It would be a curious commentary upon this language to say that the western states can materially obstruct or dam up the great navigable rivers within their borders. But the legislation of congress seems to warrant the opinion expressed by the court. Besides the acts already referred to, many others may be mentioned as indicating the views of congress as to western rivers. In the act providing for the sale of lands northwest of the Ohio and above the mouth of the Kentucky, of May 18, 1796 (1 Stat. 464), the ninth section declares that all navigable rivers within the territory to be disposed of by that act, shall be deemed to be and remain public highways. And so in relation to the rivers within certain boundaries, by the sixth section of the act of June 1, 1796 (1 Stat. 491). The same provision was applied to all the rivers of the Indiana territory, north of the Ohio and east of the Mississippi, of which Illinois then formed a part, by the sixth section of the act of March 26, 1804 (2 Stat. 277). The seventeenth section of the act of March 3, 1803 (2 Stat. 235), made the same rule applicable to all navigable rivers within the territory of the United States south of the state of Tennessee. And so, as to the navigable waters in Louisiana. Act Feb. 20, 1811, § 3. And it was an express condition of her admission into the Union, that the Mississippi and the navigable waters leading into the same should be forever free. Act April 8, 1812 (2 Stat. 642, 703). The same rule was applied to the rivers of Alabama (Act March 2, 1819); and to Mississippi (Act March 1, 1817; 3 Stat. 492, 349); and to Missouri (Act June 4, 1812, § 15; 2 Stat. 747). Indeed, without proceeding further, it may be safely affirmed that in no instance has congress permitted an occasion to pass without declaring that the Mississippi and its navigable tributaries shall remain public highways and forever free. These various enactments clearly prove the extraordinary solicitude with which congress has from the very foundation of the government watched over this subject. It would seem impossible to misapprehend the motive of such legislation. But it is said, that the new states having come into the Union upon an equal footing with the original states, these various laws in relation to the navigable rivers are not binding on the new states, unless as regulations of commerce, and that, being contained in land laws, most of them are mere territorial regulations, and temporary in their character. Now, it is immaterial whether congress has legislated under the impression that a part of the ordinance of 1787 was still in force, although it is not; provided it is apparent from its whole tenor of legislation that it has re-enacted such part and given it continued operation. And that does seem to be the fact in this instance. If we find a law of congress, and more especially if we find a series of laws all tending to the same result, the main question is not, whether congress was looking to this or that part of the constitution for the power to enact, but is the power in the instrument? If it is, it is a binding, valid law, no matter what part of the constitution congress was thinking of at the time of its passage. It has sometimes happened that congress has passed laws as they supposed under one part of the constitution, and the supreme court has given them effect under another. I think, therefore, that congress has intended, and carried that intent into effect, to make the Mississippi, and the navigable waters leading into it from this state, common public highways and free to all the citizens of the United States. To hold otherwise would be in effect to decide that Illinois and Missouri, or Illinois and Iowa would have the right to shut up the Mississippi river anywhere above a port of entry, if indeed it may be considered thus qualified. For though it has been thought that there is some magic power about a port of entry, it will be found, on examination, that the distinction which is sometimes taken between navigable waters above and below a port of entry, is rather fanciful than real.

If, then, congress has legislated rightfully on this subject, the next thing to be considered is, how far that legislation has restricted the power of the states. Do the navigable rivers declared free by congress stand upon the same footing, and not otherwise, as rivers where the tide ebbs and flows? If there is no difference, then the subject is by no means free from difficulty, because the states have in some instances partially, and in others, totally, obstructed rivers navigable at common law. In Massachusetts, the doctrine seems to be maintained that the state has the power materially to

obstruct the navigation of a river. In Com. v. Breed, 4 Pick. 460, it was proved that a bridge built over a navigable stream prevented the passage of vessels that were accustomed to pass there before. And the court say that it was a power that had been exercised from the commencement of that government without objection. And they say further that, though great vigilance has been exercised in requiring bridges to be provided with suitable draws for the passage of vessels, yet in some instances the passage of vessels of a description which before had been accustomed to pass had been entirely prevented. And they say it rests with the legislature to determine when the public convenience requires these partial obstructions. There seems to have been no question made as to what would have been the effect of the exercise of the power of congress to regulate commerce. The supreme court of the United States have gone even further than the court of Massachusetts. The state of Delaware had authorized the erection of a dam across a navigable stream, and it was erected accordingly. Some persons navigating the creek with a vessel licensed and enrolled, took away the dam as an unlawful obstruction to the navigation. Suit was brought, and the question was raised as to the power of the state to erect the obstruction. And the supreme court, in conceding the power to the state, do it upon the express ground that congress had not legislated on the subject, admitting that it would be different if congress had ever exercised the power with which it was vested. Wilson v. Black Bird Creek Marsh Co., 2 Pet. [27 U. S.] 245.

In New York, the right of a state has been placed on somewhat narrower ground. The legislature of New York had authorized the construction of a bridge across the Hudson river, at Troy, where the tide ebbed and flowed, and it was navigable; but it was required to be done so that the stream should be restored to its former state, or in such manner as not to impair its usefulness. An information was filed on the part of the state, alleging that the place where the bridge was built was an arm of the sea, in which the tide ebbed and flowed, and navigable for vessels trading in pursuance of the acts of congress. The defendants relied upon the act of the legislature, and averred that they had left over the main or principal part of the channel an opening for a convenient and suitable draw to enable vessels navigating the river to pass and repass, and so as to restore the river to its former state, or in a sufficient manner not to have impaired its usefulness as a public navigable river. The point was thus made as to the power of the state to give the authority. It will be observed that there was no averment on the part of the people that the bridge, as constructed, essentially obstructed the navigation of the river. People v. Rensselaer & S. R. Co., 15 Wend. 113. The court decided that it was the exercise of a valid power, but say, that the place where the bridge was built is one which coasting vessels have a right to pass, and where any obstruction entirely preventing or essentially impeding the navigation would be unlawful. They admit that a power exists in the states to erect bridges over navigable waters, if the wants of society require them, provided such bridges do not essentially injure the navigation of the waters which they cross. But they say that the power must be considered as surrendered by the states, so far as may be necessary for a free navigation. As has been already mentioned, the ordinance of 1787, with the exception of the anti-slavery article, was extended over some of the southwestern states, for instance, over Alabama. By that ordinance the new states were to be admitted into the Union upon an equal footing with the original states in all respects whatever. This applied to Illinois and to Alabama. It was a trust which the general government was obliged to fulfill. But when Alabama was admitted into the Union, there was a compact made by which all navigable waters within the state were to remain public highways, and free to all citizens of the United States. And the supreme court say, in Pollard's Lessee v. Hagan, already cited, that this compact would be void, if inconsistent with the constitution of the United States. Alabama being equal with the other states, no restriction could be imposed on that state which congress had not the right to impose upon others. If in the exercise of the power, congress could impose the same restrictions upon the other states as were imposed by that compact on Alabama, then it was a mere regulation of commerce among the several states, and therefore as binding on the other states as on Alabama; that is, as binding, if the power was exercised by congress: for obviously they do not mean to be understood as asserting that congress could not exercise this power as to some of the navigable rivers of the United States, leaving it dormant as to others. And they conclude, as by the compact congress had no more power over Alabama than over the original states, it was nothing more than a regulation of commerce to that extent among the several states.

It will be remembered that it had been decided in the leading case of Gibbons v. Ogden, 9 Wheat. [22 U. S.] 1, that the power to regulate commerce included the power to regulate navigation. If this be nearer to the circumstances under which Illinois was admitted into the Union, it will be difficult to distinguish between the two states in this respect. The ordinance of 1787 was extended to Alabama; but that ordinance only referred to the rivers leading into the Mississippi and St. Lawrence. Many of the rivers of Alabama flowed into the Gulf of Mexico, and therefore, when in 1819, it was proposed that

state should be admitted into the Union, it was one of the conditions, and, Alabama acceding to it, it became a compact of admission, that all the navigable rivers within the state should be forever free. This being so, the only question was whether there was anything for the compact to rest upon in the constitution of the United States. And the supreme court, as already mentioned in the case cited, decided that there was. Now it is not unimportant to observe, that in the resolution of congress admitting Alabama into the Union, it speaks of the ordinance of 1787, as articles of compact between the original states and the people and states in the territory northwest of the Ohio, and the same language is used in many of the acts of congress when referring to this ordinance. And in the act of congress authorizing the people of the Illinois territory to form a state government, it is required that their constitution shall not be repugnant to the ordinance of 1787, between the original states and the people and states of the territory northwest of the river Ohio. And the very preamble of the constitution of Illinois sets forth, that "the people of the Illinois territory, having the right of admission into the general government, as a member of the Union, consistent with the constitution of the United States, the ordinance of congress of 1787," &c. And when Illinois was admitted into the Union, on the 3d of December, 1817, the resolution referred to the ordinance as articles of compact between the original states and the people and states in the territory northwest of the river Ohio. There is great reason for saying, therefore, independently of the various statutes which have been referred to, that if the ordinance of 1787 is not in force in Illinois proprio vigore this part of it which we are now speaking of, is in force by virtue of the compact which may be said to have been made since the adoption of the constitution, between the United States and the states formed out of the northwest territory, and that the compact is binding on the states of the northwest territory, for the same reason that it is binding on Alabama, Mississippi or Louisiana. However this may be, that congress has always understood that the navigable rivers of the northwest leading into the Mississippi were free public highways, and so treated them, is most manifest. It may without exaggeration be said, that it has exercised in this respect, from the very foundation of the government, a vigilance that has never slept. Judge Woodbury, in giving a very elaborate opinion in the case of U. S. v. New Bedford Bridge [Case No. 15,867], says, that he has no doubt that the power to regulate commerce, vested in congress, authorizes it to keep open and free all navigable streams from the ocean to the highest ports of delivery or entry, if no higher, and to protect the intercourse between two or more states in all our tide waters. In Washington Bridge Co. v. State, 18 Conn. 53, there had been a bridge erected across the Housatonic, below a port of delivery. This was one of the objections taken, but the court refused to express an opinion on that point, deciding the case upon other grounds. There is a case not yet finally decided, but which is reported on an interlocutory order in 9 How. [50 U. S.] 647 (Pennsylvania v. Wheeling & B. Bridge Co.), which it may not be improper to refer to. (Since finally decided. 13 How. [54 U. S.] 519.) In that case no particular stress seems to have been laid on the fact that Pittsburgh was a port of entry, and it was not noticed in the pleadings that were originally filed in the supreme court. The state of Pennsylvania made application for the removal of the bridge at Wheeling, on the ground that it was an obstruction to the navigation of the Ohio, a navigable river, free to all the citizens of the United States. The defendants justified under charters from Virginia and Ohio, that they had complied with the provisions of the charters. There was a section in the charter from Virginia, which provided that if the defendants built a bridge which should be an obstruction to the river as usually navigated, it should be abated as a nuisance. The defendants admitted that the Ohio river was a free navigable river, but insisted that it did not essentially obstruct the navigation of the same, and introduced and relied upon an act of the legislature of Virginia, of January 11, 1850; which declared that the bridge built was in conformity with law. This of course was equivalent to saying that the bridge, as erected, was not an obstruction to the navigation of the river. And yet it is clear that the supreme court did not consider this act of the legislature of Virginia as conclusive upon all the world, because the main question referred to the commissioner, by the interlocutory order of the court, was to take proof whether or not the bridge was an obstruction to the free navigation of the Ohio river. And it is upon this report of the commission, that the cause is now being argued on the final hearing. In this case, to adopt the reasoning of the defendants would be in effect to admit that the act of the legislature could not be examined; in other words, that no citizen who was injured by an illegal act of the legislature could go behind it to show its illegality. It seems to me, therefore, that the pleas ought to go further than they have done, and they must deny that the bridge is a material obstruction, so that the plaintiffs may show, if they can do so, that it is, and that in consequence thereof, they have sustained the damage mentioned in the declaration.

[NOTE. Thereafter, by agreement, the Peoria Bridge Association was substituted as defendant in the place of the defendants herein. Defendants had previously amended their pleas by leave of the court, and, issue being joined, there was a trial, but the jury, being unable to agree, were discharged by consent of the parties. The suit was subsequently compromised. See Case No. 3,046.]

Case No. 3,046.

COLUMBUS INS. CO. v. PEORIA BRIDGE ASS'N.

[6 McLean, 70.][1]

Circuit Court, D. Illinois. Oct. Term, 1853.

AUTHORIZATION OF BRIDGE BY STATE — OBSTRUCTION TO NAVIGATION — CONSTRUCTION OF STATUTE—INJURY TO VESSEL.

1. The principles declared in Columbus Ins. Co. v. Curtenius [Case No. 3,045]—again affirmed—that the river Illinois is free to all the citizens of the United States. But the legislature had no power to authorize the construction of a bridge which would be a material obstruction to its navigation, nor to declare that a bridge, with a draw of a particular width, was not an obstruction.

2. The true construction of the 2nd section of the act of the legislature of Illinois, of the 26th of January, 1847, is, that a space of seventy-five feet, fairly and substantially embracing the principal channel of the river, must be left open, estimating with reference to its course.

[Cited in Assante v. Charleston Bridge Co., 41 Fed. 366; Hannibal & St. J. R. Co. v. Missouri River Packet Co., 125 U. S. 271, 8 Sup. Ct. 880.]

3. The right of the free navigation of the Illinois, is consistent with the right of the state to construct bridges, provided they do not materially obstruct the navigation. They exist together, and neither can be permitted to destroy or essentially impair the other.

4. The authority to construct a bridge across a navigable stream, should be so exercised as to interfere as little as possible with the free navigation of the river. Every bridge may in one sense be said to be an obstruction; but that delay or risk which is inseparable from the thing which the state has the power to create, does not make it an obstruction in law.

5. The state is to determine when, where, and under what circumstances a bridge shall be constructed; and as a general thing, no third party can question the authority of the state in this respect.

6. If the bridge was an obstruction, the plaintiff cannot recover for the injury, if there was carelessness and negligence in the management of the boat injured.

Mr. Lincoln and Mr. Chumasero, for plaintiff.

Mr. Logan, Mr. Powell, and Mr. Peters, for defendant.

DRUMMOND, District Judge. This is the same case reported in 6 McLean, 209 [Columbus Ins. Co. v. Curtenius, Case No. 3,045]—the present defendant being substituted by agreement for the former defendants. After the decision of the court upon the demurrer, the defendants had leave to amend their pleas, and in their new pleadings traversed the averment in the declaration that the bridge, as constructed, was a material obstruction to the navigation of the river. Issue was joined upon the pleas, and the case was submitted to a jury. It appears by the evidence that the steamer Falcon, on the 22d of March, 1849, having several boats in tow, among which was the canal boat Troy, loaded with wheat, was descending the Illinois river; and in attempting to pass through the piers of the bridge constructed at Peoria, the canal boat struck one of the piers, was stove and sunk, and the cargo lost. The plaintiffs, having a policy of insurance on the canal boat and cargo, paid it, and brought this suit to recover the amount. There were only two questions made in the case;—the first was whether the bridge was a material obstruction to the navigation of the river; and the second, whether the boat had been managed with competent skill. A large number of witnesses were examined on these points, and there was some conflict in the evidence.

Charge of the Court to the Jury.

From an examination of the subject in this case, at a former term, I came to the conclusion which I now repeat to you, that the river Illinois is a navigable stream, free to all the citizens of the United States, and the state could not authorize the construction of a bridge which would be a material obstruction to its navigation, and if you believe from the evidence, that the defendant has placed such obstruction in the river, then no exemption can be claimed by virtue of such obstruction. Whether it is a material obstruction or not, is a question of fact to be determined by the jury, upon a consideration of all the evidence in the case.

Some evidence has been given, which it is insisted proves that the bridge has not been constructed in accordance with the act of the legislature of 1847. It is for you to determine upon the evidence, whether it has been constructed as required by that act. If it has not been so built, then, of course, the defendant cannot claim any protection by virtue of it. The true construction of the second section of the act of 26th of January, 1847, is, that the defendant was obliged to have a space of seventy-five feet, fairly and substantially embracing the principal channel; and if, for any purpose, the bridge was run irregularly across the channel, that was not a compliance with the act, unless the seventy-five feet were left open, across the channel, estimating with reference to its curve. The defendant was not authorized to place any pier in the principal channel, but that must be left open, unless it was more than seventy-five feet wide, and in that event the usual channel for the passage of river craft should be left open. The legislature had no power to declare that a bridge constructed with a draw of a certain width, was not a material obstruction to the navigation of the river; and if the jury is satisfied from the evidence, that the defendant has complied with the act of 1847, still that does not determine the question whether or not it was an obstruction.

The right of free navigation of the Illinois, is not inconsistent with the right of the

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

state to provide means of crossing the river by bridges, or otherwise, when the wants of the public require them, provided such bridges do not essentially injure the navigation of the river. It must be considered as settled, that the right to a free navigation of our western rivers, and the right of the state to adopt those means of crossing them which the skill and ingenuity of man have devised, as both are equally important, are co-existent, and neither can be permitted to destroy or essentially impair the other. The authority to construct a bridge across a navigable river, being in the state, it should be exercised in such a manner as, while it gives full effect to the power itself, it should interfere as little as possible with the other right—that of free navigation; and this is the true test whether a particular structure is such an obstruction as is contrary to law. The state having the power, the state itself, or if delegated to a corporation, the corporation, as a general thing, is exclusively to judge of the time, place and circumstances which were to give it exercise, and if it seems to the state that the necessities of the community call for its exercise, no third party can question the propriety of it, unless under peculiar circumstances, which do not appear to exist in this case. Every bridge—unless, indeed, one suspended over a river so as to be above all vessels and water craft—may, in one sense, be said to be an obstruction; but that delay or risk which is inseparable from the existence of the thing which the state has the power to create, does not make it an obstruction in contemplation of law. The necessity is the justification, and for such delay or risk the law will not give a right of action. These are principles which I had occasion to announce in an investigation which was recently made at Chicago, upon a bill filed by certain parties, to prevent the erection of a bridge across the Chicago river, and they embody my views of the law upon this branch of the case.

The jury are to take into consideration all the facts and circumstances which are in evidence before them—the character of the river itself, the trade upon it, the craft navigating it, and are to judge whether the piers placed by the defendant were a material obstruction. It is almost impossible to do anything more than to lay down general rules, to guide the minds of the jury upon this part of the case. It is in the nature of the subject that no precise and absolute rule can be given to the jury in this case, to enable them to determine whether this particular bridge was an obstruction, because it is the province of the jury to apply the law to the facts, and their conclusions will be influenced by the view they may take of the facts. It may be clear that a supposed bridge is an obstruction and that another is not; but between the two there may be infinite degrees of difference one way or the other, and it may be, and often is, hard to decide where the line of division is, as a matter of fact. If the jury are satisfied from the evidence that the bridge was not a material obstruction to the navigator, then from what has already been said, they will infer it was such a bridge as the state was authorized to erect, or cause to be erected; and the defendant is not liable for any damages sustained by the plaintiff. If the jury still believe the bridge was a material obstruction, then it is their duty to enquire into the circumstances attending the collision of the boat against the pier. In such case, if there was any want of ordinary care, skill or diligence on the part of those navigating the steamer or canal boat, the defendant is not liable.

The plaintiff cannot recover from the defendant, solely on the ground that an obstruction had been placed in the river. Admitting the defendant had obstructed the river, a party cannot, by carelessly or wantonly running his boat against such obstruction, hold the defendant liable, if the boat was sunk. The law will not compensate for carelessness or wantonness like that; for such an obstruction the law would furnish a remedy in another way. The law does not require that there should be extraordinary care or skill—in the case supposed—on the part of those navigating the steamer and canal boat. An error of judgment would not prevent the plaintiff from recovering, unless it was an error involving a want of care, skill or diligence. If they used the usual degree of care, skill and diligence, that was sufficient: the question is not whether the steamer by going in a different channel might not possibly have avoided the danger; but whether ordinary skill was exercised. To determine this, it is proper for the jury to take into consideration the unusual stage of the river, the submersion of the pivot pier, the carrying away of the superstructure, and all the other facts proved, such as the manner of fastening the canal boat to the steamer, &c. It is the duty, undoubtedly, of persons owning boats navigating the river, to employ competent agents in the management of their boats, as captains, engineers, pilots, &c.; and if any damage be sustained in consequence of an omission in this respect, they must bear the loss.

The jury are to take the opinions of the witnesses as to the bridge being an obstruction, and as to the manner in which the steamer and canal boat were managed; simply as opinions of men of experience to inform their judgments, not as absolutely binding them. The jury may form their own conclusions on these points from the whole testimony. In this part of the case, of course, much more reliance ought to be placed on particular facts which establish a conclusion, than on the mere opinions of others. The canal boat and cargo were abandoned to the plaintiff, and were sold, and the proceeds received; if the jury shall find for the plaintiff, the measure of damages is the amount

paid by the plaintiff, with interest from the time of payment, deducting the amount received as the proceeds of the boat and cargo.

The jury, after being kept together a long time, were unable to agree, and by consent of parties were discharged; and the suit was finally compromised.

Case No. 3,047.

COLUMBUS, P. & I. R. CO. v. INDIANAPOLIS & B. R. CO.

[5 McLean, 450.][1]

Circuit Court, D. Indiana. 1853.

CONTRACT BETWEEN RAILROAD COMPANIES — LEGALITY—RESTRAINING BREACH — ABANDONMENT OR TRANSFER OF FRANCHISE.

1. When two railroad companies agree to build a road from certain cities, to connect with each other at a given place, and that the charges for transportation shall be regulated by both companies, and also the meeting of the cars, and the through freight cars, if one of the companies shall change its gauge so as to break up the connection contemplated, an injunction will be granted, to prevent the change of gauge.

2. A contract entered into to make the gauge, by one of the parties, contrary to the law of the state, such contract is not illegal, if it appear it was made in reference to an alteration of the act, and such alteration was procured, before any part of the track was laid.

[Cited in Cook v. Hamilton County Com'rs, Case No. 3,157.]

3. To fix the charge for the transportation of passengers and freight, is the exercise of the franchise by each company, and if they agree that both companies shall regulate this, it is no abandonment or transfer of the franchise of either.

Stanbery, Blackford & James, for complainants.

Andrews & Yandes, for defendants.

OPINION OF THE COURT. On the 30th of January, 1852, the parties in this case entered into the following agreement: "It is mutually agreed by and between the Indianapolis and Bellefontaine Railroad Company of Indiana, of the one part, and the Columbus, Piqua, and Indiana Railroad Company, of Ohio, of the other part, as follows: The lines of said roads from the city of Columbus, Ohio, to the city of Indianapolis, Indiana, shall meet at Union on the line between the said states, in direct connection in the same depot building, and shall be for transportation of freight and passengers a through line between the cities, each company receiving upon the through freight and passengers, in proportion to the length of the road in each, which freight and fare of passengers shall be fixed by the two roads, and to carry out which each shall be authorized to give through tickets, and freight bills on the route, to be accounted for on settlement. The time of running and meeting of the cars, and through freight cars, shall be arranged by the two companies, so as to carry into effect, in good faith, the through business connection on the roads between the two states." This contract was ratified by both boards. Sometime after the above contract was entered into, a further agreement, in regard to the gauge of the road, was considered necessary; and the president of the Indiana board made a contract with the Ohio company, that the gauge on the entire road should be four feet eight and a half inches. The Ohio gauge was fixed by statute at four feet ten inches; and other gauges were prohibited. This contract was never ratified by the Indiana company; and a great number of depositions were taken to show, from the usage of the company, that the contract, made by the president, was binding on it, though not ratified by it. Under the above contract it became necessary for the Ohio company to procure an act of the Ohio legislature, to legalize the gauge it had agreed to establish; and a law to that effect was obtained some four months after the contract was entered into. It was admitted by the parties, that when the first contract was made to connect the two roads at Union, about forty-five miles of the Indiana road was completed from Indianapolis in the direction to Union. These are the leading facts in the case, and the complainants, in their bill, represent, that the defendants are about to change the gauge of their road, so as to defeat the connection agreed upon by the two companies, requiring at Union a change not only of the passenger cars, but also the cars carrying freight; and it is alleged that the same gauge has been adopted as the Cleveland road, to the material and irremediable mischief of the Columbus company, except by an injunction to restrain the Indiana company from carrying out its contract with the Cleveland Railroad Company.

I do not deem it necessary to look into the depositions taken to show that the second contract, as to the gauge agreed upon, was binding on the Indiana company. I think the first contract between the two companies, embraces all the rights of the complainants, which are claimed under the second contract. The contract provided for a road from Indianapolis to Union, and thence to Columbus, in Ohio. It is admitted by the parties that at this time, about forty-five miles of the Indiana road, in the direction to Union, was completed; and that the gauge of that part of the road was four feet eight and a half inches. It also appears that the Ohio company applied to the legislature, and procured an act which legalized the gauge they contracted for, and which conformed to the gauge of the Indiana road. No one can read the contract and not see; that the freight cars were to be run through the entire route. The words are, "The time of running and meeting of the cars, and through freight cars shall be arranged by the two companies, so as to carry into effect, in good faith, the through

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

business connection on the roads between the two states." The running and meeting of the cars would not refer to the through freight cars. If the freight cars are to be run through, they don't meet, in the sense spoken of. The change of freight cars would cause great delay and expense, especially if the freight consisted of live stock. But the passengers can change cars in five minutes. It was therefore proper to provide for the meeting of the passenger cars, and also to regulate "the through freight cars." If the freight cars were to be run through the whole line, it is clear that the gauge must be the same throughout the line. But there is another fact equally conclusive; the Ohio end of the line was made of the same gauge of the Indiana although different from the Ohio gauge provided for by statute, and to authorize which, an act of the Ohio legislature was procured by the Ohio company. And it appears the greater part of the Ohio road has been completed. But there is another consideration which, if possible, is still more conclusive. At the time the first contract was made, it is admitted that more than forty miles of the Indiana road was completed, which was the line of road embraced by the contract. It could apply, from the description in the contract, to no other route. Can a railroad be made without a gauge? In the nature of things this is impossible. It follows then, necessarily, that the gauge of the entire road was the gauge of the Indiana road that was completed, and which was embraced by the contract. Can anything be more conclusive than this? But in addition to these facts, the Indiana company extended its road to Union, or near to it, and the Ohio Company built the Ohio road to Piqua, or near to it, from Columbus, and both roads were made of the gauge of the Indiana road, which had been made before the contract was signed. The work on both sides of Union, under the contract, shows the construction of it by both companies.

An objection is made to the legality of the contract to build the Ohio part of the road, as the gauge is in violation of the Ohio statute. To this it is answered in argument, that the defendants cannot take advantage of the objection, as it is a matter which rests between the state and the complainants, and that the state only can raise this objection. I am not prepared to say that any party, who is called upon specifically to execute a contract may not set up the illegality of that contract, as being against an express statute. But the answer to the objection that although the contract was made, it was with reference to a future execution of its conditions, when the modification of the law of Ohio should be obtained, which removed the objection. And it in fact appears that the construction of the road, by laying down the rails, was not commenced until long after the passage of the amended act by the legislature of Ohio. The law, therefore, was not violated under the contract, nor was it intended to be violated.

It is further alleged that, under the contract the respective companies, by acting together in fixing the rates for the transportation of passengers and freight, conveyed a part of their franchise, which they had no power to do. There is no part of the contract which, in this respect, affects the franchise of either company. The companies may agree, as individuals may agree, to certain rates of transportation which may be considered mutually advantageous. Neither company has parted with its corporate powers; each acts for itself, and under its own powers in fixing the rates of transportation, and they both agree that the charge shall be uniform throughout the line.

An injunction will be issued to prevent the Indiana company from changing its gauge, from Indiana to Union, which it has expressed a determination to do, and had actually commenced the work.

COLWELL, In re. See Case No. 17,529.

Case No. 3,048.

COMBS v. HODGE.

[5 Pittsb. Leg. J. 37.]

Circuit Court, District of Columbia. May 29, 1857.[1]

TRANSFER OF PUBLIC DEBT CERTIFICATES.

[An unauthorized transfer, to a bona fide purchaser, of certificates of a public debt, endorsed in blank to facilitate partial payment, and exchange for other certificates, vests an absolute title in the purchaser.]

[See note at end of case.]

[In equity. Bill by Leslie Combs against John L. Hodge, administrator of Andrew Hodge, deceased, William L. Hodge, and James Love, to recover two certificates for a portion of the public debt of the republic of Texas.

[The certificates in question were issued to complainant, and were only transferable by him or his attorney, or his representative, on the books of the stock commissioner of the republic. He endorsed the certificates in blank, and sent them to the defendant Love in Texas, with authority to receive an anticipated partial payment, and to obtain other certificates of the same description for the residue.

[The defendant John L. Hodge claimed the certificates by purchase of his intestate from Love for full value, and in reliance on the endorsement and Love's apparent authority to dispose of them.][2]

This decision embraces the settlement of

[1] [Reversed by the Supreme Court in Combs v. Hodge, 21 How. (62 U. S.) 397.]

[2] [The facts in the statement are taken from the opinion of Mr. Justice Campbell in the report of the case on appeal to the supreme court.]

a point of law of general interest and importance everywhere, viz.: That certificates of the debt of Texas, endorsed by the parties to whom issued, and placed by them in the hands of an agent to be transferred on the books of Texas, could be by that agent sold to a bona fide purchaser without notice, so as to vest in him the absolute title to them. Its importance arises from its applicability to transactions in stocks generally.

[NOTE. Complainant appealed to the supreme court, which reversed the decree of the circuit court, and remanded the cause with directions to allow the parties to amend the pleadings, and to take testimony if they should be so advised.

[The ground of the reversal, as stated by Mr. Justice Campbell, was that the protection of the law merchant to the holder of negotiable paper taken in the course of business for value did not extend to certificates like those in question, but, assuming that defendant's intestate was a holder for value, the answer failed to state the consideration paid to Love, or the time, place, and circumstances of the contract. Further, it appeared that complainant had not authorized the sale or transfer of the stock, and if there was a power of attorney authorizing Love to sell, as contended by defendant, it was incumbent on the latter to show the absence of collusion. Combs v. Hodge, 21 How. (62 U. S.) 397.]

COMBSTOCK (PHILLIPS v.). See Case No. 11,099.

COMEGYS (VASSE v.). See Case No. 16,-893.

Case No. 3,049.

COMEGYSS et al. v. ROBB.

[2 Cranch, C. C. 141.][1]

Circuit Court, District of Columbia. June Term, 1817.

AMENDMENT OF WRIT.

The court will [not] grant leave to amend the writ, by changing the name of one of the plaintiffs.

Mr. Lockerman, for plaintiffs, moved to amend the writ, by altering the name of one of the plaintiffs from Comegyss to Peerhouse.

THE COURT (nem. con.) refused.

COMEGYSS (VASSE v.). See Case No. 16,-894.

Case No. 3,050.

The COMET.

[1 Abb. U. S. 451; 2 Chi. Leg. News, 301; 5 Am. Law Rev. 184.][2]

District Court, N. D. New York. Feb. Term, 1870.

COLLISION—INSCRUTABLE FAULT—DAMAGES.

1. Where, in a collision case, the evidence is so conflicting or uncertain that the court cannot determine upon which vessel the real cause of the collision should be charged, the damages should be divided between the colliding vessels.

2. The rules and authorities governing the apportionment of damages for collision, in cases of mutual fault, inscrutable fault, and inevitable accident,—elaborately reviewed.

[Cited in The Max Morris, 28 Fed. 884.]

In admiralty. Hearing upon a libel for collision.

The libel in this case was filed by John V. Detlor and others, owners of the Silver Spray, against the Comet, the Lake and River Transportation Company, claimants; and came on for hearing upon the proofs.

The question which vessel was in fault for the collision, was closely contested. But as the decision proceeds upon the ground that the evidence did not enable the court to determine this question, and that the damages must be awarded upon the principle applicable to cases of inscrutable fault, that portion of the opinion which relates to the question of fault is omitted.

George B. Hibbard, for libelant.

H. B. Brown and John Ganson, for claimants.

HALL, District Judge. This is a cause of collision and damage, prosecuted by the owners of the side-wheel steamer Silver Spray, a Canadian vessel, against the propeller Comet, an American vessel, to recover the value of the Silver Spray and her cargo, which were sunk by a collision with the Comet, about ten o'clock in the evening of August 30, 1869, in Lake Huron, near the entrance into St. Clair river, at the foot of that lake.

The night was clear, and the weather fair; and there is nothing in the testimony tending to show that the collision occurred without culpable negligence or gross unskillfulness on the part of those in charge of at least one of the colliding vessels.

It was, therefore, necessarily conceded, upon the argument, that the case was not one of inevitable accident; but the testimony was in many respects conflicting and uncertain, and in some respects entirely irreconcilable; and it is not possible to determine, with absolute certainty, the particular fault or faults to which the collision should be attributed.

(The opinion here proceeds with a review of the evidence bearing upon the question—which vessel was to blame?)

Upon the whole evidence, it can hardly be doubted that there was gross and culpable negligence on both vessels, and the case will be disposed of as one of mutual fault—it being held that this may be properly done upon a clear and satisfactory preponderance of testimony, although it may be impossible to say that there is no reasonable doubt in regard to the specific and particular fault of each vessel, which was one of the proximate causes of the collision.

If, however, it is not a case of mutual fault,

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

[2] [Reported by Benjamin Vaughan Abbott, Esq., and here reprinted by permission. 5 Am. Law Rev. 184, contains only a partial report.]

it is one in which, from the conflicting and unreliable character of the evidence, it is impossible to determine upon which vessel the real cause of the collision should be charged, and therefore a case of inscrutable fault. In either case, the damages must be divided between the colliding vessels. And such will be the final decree of this court in the present case.

As the conclusion that a libelant, in a collision case, is entitled to recover upon a clear and satisfactory preponderance of testimony, although there may be reasonable doubt as to which party is to blame, and the conclusion that in a case of inscrutable fault the damages must be equally borne by the colliding vessels, are directly opposed to a statement of the reporter's headnote to the case of The Grace Girdler, 7 Wall. [74 U. S.] 196, and as that head-note appears to be sustained by a dictum of Mr. Justice Swayne, whose character and learning are deservedly held in very high respect, it has been deemed proper to attempt to show that the head-note referred to was founded solely upon an obiter dictum of that learned justice, and not upon the decision of the court; and also to state the reasons which have induced a decision in opposition to the dictum referred to.

The statement of the head-note referred to is as follows: "Where, in a case of collision, with loss, there is reasonable doubt as to which party is to blame, the loss must be sustained by the one on which it has fallen."

A careful examination of the report of the case of The Grace Girdler [supra] will show that no such question was decided in that case; and that the only foundation for this statement of the reporter is a mere dictum of the learned justice just named, upon a question not discussed by him, and not involved in the decision of the court. Upon the full report, it is very clear that Mr. Justice Swayne and the majority of the court based their decision upon the conclusion that the Grace Girdler was free from fault, and that if the injured vessel was not in fault, it was a case of inevitable accident.

Mr. Justice Swayne states that the point that the injured vessel (the yacht Ariel) was in fault, was not pressed by the counsel representing the Grace Girdler; and that, for the purposes of the case, they held that the yacht was blameless. It is true that he immediately adds: "But she suddenly thrust herself before the schooner (the Grace Girdler) and took the latter by suprise;" and that he subsequently states that "the controlling fact, in the case under consideration, is the sudden change of the leading vessel (the Ariel) to a course across the bows of the one behind her." But these statements were not, apparently, deemed inconsistent with the position that the case was one of inevitable accident; for, immediately afterwards, he proceeds to dispose of the question raised by the appellants under the seventeenth article of the act of 1864, "fixing rules and regulations for preventing collisions on water," and, in conclusion, states: "It would be a strange result if the statute should make an innocent vessel liable for an inevitable accident." After this, there is a short paragraph, stating what is required to entitle a libelant, in a collision case, to recover full indemnity; and then the learned justice proceeds as follows, viz.: "Inevitable accident is when a vessel is pursuing a lawful avocation, in a lawful manner, using the proper precautions against danger, and an accident occurs. The highest degree of caution that can be used is not required. It is enough that it is reasonable. under the circumstances, such as is usual in similar cases, and has been found by long experience to be sufficient to answer the end in view—the safety of life and property. When there is a reasonable doubt as to which party is to blame, the loss must be sustained by the party on whom it has fallen."

And near the conclusion of the opinion it is stated that the district court had acquitted the Grace Girdler, and dismissed the libel; that the circuit court had affirmed the decree, on appeal; that to warrant a reversal it must be clear that the lower courts had committed an error; and that the case was not one of that character.

From the foregoing statements, and indeed from the entire opinion of Mr. Justice Swayne, it is quite evident that the case was decided by the majority of the court as one of inevitable accident, and this is confirmed by the statement of Mr. Justice Davis, in his very brief dissenting opinion (which was concurred in by the chief justice and Mr. Justice Clifford), that he "could not agree that the collision was the result of inevitable accident."

It is also confirmed by the fact that, so far as can be ascertained from the report, the question of the rule of damages in cases of inscrutable fault, had not been discussed by counsel, and that it does not appear that any of the American decisions or authorities bearing upon that question had been cited or discussed by the learned counsel who argued the case, or been considered by either of the judges of the court. Indeed, the only authority referred to in support of the dictum under consideration, is the case of The Catherine of Dover, 2 Hagg. Adm. 154, and the dictum itself seems to be only an incidental remark, rather than the deliberate expression of an authoritative judicial opinion. And certainly there is nothing in the opinion, or in the full report, to show that the point had been carefully considered by the learned judge or by his associates on the bench.

The case of The Catherine of Dover (decided in 1828) is the first reported as having been decided by Sir Christopher Robinson, after his appointment as the successor of Lord Stowell. In submitting the case to the

trinity masters, the new judge said: "The result of the evidence will be one of three alternatives: either a conviction in your mind that the loss was occasioned by accident" (meaning doubtless inevitable accident), "in which case it must be sustained by the party on whom it has fallen; or a state of reasonable doubt as to the preponderance of evidence, which will have nearly the same effect; or thirdly, a conviction that the party charged with being the cause of the accident is justly chargeable with the loss of the vessel, according to the rules of navigation which ought to have guided them." The trinity masters having declared their opinion that the loss was occasioned by accident, imputable chiefly to the improper movement of the Dart (the libelant's vessel), the learned judge declared that he adopted this opinion, "with perfect satisfaction," and dismissed the libel with costs. The question now under discussion did not, it is evident, arise in that case, nor was it at all discussed by counsel or by the court.

The subsequent case of The Maid of Auckland, decided by Dr. Lushington, in 1848 (6 Notes of Cas. 240), did, however, present the question of the rule of damages in cases of inscrutable fault, and though the question does not appear to have been discussed, either by the counsel or by the court. Dr. Lushington, in addressing the trinity masters, said, in substance, that in case they decided that they could not tell which vessel was to blame, the libel and cross libel filed in the case must both be dismissed.

The rule thus announced seems to have been adopted by the English admiralty, without controversy or discussion, and apparently without considering the difference between the common law rule, so adopted, and the rule of the maritime law, and whether the one or the other should be adopted in that court. Its adoption by the English admiralty has not been, and will not be held to be binding upon the American courts of admiralty; and though several of the district courts of the United States have adopted the rule of the maritime law, in exclusion of the common law rule, in such cases, the question is, it is supposed, still an open one in the supreme court of the United States.

Although the question had probably never been referred to in any opinion delivered in the supreme court of the United States, prior to the case of The Grace Girdler, the question was not then a new one in the admiralty courts of this country, and, as before stated, the rule of division of damages in cases of inscrutable fault had been approved by some of those courts. It had also been accepted as the established rule in this country by some of our most distinguished jurists.

Some of these authorities will be presently considered, but it may be well first to refer to the provisions of the judiciary act of 1789 [1 Stat. 76], and the process acts of 1789 and 1792 [1 Stat. 93, 276], as bearing upon this subject; and also to the rule which prevails in the maritime courts of Europe.

By the judiciary act of 1789, original cognizance of all civil causes of admiralty and maritime jurisdiction was given to the district courts of the United States, saving to suitors, in all cases, the right of a common law remedy where the common law was competent to give it; and under this act it has been held that the jurisdiction of those courts embraces all cases of a maritime nature, whether they be particularly of admiralty cognizance or not; and that such jurisdiction, and the law regulating it, are to be sought for in the general maritime law of nations, and are not confined to that of England, or any other maritime nation. Davis v. The Seneca [Case No. 3,650]; The Chusan [Id. 2,717]; Thompson v. The Catharine [Id. 13,949]; The Friendship [Id. 5,123.]

The temporary process act of 1789, provided that the forms and modes of proceeding in the courts of admiralty and maritime jurisdiction should be according to the course of the civil law; and the process act of 1792, which is still in force, provides, in substance, that "the forms and modes of proceeding in suits of admiralty and maritime jurisdiction shall be according to the principles, rules, and usages which belong to courts of admiralty as distinguished from courts of common law," except so far as might have been, or might be otherwise provided by congress or those courts.

Under these statutes, as well as from the character of the question, our courts of admiralty have naturally and properly looked to the admiralty and maritime courts, rather than to the courts of common law, for the rule of damages in collision cases; and, consequently, the rule of the division of damages, in cases of mutual fault, has been firmly established by repeated decisions; first, in the district courts, and more recently by decisions of the supreme court of the United States.

The rule of the division of damages, embracing the case of mutual fault, was recognized and sanctioned by the early maritime codes of Europe; and in cases of mutual fault, it has been adopted by the admiralty courts of England and of this country, in direct opposition to the rule of the common law. But it was not to cases of mutual fault alone that this rule of division was applied by the maritime codes and maritime courts of continental Europe; for the crude provisions of the ancient maritime codes required a division of the damages caused by a collision in the three cases of mutual fault, of inscrutable fault, and of inevitable accident. Laws of Oleron, art. 14; Laws of Wisbuy, arts. 26, 50, 67, 70; Poth. Mar. Cont., by Cushing, 91, 92, arts. 155, 156.

The provisions of the celebrated marine ordinance of Louis XIV. are, perhaps, some-

what more full, definite, and precise than those of the earlier maritime codes.

Articles 10 and 11 of title 7 of this ordinance, have been rendered into English (2 Pet. Adm. append. 57), as follows:

"X. In case of ships running aboard each other, the damage shall be equally sustained by those that have suffered and done it, whether during the course, in a road, or in a harbor."

"XI. But if the damage be occasioned by either of the masters, it shall be repaired by him." And see 2 Valin, Comm. 177–187.

The ancient rule of the division of damages, and which applied equally to the cases of mutual fault, inscrutable fault, and inevitable accident, was doubtless originally adopted because of the difficulty of determining to which vessel the fault which caused the loss should be imputed. Thus Grotius (book 2, c. 17, art. 21), in speaking of a master's liability for damage caused by his slave or beast, says:

"For the master that is not in fault, is not bound to make reparation by the law of nature; no more than he whose ship, without his fault, falls foul upon his neighbor's ship and damages it. Although by the laws of many nations, as by our own, such damages are to be equally divided between them both, by reason of the difficulty of proving the fault." And for a similar reason, the civil law made the several occupants of different parts of a house liable for damages in certain cases without proof of personal fault, unless it could be proved to whom the cause of such damages should be imputed. Domat, Civ. Law, pt. 1, bk. 2, tit. 8, § 1, art. 5.

It is true that the rule which requires a division of damages in collision cases has been much discussed, and sometimes disapproved by elementary writers and learned judges; but it has nevertheless been generally accepted as the rule in common use by the maritime courts of this country and of the European continent, and by the most eminent writers on maritime law. It has had the sanction of Cleirac, Valin, Grotius, Emerigon, Pardessus, and Boulay-Paty, and of Kent and Story, as well as that of the judges of the maritime courts. It has been considered as firmly established in the cases of mutual fault and of inscrutable fault; whilst in this country and in France, as well as in England, the civil law rule (which in this respect corresponds with that of the common law), that in the case of inevitable accident the damage must be borne by the party on whom it has fallen, has, in those cases, displaced the rule of division adopted by the ancient maritime codes.

The Code de Comm. art. 407, contains the following provisions: "In case of running foul, if the occurrence was purely accidental, the damage is borne, without remedy, by the suffering vessel. If the running foul proceeded from the fault of one of the captains, the damage is paid by the one who occasioned it. If there be a doubt which of the two vessels was in fault in running foul, the damage is to be repaired at their common expense, in equal portions between them." Code de Comm., with translation by Rodman, 1814, 232, 233. The original of so much as relates to the question now under discussion, is as follows: "S'il y a doute dans les causes de l'abordage, le dommage est répairé à frais communs, et par égale portion par les navires qui l'ont fait et souffert." Bacqua's Codes, new edition, published by Durand, in Paris, 1856.

As has been said, the ordinance of Louis XIV. made no distinction between the cases of mutual fault, of inscrutable fault, and of inevitable accident; and the Code de Commerce, while it specially adopts the rule of the civil law, and of the common law, in the case of inevitable accident, makes no express provision for the case of mutual fault. Emerig. Ins. (Meredith's Ed.) 327, apparently ignores the existence of cases of mutual fault. He says: "There are three kinds of collision—that which happens from casualty; that which happens by the fault of some one; and that which happens without it being possible to ascertain by whose fault." He further says (page 328), that in the first of these cases, "each vessel puts up with the injury it has received;" that, in the second case (page 329), "the damage shall be made good by the party who caused it." In respect to the third case, he says (pages 332, 333): "If the collision has not happened from casualty, though it is impossible to know by whose fault, it is then a case for dividing the disaster, and making each of the vessels bear one-half of the damage. Such is the sense of article 10 of the ordinance of Louis XIV. 'In case of collision of vessels, the damage shall be paid for equally by the vessels which have done and suffered it, whether on the voyage, or in a roadstead or port.' "

"Stypmanus, Kuricke and Loccenius, say that this division of the loss is prescribed by equity, and on the account of the difficulty of proof. Cleirac appears to confine it to the case where the party doing and the party suffering the damage are to blame, and their excuses are very obscure. Grotius says that, as it is difficult to prove the fault, even when it has been willful, the laws of some countries direct that in the case in question the masters of the two vessels shall bear each an equal portion of the damage. Many cases are found in our books where this division of loss has been decreed on account of the difficulty of the question." And see Arn. Ins. (Perkins' Ed.) 805.

It may be proper to observe that the quotation from Grotius, made by Emerigon, as above stated, is a different translation of a part of section 21, lib. 2, c. 17, which has been hereinbefore referred to in another translation.

Lord Tenterden says (Abb. Shipp. 229): "By the law of most of the maritime states, differing in this particular from the Roman law, which leaves each party to bear his own loss, the cost of damages resulting from collision without fault in the persons belonging to either ship, is to be divided equally between them. The same rule obtains when both vessels are to blame, and when the blame cannot be detected."

The division of damages in cases of mutual fault has been more seriously controverted than the rule which requires such division in cases of inscrutable fault; and so late as 1837, a learned and able writer on mercantile law, in the London Law Magazine, in questioning the rule in cases of mutual fault, ventured to declare that no writer on maritime law applied the rule of equal partition to any case but that of inscrutable fault. Note to Curt. Adm. Dig. 145, and 17 Law Mag. 327.[2]

And in 1848, in the case of The Bay State [Case No. 1,148], Judge Betts, of the southern district of New York, after stating that it was the first case which had occurred in that district in which the question had arisen, and after declaring himself better satisfied with the common law rule, adopted the rule of division in a case of mutual fault as having been sanctioned by Judges Ware and Hopkinson, and impliedly admitted by the supreme court of the United States in Strout v. Foster, 1 How. [42 U. S.] 92; but adding, that the principle deserved the solemn adjudication of our highest tribunals.

The American authorities, with scarcely an exception, affirm the rule of equal division in cases of inscrutable fault.

In 1847, in the case of The Scioto [Case No. 12,508], one of the most learned, as well as one of the most careful of our admiralty judges,—Judge Ware, of the Maine district, —sanctioned the rule in a very carefully prepared and able opinion; and in 1854, in the case of The Nautilus [Id. 10,058], the same learned judge again applied the rule of division in a case of inscrutable fault. And, also in 1854, the learned judge of the Ohio district, in the case of Lucas v. The Thomas Swann [Id. 8,588], unhesitatingly applied the rule of division in a case held to be one of inscrutable fault. In Jarvies v. Maine [Id. 7,224], in the southern district of New York, in 1857, the same rule was adopted under like circumstances. The rule has been acted upon in other districts, in like cases, and it is believed that in all such cases the decisions upon that question have been submitted to without appeal.

The American writers on maritime law, it is believed, without exception, accept the rule of division of damages in cases of inscrutable fault. Story, Bailm. §§ 608, 609, and notes; 3 Kent, Comm. 231; 1 Pars. Merc. Law (1st Ed.) 188; 1 Conk. Adm. (2d Ed.) 378, etc.; Bouv. Law Dict. tit. "Collision;" Fland. Mar. Law, §§ 357, 358.

It is deemed proper also to refer again to the particular language of the dictum of Mr. Justice Swayne, not for the purpose of verbal criticism, but as furnishing additional evidence that it was a hasty and inconsiderate expression, not based upon any well considered or deliberate opinion of that learned judge.

In a case of collision, the term reasonable doubt, may, perhaps, have a somewhat different signification from that given to it upon a criminal trial; but lawyers and judges accustomed to the trial of collision cases (in which, perhaps, more than in any other class of cases, the testimony is very often so conflicting and irreconcilable, that there must be reasonable doubt which party was to blame), will at once admit that if these cases are not to be decided, like other civil cases, upon the clear preponderance of testimony, the majority of those who suffer damage by collision, occasioned by negligence, will find that a remedy is often denied them when it would have been afforded by the admiralty courts under precisely the same circumstances if the new rule had not been adopted.

As further additional evidence of the same character, it may be observed that the dictum of Mr. Justice Swayne is not justified by the dictum of Sir Christopher Robinson, cited in its support. "A state of reasonable doubt as to the preponderance of evidence" in a collision case, is a very different thing from a "reasonable doubt as to which party is to blame;" for in many cases a very clear and decided preponderance of testimony may exist, and the judicial mind yet be subject to reasonable doubt as to which party was to blame.

For these reasons the dictum referred to has not been considered as binding upon this court, and its final decree in this case will provide for a division of the damages.

Decree accordingly.

[NOTE. The Lake & Transportation Company, claimants of the Comet, appealed to the circuit court, where the decree herein was reversed, and the libel dismissed. Case No. 3,051.]

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[2] In the head-note to the case of The Mary Stewart, decided in 1844, 2 W. Rob. Adm. 244, it is stated that "in cases of collision, where the evidence on both sides is conflicting and nicely balanced, the court will be guided by the probabilities of the respective cases which are set up, &c." And see The Speed, Id. 225.

Again, in The Wheatsheaf v. The Intrepide, Holt, Rule Road, 210, 212, 213, Dr. Lushington, in addressing the trinity masters, said: "I am exposed to great difficulty from the extreme contradiction in the evidence in the case;" . . . and "you must consider from the evidence the probabilities on the one side and on the other." And there was a decree for the libelants. And see The Jane and Ellen v. The Emma, Id. 207; The Saucy Lass v. The Bolderaa, Id. 205; The Esther v. The Concordia, Id. 142; The Benedetto v. The Calypso, Id. 117. In the case of The Emperor v. The Zephyr, Id. 24, it was said by the court that the evidence was so conflicting that it was impossible to reconcile it, and that in cases of that description they must be governed by the probabilities. H.

Case No. 3,051.

The COMET.

[9 Blatchf. 323.][1]

Circuit Court, N. D. New York. Jan. 16, 1872.[2]

COLLISION BETWEEN STEAMERS—LOOKOUT—ERRONEOUS MANOEUVRE.

1. In a collision between two steamers, in the night, the S. and the C., the S. was *held* in fault for not having any lookout assigned or stationed for the performance of that duty; and for starboarding, instead of porting, when the two steamers were meeting nearly end on; and for starboarding when she saw the red light of the C., a short distance off, a very little on her starboard bow; and for not stopping and reversing.

[Applied in The Manitoba, Case No. 9,029. Cited in The Ancon, Id. 348; The Jay Gould, 19 Fed. 769.]

2. It being shown that the S. was negligent, she is to be *held* to clear proof of contributing negligence or fault in the C.

[Cited in The Clarion, 27 Fed. 131; Pierce v. The J. R. P. Moore, 45 Fed. 268; The Athabasca, Id. 655; The John King, 49 Fed. 474.]

3. On the evidence, the C. was *held* not to have been in fault.

[Cited in The Sunnyside, Case No. 13,620.]

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

[In admiralty. Libel by John V. Detlor and others, owners of the Silver Spray, against the Comet (the Lake & River Transportation Company, claimants).]

George B. Hibbard, for libellants.

John S. Newberry and Henry B. Brown, for claimants.

WOODRUFF, Circuit Judge. The libel herein was filed by the owners of the steamboat Silver Spray, for damages caused by a collision on Lake Huron, between their vessel and the propeller Comet, in which collision the steamboat was sunk. In the district court, the libellants obtained a decree for contribution, upon the ground that both vessels were in fault. 1 Abb. U. S. 451 [Case No. 3,050]. The claimants, owners of the Comet, appealed, and the cause has been tried in this court.

The Spray, a small steamboat of 150 tons burthen, was on a voyage from Goderich, in Canada, on the east side of the lake, to Sarnia, on the east side of the St. Clair river. She left Goderich about 2 o'clock and 45 minutes in the afternoon of the 13th of August, 1869, and took her course south-west by south, (or, by her compass, south by west half-west,) for Fort Gratiot light, on the American or west side, a short distance north of the mouth of St. Clair river. She continued that course until she made the light, directly ahead, when her course was changed to south-west by south half-south, (or, by her compass, south by west,) in order to enter the St. Clair river at the centre of its mouth. While on this course, at a speed of from nine to ten miles an hour, about 10 o'clock at night, and not far from the mouth of the river, green and white lights were seen, (according to the testimony of six witnesses, who were on board,) which bore a little on her starboard bow. These lights, the witnesses say, proved to be on the Comet. The witnesses differ slightly as to the angle of variation from dead ahead. Her master says, one point on her starboard bow; her mate, one half a point to one point; her wheelsman, one half to one point; a passenger, from half a point to a point; her engineer, that it appeared to bear a little to the right of her course; another passenger says, "on the starboard side." After two or three minutes, the master blew two whistles, and, after that, gave an order to starboard the helm, which was done. The change in the bearing of the green light, if any, during that two or three minutes, was so slight, that the mate thought it bore, when the two whistles were sounded, in the direction in which he says he first saw it, namely, from half point to a point on the starboard bow. The master thinks, that, during that interval, if anything, it widened. Having starboarded, the Spray continued under a starboard helm, until the red light of the Comet was seen. According to the testimony of the passenger, who gives its bearing, "it was in the same direction to us, when first discovered, as the green was when first discovered;" and the mate says, that, prior to that, he had not seen any change in the relative position of the white and green lights previously observed. The master and mate think that the red light was from one to two points on their starboard bow. After seeing the red light of the Comet, then distant, as estimated by the master and mate of the Spray, about 300 feet, the master blew two more blasts of the whistle, and gave another order to starboard, and, immediately after, hard-a-starboard, under the influence of which the Spray swung around two or three points; but no effort was made then or previously to slacken speed, or stop or reverse the engine. The Comet struck the Spray "two or three feet forward of her starboard paddle wheel," the direction of the blow being indicated by the captain as "about seven points between the two sterns." The Comet was a much larger vessel, of over 700 tons burthen, and the injury to the Spray was such that she sank almost immediately after the blow.

The night was clear, and there was nothing in the state of the weather, or of the atmosphere, to justify or explain any mistake or error on the part of either vessel, or excuse any neglect of observance of the rules of navigation, or of the requirements of good seamanship. The Comet was bound from

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

[2] [Reversing decree of the district court in Case No. 3,050.]

Buffalo, New York, to Green Bay. Passing up the St. Clair river, she arrived, shortly before ten o'clock, at the dock in front of the passengers' station of the Grand Trunk Railroad Company, near Fort Gratiot, on the west or American side of the river, and stopped to receive a passenger. When about leaving the dock, her officers saw the lights of vessels apparently about entering the mouth of the river, from the lake, which was about 2,300 feet distant from the dock. In order to avoid them, she "sagged" over to the right or Canada side of the river, near to the shore. Moving up, she passed a schooner, nearly opposite what the witnesses called "Sand Point," on the Canada side, at or about the mouth of the river, leaving her about 200 feet off to port, and blowing one whistle as she passed her. Next, and very soon after, she met and passed a propeller called the Fountain City, and, almost immediately afterwards, the propeller Cleveland, giving them one blast of the whistle as she passed the Fountain City, and leaving them also about 200 feet to port. In avoiding these vessels, the Comet had got into shoaler water than usual, nearer to the Canada shore than the captain had ever been before, and was, according to the testimony, on a course north-east-one-quarter-east, having the red light and two white lights of the Spray on the port bow, and, according to the captain, three or four points on that bow, when he passed the Fountain City. The Comet drew eleven feet, and her captain says: "I starboarded the wheel a little, as I was getting closer to the Canada shore than I had ever been before. I let her (the Spray) come up within a point, or point and a half, on my port bow." The speed of the Comet was about the same as that of the Spray, but, in the river, the current was about three miles an hour—in the lake, the current was less—and the current must be assumed to have reduced somewhat her actual progress. So soon as the Comet had passed the Cleveland, so as to make it apparent that his signal was intended for the Spray, her master blew one whistle, to indicate that each should pass to the right, or port to port, and gave the order to "port half a point and show your red light strong," which, he says, was done, the Spray already, before the change, bearing one and a half points on the port bow. He heard from the Spray the apparent answer, two whistles, and instantly gave the order to stop, and, as rapidly as would give time to execute the order, rang to back, and, as soon as he could feel her back, rang the alarm bell to back strong, and also gave the order to port, and, according to the wheelsman, hard-a-port, under which orders, he says, the Comet swung off three or four points. The Spray having swung around, on her starboard wheel, across the bow of the Comet, the latter, her headway not being overcome, struck the Spray, as already stated.

The testimony of the master, mate, wheelsman, look-out, and engineer, and of one passenger, of the Comet, is to the effect, that, when she passed the propellers, and continuously thereafter, the red light of the Spray was in view over the port bow of the Comet, until just before the collision, when the Spray, swinging around on her starboard helm, brought her green light into view. The faulty negligence and mismanagement of the Spray, and that such negligence and mismanagement were a cause of the collision, was deemed fully established in the district court; and, on this trial, it is hardly claimed that the conclusion of the district court on that point is not correct. In fact, the proof of her fault is fully established by witnesses for the libellants, from their own vessel.

The Spray had no look-out. There was no person on board assigned or stationed for the performance of that duty. Her master stated, that, upon his watch, he looked out, and the mate, on his watch, looked out. The Spray was approaching the mouth of a river navigated by frequent vessels passing each way through the river, from lake to lake. On each side, near the mouth of the river, and up along the shore of the lake, was a railroad, with its depot-houses and switches, with lights, red and green, elevated to signal to approaching trains the condition of the switches, and where colored lanterns on cars, or in the hands of conductors and other attendants, might be expected. In such circumstances, and in view of other suggestions to be presently made, the importance of a look-out exclusively devoted to that duty, and vigilant in its performance, cannot be over-stated; and it will appear, I think, that, had there been a competent and vigilant look-out on the Spray, she would not have made the mistake which, I think, she did make, nor the unfortunate manoeuvre which produced the collision. Indeed, the proof goes even further. It is not necessary to repeat what has so often before been said, that, in circumstances calling for the watchful vigilance of a look-out, the master, or the mate, charged with the general management of the vessel, is not competent to act at the same time as look-out. On this occasion, the mate, left in charge by the captain, appears to have been occupied, for more than an hour, in conversation with a passenger; and when, at the usual time, the captain was called, he joined them; and there is no pretence that either mate or captain discovered the Comet until the passenger enquired of the mate about a green light which he had observed near the centre of the river. In this state of gross inattention, neither the whistle blown by the Comet to signal the schooner, the whistle she gave to the other propellers which she passed, nor, finally, the signal given by the Comet to the Spray, was heard by any one on the latter.

So, also, upon her own testimony, she was in fault in starboarding and persisting therein. Conceding, for the purposes of this point,

that, when she saw a green light, it was the green light of the Comet, her testimony is, that it was at about the centre of the river, and her witnesses place it from half point to a point only on her starboard bow. After observing it, according to their testimony, for a period of two minutes, at least, it opened so little, that even the master qualifies his statement by saying, that it widened, if anything. Considering their own speed, of nine or ten miles an hour, this indicated that, if that light was approaching, it was coming nearly end on. But that is by no means the worst of this fault. Whatever may be true of the green light, if their testimony be taken, they did see the Comet, with her red light in view, distant 300 feet, at least, and bearing very slightly on their starboard bow. To starboard after that, and hard-a-starboard, and rush, with unabated speed, upon almost certain destruction, was recklessness or want of skill, of such degree that no suggestion that peril was then imminent will excuse. They had blown two whistles, as a proposition to pass to the left, and, without any reply of assent, had starboarded. On discovering that the Comet was passing to the right, in obedience to the rule prescribed to steam vessels meeting end on, they made no effort whatever to check the motion of the Spray, but increased the danger by starboarding again. It is palpable, that if, even then, the Spray had either ported, or slowed and backed, and, as I think, also, if she had done nothing, no collision would have happened.

In every view of the circumstances, as presented by her own witnesses, her neglect to slow, stop, and reverse is inexcusable, and, of itself, seems sufficient to account for her disaster, if her actual movements were otherwise deemed justifiable. This reference to the negligence of the Spray is not important as ground for sustaining the like conclusion reached in the district court. Not having appealed from the decision there, the libellants' conduct is not to be examined here with a view to test the correctness of that conclusion. Such negligence is, nevertheless, important to the further enquiry, whether the Comet was also in fault; and, in an apparent conflict of testimony, and an apparent uncertainty as to the accuracy of observations made on the Spray, it may be very significant. When the libellants come into court, themselves showing negligence and want of skill, and seek to cast the burthen of its consequences, in part, upon another vessel, there is some presumption, at least, adverse to their claim; and they may properly be held to clear proof of contributing negligence or fault in the management of the other vessel. Their own negligence sufficiently accounts for their disaster, and it should not be enough that they make the care and skill and good management of the other vessel doubtful.

In this case, after the most careful scrutiny, I cannot escape the conclusion, that there is not so much as doubt. In view of the elaborate and able presentation of the opposite view, in the opinion of the careful, painstaking, and learned judge of the district court, it would have been easy to rest upon his analysis of the evidence, and his estimate of its weight; and, as a mere matter of personal choice, I should much prefer to do so, if such choice might have any place in the discharge of duty. But I am not able to concur in this conclusion. A conviction of the injustice of that conclusion is strengthened by each examination of the testimony, and I am bound, therefore, to acquit the Comet of fault.

The only two supposed facts which were deemed to indicate fault in the Comet, are, first, that she did not maintain a competent and vigilant lookout; and, second, that, after she passed beyond the two propellers, the Fountain City and the Cleveland, she starboarded, and went across the course of the Spray, to her starboard, and, continuing on that course, showing her green light to the Spray until within a short distance, (the greatest stated by the captain of the latter being 330 feet,) suddenly turned, ported her helm, and attempted to pass again across the bows of the Spray. If the evidence warrants these conclusions, then, undoubtedly, the Comet was in fault.

As to the first, there is no just ground for doubting or denying that the Comet had a man on duty as lookout; and, whatever his general competency, he did see the Spray as soon as, or before, the Comet passed the Cleveland, and as soon as there was any occasion for any manoeuvre to avoid her. The captain, also, of the Comet saw the lights of the Spray, when lying at the railroad dock in the river below; and, though then uncertain what the numerous lights then visible indicated, (they, viewed at that distance, suggesting to him and to others on board, that it might be an approaching tow,) he observed them with his glass, made out the different vessels, proceeded to the right hand side of the river, to avoid them, and, before passing the Cleveland, was in full observation of the Spray. He was, therefore, in full charge of the situation, and with full knowledge that the Spray was approaching, and knew her bearing. If he mismanaged after that, the fault was not the want of a competent lookout or of a vigilant lookout, but his own negligence or want of skill. The mate, also, had like knowledge and observation, as, also, the others who testified to seeing and watching the Spray. Indeed, I do not see what any other lookout could have done, which would have affected the question, when the other officers were cognizant of the approach of the Spray, and were actually taking measures to avoid her. I think the inference of fault in the lookout was, in the mind of the learned judge below, connected with the other conclusion, or second alleged fault; that is to say, if, in truth, all on board of the Comet were mistaken in saying that the red light of

the Spray bore on them, from the time the Comet passed the propellers, till the instant before the collision, and the Comet did cross the bows of the Spray between her and the Cleveland, so as to show her green light to the Spray, and, therefore, necessarily, to be herself in view of the Spray's green light, and yet no one on the Comet saw that light, then, indeed, the inference that no sufficient and vigilant lookout was kept on the Comet would be warranted. This is, I think, the ground on which the want of a proper lookout was deemed proved. The enquiry into the conduct of the Comet becomes, therefore, reduced to the second allegation of fault above stated; and, on that subject, I observe:

1. It cannot be denied, upon the proofs, that the Comet did go up the river on the right hand side, near the shore, and keep off towards the Canada shore, until after she passed the propellers. She passed those propellers in the lake, above the mouth of the river. The mate of the Spray had seen the propellers. One of them had passed him, and he saw her enter the mouth of the river. The Comet passed that propeller on her port side, at a distance of 200 feet. At that time she was on a course northeast one-quarter east, and her red light then, beyond all possible question, was in full view from the Spray. If she then crossed the course of the Spray, between her and the propeller Cleveland, to the starboard of the Spray, so as to change her light from red to green, why was not that movement seen by the mate of the Spray especially, and why not, also, by some other one on the Spray?

2. That the Comet did thus cross over between the propeller and the Spray, and, having accomplished that, and so got nearer to her course up the American side of the lake, then, with every motive to continue to move further in that direction, and more fully reach that course, after getting over so as to have the Spray's green light in view, turned back, and attempted to recross before the bows of the Spray, is, in itself, incredible.

3. The master not only regarded an attempt to pass between the Cleveland and the Spray imprudent, but he and the mate, wheelsman, engineer, lookout, and passenger unqualifiedly deny that any such attempt was made. It is true, that, when he found himself nearer than he had ever before been to the Canada shore, he starboarded a little, so that the bearing of the Spray came up a point or point and a half on his port bow. Their combined speed bringing them constantly nearer, she would continue to bear, when they ported, at about the same angle on that bow as before, and thereafter would open further, had she not herself run across the bows of the Comet.

4. The six witnesses from the Comet concur in the statement, that it was the red light of the Spray which was in view from the Comet; and some of them, from their position when seeing it, could not have seen it at all, if it had not been the red light on the port bow. And here it is to me of special importance that—where there are six witnesses from the Spray testifying that they did see the green light of the Comet, and they thereby bring the Comet over to the west of the course of the Spray, and, on the other hand, there are six witnesses from the Comet who testify that she was never in any such relative position to the Spray, and that the red light of the latter was in full view till near the moment of collision—there is testimony from a disinterested party, an observer of the course of the Comet, and of the actual collision, which throws light on the point in conflict. Maisonville, the captain of the steamboat W. J. Spicer, was, with his boat, lying at the railroad dock, when the Comet left it. His view up the river enabled him to see the course of the Comet, and her passing the schooner and propellers; and he declares her very near the Canada shore. He saw the Silver Spray come down, and he witnessed the actual collision; and, upon his information of the place of the collision, the wreck of the Spray was afterwards found and raised. He did not see any such crossing of the Comet past the bows of the Spray, as is necessarily involved in the libellants' testimony; and it is not credible, if even possible, that he should not have seen it if it happened. And it is strongly corroborative of the testimony from the Comet, in this conflict of witnesses, that Lathrop, a wholly indifferent witness, testifies, that, after the collision, the master of the Spray attempted to account for his not stopping, by saying that he thought he could cross the bows of the Comet, and get on to his own side—the Canada shore—and that he was heading right on to the Canada shore.

Hereupon, the question presents itself—What is to be believed concerning the master, mate, wheelsmen, engineer and two passengers on the Spray, who all say, that they saw the green light of the Comet bearing on the starboard bow of the Spray, and that it so continued till suddenly her red light appeared over the same bow? Are they perjured? My conclusion involves no such necessary inference; and, if they are mistaken, the whole pretence of fault on the part of the Comet is at an end. Their seeing the Comet's red light on that bow tends to confirm the testimony from the Comet, for it was after the Spray had starboarded, and had been moving some time to port, on a starboard wheel, that the red light of the Comet was discovered. It should have been seen before, and then it would have been seen on their port bow. By starboarding, they brought it a little on their starboard bow, just before the collision. They did not see the Comet's green light, as they suppose they did. They saw some other light, and, acting on the assumption that it was an approaching vessel, they now say it was the green light of the Comet. A careful examination of

the testimony shows, I think, conclusively, that, unless the Comet crossed the course of the Spray, so as to exhibit a green light, she is without fault. The testimony of her witnesses is positive and has confirmation in the testimony of Maisonville and Lathrop, already referred to. The testimony from the Comet seems also to me to be consistent, natural and credible.

There was less liability to mistake. From the Comet, looking outward towards the lake, there was no other vessel or lights in view. Her officers and others on board had, therefore, nothing to distract their attention or mislead them. On the other hand, the view before the eyes of those on the Spray presented many lights. Her wheelsman had covered the compass and was endeavoring to steer his ship by colored lights which were, or which he supposed were, on shore. He selected a red light on the Canada shore, supposing it, no doubt, one of the semaphore lights along the line of the railroad. The counsel for the claimants suggests that this was the red light of the Comet. Who shall say it was not? By covering his compass, he had rendered it impossible to detect his mistake, if he made that blunder. And who shall say, that, if he was steering by a red light off his port bow, he did not mistake one of the green lights on shore for the green light of the Comet, and then, when, by starboarding, he brought the red light of the Comet in fact just over the starboard bow, conclude that it was a red light on the same vessel on which he had seen the green? But, more plausibly still—the W. J. Spicer, lying at the railroad dock, exhibited her green light fully to the view of the Spray. That view was a little, and but a little, to her starboard, as her course and position, and the direction of the river, and the line of sight to the dock distinctly show. The assumption that it was this green light which was seen on the Spray, accounts for two circumstances of no little importance, in explaining the conflict of testimony, besides disposing of the main dispute as to the course of the Comet. First, the distance at which the master of the Spray thinks he first saw the green light of the Comet. He makes it much greater than is consistent with the witnesses from the latter vessel. Now, the dock of the railroad company, where the Spicer lay, is over one third of a mile below the mouth of the river; and, seeing the green light there, he would, of course, estimate the distance as greater than in fact he was from the Comet, which he did not then see. Second, it seems extraordinary, and yet is testified by the witnesses from the Spray, that the green light, which they say was the Comet's light, was first seen from half a point to a point on their starboard bow; and yet, notwithstanding, upon their theory, the two vessels were approaching each other at a combined speed of from 12 to 16 miles an hour, they observed it two or three minutes, and it opened so little, that the captain speaks of it as "widening, if anything," and other witnesses create doubt whether it changed its bearing at all, and the utmost suggested is, that its starboard bearing reached two points. This is incredible, if it was borne by the Comet on a course crossing the bows of the Spray to the starboard enough to keep a green light in view, but is not only not extraordinary, but inevitable, if the green light was on the Spicer, lying still, and the Spray was on a course to the centre of the river, in a line very slightly varying from a direct line to that light. It is not certain that this was the mistake which they made; but their want of look out, the inattention of the officers when on duty, the actual fault in what they did, whether it was the green light of the Comet or not, and their neglect of the obvious precaution to slacken speed, prepares me for the conclusion to which the other evidence compels me, that some such mistake was made.

In what I have written I have aimed at giving an intimation of the grounds of my conclusion, rather than at discussing all the details of the testimony. No doubt, there are some of those details, not adverted to, which conflict with the conclusion. So, on the other hand, there are many other particulars, which might be stated, which go to sustain it. The counsel on both sides have presented them fully, and I have not failed, I think, to give them due consideration. To recite and discuss each in writing would involve labor which would be of no profit to counsel already familiar with the whole. For them, it might have been sufficient to state my conclusion without any reasons, and leave them to infer that I was convinced by the argument. It seemed to me just, however, to say enough to point to the prominent reasons, which, on examination and re-examination of the testimony, have forced upon me the conviction, that the Silver Spray is alone in fault, and that the libel of her owners, filed herein, should be dismissed, with costs.

COMINGS (BAILEY v.). See Case No. 733.

Case No. 3,052.

COMINGS v. The IDA STOCKDALE.

[22 Pittsb. Leg. J. 9.]

Territorial Court, Dakota Territory. Feb., 1874.

ADMIRALTY PRACTICE—AMENDMENT OF LIBEL.

[1. Under section 32 of the judiciary act of 1789, authorizing amendments for imperfections, a libel in admiralty may be amended while the proceedings are in fieri and before judgment.]

[2. In conformity with Admiralty Rule No. 24, a writing should be filed, containing the matter of amendment as a distinct proceeding in the case; but this writing may properly extend to a new draft of the libel.]

[3. A complaint framed under the territorial laws of Dakota, giving a right of action in rem for supplies furnished, which names the vessel as defendant, sets forth the furnishing of goods to, and the advancement of money for her, and asks that she be seized and libelled for the payment of the claim, is sufficient to confer jurisdiction on a court in admiralty, and sufficient in substance to allow the necessary amendments to conform it to the admiralty practice.]

[In admiralty. Libel by E. D. Comings against the steamboat Ida Stockdale.] Motion made February 3, 1874, for leave to amend the libel heretofore filed, &c., &c.

SHANNON, Judge. A liberal principle was prescribed by the original judiciary act, as to amendments, which has continued to guide the procedure of the courts in civil cases. See [1 Stat. 91], § 32. The statute is not a grant of a new power, but rather a declaratory definition of the power of the federal courts. The clear power of courts of admiralty, to direct the amendment of pleadings and proceedings, and to supervise all the various steps in a case, so that the rules and practice of the court shall be administered and enforced in such a manner as to prevent hardship and injustice—and so that the merits of the cause may be fairly tried—is essential to, and is inherent in, the organization of courts of justice. The first portions of the statute relate to amendments of defects in form; its last clause authorizes amendments in matters of substance. It reaches all defects in the process and pleadings, but does not extend to the judgment. Therefore, an amendment in substance may be made, whilst the proceedings are in fieri, and before judgment. In courts of admiralty the most liberal principles as to amendment, have always prevailed; and the statute in question is but an embodiment of the almost unanimous voice of all authorities upon this subject. The statute is the foundation in a legislative shape of the 24th and 52d rules in admiralty adopted by the supreme court of the United States. The former rule—No. 24—is the one now invoked by this motion to amend the libel. It is not required, nor is it recommended, that the matter to be inserted, or to be omitted from any libel, or pleading to be amended, should be in fact, interlined upon, or erased in the original paper or file. Filing a writing containing the matter of the amendment as a distinct proceeding in the cause is a proper mode. But this writing may often properly extend to a new draft of the entire instrument amended. The latter course has been pursued in the present case.

But the motion is opposed upon the ground that the paper originally filed is no libel in admiralty; and, consequently, that there is nothing to amend. Let us proceed to examine this point. When the writing in question is confronted and compared with rule 23 of the supreme court of the United States it must be confessed that it appears in a most irregular form, and in a very unshapen contrast. As to matter of form, it is an ugly deformity, when coming into a court of admiralty, whose rules are so plain. But it must be presumed that it is the offspring of some other practice, and may have been intended for some other forum, or perhaps for the other side of this court. There is, in fact, standing upon the pages of our territorial enactments an act relating to boats and vessels, and "to provide for proceedings for the collection of demands against such boats and vessels." It became a law on the 2d May, 1862, but whether or not it is still efficacious, is a question which does not now arise. It makes every boat or vessel navigating the waters of the territory liable for all debts contracted by the master, owner, agent, or consignee, on account of supplies furnished for the use of the vessel; for work done or services rendered on board; for labor done or material furnished by mechanics, tradesmen, or others, in and for building, repairing, fitting out, furnishing, or equipping such boat. Secondly, for all sums due for wharfage or anchorage. Thirdly, for demands or damages accruing from the non-performance of any contract of affreightment, or any contract touching the transportation of persons or property, and for all injuries done to persons or property by such boat. The second section of the act authorizes the institution of suit against the boat or vessel by name—that is, against the rem. Section third prescribes merely the filing of a complaint against the rem, with the clerk of the district court of the county in which such vessel shall be—such complaint to be, it is presumed, after the brief, common mode of the code in use. The fifth section directs the issuing of a warrant to seize the rem, etc., etc. It is a brief, petty code taken from and framed after the admiralty form of procedure. In 1851, there was a similar statute in California; and something like it was in force in the state of Iowa, to say nothing of other states. Hence it is likely that the complaint filed in this case was fashioned from the laws and practice above referred to, which presumption may well account for the crude form in which this case makes its first appearance here. Again, our courts may be said to be in their infancy in this new border country; and it was but quite recently, indeed, that the machinery of the admiralty practice was first put in motion in this territory. So much with regard to defects in form. As to defect in matters of substance, let us next inquire. And first, does the complaint sufficiently disclose a proceeding in the nature and with the incidents of a suit in admiralty? We find it is an action against "the steamboat Ida Stockdale." The distinguishing and characteristic feature of a suit in admiralty is, that the thing or vessel proceeded against is itself named, seized, and

impleaded as the defendant and is judged and sentenced accordingly. It is this dominion of the suit in admiralty over the vessel, or thing itself, which gives to the title made under its decrees, validity against all the world. By the common law process, whether of mesne attachment or execution, property is reached only through a personal defendant, and then only to the extent of his title. Under a sale, therefore, upon a judgment in such common law proceeding, the title acquired can never be better than that possessed by the personal defendant. It is his title, and not the property itself, which is sold.

The vessel, then, in the case before us, is named and impleaded as the res, or defendant. The complaint further states that the said "steamboat" was engaged in navigating the Missouri, and that while so engaged the plaintiff furnished goods to said defendant (the thing), and advanced money for said steamboat to pay her store-bills and to pay seamen their wages who were at work on said boat. The complaint concludes by asking for a writ of attachment against said boat, that she may be seized and libelled for the payment of the claim and costs. Here then we have the substance of the complaint; and has it not almost every trait and incident of a suit in admiralty in rem? Can this cause of complaint be properly defined as a maritime one? If so, is it not a proper subject for the maritime jurisdiction of this court? First, as to the locus or territory of maritime jurisdiction. It extends not only to the main sea, but to all navigable waters of the United States. The Missouri is such river. It is water navigable from the sea by vessels of ten or more tons burden. Secondly, as to contracts. The true criterion is the nature and subject matter of the contract, as whether it is a maritime contract, having reference to maritime service, or maritime transactions. Jurisdiction in admiralty depends on the subject matter. Such jurisdiction has been sustained in cases for money advanced, as well as for repairs, materials, and supplies furnished by material men. All contracts, claims, or service purely maritime, and touching rights and duties, appertaining to commerce and navigation, are cognizable in the admiralty courts. Torts or injuries committed on navigable waters, of a civil nature, are also cognizable in the same courts. But jurisdiction in the former case depends upon the nature of the contract; in the latter it depends entirely upon the locality. The point under consideration is not what proof, or how much of it, may be required to maintain a suit in admiralty upon a contract for supplies, or for money advanced therefor. Nor is it under discussion as to whether or not such supplies or moneys were necessary. It is well known that if the suit be for supplies, materials, or for money advanced, it will be incumbent on the creditor, if he means to charge the vessel or owner, to show the apparent or presumed necessity of the repairs, supplies, or money advanced therefor. The point is, however, this, to wit: Is there enough of substantial allegation in this complaint to bring it within maritime jurisdiction, as to the locus and as to the nature and subject matter of the contract? If so, then there is substance which is amendable, to prevent hardship, to further justice, and so that the merits of the cause may fairly be reached and tried. The case of The Hine v. Trevor, 4 Wall. [71 U. S.] 556, was on error to the supreme court of Iowa. It was on a complaint and proceeding under the laws of that state, very similar to the requirements of our territorial statute of 1862, above alluded to. And in that complaint there was no averment that the steamboat was of twenty tons burden, under the act of congress of 1845 [5 Stat. 726], no averment that she was enrolled and licensed for the coasting trade; and no averment that she was engaged in business of commerce and navigation upon the lakes, navigable waters, etc., and, as was argued, no averments which affirmatively showed jurisdiction in the district court of the United States. Mr. Justice Miller, in delivering the opinion of the supreme court of the United States, remarked: "The state courts have been in the habit of adjudicating causes, which, in the nature of their subject matter, are identical in every sense with causes which are acknowledged to be of admiralty and maritime cognizance; and they have in these causes administered remedies which differ in no essential respect from the remedies which have heretofore been considered as peculiar to admiralty courts."

The learned justice further added that "if the facts of the case before us in this record constitute a cause of admiralty cognizance then the remedy, by a direct proceeding against the vessel, belonged to the federal courts alone." And, again: "But the remedy pursued in the Iowa courts, in the case before us, is in no sense a common law remedy. It is a remedy partaking of all essential features of an admiralty proceeding in rem. The statute (that of Iowa) provides that the vessel may be sued and made defendant without any proceeding against the owners, or even mentioning their names. That a writ may be issued and the vessel seized, on filing a petition similar in substance to a libel. That after a notice in the nature of a monition, the vessel may be condemned, and an order made for her sale, if the liability is established for which she was sued. Such is the general character of the steamboat laws of the western states." Moreover, in the case before us, the vessel was found and seized by the marshal within this district, and is in the custody of the law. After full consideration it is deemed there was, and is, sufficient of material allegations in the complaint to warrant her

seizure and to hold her; and sufficient substance to allow an amendment. The motion for leave to amend the complaint, in matter of form and substance, as set forth in the amended libel presented to the court, is hereby granted.

Case No. 3,053.

COMLY v. FISHER et al.

[Taney, 121.][1]

Circuit Court, D. Maryland. Nov. Term, 1847.

SALE OF PERSONALTY — CHANGE OF POSSESSION — WRONGFUL ATTACHMENT — MEASURE OF DAMAGES.

1. Where the owner of a factory and store has his agent residing there, holding possession and carrying on the business in the name of his principal: *Held*, that the possession of the agent is the possession of the principal.

2. If the principal assign the goods in such store and factory to the agent, though for a bona fide consideration, still such goods will be liable for the debts of the principal, unless the agent, in some manner, make known to the public, the change of possession, and that he no longer holds the goods as the property of his former principal, but in his own right.

3. If such sale be private, without witnesses, or visible change in the possession or ownership, it will be void as against the creditors of the vendor, until the change in the title, and the character of the possession, be so made known.

4. Where goods seized under an attachment, are proved not to be the property of the person against whom the writ is issued, the measure of damages, in an action against the attaching creditor, is the value of the goods, at the time they were attached, and such further damages, if any, as the jury may find was actually sustained by the plaintiff, by reason of the seizure.

[Cited in First Nat. Bank of Clarion v. Jones, 21 Wall. (88 U. S.) 339.]

5. In such an action, the amount of rent due on the premises, at the time of the seizure, and retained by the sheriff, to be paid to the landlord, ought to be deducted by the jury from the amount of their verdict.

At law. This suit was brought, on the 25th January 1846, by Robert Comly, a resident of the state of Pennsylvania, to recover damages for seizing, taking and carrying away the plaintiff's goods. The defendants [Alexander Fisher, William D. Miller, and William E. Mayhew, Jr.] pleaded not guilty.

The facts of the case may be briefly stated as follows: Prior to the 25th April, 1846, Samuel Comly, of Philadelphia, was the proprietor of Rockland Factory, and of the store in which were the goods in question, at the time of their seizure; Robert Comly, the plaintiff, resided at the factory, and was in possession of the goods, and carried on the factory and store, as the agent and under the name of Samuel Comly. On the 22d of that month, Samuel Comly sold the factory and store to Thomas J. Folwell, who sold the same, on the same day, to Robert Comly, the plaintiff, and he continued the business under the old name. On the 5th of August following, the defendants, who were creditors of Samuel Comly, sued out a writ of attachment and seized, under said attachment, the goods in the store and the machinery in the factory, claiming the same as the property of Samuel Comly. The said defendants insisted that the sale by Samuel Comly to Folwell, and by Folwell to the plaintiff, was without consideration, and intended to hinder and delay the creditors of the former, and therefore void; and also that, inasmuch as these sales effected no ostensible change in the ownership of the property, the vendee having been, at the time, in possession thereof, as agent of the vendor, and no notice of such change of property having been given to the public, the same, even if an actual sale, would not affect the rights of the vendor's creditors, who had no notice thereof. At the time of the seizure under the attachment, the sheriff closed the factory and store, and the object of this suit was to recover, not only the value of the property seized, but also the damages sustained by the plaintiff in the breaking up of his business.

The following prayers were made to the court:

Plaintiff's prayers: "1. If the jury find from the evidence that, on the 22d day of April 1846, Thomas J. Folwell, by purchase from Samuel Comly, for a fair and bona fide consideration, was entitled to the store, and the goods and effects therein, and to the machinery in the factory, at Rockland; and that, being so entitled, he took possession thereof, and on the same day, sold the same, fairly and bona fide, to Robert Comly, the plaintiff, who was then, and continued afterwards, in the possession thereof, claiming title to the same; and shall further find that, on the 5th day of August 1846, the goods and property mentioned in the schedule offered in evidence, were seized by the sheriff of Baltimore county, by the authority, or under the direction, and with the consent of the defendants; and that the said goods and property were taken possession of by said sheriff, and the store-room and factory in which they were contained locked and shut up, so as to deprive the plaintiff of the control of said goods and property; that then the plaintiff is entitled to recover such damages as the jury, under the circumstances of the case, may think just to allow. 2. That in estimating such damages, should the jury find the facts stated in the foregoing prayer, they are to regard the actual value of the goods and property seized, and the loss to the plaintiff resulting from the breaking up of his business; and should they believe said seizure to have been made wantonly, and with notice of the claim of the plaintiff, that then they may find exemplary damages."

Defendants' prayers: "1. That the proceedings in Baltimore county court, on the

[1] [Reported by James Mason Campbell, Esq., and here reprinted by permission.]

attachment issued by the present defendants against Samuel Comly (a transcript whereof is in evidence), are conclusive against the right of the plaintiff to recover in this action. 2. That it is competent for the jury to find from the evidence, that the alleged agreements between the said Samuel Comly and Thomas J. Folwell, and between the said Folwell and the plaintiff (if any such agreements were actually made) were made by the parties aforesaid with intent to delay, hinder and defraud the creditors of the said Samuel; and if such alleged agreements are found to have been made with intent as aforesaid, then the same are fraudulent and void as against the present defendants. 3. That the alleged agreement between the said Comly and Folwell (if any such agreement is found by the jury to have been made) is fraudulent and void as against the defendants, unless the jury shall also find that the said Folwell, pursuant to said agreement, did obtain the actual and exclusive possession of said goods. And if the jury shall find that, at the time of making the alleged agreement between the said Comly and Folwell (if any such agreement was actually made) the said goods were in the actual custody and possession of the plaintiff, holding them as agent of, and for the said Comly, and that after making the said agreement, and without entering into the actual and exclusive possession of the said goods, the said Folwell agreed to sell said goods to the plaintiff, in manner as stated in evidence by him, then that said agreements are fraudulent and void as against these defendants. 4. If the jury shall find from the evidence that the goods in question were the property of the plaintiff, at the time of the seizure thereof, under the writ of attachment of the present defendants, issued out of Baltimore county court as aforesaid, and that the defendants caused said goods to be seized as aforesaid, under an impression fairly entertained that they were the property of the said Samuel Comly, and in the fair pursuit of their supposed legal rights, the measure of damages to be assessed by the jury will be the value of the goods at the time of seizure, with interest from that date; and that the defendants will be entitled to a deduction for the sum retained by the sheriff, to be paid over to the landlord of the premises whereon said goods were found, at the time of seizure as aforesaid."

The court rejected the prayers of the plaintiff, and also those of the defendants, and instructed the jury as follows.

J. Glenn and S. H. Taggart, for plaintiff.
Th. S. Alexander and Wm. F. Frick, for defendants.

TANEY, Circuit Justice. 1. It being admitted that the goods in question were the property of Samuel Comly, of Philadelphia, from the 13th of March 1846, to the 20th of April in the same year, and that, during that time, the plaintiff, as agent of Samuel Comly, resided at the factory mentioned in testimony, and held possession of the said goods, and carried on the business of the factory for and in the name of the said Samuel Comly —the possession of the plaintiff, during that time, was the possession of Samuel Comly. And if the jury find that the sales by Samuel Comly to Folwell, and by Folwell to the plaintiff, were bona fide and upon the valuable consideration stated in the plaintiff's testimony, still the said goods were liable for the debts of Samuel Comly, unless the jury find that the plaintiff had, in some mode or other, made known to the public the change of possession, and manifested that he no longer held the property as the property of Samuel Comly, and for him, but in his own right. The sale and delivery to Folwell, and by him to the plaintiff, being private, and without witnesses to either, and producing no visible change in the possession or ownership, the said sales were fraudulent and void as against the creditors of Samuel Comly, until the change in the title and the character of the possession was made known as above stated.

2. If the jury find that the sales alleged to have been made by Samuel Comly to Folwell, and by him to the plaintiff, were collusive, and intended to hinder, delay or defraud the creditors of Samuel Comly, then the said sales were fraudulent and void as against the creditors of Samuel Comly, and the plaintiff is not entitled to recover.

3. If, under the above directions of the court, the jury find that the plaintiff is entitled to recover, the measure of damages is the value of the property at the time it was attached, with interest to this time, and such further damages, if any, as the jury may find was actually sustained by the plaintiff, by breaking up the business in which he was engaged, deducting from the amount the rent due on the premises at the time the attachment was laid.

Judgment of nonsuit.

COMMANDANT OF FORT DELAWARE (UNITED STATES v.). See Case No. 14,842.

Case No. 3,054.

The COMMERCE.

[1 Spr. 34.][1]

District Court, D. Massachusetts. Oct., 1842.

SEAMEN'S WAGES—DEMAND OF RECEIPT—DISPUTE —LIBEL IN PERSONAM.

1. The statute which precludes a seaman from having admiralty process for his wages against the vessel until ten days after the discharge of

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

the cargo, does not affect his right to proceed in personam.

2. It is improper to require of a seaman a receipt in full of all claims, as a condition of the payment of his wages.

3. A demand of wages and a refusal by the owner to pay, till after ten days, does not constitute a dispute, within the statute, so as to authorize process in rem before the expiration of the ten days.

This was an application for admiralty process to issue against the vessel in a cause of subtraction of wages. The voyage was ended on the twenty-eighth of September last. The crew on that day were discharged, and were told to come to the counting-room of the owner, where they would receive their wages. They repaired to the counting-room, where the clerk made up the balance due to each man, and paid them off, on their signing a receipt printed on the back of the articles, which, in consideration of the sum so received, released as well the claim for wages, as also all other claims for assaults and batteries, and imprisonments, &c., &c. The libellant refused to sign this receipt, but offered to sign a release of his claim for wages. The owner persisted in requiring him to sign the same receipt which had been signed by the other men, and informed him, that if he did not sign it, he must wait till the expiration of ten days from the discharge of the cargo, and that in the mean time "the money would be in good hands." The mariner filed his libel on the next day. The owner appeared under protest, and contested the right of the libellant to take out admiralty process against the vessel, by reason of the statute of 1790 (chapter 29, § 6 [1 Stat. 133]), which provides that "if such wages shall not be paid within ten days after such discharge (of the cargo), or if any dispute shall arise between the master and seamen, or mariners, touching the said wages," admiralty process shall issue.

R. H. Dana, Jr., for libellant.
C. H. Parker, for the owner.

SPRAGUE, District Judge. The requirement of the owner that the mariner should sign the receipt, in this case, was clearly wrong. The practice of requiring such a receipt, in which upon the mere payment of the wages due, all claims of whatever kind are released to the master, owners and officers, has become so inveterate that the receipt itself is actually printed on the back of the articles. Every intelligent person knows, or ought to know, that as a release of anything but the claim for wages, such a receipt is void; and it is time that intelligent ship-owners should abandon a practice, which, in the use often made of it, is delusive and immoral. It is delusive, because the receipt cannot be made to operate as it is intended; and it is immoral, because it attempts to obtain from the seamen, and sometimes causes them to believe that it has obtained from them, a surrender of rights which they might otherwise enforce, without giving them any consideration for that surrender. I feel called upon thus to animadvert upon this practice, because, in the present case, it is the source of all the difficulties between these parties. It is contended by the libellant's counsel that the wages, in the present case, were immediately payable on the day when the receipt was demanded, and that requiring that receipt was wrong. In this I fully concur. The seamen were entitled to their wages, and the refusal to pay, unless the libellant should sign the receipt, was improper. But the question is, what remedy had the mariner upon that refusal? Two remedies were undoubtedly open to him, the one a suit at common law, against the master or owner, the other a libel in personam in this court. It is insisted by counsel that the seaman could not have had the latter of these remedies, within the ten days, any more than process against the vessel. But in this I do not concur. The statute provides that process shall not issue against the vessel, within the ten days; but it says nothing about a suit in personam. It is not necessary to go into the reasons which seemed to the legislature sufficient for this distinction. We take the statute as we find it; and we find that, whereas by the general law, the mariner had both remedies in rem and in personam, open to him within ten days, as well as within any other time, the statute intercepts one of them for that period. But it precludes only one, and being in its nature a restraining act, those remedies which it does not expressly cut off, are to be presumed to remain. Mr. Dunlap, in his Admiralty Practice, says, that it has not been thought, in this district, that suits may be commenced in personam within the ten days; but he cites no decision. I regard what he says rather as his opinion of a matter of practice, than as historical evidence of the judgment of my predecessor. I am the more confirmed in the view I take, from the fact that Judge Betts (Adm. Pr. 67) holds that a suit in personam may be commenced within ten days.

There was then a personal remedy open to the mariner, when he filed the present libel. But the right to process against the vessel, within ten days, is governed by the statute, and it is necessary that the case should be brought within its provisions. It is contended that the case is within the statute, because "a dispute" had arisen touching the wages, inasmuch as the owner had refused to pay, unless the mariner would sign a receipt, which he was clearly not bound to sign. I agree that a general and unqualified refusal to pay, except upon an improper condition, is tantamount to an absolute refusal; and if the owner had declared that he never would pay, except upon the signing of the receipt which he tendered, that might have created a dispute, within the meaning

of the statute; for it would have been a denial of the absolute right of the seaman to his wages at any future day, and a refusal ever to pay, except upon the prescribed condition. But the evidence does not show either an absolute refusal, or what is equivalent thereto. There was no declaration that he would never pay, but only that he would not for ten days; the owner saying that in the meantime the money would be in safe hands. I cannot agree that this was a dispute, within the meaning of the statute. The amount of wages was ascertained; the title to them was admitted; no deduction was claimed. The owner merely said that he should not pay, till after ten days. If this be a dispute, within the meaning of the law, then every refusal of immediate payment, merely from convenience or necessity, must also be deemed such. The statute permits admiralty process, where a dispute has arisen touching the mariner's title to what he claims as his due. I do not think that a mere postponement of payment creates the statute dispute, and I am therefore of opinion that the application for the process is premature.

See Collins v. Nickerson [Case No. 3,016]; The William Jarvis [Id. 17,697]; The Sarah Jane [Id. 12,348]; The Eagle [Id. 4,233]; Freeman v. Baker [Id. 5,084]. Whether the discharge of the seaman authorizes process in rem before the expiration of the ten days, see The Cabot [Id. 2,277]; The Cypress [Id. 3,530]; The Mary [Id. 9,191].

COMMERCE, The (FITZHUGH v.). See Case No. 4,841.

COMMERCE, The (WHITTON v.). See Case No. 17,604.

Case No. 3,055.

The COMMERCEN.

[2 Gall. 261.][1]

Circuit Court, D. Massachusetts. Oct. Term, 1814.[2]

RIGHT OF NEUTRAL CARRIER TO FREIGHT.

1. A neutral cannot lawfully become the carrier of provisions for the supply of the army of one of the belligerents, although such army may be in a neutral country, and directly engaged in hostilities only against a third belligerent. See Maissonaire v. Keating [Case No. 8,978]. A neutral ship engaged in such traffic is not entitled to freight.

2. In what cases provisions are contraband. [See note at end of case.]

This was an appeal on the part of the captors from so much of the decree of the district court [of the United States for the district] of Maine, as allowed freight to the owners of this vessel which was restored as Swedish. She was captured on a voyage from Limerick in Ireland to Bilboa, carrying a cargo of grain, the property of British subjects, which appeared, from a letter found on board, to have been exported by the special permission of the British government for the supply of their army in Spain, and the shipper was required to produce a certificate of its being delivered for that use. The cargo was condemned in the district court.

Dexter & Kinsman, for captors.

It is of no importance to inquire, whether the cargo consisted of articles, which are usually contraband, or not. Within the true spirit and meaning of the laws of nations, they became contraband from the character of the voyage. Provisions, though not in their nature contraband, are yet made so by circumstances; as when on their way to a besieged place. Spain at this time was so far exhausted that provisions became as necessary, to enable the British to prosecute the war in that country, as they ever were to enable a besieged place to hold out. If, when shipped from one individual to another, they would have been contraband, how much more so in this case, where the shipment was made expressly for the use of a power at war with us, and by a permission, which in ordinary cases is rigorously withheld? Bynk. per Dupon, 111; 1 C. Rob. Adm. 296; 2 C. Rob. Adm. 186. Though the right of the neutral to freight is now generally admitted, yet there are not wanting respectable authorities in support of an opposite doctrine. Bynkershoek especially maintains, that the neutral ought to know the risk he takes, and to demand a rate of freight proportioned to it; and that, as he makes his own bargain, no freight ought to be allowed, unless he delivers his cargo at the port of destination. What is the reasoning opposed to this? It is founded entirely on the fiction, that the captor takes the place of the enemy shipper. This is not true. If it were, why should not the captor be bound by the contract for the purchase of the goods, if bought on credit, as well as by that for the carriage of them? The captor stands in the place of the enemy shipper as to rights only, but not as to duties. It may be said, that this is against authority; but we are bound by authority no further, than it has actually gone. The rule as to freight has been encroached upon in several instances. What reason can be given for the exceptions of the colonial or coasting trade, which will not apply, with equal or greater force to the present case? The reason usually urged is, that by such trade the commerce of the enemy is aided—a most feeble reason, compared with that, which exists in the case before the court. Here not only was aid afforded to commerce, but direct assistance was given in the prosecution of the war. That the army, for which these supplies were intended, was not acting against us, cannot affect the question. The

[1] [Reported by John Gallison, Esq.]

[2] [Affirmed in The Commercen, 1 Wheat. (14 U. S.) 382.]

relief afforded to our enemy in his operations against one hostile power, left him at liberty to employ the greater resources against us. We may appeal to the very facts of the present case; for Lord Wellington's army, after being successful in Spain, was transported to the United States, and is at this moment making war upon our shores.

Mr. Prescott, for claimant.

The rule, which allows freight to the neutral carrier of enemy's goods, is ancient and well established. Though questioned by Bynkershoek, it is recognised by nearly all other writers on maritime law, and by the Consolato del Mare. It is founded upon the principle, that the rights of the neutral are no further to be interfered with, than may be necessary for the prosecution of the war. His lawful contracts are not to be disturbed, and among these is the employment of his ships in carrying the property of a nation in amity with him. The restrictions upon this right are accurately defined. He is to carry on no unlawful trade. The coasting trade, therefore, which relieves the enemy from the pressure of the war, is not allowed. The colonial trade also, is prohibited, upon the principle, whether just or not, that no trade is lawful in war, which is not permitted in peace. Contraband is the next case defined, and this ought not to be carried beyond its present extent, which is confined to articles in their nature warlike, or to such as become contraband from their being destined to a besieged place, or to a port of naval equipment. The articles, in the present case, were not in their nature contraband, nor was there any thing illegal in a neutral's carrying provisions to the British fleet in Lisbon, or elsewhere not on our coast. This does not resemble the case of destination to a known port of naval equipment. It is admitted, that the neutral might lawfully transport provisions to Lisbon or Bilboa for the supply of the inhabitants. Suppose then, that the master is directed to deliver his cargo to the commissary of an army there. It is the army of Spain, our friend. There can be no unneutral conduct toward us in carrying provisions to an army of our enemy employed in defending a country, with which we are in amity. The case might be different, if supplies were brought to an army hovering on our coast, or a navy blockading our harbors. No case has been, and none, it is believed, can be produced, in which neutral property has been confiscated under circumstances like the present. As to the argument, that the British army were aided, and thus the enemy enabled to employ a larger portion of his force against us, it is too remote to justify any conclusion from it, on the subject before the court.

STORY, Circuit Justice (after stating the facts). The general rule, that the neutral carrier of enemy's property is entitled to his freight, is now too firmly established, to admit of discussion. But to this rule there are many exceptions. If the neutral be guilty of fraudulent or unneutral conduct, or have interposed himself to assist the enemy in carrying on the war, he is justly deemed to have forfeited his title to freight. Hence the carrying of contraband goods to the enemy, the engaging in the coasting or colonial trade of the enemy, the spoliation of papers, and the fraudulent suppression of an enemy's interest, have been held to affect the neutral with the forfeiture of freight. And in cases of a more flagrant character, such as carrying despatches, or military passengers, for the enemy, or an engagement in the transport service of the enemy, or a breach of blockade, the penalty of confiscation of the vessel has been also inflicted. Bynk. Q. P. Jur. c. 14; The Sarah Christina, 1 C. Rob. Adm. 237; The Haase, Id. 286; The Emanuel, Id. 296; The Immanuel, 2 C. Rob. Adm. 186; The Atlas, 3 C. Rob. Adm. 299; The Rising Sun, 2 C. Rob. Adm. 104; The Madonna del Burso, 4 C. Rob. Adm. 169; The Neutralitet, 3 C. Rob. Adm. 295; The Weelvaart Van Pillaw, 2 C. Rob. Adm. 128; The Friendship, 6 C. Rob. Adm. 420.

By the modern law of nations, provisions are not, in general, deemed contraband; but they may become so, when the property of a neutral, on account of the particular situation of the war, or on account of their destination. The Jonge Margaretha, 1 C. Rob. Adm. 189. If destined for the ordinary use of life in the enemy's country, they are not, in general, contraband; but it is otherwise, if destined for military use. Hence, if destined for the army or navy of the enemy, or for his ports of naval or military equipment, they are deemed contraband. Id. Another exception from being treated as contraband, is when the provisions are the growth of the neutral exporting country. But if they be the growth of the enemy's country, and more especially if the property of his subjects, and destined for the enemy's use, there does not seem any good reason for the exemption; for, as Sir William Scott observes, in such case, the party has not only gone out of his way for the supply of the enemy, but he has assisted him by taking off his surplus commodities. The Jonge Margaretha [supra]. But it is argued, that the doctrine of contraband cannot apply to the present case, because the destination was to a neutral country. And it is certainly true, that goods destined for the use of a neutral country can never be deemed contraband, whatever may be their character, or however well adapted to warlike purposes. But if such goods are destined for the direct and avowed use of the enemy's army or navy, I should be glad to see an authority, which countenances their exemption from forfeiture, when the property of a neutral. Suppose a British fleet were

now lying in a neutral port, would it be lawful for a neutral to carry provisions or munitions of war there, avowedly for the exclusive supply of such fleet? Would it not be a direct interposition in the war, and an essential aid to the enemy in his hostile preparations? In such a case, I should imagine the goods, if the property of a neutral, had the taint of contraband, in its most offensive character, on account of their destination, and that the mere interposition of a neutral port would not protect them from forfeiture. I agree, however, that strictly speaking this is not a question of contraband, for that can arise only when the property belongs to a neutral, and here the property belonged to an enemy, and therefore was liable, at all events, to condemnation. But was the voyage lawful, and such as the neutral could, with good faith, and without a forfeiture of his character, engage in? It has been solemnly adjudged, that being engaged in the transport service of the enemy, or in the conveyance of military personages in his employ, are acts of hostility, which subject the property to confiscation. The Friendship, 6 C. Rob. Adm. 420; The Orozembo, Id. 430; The Carolina, 4 C. Rob. Adm. 356. And the carrying of despatches, from the colony to the mother country of the enemy, has subjected the party to the like penalty. The Atalanta, 6 C. Rob. Adm. 440; The Constantia, Id. 461, note. And in these cases, the fact, that the voyage was to a neutral port, was not thought to change the character of the transaction. The principle of these determinations was asserted to be, that the party must be deemed to place himself in the service of the hostile state, and assist in warding off the pressure of the war, or in favoring its offensive projects.

Now I cannot distinguish these cases, in principle, from that before the court. Here is a cargo of provisions exported from the enemy's country with the avowed purpose of supplying the army of the enemy. The Antonio Johanna, 1 Wheat. [14 U. S.] 159; The Friendschaft, 4 Wheat. [17 U. S.] 105; 1 Kent, Comm. 140. Without this destination, they would not have been permitted to be exported at all. Can a more important or essential service be performed in his favor? In what does it differ from the case of a transport in his service? The property nominally belongs to individuals, and is freighted apparently on private account, but in reality for public use, and under a public contract, implied from the very permission of exportation. It is in vain to contend, that the direct effect of this voyage was not to aid British hostilities against the United States. It might enable the enemy indirectly to operate with more vigor and promptitude against us, and increase his disposable force. But it is not the effect of the particular transaction, that the law regards. It is the general tendency of such transactions to assist the military operations of the enemy, and the temptation which it presents to deviate from a strict neutrality. Nor do I perceive how the destination to a neutral port can vary the application of the rule. It is only doing that indirectly, which is prohibited in a direct course. Would it be contended, that a neutral might lawfully transport provisions for the British fleet and army, while they lay at Bourdeaux, preparing for an expedition to the United States? Would it be contended, that he might lawfully supply a British fleet stationed on our coasts? I presume, that two opinions could not be entertained on such questions; and yet, though the cases put are strong, I do not know, that the assistance is more material, than may be supplied under cover of neutral destinations like the present. On the whole, I am of opinion, that the voyage, in which this vessel was engaged, was illicit, and inconsistent with the duties of neutrality; and I think it is a very lenient administration of justice, to deny the neutral master his freight.

The decree of the district court is reversed, so far as it allows the freight; and as to the residue is affirmed.

Affirmed in the supreme court ([The Commercen] 1 Wheat. [14 U. S.] 382); Washington, Story, Todd, and Duvall, JJ., concurring; Marshall, C. J., Livingston, and Johnson, JJ., dissenting.

[NOTE. The opinion for affirmation, delivered by Mr. Justice Story in the supreme court, was substantially the same as the foregoing.]

COMMERCIAL & FARMERS' BANK (LOWRY v.). See Case No. 8,581.

Case No. 3,056.

COMMERCIAL & FARMERS' BANK v. PATTERSON.

[2 Cranch, C. C. 346.][1]

Circuit Court, District of Columbia. Oct. Term, 1822.

PROOF OF STATE STATUTES — ACTION ON PROMISSORY NOTE—EVIDENCE—MATERIAL ALTERATION.

1. The statute book of one of the states, purporting to be published by authority of its legislature, and deposited in the department of state of the United States under an act of congress requiring the secretary of state to obtain copies of the laws of the several states, is admissible evidence of the laws of such states, in the courts of the District of Columbia; and it is not necessary that such statute book should be authenticated according to the provisions of the act of congress of the 26th of May, 1790 [1 Stat. 122].

2. According to the laws of Pennsylvania the equity follows a promissory note into the hands of an indorsee, unless dated at Philadelphia and made payable "without defalcation."

3. The words, "without defalcation," do not prevent the maker of a Pennsylvania note from showing fraud in the payee in obtaining the note.

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

4. In an action by the indorsee against the maker of a promissory note, the declarations of the payee, before he parted with the note, are competent evidence for the defendant; and the defendant having proved the declaration made after the date of the note and before the suit brought, the burden of proof is on the plaintiff to show that the payee had passed away the note before the declarations were made. The addition, by the plaintiffs or the payee, of the word and letters, "Washington, D. C.," to the signature of the maker, without his consent, and with the intent to use that word and those letters as a part of the date of the note, which was really made in Perryopolis, in Pennsylvania, with intent to make it negotiable according to the laws then in force in the District of Columbia, is a material alteration of the note, and makes it void.

At law. Assumpsit by [the Commercial & Farmers' Bank of Baltimore] the indorsee of the defendant's promissory note to Barnett and Cammann for $1,000, dated November 16, 1818, payable on the 1st of June, 1819, "without defalcation." Under the signature of the defendant [Thomas Patterson], the word and letters, "Washington, D. C.," were written apparently by another person. The note was really made by the defendant in Perryopolis, in Pennsylvania, and was given for part of the purchase money of a share in a certain company called "The Perryopolis Green Glass Company," under a written agreement bearing even date with the note. Upon the general issue the defendant's counsel contended for two grounds of defence: 1. That the note was given for a share in certain glassworks, upon a false and fraudulent representation by the payees of the note of the value of the profits and effects of the company. 2. That the word "Washington," and the letters "D. C.," had, without the consent of the defendant, been added to his signature, with a view to make the note negotiable according to the laws in force in the District of Columbia where the defendant resided, so as to deprive him of the benefit of his defence on the ground of fraud.

Mr. Taylor and Mr. Marbury, for plaintiffs, objected to the admission of evidence of fraud or want of consideration because the note was passed to the plaintiffs before it was dishonored, and because it has the words, "without defalcation."

Mr. Key, for defendant. The words, "without defalcation," mean no more than "without offset." By the statute of Pennsylvania, where this note was made, the equity follows the note into the hands of the indorsee, unless the note is dated in Philadelphia, and made payable "without defalcation." Cromwell v. Arrott, 1 Serg. & R. 180.

Mr. Marbury, for plaintiff, objected to the statute book of Pennsylvania, as evidence of the law of that state. Foreign laws must be proved as facts. Church v. Hubbart, 2 Cranch [6 U. S.] 187. The acts of the legislatures of the several states must be authenticated in the manner provided for by the act of congress of the 26th of May, 1790 (1 Stat. 122).

Mr. Key. The statute book which is offered in evidence is Smith's edition of the Laws of Pennsylvania, purporting to be published by authority of the legislature of that state, and deposited in the department of state of the United States, under the act of congress requiring the secretary of state to obtain copies of the laws of the several states, accompanied by the testimony of Mr. Clarke, a lawyer of Pennsylvania, that that edition of the laws was admitted as authentic in the courts of Pennsylvania.

THE COURT (nem. con.) permitted the law to be read to the jury from the statute book.

THE COURT, also (nem. con., but MORSELL, Circuit Judge, hesitating), was of opinion that by the law of Pennsylvania the equity followed the note into the hands of the indorsee, and therefore admitted evidence, on the part of the defendant, tending to show a false and fraudulent representation as to the subject-matter of the contract under which the note was given. Among other evidence, the defendant offered to prove the declarations of Barnett, one of the payees of the note.

Mr. Taylor, for plaintiff, objected to those declarations as evidence: 1st. Because Barnett himself might be examined as a witness; and 2d. Because it does not appear that Barnett was the holder of the note at the time of the supposed declarations, which fact the defendant ought to prove before the declarations could be given in evidence.

But THE COURT (MORSELL, Circuit Judge, doubting) said that the burden of proof was on the plaintiff to show that the note was passed away by Barnett before he made the declarations; the defendant having proved that they were made after date of the note and before suit brought by the plaintiffs. And that, as Barnett could not be compelled to testify, on account of his interest, his declarations might be given in evidence.

And THE COURT (nem. con.), at the prayer of Mr. Key, for the defendant, instructed the jury, that if they should believe from the evidence that the note was written and delivered at Perryopolis in Pennsylvania, and that, since the delivery thereof, the payees, or some person acting for them, or holding the same by assignment under them. added the word and letters, "Washington, D. C.," now appearing on the said note, with the intention of using the said words as a part of the date of the said note for the purpose of making the same negotiable according to the laws in force in the District of Columbia, then such insertion of that word and those letters amounts to an alteration of the said note in a material part thereof, and makes the said note void, and the plaintiff cannot recover upon it.

Verdict for defendant. The plaintiffs took bills of exception, but did not sue out a writ of error.

Case No. 3,057.

COMMERCIAL & SAV. BANK v. CORBETT et al.

[5 Sawy. 172.][1]

Circuit Court, D. Nevada. May 10, 1878.

RECEIVER—REMOVAL OF CAUSE—ORDER OF STATE COURT—RECORD, HOW CERTIFIED—RECEIVER—PLEADING—HOMESTEAD—SECTION 30, ART. 4, NEVADA CONSTITUTION CONSTRUED.

1. When the proper proceedings for the removal of a cause have been taken in the state court, the circuit court has jurisdiction of the cause, for the purpose of granting a provisional remedy, before the first day of the next term on which the party removing the cause, is, by statute, required to enter a copy of the record. Mahoney Min. Co. v. Bennett [Case No. 8,968], followed.

2. No order of the state court accepting the petition and bond is necessary to remove a cause.

[Cited in Brigham v. C. C. Thompson Lumber Co., 55 Fed. 884.]

3. Where the clerk of the state court made up the record in detached papers, certifying to each one, and also, that the papers constituted the whole record: *Held*, a sufficient "copy of the record."

4. The facts essential to the appointment of a receiver need not be pleaded, but may be shown by affidavit at the hearing.

5. A prayer for a receiver is unnecessary.

6. The defendants borrowed money to be used in building a hotel on a block of land, and applied it to that purpose: *Held*, that a note for the money and a mortgage of the block to secure it, constituted an obligation for the erection of improvements within the meaning of the section above-mentioned, superior to any homestead claim of defendants.

This is a motion in a suit to foreclose a mortgage, for the appointment of a receiver. The suit was begun in the state court, March 5, 1878. On March 11, without first obtaining leave of court, plaintiff [the Commercial & Savings Bank of San Jose] filed certain amendments to the complaint, and served them on attorneys for defendants [Daniel G. Corbett, William H. Corbett, and others]. These amendments allege the facts deemed necessary to entitle plaintiff to a receiver. March 15, a demurrer to the complaint was filed. Motion for a receiver was made March 11, in the state court, but before a hearing the defendants filed a petition and bond for the removal of the cause to this court. Thereupon, the state court on motion of defendants' attorneys made the following order and entry on its records: "Now comes counsel for defendants, and presents to the court a petition and bond for the transfer of the cause to the circuit court of the United States for the district of Nevada; and, thereupon, on motion of counsel for petitioners, the court approved the bond and accepted the same as sufficient, and ordered the record herein duly certified to the said circuit court; and it is further ordered, that further proceedings in this cause and court be stayed." This order was made on the first day of the March term of this court, so that the defendants were not required to enter a copy of the record in this court until the first Monday in November, that being the first day of the next term. March 21, the plaintiff moved for, and obtained leave to file a copy of the record in this court for the purpose of applying for the appointment of a receiver, and renewed the motion here. The record filed consists of copies of all papers and minutes in the cause, each separately made out and certified to by the clerk to be a full and correct copy of the original. In addition to these separate certificates, the clerk further certifies as follows: "I, Alfred Helm, clerk etc., do hereby certify that the accompanying papers, to wit: the complaint" (etc., naming each paper), "are full and true copies of all the papers on file and of record in said state district court, and of all the indorsements thereon, and that the said accompanying papers are true and correct copies of the said record, and all the papers, records, documents and files in said above-entitled cause, as the same appear on file and of record in the clerk's office in said state district court." These papers so certified are filed in this court as a copy of the record in the cause. At the hearing it appeared that the defendants are insolvent, and that the mortgaged property is an inadequate security. The mortgages each contain a stipulation or covenant that in any action to foreclose, a receiver may be appointed. Since the execution of the mortgages the defendants, D. G. and W. H. Corbett, and their wives, have filed claims to homesteads in that part of the mortgaged premises described as block 56. The value of this block is variously estimated by the witnesses at from twenty to thirty-six thousand dollars.

Robert M. Clarke, for plaintiff.
Jonas Seely, for defendants.

HILLYER, District Judge. The defendants object to the appointment of a receiver on several distinct grounds, the first being that this court cannot take any jurisdiction in this cause before the first day of the next term which will be the first Monday of November next. This objection raises a question which can hardly be considered an open one in this circuit, and is overruled upon the authority of Mahoney Min. Co. v. Bennett [Case No. 8,968]. In that case the circuit court for the district of California took jurisdiction of a cause removed, before the "first day of the next term," for the purpose of granting a provisional injunction. Counsel for defendants denies that this case states the law correctly, and pressed this court earnestly to adopt his view. Regarded simply as a question of power, I presume it can not be denied that the circuit court for Nevada, presided over by the district judge, has the power to disregard a decision of the circuit judge made in the California dis-

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

trict. A district judge while sitting alone in the circuit court has the same power as any other judge sitting in the same court. Robinson v. Saterlee [Id. 11,967]. While this is so I do not think the district judge should forget that if the circuit judge were present his opinion would control. When his opinion has been embodied in a judicial decision, it ought not to be departed from without most cogent reasons. But in the present instance my own judgment is in concurrence with that of the circuit judge. It would certainly be a great grievance if a case like this could be put in the position counsel contend it is, for more than six months. According to him it is "hung up" beyond the reach of either this or the state court. It is practically nowhere, and the plaintiff is in a far worse position than if he had begun no suit. I have no doubt in my own mind that the moment the jurisdiction of the state court ceases, by reason of presenting to it the statutory bond and petition, the jurisdiction of the United States court attaches. Whenever the purposes of justice require it, the circuit court is bound to take cognizance of the cause.

The second objection is that the case is not properly here, because the state court did not, by its order, accept the petition as well as the bond. This acceptance, it is said, is a judicial act which must be made of record in the state court, and can only be proven to this court by a transcript of that record. The statute provides that after the making and filing of the petition and bond, "it shall then be the duty of the state court to accept such petition and bond and proceed no further in such suit." It does not appear, however, that the jurisdiction of the circuit court depends upon the circumstance that the state court does or does not do this duty. An order, not in terms accepting the bond or petition but directing a stay of further proceedings, would sufficiently show that the state court had accepted both petition and bond, if such acceptance were a condition precedent to the acquiring of jurisdiction of this court. But in any case which is a proper one to be removed, this court can obtain the record and jurisdiction of the cause although the state court not merely omits making an order accepting the petition and bond, but even when it refuses to accept them and attempts to proceed with the suit. The provisions of section 7 of the act of 1875 [18 Stat. 472], giving to the circuit courts of the United States power to issue a certiorari to the state court, commanding it to make return of the record in any cause removed, or to compel the prosecutor to file a copy of his complaint, demonstrate, it seems to me, that the jurisdiction of the circuit court does not depend upon the action of the state court, nor, indeed, upon the filing of a certified transcript of the record. The suit being one which by reason of its parties or subject-matter the circuit court is capable of exercising jurisdiction over, that jurisdiction is acquired by the filing of a statutory petition and bond.

The third objection is to the manner of certifying the record. The clerk of the state court instead of attaching all of the papers together, and certifying to the whole as a copy of the record, has certified to each paper separately, and has also accompanied the papers sent to this court as the record with another certificate in which each paper is named, and they are stated to be the whole record. This course was taken because it has been found convenient to have the papers in the case detached during its progress in the circuit court. The statute speaks of "entering a copy of the record." How that record is to be made up, whether in one book, or on separate sheets of paper, is not stated. In this case I see no reason to doubt that a copy of the record has been entered in this court; at least there is enough to show a cause within its jurisdiction and properly removed. Each paper filed is so authenticated as to be prima facie evidence in this court of what it purports to be. Under such circumstances the circuit court will not remand a cause even if it should appear that the copy of the record entered is imperfect, but will take the necessary action to complete the record.

It is next objected that the amendments cannot be considered on this motion because filed without leave of court. Although no good reason whatever can be given for allowing an amendment to be filed as of course, after demurrer and before answer, and requiring leave of court to file it before demurrer, yet the state practice act seems to require a construction of that kind, and if so the amendments to the complaint were not properly filed. It is unnecessary to decide the question, for a receiver may be appointed upon the complaint and affidavits without the amendments. The complaint is complete as a bill to foreclose a mortgage, but it does not pray for the appointment of a receiver and does not show the facts that the property is an inadequate security, and the mortgagors insolvent. The amendments were filed to set up these facts and pray a receiver. A receiver may be appointed although there is no prayer for one in the bill. Daniell, Ch. Pr. p. 1726; High, Rec. § 83. In this latter authority it is also said that it is not essential that the facts upon which the application is based be set forth in the pleading, but it is sufficient if they appear by affidavit upon the hearing. Section 88. A receiver, says the supreme court of Kansas, may be appointed in an action to foreclose a mortgage if the mortgaged property is insufficient to discharge the mortgage debt. In such case all that the petition need contain is the ordinary averment for the foreclosure of a mortgage. The relation of the value of the property to the debt may be shown by affidavit. Hottenstein v. Conrad, 9 Kan. 435. This rule seems to be a satisfactory one, where as in this case the

appointment of the receiver is merely a provisional remedy and not the chief object of the suit.

These objections, which do not touch the merits, being overruled, the case is a strong one for a receiver. The defendants have not kept their covenants in the mortgages to pay interest, taxes, and insurance. The validity of the mortgage debt is not questioned, nor is it denied either that the property mortgaged is an inadequate security, or that the defendants are insolvent. In addition, there is the covenant in both mortgages that in any action to foreclose the plaintiff may have a receiver of the rents appointed. The power of the court to appoint a receiver of block 56, in which the defendants claim homesteads, was denied on the argument, but the questions arising out of the claim of the defendants to homesteads were reserved for future argument and decision, with the understanding that if the court should appoint a receiver of any of the property, such receiver should not be put in possession of any portion of block 56 actually used by defendants for homesteads, including the portions of the Arlington block used for a hotel, before a decision of the question reserved. There must be a receiver appointed of all the mortgaged premises, except the dwelling-houses and the hotel, and it is so ordered.

Afterwards the following decision was rendered upon a motion to put the receiver in possession of the premises withheld from him on the first motion.

Block 56, in which the defendants claim homesteads, is a piece of land one hundred and seventy feet square with an alley ten feet wide running through it north and south. The block contains ten lots eighty feet by thirty-four. On the west half are the dwelling-houses of defendants with some out-buildings. On the east half is a brick store and the building called the Arlington House, a portion of which is used for a hotel, and the rest for business purposes, not connected with the hotel. The brick store and that portion of the Arlington House not used for a hotel are occupied by tenants, except one room, which is vacant. The west half of the block, and the hotel premises, it is agreed, are worth twenty-five thousand dollars. The value of the homestead exemption may not exceed five thousand dollars. On August 19, 1876, there stood on the east half of the block, on lots 5 and 8, a frame building called the Corbett House, occupied by defendants. The rest of that half on which was situated two stores, a milliner's shop and a saloon, was leased to tenants. On that day a fire destroyed the Corbett House and the stores, and subsequently all that portion of the east half of the block, except the brick store, was cleared preparatory to building a new hotel. The first mortgage for twenty thousand dollars was made on October 4, 1876. At that time no new buildings had been erected, and the defendants were residing with their families in the two dwelling-houses on the west side of the block. The sum of twenty thousand dollars secured by the first mortgage was borrowed for the purpose of building the Arlington House, and it was so used.

The understanding between the plaintiff and the defendants, says Mr. Wm. Corbett in his testimony, was that the money should be deposited with Rice, agent of Wells, Fargo & Co. in Carson, and applied to the building of improvements on the Arlington lot, and this was done. Upon this state of facts there are two grounds upon which, in my judgment, the receiver is entitled to possession of the hotel:

First, and chiefly, because the note for twenty thousand dollars, and the mortgage securing it, constitute an "obligation contracted for the erection of improvements." The constitution of Nevada (article 4, § 30), while exempting a homestead, provides that "no property shall be exempt from sale * * * for the payment of obligations contracted for the purchase of said premises, or for the erection of improvements thereon." The argument for defendants is that this clause only refers to vendors, mechanics, laborers and material-men, and their liens. But I can see nothing in the language which warrants a court in so restricting the meaning of the very comprehensive word "obligation." Whether the defendants contracted the obligation directly to the material-men, laborers and mechanics, or borrowed the money of a bank for the purpose of paying those men, the obligation is as much in the one case as the other one contracted for the erection of improvements. The inquiry is for what, and not to whom, was the obligation contracted. If I am right in this, there is no need of deciding the much discussed question as to the extent of the homestead interest of defendants in block 56. For in respect to the mortgage for twenty thousand dollars the whole block is subject to sale, as it would be were there no question of homestead in the case.

In the second place, if I am wrong in this construction of the constitution, and block 56 is to be treated as exempt from sale to the extent of the homestead rights of the defendants, still the mortgage attaches as a valid lien upon the excess over ten thousand dollars in value, which excess is placed at fifteen thousand dollars. Under existing circumstances, no portion of the block of the value of five or ten thousand dollars can be set apart; at least the case has, so far, proceeded upon this assumption. It will, therefore, in the course of this suit, become necessary to sell the whole of block 56. The defendants, if their homestead claims are sustained to their full extent, cannot retain as homesteads any specific portion of block 56. If the motion of the receiver is now denied the defendants will retain possession, during the suit, of property worth twenty-five thousand dollars, when their exemption could

not at most amount to over ten thousand dollars. If the order is granted the defendants will have comfortable homes until the sale, which must take place in any event. By the order asked, the plaintiff will be protected, and no injustice done to defendants. No rights are determined by such an order. The receiver will take possession as an officer of the court, and will hold the rents and profits received for whoever shall hereafter appear entitled to them. If it shall ultimately appear that the defendants are entitled to homesteads of five thousand dollars each out of the block, a ratable proportion of the rents can be paid to them. On the other hand, if they are not so entitled, and are permitted to remain in possession of the hotel and receive the rents pending this suit, the plaintiff is injured without remedy.

Let an order be entered that the receiver be let into possession of the premises occupied by the defendants as a hotel.

[NOTE. On the final hearing there was a decree for complainant. Case No. 3,058, next following.]

Case No. 3,058.

COMMERCIAL & SAV. BANK v. CORBETT et al.

[5 Sawy. 543.][1]

Circuit Court, D. Nevada. June 9, 1879.

HOMESTEAD—PARTNERS—OBLIGATION CONTRACTED FOR IMPROVEMENTS — DECLARATION OF HOMESTEAD.

1. Accepting the decision of the supreme court of Nevada in Terry v. Berry, 13 Nev. 514, as one a court of the United States, sitting in Nevada, is bound to follow, it is *held*, that there can be no homestead carved out of land held by parties as partners.

2. A note and mortgage given for money borrowed expressly for erecting improvements on a homestead and actually used for that purpose, constitute an obligation contracted for the erection of improvements thereon within section 30, art. 4, Const. of Nevada, and the homestead is not exempt from sale therefor.

3. A mortgage of property occupied by husband and wife as their homestead, duly made and recorded by the husband alone before such property has been selected as a homestead by filing for record the declaration provided for in the homestead act of Nevada, is valid and superior to the homestead claim.

Suit [by the Commercial & Savings Bank of San Jose] to foreclose a mortgage. Two of the defendants, Daniel G. and Wm. H. Corbett, are brothers, and have been general partners since the year 1860. The property covered by the mortgage was bought with partnership funds and held as partnership property. Block 56, the premises in dispute, has for several years been the residence of both partners and their wives and children. In August, 1876, a fire burnt down the "Corbett House situated on this block, and afterwards in October of the same year the complainant loaned twenty thousand dollars to the Corbett brothers for the express purpose of building a hotel on block 56; and as security therefor the brothers executed the mortgage now in question which covers that block. Subsequently and after the filing of the bill in this suit, the wives of the brothers each filed a declaration of homestead upon block 56, and were afterwards, by agreement of parties, made defendants with their husbands. The money borrowed, twenty thousand dollars, was actually used in erecting a brick hotel on a portion of block 56. In purchasing block 56 the brothers took joint deeds of the various lots, thus becoming, under the statute of Nevada, tenants in common of the block. The Corbett brothers are insolvent."

[A receiver was heretofore appointed herein, and an order made letting him into possession of the mortgaged property. See Case No. 3,057, next preceding.]

Robert M. Clarke, for complainant.

Jonas Seely and A. C. Ellis, for defendants.

Before SAWYER, Circuit Judge, and HILLYER, District Judge.

HILLYER, District Judge. The first question regards the nature of the title as bearing on the homestead right. There is no doubt, on principle, a marked difference between lands held by partners and devoted to partnership use in such manner that it is partnership property, applicable to the payment of the joint debts in equity, at the instance of either partner, and lands held by such partners simply as tenants in common, to which no such equitable right of the partners attaches. When real estate is so situated that a court of equity regards it as a trust estate for the joint creditors, the interest of the partners therein is in the surplus only, and hence it is evident no homestead could be set off as against joint creditors, having a right to avail themselves of the partners' equity, out of such real estate if the firm were insolvent. But there is no room for the application of this doctrine to the present case, for it is not denied that the partners jointly executed this mortgage on the joint property, and no joint creditors are here contesting the plaintiff's right. The contention here is between the mortgagors and mortgagees, and for the purposes of this case the lands mortgaged must be looked upon as held by the Corbetts as tenants in common, and no question of resulting trust can arise between the parties to this suit. This is the most favorable view for the defendants claiming a homestead.

The question then is whether, under the laws of Nevada, tenants in common can have a homestead right in the common property. Were the point res integra I should have no hesitation in deciding that a tenant in common, who actually resides and makes his home upon the common property, should

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

have such home, to the extent of his interest therein, protected from forced sale. By both the constitution and law of Nevada it is the homestead which is exempt. Nothing is said about the kind of title a man must have to secure the exemption. Why should the fact that a debtor owns but a half interest in his home put him in a worse, and his creditors in a better, position than he would occupy were the debtor owner of the entire estate? The question of title is not one which concerns the creditor. That rests between the debtor and the party owning the residue of the estate. In re Swearinger & Lamar [Case No. 13,683].

The supreme court of Nevada, however, has adopted a different view of the law upon this point, and has held that out of property situated like that now in question no homestead can be taken. Terry v. Berry, 13 Nev. 514. An attempt was made by counsel to disunguish that case from this, because there the court found that the property out of which a homestead was claimed "was claimed and held by Ginaca and Gintz as copartners." But the same can be said in this case. The Corbett brothers claimed and held the land now in question as copartners. Ginaca and Gintz were tenants in common, as the Corbetts are. In neither case is there any question raised involving the equitable right of one partner or of the joint creditors to have the partnership property applied to the payment of the joint debts in preference to the homestead. Moreover, in this case the partners having made a valid mortgage of the property before the joint creditors took any steps to enforce their rights, their right is gone, their equity being that of the partners, and only available so long as the equity of the partners subsists. If, then, any distinction exists between the case of Terry v. Berry [supra], and this, it is to the disadvantage of defendants rather than otherwise. A decision by the highest court of the state of Nevada construing the constitution and statute of that state is binding on us. We are therefore bound to hold that the homestead law of Nevada does not permit a homestead to be held by a tenant in common in the common property.

For another reason the complainant is entitled to a decree for the sale of the whole of block 56, admitting it to have a homestead character. By the constitution of the state of Nevada (article 4, § 30) it is provided that "no property shall be exempt from sale * * * for the payment of obligations * * * contracted for the erection of improvements thereon." If, then, the mortgage is an obligation within this clause and contracted for the erection of improvements on the block, the payment of it may be inforced by a sale of the block. It is perfectly clear from the evidence that the money secured by the mortgage was borrowed for the express purpose of erecting a hotel, that it was actually used for that purpose, and that the money would not have been loaned on block 56, except upon the understanding that it was so to be used, thus increasing the security.

The defendants argue, that the constitution only extends to obligations contracted for labor or materials actually done or furnished for the improvements, and does not reach an obligation given like this one for money to be applied to payments for labor and materials used in building the improvements. The soundness of this argument cannot be admitted. Money borrowed upon note and mortgage, as this was, for the purpose of paying for labor and material, is, in reason, a thing as much to be protected as the debt of the laborer or material-man when they work or furnish materials on credit. This money has paid the laborer, the material-man, and has, in fact, built the house. It seems a self-evident proposition that the note and mortgage given to secure the money so borrowed and used, constitute an obligation contracted for the erection of improvements. We therefore think that the exemption from sale claimed cannot be allowed as against the note and mortgage of the plaintiff.

The whole block is considered as impressed with the homestead character, and therefore the hotel, although it only covers four lots, must be treated as an improvement on the whole. The defendants themselves have in the course of this suit claimed that the whole block 56 must be regarded as impressed with a homestead character. The case of Smith v. Stewart, 13 Nev. 65, seems to us to justify that claim. Under that decision the tract of land upon which a homestead is located may be held as such to the extent of five thousand dollars in value, regardless of other uses to which the land may be put while used and claimed as a homestead.

Upon still another ground we think there must be a decree against the defendants. This homestead right, if any such was acquired, must have been acquired under the act of March 6, 1865 (1 Comp. Laws, p. 60, § 186 et seq.), which, so far as relates to the question involved, is a verbatim copy of the California act of April 28, 1860 (Stat. 1860, 311). Under the constitution of Nevada a homestead right is acquired "as provided by law." Const. art. 4, § 30. Now, the mode provided by law is, as prescribed by the act of 1865 above cited. To secure the right there must be a declaration in writing, either by husband or wife, or both, making the claim and stating the matters required by that act, signed, acknowledged and recorded as conveyances affecting real estate are required to be acknowledged and recorded, "and from and after the filing for record of said declaration the husband and wife shall be deemed to hold said homestead as joint tenants," that is to say, the character of homestead attaches, and the estate takes its new characteristics as such from the date of this record. Smith v. Shrieves, 13 Nev. 303.

The mortgage in this case was made and

recorded long before the filing of the declaration of homestead. There can be no doubt, we take it, that if the Corbetts at the date of the mortgage had sold this property (block 56), taking their pay for it, and had executed a conveyance in fee, such conveyance could not have been defeated by any subsequent filing of a declaration of homestead by either husband or wife, or both, or in other words, by any homestead right acquired after the making and recording of the conveyance. Hawthorne v. Smith, 3 Nev. 182; Estate of Walley, 11 Nev. 265. If so, the mortgage cannot be defeated, for it was executed for a valuable consideration when no homestead right had attached, "as provided by law." The object of the law requiring a declaration to be filed, among other things, "particularly describing the premises," was doubtless to give notice to parties dealing with the property, and till such notice parties could safely deal with it.

This is not like a case of attachment or judgment lien. Those are but general liens imposed in invitum by the law. The party parts with no consideration to obtain them until he actually purchases at the sheriff's sale. The indebtedness has already been incurred without taking security, and the attaching or judgment-creditor is only seeking to force himself, under the law, into a better position. Until he has purchased at the sale he has parted with nothing on the credit of the property. If a sale should actually take place before any claim of homestead is made I apprehend a title would pass, notwithstanding a subsequent claim of homestead should be made with all the forms of law.

This seems to be the view of the law taken by the supreme court of Nevada in Hawthorne v. Smith, supra. But in making this mortgage there was the consent of the party, and the mortgage was given in consideration of the money advanced. The money was advanced on the credit of the property and the mortgagee stands in the same position that a bona fide purchaser taking a conveyance in fee would occupy. The property, under the constitution and laws, had not then been impressed with the character of a homestead. Such was the construction actually given to the California act before it was adopted by Nevada, and the construction being most reasonable, may be presumed to have been adopted with the language of the statute; and such is the sound reason of the thing. Cohen v. Davis, 20 Cal. 187; Gluckauf v. Bliven, 23 Cal. 312. None of the defendants having established a homestead right superior to the mortgage, there must be a decree in favor of the complainant.

COMMERCIAL BANK OF ALBANY v. TOWNSEND. See Case No. 9,381.

COMMERCIAL BANK OF CLEVELAND v. SIMMONS. See Case No. 3,062.

COMMERCIAL BANK OF CLEVELAND (WOOLSEY v.). See Case No. 18,032.

Case No. 3,059.

COMMERCIAL BANK OF COMMERCE v. GREEN et al.

[2 Flip. 181.][1]

Circuit Court, N. D. Michigan. May 22, 1878.

FOREIGN CORPORATION—A CITIZEN OF ONE STATE SUED AS DEFENDANT WHO CLAIMS TO BE A CITIZEN OF ANOTHER—SERVICE—JURISDICTION.

Where a foreign citizen (corporation) sued a person in the circuit court of the United States, and had service upon him as a citizen of Michigan, when, in fact, it turned out that he was at time of such service a citizen of Illinois: *Held*, that the service was good, and a demurrer to a plea setting up such defense was sustained.

[In equity. Bill by the Commercial Bank of Commerce against George Green and others.]

T. J. O'Brien, for plaintiff.

L. M. Keeting, for defendants.

WITHEY, District Judge. Plaintiff is a corporation created and doing business in Canada under the laws thereof, and consequently a citizen of such foreign state. The declaration states such facts and avers that defendants are citizens of Michigan. Service was had on defendant Green alone; the other defendants are not necessary parties and have not appeared. Defendant Green has interposed by way of plea in abatement that he is a citizen of Illinois and not of Michigan, to which plea a demurrer has been filed. The single question is whether it affects the jurisdiction of the court that Green is alleged to be a citizen of Michigan, when, in fact, he is a citizen of Illinois, service having been made within this district where defendant was found.

We are of opinion that demurrer should be sustained. This court has jurisdiction of suits in which there exists "a controversy between citizens of a state and foreign states, citizens or subjects." Act March 3, 1875 (18 Stat. 470). Such is this case. But the same act provides that, "no civil suit shall be brought before either of said courts," (circuit or district) "against any person by an original process or proceeding in any other district than that whereof he is an inhabitant, or in which he shall be found at the time of serving process." The facts are, plaintiff is a citizen of the dominion of Canada, defendant a citizen of Illinois, and this is a suit in which there is a controversy between them. So far the case satisfies the provisions of the statute as to jurisdiction. A further fact is that defendant is not an inhabitant of this district, but is found at the time of the service of process within the district, and served, and this satisfies

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

the only other provision of the statute involved in order to give unquestioned jurisdiction. The clear import of the act of congress is to give to an alien the right to sue a citizen of any state of the Union in the circuit court of any district where the defendant is found and served. If such is not the statute, then so long as defendant absents himself from the state of which he is a citizen, he cannot be sued in a federal court, whereas it was the clear intention to provide otherwise.

We are aware that it has been held, under the eleventh section of the judiciary act [1 Stat. 78], that it is necessary to state in the declaration of what particular states the respective parties are citizens in order to advise the court of such facts as show jurisdiction. Hodgson v. Bowerbank, 5 Cranch [9 U. S.] 303; Wilson v. City Bank [Case No. 17,797]. But in those and other cases, where the language of the court tends to convey the same view, the facts and the question were quite unlike those in the case at bar. The declaration contains the necessary averments as to citizenship of the parties. The plea states no fact showing want of jurisdiction, but merely want of accuracy as to the state of which defendant is a citizen. It is quite immaterial that defendant is a citizen of some other state than Michigan, so long as he was found and seized within the district.

Demurrer sustained, with leave to defendant to plead over.

Case No. 3,060.

In re COMMERCIAL BULLETIN CO.

BUCKNER v. JEWELL et al.

[2 Woods, 220;[1] 14 N. B. R. 286; 8 Chi. Leg. News, 330; 3 N. Y. Wkly. Dig. 12; 1 La. Law J. 176.]

Circuit Court, D. Louisiana. April Term, 1876.

BANKRUPTCY—LIEN OF LANDLORD FOR RENT—OCCUPATION BY ASSIGNEE.

1. A landlord cannot prove, as a claim against a bankrupt's estate, a demand for rent which accrued after the bankruptcy.

2. But neither the bankrupt nor the assignee can claim to occupy leased premises after the bankruptcy without paying the rent in full.

[Cited in Re Ives, Case No. 7,116.]

3. If either the bankrupt or the assignee continues to occupy the leased premises after the bankruptcy, he is liable for the rent, and the landlord has the same lien upon the goods on the premises as he has upon the goods of other tenants.

4. Where a bankrupt's assignee occupied, after the bankruptcy, for storing the goods of the bankrupt's estate, premises which had been leased to the bankrupt, it was no answer to a demand for rent by the landlord, for the assignee to say that all the assets of the estate had been consumed by the general expenses of the bankruptcy.

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

The petitioner [James Buckner] leased a store, 133 Gravier street, New Orleans, to the bankrupt, for five years, commencing October 1, 1871, at an annual rent of $3,200, payable in monthly installments of $266.66. The lessee became bankrupt January 9, 1872, having paid all arrears of rent up to that time. The assignees [W. L. Jewell and E. E. Norton] were appointed in April, and took possession of the premises, and refused to give up possession to the landlord. They paid him rent, however, from time to time, to the amount of $650. He sued for nine months rent, which accrued during the occupation by the assignees, less the said payment of $650—the amount demanded being $1,750 besides interest. He only demanded judgment against the assignees for the proceeds of the property of the bankrupt, which was in the building, on which he claims he had a lien. For the balance he asked a general judgment, with the privilege of coming in pro rata with the other creditors. The assignees filed an answer, and with it an account, showing that the proceeds of the estate amounted to $2,492.40, of which $1,500 was from the goods in the leased premises; but they claimed credit for the whole amount for the general expenses of the bankruptcy, including their own fees and the $650 paid to the petitioner, and claimed to have the petition dismissed.

J. H. Kennard, W. W. Howe, and S. S. Prentiss, for petitioner.

Lionel A. Sheldon and Singleton & Browne, contra.

BRADLEY, Circuit Justice. The position of the assignees is untenable. A landlord cannot prove against a bankrupt's estate for rent which accrues after the bankruptcy; and neither the bankrupt nor the assignee can claim to occupy the leased premises thereafter without paying the rent in full, unless it has been prepaid by the bankrupt. If they continue to occupy the premises they are liable personally for the rent; and the landlord has his lien on their goods on the premises the same as against other tenants. For rent thus accruing after the bankruptcy, the landlord has nothing to do with the expenses of the estate. They are nothing to him. They cannot be deducted from his rent. If an assignee continues to occupy leased premises of the bankrupt, he ought always to make some definite arrangement with the landlord, unless he expects and is willing to pay the accruing rent. This being the case, the petition for the rent is like any action for rent, and is subject to like rules and proceedings. I think I was mistaken. therefore, in refusing a jury trial in this case. If the assignees wish it they may have it; but the petitioner ought in that case to be allowed to amend his petition and claim a judgment for the whole rent due. If the assignees elect to let the case stand without a jury, the petitioner

may have such judgment as he asks, namely, that the assignees be compelled to pay him the proceeds of the goods which were on the leased premises, less the expenses of sale, and have a judgment for the balance to come in pro rata with the other creditors. The assignees must within ten days, file a written election which course they will pursue.

COMMERCIAL INS. CO. (ALSOP v.). See Case No. 262.

COMMERCIAL MUTUAL MARINE INS. CO. (UNION MUT. INS. CO. v.). See Case No. 14,372.

Case No. 3,061.

COMMERCIAL NAT BANK v. IOLA.

[2 Dill. 353;[1] 5 Chi. Leg. News, 461.]

Circuit Court, D. Kansas. June 6, 1873.[2]

CONSTITUTIONAL LAW—SPECIAL ACTS—CORPORATE POWERS—EXTENT OF TAXING POWER.

1. Article 12 of the constitution of the state of Kansas construed; and, following the interpretation of the state supreme court, *held*, that an act legalizing a special election held in a single city, and authorizing such city to issue bonds to aid a specified manufacturing enterprise, was a special act, and one which conferred corporate powers within the meaning and contrary to the prohibition of said article of the constitution.

[Followed in Citizens' Sav. Ass'n v. Topeka, Case No. 2,734. Cited in Jarrott v. Moberly, Id. 7,223.]

[See note at end of case.]

2. The legislature of a state has no authority to authorize taxation in aid of private enterprises or objects; and municipal bonds issued under legislative authority, to be paid by taxation, as a bonus or donation to secure the location or aid in the erection of a manufactory or foundry owned by private individuals, are void even in the hands of holders for value.

[Followed in Citizens' Sav. Ass'n v. Topeka, Case No. 2,734. Cited in Cole v. City of La Grange, 19 Fed. 873.]

[See note at end of case.]

This is an action on coupons attached to bonds issued by the city of Iola, in Kansas, under the authority of an act of the legislature of that state. The coupons in suit and the declaration are in the usual form. The declaration avers that the bonds to which the coupons are annexed were issued in pursuance of the act of the legislature, which went into effect February 23, 1871. The nature of this act appears in the court's opinion. It is conceded that there is no general statute of the state authorizing municipalities to subscribe for the stock, or otherwise to aid such enterprises as foundries or bridge companies.

The constitution of the state of Kansas, adopted in 1859, contains the following provisions:

Article 2, § 17. "In all cases where a general law can be made applicable, no special law shall be enacted."

Article 12 is entitled "Corporations."

"Sec. 1. The legislature shall pass no special act conferring corporate powers. Corporations may be created under general laws; but all such laws may be amended or repealed."

"Sec. 5. Provision shall be made by general law for the organization of cities, towns, and villages, and their power of taxation, assessment, borrowing money, contracting debts and loaning their credit, shall be so restricted as to prevent the abuse of such power."

"Sec. 6. The term 'corporation,' as used in this article, shall include all associations and joint stock companies having powers and privileges not possessed by individuals and partnerships, and all corporations may sue and be sued in their corporate name."

The declaration is demurred to on the ground that the above-mentioned act of February 23, 1871, is unconstitutional, for two reasons: 1st, because it is a special act conferring upon the city of Iola corporate powers; 2d, because it undertakes to authorize the levy and collection of taxes by the city authorities for private, as distinguished from public, purposes or objects.

Alfred Ennis, for plaintiff.

McComas & McKeighan, for defendant.

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

DILLON, Circuit Judge. Without express legislative authority the city of Iola would have no power to appropriate money or to loan its credit to aid private persons to establish manufactories either near to, or within, the corporate limits. This proposition admits of no dispute, and is well settled. Stetson v. Kempton, 13 Mass. 278; Cushing v. Newburyport, 10 Metc. [Mass.] 510; Cook v. Manufacturing Co., 1 Sneed. 698; Pennsylvania R. Co. v. Philadelphia, 47 Pa. St. 189; Dill. Mun. Corp. § 106. No precedent authority either by general or special act was conferred upon the city to pass the ordinance to provide for the holding of the election to determine whether the citizens would extend the proposed aid to the bridge manufactory and foundry. The adoption of the ordinance and the holding of the election were without color of law. But subsequently the legislature passed the act mentioned in the statement of the case, which undertook to legalize the election and to authorize the issue of the bonds in question. The bonds were issued under the authority of this act, and so the declaration alleges. Their binding obligation upon the municipality depends upon the validity of this enactment, and the question of its validity is raised by the demurrer to the declaration.

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

[2] [Affirmed in Commercial Nat. Bank v. Iola City, 22 U. S. (Lawy. Ed.) 463.]

Against the act two objections are urged in argument: 1st, that it contravenes certain special provisions of the constitution of the state; 2d, that it authorizes the levy and collection of taxes for objects or uses not within the scope of the taxing power. The act whose constitutionality we have to determine purports to legalize the prior election in Iola and to authorize the issue of bonds pursuant to that election. If the legislature might have passed such an act prior to the election, it will not be disputed that it can ratify and confirm an election held without it, but the legislature, it is clear, cannot do by a curative or retrospective act what it could not have previously authorized. Cooley, Const. Lim. 281.

The act which was passed and which went into effect February 23, 1871, after reciting the election and legalizing it, authorizes the city to appropriate $50,000 to aid in the erection of buildings at or near the city of Iola, to be used for the purpose of manufacturing bridges, plows, and stoves, and to issue and deliver the bonds of the city, with coupons attached, payable in fifteen years, and enjoins that it shall levy and collect taxes to pay the principal and interest of the bonds. It is objected that this act violates section 1 of article 12 of the constitution of the state, which provides that the legislature shall pass no special act conferring corporate powers. That the act in question is a special act is so plain as not to justify extended discussion. It is not only limited in its application to the city of Iola, but to a single election and the issue of specific bonds. Never was an act more manifestly special.

It seems to me to be almost equally clear that it is an act which undertakes to confer upon a city corporate powers. It ratifies an election held by the city, and authorizes it to do what, without an express grant, no municipality can do, namely, to issue bonds in aid of a manufacturing enterprise, and to levy and collect taxes to pay such bonds. If the power to create a debt binding upon the municipality and to lay burdens upon all the property within it to pay the debt created, is not a corporate power, it is difficult to conceive what could justly be regarded as such.

The powers given by the terms of the act under discussion are the most important of any which can be conferred upon municipal corporations. They are, indeed, precisely the powers the exercise of which is most to be feared, and which were particularly liable to be unwisely conferred by special legislation. If this prohibition in the constitution (§ 1, art. 12) applies to municipal corporations, the special act in question plainly contravenes it. Whether the twelfth article of the constitution of Kansas, quoted in the statement of the case, was designed to apply to municipal corporations, might admit of some discussion if the question were res nova. This article is taken from the constitution of Ohio.[3] And the supreme court, not only of that state, but of Kansas, has, upon full consideration, repeatedly decided that it did include municipal corporations. Atchison v. Bartholow (1866) 4 Kan. 124; Wyandotte City v. Wood (1870) 5 Kan. 603; State v. Cincinnati (1870) 20 Ohio St. 18, following Atkinson v. Marietta & C. R. Co. (1864) 15 Ohio St. 21.

In the first case cited, the supreme court of the state of Kansas held that the constitution compelled the legislature to regulate the grant of powers to municipal corporations by general laws; and hence a special act, or an act specially amending the charter of the city of Atchison in respect to making local improvements and local assessments was void. In the case next cited (Wyandotte City v. Wood) the same court adhered to this view, and accordingly held that an act of the legislature specially extending the limits of the city of Wyandotte was unconstitutional, because it contravened both sections 1 and 5 of article 12 of the constitution.

So in the case of State v. Cincinnati, above cited the supreme court of Ohio, under the same constitutional provisions, held that the legislature cannot, by special act, create a corporation; nor, by special act, confer additional powers on a corporation already existing, and that in these respects there was no difference between private and municipal corporations since the constitution equally embraced and equally applies to both classes; and therefore the act of April 16, 1870, "to prescribe the corporate limits of Cincinnati," being considered a special act, was adjudged void. See, also, Atkinson v. Marietta & C. R. Co., supra. In this case, Ranney, J., thus expounds the constitution: "These provisions of the constitution are too explicit to admit of the least doubt that they were intended to disable the general assembly from either creating corporations or conferring upon them corporate powers by special acts of legislation. It was intended to correct an existing evil, and to inaugurate the policy of placing all corporations of the same kind upon a perfect equality as to all future grants of power; of making such law applicable to all parts of the state, and thereby securing the vigilance and attention of its whole representation; and, finally, of making all judicial construction of their powers, or the restrictions imposed upon them, equally applicable to all corporations of the same class. We must give such a construction to the constitution as will preserve its leading objects intact." One of these objects in Kansas, as well as in Ohio, was to cut up by the roots the mischief of special legislation, particular-

[3] Sections 1 and 2 of article 13 of the constitution of Ohio are the same as section 1 of article 12 of the constitution of Kansas. Section 6 of article 13 of the Ohio constitution is the same as section 5 of article 12 of the Kansas constitution.

ly in respect to corporations, both public and private. The object would be defeated if the special act relating to the city of Iola could stand.

If, under the doctrine of Butz v. Muscatine, 8 Wall. [75 U. S.] 575, this court is not absolutely bound, in this class of cases, to follow the interpretation of the state constitution given by its highest court, yet it seems that it ought to follow it where it appears to rest upon solid grounds, and was made in cases and in respect to questions where there was nothing to warp the judgment of its judges, and where the interpretation was settled or had been declared at the time the act in controversy was passed.

In the latest case on this subject, decided by the supreme court of the United States, it is not denied that the supreme court of a state is the appointed expositor of its constitution and laws, and that the federal courts will adopt as rules for their own judgments the decisions of the highest courts of the state "respecting local questions peculiar to itself, or respecting the construction of its own constitution and laws." It only denies the binding force of the state adjudications which rest upon general principles of law, and not upon the meaning of special constitutional or legislative provisions. Olcott v. Supervisors [16 Wall. (83 U. S.) 678].

I think the present case is one in which it is the duty of this court to follow the decisions of the state supreme court; and so far as my judgment rests upon the special provisions of the constitution above referred to, I place it upon the state adjudications without an inquiry into their soundness.

But suppose the enactment under which the bonds in question were issued is not "a special act conferring corporate powers" within the meaning of the constitutional prohibition, the other objections made to the validity of the bonds remain to be considered. The act authorizes the creation of a debt by the municipality to raise money by the issue of bonds to be given as a donation or bonus "to aid in the erection or completion of buildings at or near the city of Iola to be used for the purpose of manufacturing Z. King's patent bridges, and as a foundry and iron works," and the act also authorizes and requires the levy and collection of such taxes as may be necessary to pay the interest and principal of these bonds. It is important to be observed that this is undeniably a private enterprise. These buildings and works are the private property of the owners. No public or municipal control over this property or the enterprise aided is specially reserved or provided for, and none exists different from that which exists as to all other property owned by private persons and devoted to private uses. The proprietors of these works are under no obligations, by reason of the aid extended and the burden of taxation thereby imposed upon the municipality, to render it or the state any duty or service whatever—not even to repay the loan, or to maintain for any specified time the contemplated manufacturing enterprise. The state or city could not compel them to complete or operate the works or prevent their removal at pleasure to some other locality.

And thus we have presented the inquiry than which no question concerning the property-rights of the citizen is of more transcendent moment, viz: Whether the legislature may thus compel or coerce the citizen to aid in the establishment of purely private enterprises or objects because these will or may incidentally promote the general good of the community or locality. I think it safe to affirm that no such principle has yet received judicial sanction. On the contrary, the principle has been declared unsound by courts of the highest respectability.

The general subject of the extent of the taxing power in connection with municipal aid to railways has been thoroughly discussed in a majority of the states of the Union, and recently by the supreme court of the United States. Olcott v. Supervisors [supra]; Railroad Co. v. Otoe Co. [16 Wall. (83 U. S.) 667]. The courts everywhere have agreed that taxes can lawfully be imposed for public purposes only; and therefore, in the language of Chief Justice Black: "The legislature has no constitutional right to create a public debt or authorize any municipal corporation to do it in order to raise funds for a mere private purpose. No such authority passed to the assembly by the general grant of legislative power. This would not be legislation. Taxation is a mode of raising revenue for public purposes. When it is prostituted to objects in no way connected with the public interests or welfare, it ceases to be taxation and becomes plunder. Transferring money from the owners of it into the possession of those who have no title to it, though it be done under the name and form of a tax, is unconstitutional, for all the reasons which forbid the legislature to usurp any other power not granted to them. * * * An act of the legislature authorizing contributions to be levied for a mere private purpose, or for a purpose which, though it be public, is one in which the people from whom they are exacted have no interest, would not be a law, but a sentence commanding the periodical payment of a certain sum by one portion or class of people to another. The power to make such order is not legislative, but judicial, and was not given to the assembly by the general grant of legislative authority." Sharpless v. Philadelphia, 21 Pa. St. 147. Similar language is held by Mr. Justice Strong, in delivering the opinion of the supreme court of the United States in the recent case of Olcott v. Supervisors [supra]. The learned justice says: "that the taxing power of the state extends no further than to raise money for a public use, as distinguished from private, or to accomplish some end public in its nature."

Again he says: "No one contends that the power of a state to tax, or to authorize taxation, is not limited to the uses to which the proceeds may be devoted. Undoubtedly taxes may not be laid to a private use." See Freeland v. Hastings, 10 Allen, 570; Tyson v. School Directors, 51 Pa. St. 9.

The only question, therefore, is, whether the use for which taxation in the present case is authorized is a public or a private use. The supreme court of the United States, in sustaining the validity of legislative acts authorizing municipal aid to railways, place it upon the distinct ground that highways, turnpikes, canals, and railways, although owned by individuals under public grants or by private corporations, are publici juris; that they have always been regarded as governmental affairs, and their establishment and maintenance recognized as among the most important duties of the state, in order to facilitate transportation and easy communication among its different parts. Rogers v. Burlington, 3 Wall. [70 U. S.] 654; Mitchell v. Burlington, 4 Wall. [71 U. S.] 270; Railroad Co. v. Otoe Co., supra. Therefore it is that in favor of such improvements the state may put forth its right of eminent domain, and also as now established by judicial decisions, unless the right be denied it in the constitution, its power to tax. That these acts may lawfully be done is because, and only because, the use is a public one, public in its nature; and hence these works are subject to public control and regulation, notwithstanding they may be constructed under legislative authority and be exclusively owned by private persons or corporations. Compulsory taxation in favor of railways and like public improvements owned by individuals or companies, is an exercise of power going quite to the verge of legislative authority. Although it is a doctrine that must now be considered as judicially settled, still it is one which has encountered a vigorous opposition, both on the ground of expediency and of power, and the exercise of the authority has been so disastrous, as already in some of the states to have led to constitutional provisions for the protection of the citizen.

But it is obvious from the statement of the grounds upon which such legislation rests, that it furnishes no support for the validity of taxation in favor of enterprises and objects essentially private; and such I consider to be the establishment of a bridge manufactory or foundry owned by private individuals. Cases may be imagined giving rise to doubts whether the use be public or private, but the one in hand does not seem to be difficult to class. It is certainly not usual for the legislature to undertake to exercise the right of eminent domain to procure sites for hotels, banks, manufactories, stores, and the like, and it may be safely said, unless extraordinary circumstances may occasionally furnish an exception, that private property cannot lawfully be condemned for such purposes; and the reason is that it would not be a taking for public use, nor justified by any reasonable necessity.

So taxation to aid ordinary manufactories or the establishment of private enterprises is a device, until recently, quite unheard of; and the power must be denied to exist unless all limits to the appropriation of private property and to the power to tax be disregarded. The question under discussion must be determined upon some principle, and I hold it to be sound doctrine that the mere incidental benefits to the public or the state which result from the pursuit by individuals of ordinary branches of business or industry do not constitute a public use in a sense which justifies the exercise of either the power of eminent domain or of taxation. If this salutary principle be abandoned, we unsettle the foundations of private property, and unwisely open the door for frauds and abuses of the most alarming character.

That these views are sound I entertain no doubt, but my conviction of their soundness has been much strengthened by the decision of the supreme judicial court of Massachusetts, declaring unconstitutional the act authorizing the issue of what is known as the "Summer Street Fire Bonds." In November, 1872, a considerable portion of the city of Boston was destroyed by fire. In December following the legislature empowered the city to issue bonds to the amount of twenty-five millions of dollars, the proceeds of which three commissioners, appointed by the mayor, were authorized to loan in a safe and judicious manner "in such sums as they shall determine, to the owners of land, the buildings upon which were burned by the fire in said Boston, on the ninth and tenth days of November, 1872, upon the notes or bonds of said owners secured by first mortgages of said land; said mortgages to be conditioned that the rebuilding shall be commenced within one year from the first day of January, 1873; and said commissioners to have full power to apply the proceeds of said bonds in making said loans in such manner, and to make such further provisions, conditions, and limitations in reference to said loans, and securing the same, as shall be best calculated, in their judgment, to insure the employment of the same in rebuilding upon said land burned over, and the payment thereof to the said city."

In the late case of Lowell v. Boston [111 Mass. 454], the constitutionality of this act was the question to be decided. It will be seen that the object of the act, as shown by its provisions, was "to insure the speedy rebuilding on land the buildings upon which were burned" by the great fire; and the question was as to the right of the state to impose any taxes for this object, and this depended upon the further question whether this object was, in a legal sense, a public object.

The court distinctly held, to use the lan-

guage of the rescript sent down in the case, that taxes can only be laid "for some public service or some object which concerns the public welfare;" that "the preservation of the interests of individuals either in respect of property or business, although it may result incidentally in the advancement of the public welfare, is, in its essential character, a private and not a public object." "That the incidental advantages to the public or to the state which result from the promotion of private interests, or the prosperity of private enterprises or business, do not justify their aid by taxation." "That as a judicial question the case is not changed by the magnitude of the calamity which has created the emergency." And, finally, the court say: "The expenditure authorized by this statute being for private and not for public objects, in a legal sense, it exceeds the constitutional power of the legislature, and the city cannot legally issue the bonds for the purposes named in the act." See, also, as to distinction between public and private use: Bloodgood v. Mohawk & H. R. Co., 18 Wend. 65; [Allen v. Jay, 60 Me. 124].[4] Jenkins v. Andover, 103 Mass. 94, holding invalid a statute authorizing taxation in favor of a private incorporated academy. Same principle, Curtis v. Whipple, 24 Wis. 350; People v. Salem, 20 Mich. 452.

As the only authority for the issue of the bonds in question was an unconstitutional act of the legislature, they are void—void from the beginning, and void into whosesoever hands they may come. All persons must, at their peril, take notice of the power of municipal corporations or officers to issue securities, and especially is this so where the want of power results from constitutional prohibitions or provisions. The Floyd Acceptances, 7 Wall. [74 U. S.] 676; Marsh v. Fulton Co., 10 Wall. [77 U. S.] 676; Clark v. Des Moines, 19 Iowa, 199; Steines v. Franklin Co., 48 Mo. 167.

The demurrer to the declaration is sustained, and unless the plaintiff desires to amend, judgment will be entered for the defendant. Judgment for defendant.

NOTE [from original report]. In Allen v. Jay [60 Me. 124], the supreme court of Maine recently decided (July term, 1871) a similar question. The opinion of the court was delivered by Appleton, C. J. In that case the legislature had authorized the town of Jay to lend $10,000 to certain men to enable them to build a saw mill and grist mill, and to exempt the mills from taxation for ten years, and the act was adjudged invalid: Dill. Mun. Corp. (2d Ed.) § 105a. The following is the rescript sent down by the supreme judicial court of Massachusetts in the case of Lowell v. Boston, supra:

"The issue of bonds by the city, whatever provision may be made for their redemption, involves the possible and not improbable consequence of a necessity to provide for their payment by the city. The right to incur the obligation implies the right to raise money by taxation for the payment of the bonds. The point of difficulty in the case is not as to the distribution of the burdens by allowing it to be imposed upon a limited district within the state, but as to the right to impose any tax for the object contemplated by the statute. The power to levy taxes is founded upon the right, duty, and responsibility to maintain and administer the governmental functions of the state, and to provide for the public welfare. To justify any exercise of the power requires that the expenditures which it is intended to meet, shall be for some public service or some object which concerns the public welfare. The preservation of the interests of individuals either in respect of property or business, although it may result incidentally in the advancement of the public welfare, is, in its essential character, a private, and not a public object. However certain and great the resulting good to the general public, it does not, by reason of its comparative importance, cease to be incidental. The incidental advantages to the public or to the state which result from the promotion of private interests, and the prosperity of private enterprises or business, do not justify their aid by the use of public money raised by taxes alone, or for which taxation may become necessary. It is the essential character of the direct object of the expenditure which must determine its validity, as justifying a tax; and not the magnitude of the private interests to be effected, or the degree to which the general interests of the community, and thus the public welfare, may be ultimately benefited by the promotion of those private interests. By the terms of the statute, the proceeds of the bonds thereby authorized are to be expended in loans to persons who are or may become owners of land in Boston, 'the buildings upon which were burned by the fire in said Boston on the ninth and tenth days of November, 1872.' The ultimate end and object of the expenditure, as indicated by the provisions of the statute itself, is to 'insure the speedy rebuilding on said land.' The property thus created will remain exclusively private property, to be devoted to private uses, at the discretion of the owners of the land, with no restrictions as to the character of the buildings to be erected or the uses to which they shall be devoted, and with no obligation to render any service or duty to the commonwealth or the city—except to repay the loan—or to the community at large, or to any part of it. If it be assumed that the private interests of the owners will lead them to re-establish houses, shops, and manufactories, and that the trade and business of the place will be revived or enlarged by means of the facilities thus afforded, still these are considerations of private interest, and if expressly declared to be the aim and purpose of the statute, they would not constitute a public object in any legal sense.

"As a judicial question, the case is not changed by the magnitude of the calamity which has created the emergency, nor by the greatness of the emergency or the extent and importance of the interests to be promoted. These are considerations affecting the propriety and expediency of the expenditure, as a legislative question only. If an expenditure is, in its nature, such as will justify taxation under any state of circumstances, it belongs to the legislature exclusively to determine whether it shall be authorized in the particular case; and however slight the emergency or limited and unimportant the interests to be promoted, the court has no authority to revise the legislative action. On the other hand, if its nature is such as not to justify taxation in all cases in which the legislature might see fit to give authority therefor, no stress of circumstances affecting the expediency, importance, or general desirableness of the measure, and no concurrence of legislative and municipal action, or preponderance of popular favor, in any particular, will satisfy the element necessary to bring it within the scope of legislative power. The expenditure authorized by this statute being for pri-

[4] [From 5 Chi. Leg. News, 461.]

vate and not for public objects, in a legal sense, it exceeds the constitutional power of the legislature; and the city cannot legally issue the bonds for the purposes named in the act."

[NOTE. Plaintiff sued out a writ of error, and the supreme court affirmed the judgment below.

[This case differed only from the case of Citizens' Sav. & Loan Ass'n v. Topeka, 20 Wall. (87 U. S.) 655, decided at the same time, in that in this case the bonds were issued before the general act of February 29, 1872, at a time when there was no statute professing to authorize such a proceeding, and that, after the vote in favor of the issue, the legislature undertook to legalize the election, and to authorize the city officials to deliver the bonds and levy the taxes necessary to pay the principal and interest.

[After stating the foregoing difference in the facts as to the two cases, the court (Mr. Justice Miller delivering the opinion) affirmed the judgment of the circuit court on the authority of Citizens' Sav. & Loan Ass'n v. Topeka, supra. Commercial Nat. Bank v. Iola City, 22 U. S. (Lawy. Ed.) 463. See, also, Citizens' Sav. Ass'n v. Topeka, Case No. 2,734.]

Case No. 3,062.

COMMERCIAL NAT. BANK v. SIMMONS et al.

[1 Flip. 449; 20 Int. Rev. Rec. 32, 79; 22 Int. Rev. Rec. 66; 2 N. Y. Wkly. Dig. 97; 8 Chi. Leg. News, 164; 10 Alb. Law J. 155; 1 Thomp. Nat. Bank Cas. 294; 6 Chi. Leg. News. 344; 3 Am. Law Rec. 107; 31 Leg. Int. 269; 22 Pittsb. Leg. J. 23; 1 Cin. Law Bul. 29.] [1]

Circuit Court, N. D. Ohio. Jan. Term, 1876.

NATIONAL BANKS—RIGHT TO SUE IN FEDERAL COURTS.

A national bank does not sue by virtue of any right conferred by the judiciary act, [1 Stat. 78], but because of the right conferred by the act of 1864 [13 Stat. 101], which authorized and created it, and which is its charter. The charter of the old Bank of the United States was but a law of the United States as the general banking act is. Nor does the judiciary act control the power and right of these banks to sue in the federal courts. The limitations in the 11th section of that act as to suits on assigned paper do not apply to them.

[Suit by the Commercial National Bank of Cleveland, Ohio, against John G. Simmons and others.]

W. J. Boardman, for plaintiff.

Estep & Burke, for defendants.

WELKER, District Judge. This suit is brought on two promissory notes payable to the order of J. G. Simmons & Co., and indorsed to the plaintiff.

The petition states that the plaintiff is a corporation existing under the laws of the United States, and does not state that the payee of the notes is not a citizen of Ohio.

The defendants, Thompson and Mills, demur to the petition, and assign three grounds of demurrer. "1st—That it appears on the face of the petition in each of said causes of action, that the court has no jurisdiction of the defendants, or either of them, or of the subject of the action. 2d—That the plaintiff and its assignor are both residents of the state of Ohio, and of said district, and have no legal right to bring suit against the defendants in this court. 3d—For other good and sufficient reasons appearing on the face of the petition.

This demurrer raises two questions: 1st—Whether the plaintiff can sue in this court, being located in the state of Ohio, and in this district? 2d—Whether, under the judiciary act of 1789 [supra], and the limitation of the 11th section thereof, the plaintiff can sue in this court upon the promissory notes in petition described, the assignor thereof to the plaintiff being a citizen of the state of Ohio, and of this district.

In order to dispose of the questions made, it will be necessary to examine the provision of the act of congress "to provide a national currency, etc.," approved June 3, 1864 [supra], under which the plaintiff was organized, and also the act on the same subject, approved in 1863.

The 59th section of the act of 25th February, 1863 [12 Stat. 681], provides that "all suits, actions and proceedings by or against any association under the act, may be had in any circuit, district or territorial court of the United States held within the district where such association was established."

The 57th section of the act of 1864 provides: "That suits, actions and proceedings against any association under this act, may be had in any circuit, district or territorial court of the United States held within the district in which such associations may be established, or in any state, or municipal court in the county or city in which such association is located having jurisdiction in similar cases."

It is claimed by the defendants that under this section as amended, suit can not be brought by national banks in the state in which they are established. That it only applies to suits against such associations. That, it is true, would seem to be the provision of the section.

But the supreme court of the United States in the case of Kennedy v. Gibson, 8 Wall. [75 U. S.] 498, have given a construction of these two sections that is binding upon this court. Justice Swayne, delivering the opinion of the court, says:

"The 59th section of the act of February 25th, 1863, provides that all suits by or against such associations, may be brought in the proper courts of the United States, or of the state. The 57th section of the act of 1864 relates to the same subject, and revises and enlarges the provisions of the 59th section of the preceding act. In the latter, the word by, in respect to such suits, is dropped. The omission was doubtless accidental. It is not to be supposed that congress intended to exclude the associations from suing in the courts where they can be

[1] [Reported by William Searcy Flippin, Esq., and here reprinted by permission. 2 N. Y. Wkly. Dig. 97, contains only a partial report.]

sued. The difference in language in the two sections is not such as to warrant the conclusion that it was intended to change the rule prescribed by the act of 1863. Such suits may still be brought by the associations in the courts of the United States. If this be not the proper construction, while there is provision for suits against the associations, there is none for suits by them in any court."

Again, in [Merchants' Bank v. State Bank] 10 Wall. [77 U. S.] 605, the National Bank of Boston sued a state bank of the same state in the circuit court of Massachusetts, and the action was maintained. This case recognizes the construction given to these sections by Justice Swayne by entertaining jurisdiction in that case.

We may then regard the section as reading by or against, and authorizing suit by or against these associations.

It is claimed also by defendants that the 57th section only provides for suits under or authorized by the act, that is for liabilities under the act. This is not tenable. The words "under this act" refer to and apply to associations under the act, as descriptive of the parties authorized to sue or be sued, and not to liabilities or causes of action.

We now come to the second question made, and a very important one, and about which there well may be difference of opinion. I have examined it with much care, in order to arrive at a correct conclusion, and feel well satisfied at the conclusions to which I have arrived.

Suppose the plaintiff has the right to sue generally in this court as we have determined, has it the right to sue on promissory notes assigned to it by a resident of the district? I can find no adjudicated case under the banking law, settling this question.

The 11th section of the judiciary act of 1789, after stating that circuit courts shall have jurisdiction in civil cases, etc., in all cases where the suit is between a citizen of the state where "the suit is brought, and a citizen of another state," provides "nor shall any district or circuit court have cognizance of any suit to recover the contents of any promissory note or other chose in action in favor of an assignee, unless a suit might have been prosecuted in such court to recover the said contents if no assignment had been made, except in cases of foreign bills of exchange."

I find two cases in 9 Wheat. [22 U. S.] decided by the supreme court under a similar question made, which arose under the charter of the old United States Bank.

In the first case (Osborn v. U. S. Bank, 9 Wheat. [22 U. S.] 740) it is decided that the charter of the bank confers on the bank the right to sue in any circuit court of the United States. In delivering the opinion in this case, Chief Justice Marshall says:

"The charter of incorporation not only creates it, but gives it every faculty which it possesses. The power to acquire rights of any description, to transact business of any description, to make contracts of any description, to sue on those contracts, is given and measured by its charter, and that charter is the law of the United States. This being can acquire no right, make no contract, bring no suit, which is not authorized by a law of the United States."

Another case was decided at the same term of the supreme court. U. S. Bank v. Planters' Bank of Georgia, 9 Wheat. [22 U. S.] 905. The suit was originally brought by the United States Bank against defendant in the circuit court for the district of Georgia upon notes payable to a citizen of Georgia, and indorsed and transferred to the bank. The defense set up was that the court had no jurisdiction under the 11th section of the judiciary act, or, rather, the limitation to it.

In delivering the opinion of the court, Chief Justice Marshall says:

"We proceed next to inquire whether the jurisdiction of the court is ousted by the circumstance that the notes on which the suit was instituted were made payable to citizens of the state of Georgia. The words of the judiciary act, § 11, are:" (He then quotes the part of the act above quoted, being the limitation, and says:) "This is a limitation on the jurisdiction conferred by the judiciary act. It was apprehended that bonds and notes given in the usual course of business by citizens of the same state to each other, might be assigned to citizens of another state, and thus render the maker liable to a suit in the federal courts. To remove this inconvenience, the act which gives jurisdiction to the courts of the Union over suits brought by the citizen of one state against the citizen of another, restrains that jurisdiction where the suit is brought by an assignee to cases where the suit might have been sustained, had no assignment been made. But the bank does not sue in virtue of any right conferred by the judiciary act, but in virtue of the right conferred by its charter. It does not sue because the defendant is a citizen of a different state from any of its members, but because its charter confers upon it the right of suing its debtors in a circuit court of the United States. * * * There is, consequently, scarcely a debt due to the bank for which a suit could be maintained in the federal court, did the jurisdiction of the court depend on citizenship. A general power to sue in any circuit court of the United States, expressed in terms obviously intended to comprehend every case, would thus be construed to comprehend no case. Such a construction cannot be the correct one. We think, then, that the charter gives to the bank a right to sue in the circuit courts of the United States, without regard to citizenship."

Now let us examine the banking law itself under which the plaintiff was organized.

Section 8, of the act of 1864, provides: "That every association formed pursuant to the provisions of this act, shall, from the date of the execution of its organization certificate, be a body corporate. * * * By such name it may make contracts, sue and be sued, complain and defend in any court of law and equity as fully as natural persons, * * * and exercise under this act all such incidental powers as shall be necessary to carry on the business of banking, by discounting and negotiating promissory notes, drafts, bills of exchange, and other evidence of debt; by receiving deposits; by buying and selling exchange, coin and bullion; by loaning money on personal security," etc.

Then follows, in the same act, section 57, already quoted, providing "that suits, actions, and proceedings, by or against any association under this act, may be had in any circuit, district, or territorial court of the United States within the district in which such association may be established."

To ascertain the privileges and powers conferred upon the banking associations, these sections are to be taken and construed together. It seems to me that these privileges and powers thus given in this act, are as broad and comprehensive as those given to the United States Bank by its charter, and referred to in the case of 9 Wheat. [22 U. S.].

It must be borne in mind that in the judiciary act the right to sue or be sued mainly depends upon citizenship of the parties. That corporations are only allowed to sue or be sued in the federal courts, under the act, through the legal fiction of citizenship, arising from the presumption that such corporations are citizens of the states under whose laws they are created.

These banking associations, not being created by state laws, have no state citizenship growing out of the presumed residence of the stockholders. Under the judiciary act, then, they have no power to sue in federal courts, and must, therefore, derive it from the act creating them. Having no right to sue under that act, the limitation in the 11th section as to suits upon indorsed notes and choses in action does not apply; the right to sue under that section, and the limitation thereto, go together, the one controlling the other.

If the matter of citizenship, in reference to the national banks, is dispensed with in favor of such banks, then what reason is there for the application of the limitation, as to suits on assigned paper? That limitation is only attached to enforce the privileges of citizenship and to prevent its abuse in bringing suits in federal courts. And, further, the banks, in purchasing notes, etc., only are doing what the law authorizes them to do.

I may, then, well say, as was said in the case in Wheaton, that the bank does not sue in virtue of any right conferred by the judiciary act, but in virtue of the right conferred upon it by the act of 1864, authorizing and creating it, and which constitutes its charter. The charter of the old United States Bank was but a law, as this general act is a law of the United States.

The judiciary act does not control the right and power of these banks to sue in the federal courts.

The demurrer to the petition is overruled.

Case No. 3,063.

COMMERCIAL NAT. BANK v. SIMMONS.

[See Case No. 3,062.]

Case No. 3,064.

COMMERCIAL STEAMBOAT CO. v. DUTTON et al.

[2 Cliff. 537.][1]

Circuit Court, D. Rhode Island. Nov. Term, 1865.

COLLISION—VESSEL AT ANCHOR.

A schooner was at anchor in good weather, on a clear day, and in a proper place in a harbor. The master of an in-coming steamer, supposing he could pass to one side of the anchored vessel, attempted so to do, but, in the attempt, his vessel touching the bottom, swung round and collided with the anchored vessel. *Held*, the master of the steamer was at fault in acting upon his own supposition, without proper investigation, that he could thus pass the schooner, and that the steamer was liable for the damage resulting from the accident.

[Appeal from the district court of the United States for the district of Rhode Island.]

Admiralty appeal in a cause of collision. The libellants and appellees [William Dutton and others] were the owners of the schooner Adelaide, and the appellants of the steamer Falcon. The schooner was lying at anchor in the harbor of Providence, between Crook buoy and Field's point; the steamer was entering the harbor coming from New York. The day was clear, without wind. The defence was, that the schooner was in the channel, and the master of the steamer, seeing a number of vessels at anchor near the same place, supposed he could safely pass the schooner thus at anchor; but the fact was, there was not room in the channel, and the steamer touched bottom, and while endeavoring to back the steamer down the channel, she swung round (the water being so low that she would not steer) and collided with the schooner. In the district court a decree was entered in favor of the libellants. [Unreported.]

A. Payne, for appellants.

G. H Browne and N. Van Slyck, for appellees.

CLIFFORD, Circuit Justice. The collision occurred in good weather, and on a clear day, and it is plain that there must be fault

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

on the part of one or the other of the two vessels.

The evidence shows that the schooner was at anchor, and there is no testimony that she was anchored in an improper place. The harbor regulations of the port of Providence proved that all vessels drawing over eight feet of water, approaching the harbor at any time other than at high tide, were required to come to anchor below the Crook, until the tide should allow them free passage. Irrespective of that regulation, however, it was the duty of the master of the steamer, seeing the schooner at anchor and in a helpless condition, to keep out of the way. The master, under the circumstances, had no right to act upon the erroneous supposition set up in the answer; and having done so, without any proper investigation, and a collision having occurred, the owners of the steamer are liable.

Decree of the district court affirmed, with costs.

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

COMMISSIONER OF PATENTS (MARSH v.). See Case No. 9,114.

Case No. 3,065.

COMMITTEE OF WEST NEW JERSEY SOC. v. MORRIS.

[Pet. C. C. 59.] [1]

Circuit Court, D. New Jersey. April Term, 1812.

ACCOUNTING BETWEEN PRINCIPAL AND AGENT—COMPENSATION OF AGENT.

Compensation to an agent for the sale and management of estates, the property of absent proprietors, remitting proceeds of sales made by him, and performing all the duties of such an agency.

This was a suit in chancery, the object of which was to have an account against the defendant [Robert Morris], who was the agent for the complainants, for managing their estates in New Jersey and Pennsylvania; and collecting their debts and rents, and selling their lands in those states, from 1784 to 1802. The only disputed item in the defendant's account, was the compensation which he claimed for his services. The former agents in this business had received ten per cent. on sales and remittances, and a per diem allowance for all days employed in the service of the complainants. The material facts are stated in the opinion of the court.

WASHINGTON, Circuit Justice (MORRIS, District Judge, absent). The only question of difficulty, is, whether any contract, fixing the defendant's compensation for services in the business of the complainants, was at any time concluded between the parties; because, if there was not, the court feels no hesitation in declaring; that upon the ground of quantum meruit, the extraordinary services of the defendant, his great personal sacrifices as a lawyer in full practice, the privations to which he exposed himself in managing this property, and the great benefits derived by the complainants from his persevering attention, prudence and knowledge; justly entitle him to the compensation which he claims. But, if he has bound himself by contract to accept less, he must be satisfied to abide by that rule.

The question of contract must be decided by the correspondence between the parties, where alone the subject of compensation is to be found. On the 21st July, 1784, the complainants, living in England, by their authorised agent, wrote to the defendant and informed him, they had appointed him their agent to superintend their interests in Pennsylvania and New Jersey; and accompanied their letter with a power of attorney, limited in its terms, and confined to the collection of debts, and rents, settlement of particular accounts, and generally to the securing and preserving of their real property in America. Although the complainants appear to have had but an imperfect knowledge of their affairs in this country, they were nevertheless aware, that the rate of compensation to be allowed the defendant, for the services he was called upon to render under these restricted powers, could not be fixed by any allowance, in the nature of commissions, on the small sums he would have to collect; and therefore they assure him generally, that they will make him a just and honourable satisfaction for the trouble imposed on him. They add, it is true, that "the services of an agent had been established at ten per centum commission on all sales realized by remittances to the society;" but, they are so far from proposing this to him as a rate or compensation in the business then committed to his care, and in a way for the defendant to notice, that they expressly declare it to be inapplicable. It is most apparent, that the complainants, in mentioning this usage, did not mean to intimate that ten per cent. was the customary compensation for collecting and remitting money, including the management and preservation of property, so peculiarly situated as this was; and which required extraordinary trouble, and sacrifices of a nature totally unconnected with the ordinary duties of a collector. First, because, such a statement would have been untrue, and that within the knowledge of the complainants, as appears by the allowance made to their former agents, and particularly to Mr. Hunt, whose account was transmitted with this letter to the defendant: and, secondly, because, if such was the meaning of the complainants, the limited powers sent to the defendant, afforded no good reason why this allowance ought to have been received as satisfactory by the defendant; which, however, they admit to be inapplicable. I understand, then, the usage

[1] [Reported by Richard Peters, Jr., Esq.]

spoken of in this letter, as fixing merely the rate of commissions allowed for collecting and remitting money, distinct from the extra trouble of an agent in superintending, recovering, and preserving the property of the principal. The duties are perfectly distinct; and no rate of compensation, which might be just for the performance of one of these duties, could possibly furnish a rule in respect to the other.

Nothing farther seems to have passed between the parties on the subject of compensation, (except a repetition of the general assurance before made, that the complainants would generously remunerate the defendant for his services,) until the 2d November, 1788, when the defendant, in his letter of that date, referring to the complainants' letter of the 21st July, 1784, and repeating what they had then said, as to this matter, draws the distinction between the services which he was called upon to render, and those ordinary duties which belong to an agent, under the character of a collector;—and he suggests the idea of a compensation, proportionable to the nature of his services, in the way of a per diem allowance. This mode of compensating the defendant for his services, prior to the 1st January, 1789, was finally adopted and fixed by the complainants, at seven dollars for each day the defendant had been employed in their service; which being more than the defendant had demanded, they express, in their letter of the 25th March, 1790, a hope that their liberality on this occasion, will be considered by the defendant as an earnest of their wish to reward him fully for his future services. In 1788, the defendant received from the complainants full powers to sell their lands in Pennsylvania and New Jersey; but the difficulties in which the former were entangled, precluded him from selling them until 1792, when the price was fixed by arbitration, on terms very beneficial to the complainants at that time. The purchase money for these lands was paid by instalments; which began in 1793, and continued until the whole was discharged; amounting to a very large sum of money. These sums, as fast as they were received, were regularly remitted to the complainants; and the defendant has charged in his account a commission of ten per cent. on all such sums; but without claiming any other allowance from the 1st January, 1793, on account of these lands; his trouble having ceased in respect to them, by the award in 1792. The New Jersey lands were unsalable, except to an inconsiderable amount; but they continued to demand the care of the defendant, for their preservation against lawless depredation and injury. The defendant has consequently charged in his account, an allowance of seven dollars for every day employed in superintending the interest of the complainants on these days; and also a commission on the rents collected by him, and on the sums received and remitted by him, on the few sales it was in his power to effect. These claims, the court is of opinion, are well founded, and ought to be allowed upon the principle of a quantum meruit, and the absence of any contract on the subject. The defendant admits an error in his account to the amount of —— dollars; and the court is of opinion, that his charge of a sum per day, for preparing his own account, and the papers of the estate, and delivering them over to his successor in 1802, ought not to be allowed; for these were his duties. The decree will be for the balance, which will remain, after deducting from it the balance now appearing to the debit of complainants, by the defendant's account; with interest at seven per cent. from the 1st January, 1803, and the costs.

Case No. 3,066.

COMMON COUNCIL v. SWANN.

[Cited in Alexandria v. Mandeville, Case No. 184. Nowhere reported; opinion not now accessible.]

COMMON COUNCIL OF.

[Note. Additional cases cited under this title will be found arranged in alphabetical order under the names of the municipalities; e. g. "Common Council of Alexandria v. Brockett. See Alexandria v. Brockett."]

Case No. 3,067.

COMMONWEALTH v. MURPHY.

[Case cited as from 3 Pac. Coast Law J. 390, is nowhere reported.]

Case No. 3,068.

COMMONWEALTH v. ROGERS.

[This is a state case, and is reported in 10 Pittsb. Leg. J. 178.]

COMMONWEALTH (TAYLOR v.). See Cases Nos. 13,787 and 13,788.

COMMONWEALTH INS. CO. (DUNN v.). See Case No. 4,174.

COMMONWEALTH INS. CO. (ROBINSON v.). See Case No. 11,949.

COMMONWEALTH NAT. BANK (WHITE v.). See Case No. 17,544.

COMMONWEALTH OF.

[Note. Cases cited under this title will be found arranged in alphabetical order under the names of the commonwealth; e. g. "Commonwealth of Pennsylvania v. Artman. See Pennsylvania v. Artman."]

Case No. 3,069.

The COMPTA.

[4 Sawy. 375.][1]

District Court, D. California. Oct. 11, 1877.

"PERILS OF THE SEAS"—CARRIER'S DEFENSE.

Where the damage to goods shipped under a bill of lading is shown to have been occasioned by leaks in the ship's decks, and the defense relied on is "perils of the seas," it is not enough for the carrier to prove the occurrence of sea perils which might have caused the leaks; he must show that they did. This he may do by showing that the peril was of such a character that injury to the vessel was its natural and necessary consequence; or he may prove that the vessel was in fact injured, by the testimony of those who observed the effect of the peril at the time of its occurrence; or he may prove its effect by showing her condition on her arrival; or he may exclude any other hypotheses, by satisfactory proofs that her decks were sound, stanch and well caulked at the commencement of the voyage: *Held*, under the proofs in this case, that the decks were unseaworthy.

In admiralty.

George B. Merrill, for libellants.

C. Temple Emmet, for claimants.

HOFFMAN, District Judge. This action is brought to recover damages for injuries to goods shipped on board the above vessel and consigned to libellants under various bills of lading, which are appended to the bill. At the hearing, the shipment of the goods and their delivery in a damaged condition were admitted. It was also admitted that the damage was by sea-water. The burden of proof was thus cast upon the carrier to show that the damage was occasioned by one of those causes from the effects of which he is exempted by the terms of the bill of lading or by the general rules of law.

The defense set up in the answer is "perils of the sea." It is contended that the vessel, during the voyage, encountered such violent gales and heavy seas "as to strain and damage her, thereby causing her decks to leak and admit water to the cargo." In proof of these allegations, the claimants produced the log-book and the protest of the master, supported by the suppletory oaths of the latter and the two mates. The log-book shows that the ship experienced weather of very considerable severity. On the twenty-eighth of October the log-book notes "terrific squalls of wind and rain, high confused sea, flooding the decks at times." On the twenty-seventh of November it notes: "Eight a. m., frightful sea with terrific squalls, with hail and rain, flooding decks fore and aft; noon, squalls taking off, but still a heavy sea." The decks appear to have been very frequently flooded, and "high, confused seas, heavy seas, heavy swells," are constantly mentioned. On four occasions the record notes "heavy head-sea, causing ship to pitch hard." "Heavy head-sea, ship pitching heavily." "Heavy head-sea, causing ship to go bows under." "Ship driving heavily." But it is to be observed that the log-book nowhere records any serious disaster to the ship, unless the springing of the head of the mizzen-top-gallant mast be so considered. Some sails were split on one or two occasions, and some halliards and sheets were parted, but the hull of the ship seems to have sustained no damage whatever. She is once or twice mentioned as "rolling heavily," but throughout the voyage she is not once spoken of as "straining" or "laboring" in the seas. On the thirteenth of December, when the log-book states that a heavy head-sea caused the "ship to go bows under, filling decks fore and aft," she appears to have been under top-gallant sails, and the entry contains the note: "Ship behaving well." On the third day, when she is mentioned as driving heavily, she seems to have been under all sail. These facts tend to corroborate the suggestion of some of the experts, that much of the flooding of the decks may have been caused by her having been driven against head seas, under too much canvas. The squalls she experienced, though frequent and severe, appear to have been of short duration. Only twice during the voyage does she seem to have encountered what the log-book mentions as a "strong gale." But the most significant circumstance is the fact that the ship was compelled by stress of weather to heave to, only twice during the entire voyage, and then only for a few hours. This fact seems of itself sufficient to show that the voyage could not have been of extraordinary severity.

From the foregoing it may, I think, reasonably be concluded that the weather experienced by the vessel was such as might, possibly, have produced, on a stanch and seaworthy ship, the effects attributed to it by the claimants. But that it was not of such unusual and extreme severity as to justify the assumption, without further evidence, that it caused the leaks which occasioned the damage. The carrier, to make good his defense, is bound to show that the damage arose from a sea peril. It is not enough for him to show that it might have arisen from that cause. He must prove that it did. This proof can be afforded either by showing a sea peril of such a character that injury to the vessel, however stanch and seaworthy, would be its natural and necessary consequence; or, by the direct testimony of those who observed its effect upon the ship; or, by proving her condition on her arrival; or, he may exclude every other hypothesis of causation, by satisfactory proof that she was tight, stanch and seaworthy at the commencement of the voyage. The proofs fail to show sea perils of the kind first above referred to. The log-book shows weather of some severity, but not greater than is usually encountered on similar voyages; no proof of the second kind above-

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

mentioned is offered. No one, during the voyage, observed that the ship was straining, that her butts and seams were opening, that her oakum was being "spewed out" under stress of weather, or that from any cause her decks were leaking and water gaining access to her cargo.

The master and mates testify very positively that when the vessel left Calcutta, her decks were tight, and neither "leaky, decayed, worn or perforated." The testimony of the numerous experts who made a critical examination of her condition after her arrival at this port will hereafter be noticed. But with reference to the master, it may at this point be observed that his testimony must be received with much reserve. He swears that the decks were not repaired at Calcutta; that he "never saw any rotten places in her decks, nor any place where her deck might have leaked during her last voyage; that he couldn't find any leaks about the decks, only about the bitts forward; and that no caulking was done while it rained." On all these points he is contradicted by the claimants' own witnesses. The mate testifies that he repaired the decks at Calcutta, by the master's orders. He cut out rotten pieces in her decks, and replaced them by graving pieces. He is unable to say in how many places these repairs were made. It is admitted on all sides that the decks leaked, and that the cargo was thereby damaged. The disputed point is whether the leaks were caused by the vessel's straining in heavy weather or by their being rotten, worn and badly caulked. The master's virtual denial of the existence of any leaks is inconsistent with the admitted facts of the case. It is established beyond controversy, and is not seriously disputed by the claimants, that the decks were decayed in many places. The contention is that the decay did not extend far enough into the wood to impair the seaworthiness of the decks. And, finally, the log-book seems to show that between August 19 and August 26, the period during which the caulking was done, it was almost constantly raining. The testimony on which the decision of the case must finally turn, is that given by the experts who examined the vessel at this port, and after the discharge of the cargo, for the purpose of ascertaining her condition and the cause of the damage.

On the part of the respondents, five witnesses of great respectability (three of them marine surveyors and two master shipwrights) testify that beneath the graving pieces in the vessel's decks there were, at least three inches, of sound wood; that in the between-decks, which had been whitewashed, there were several stained spots which they attributed "to small leaks through the decks, which the whitewash rendered more conspicuous than they would otherwise have been;" that the bolts had been driven down in several places to admit of the graving pieces being set in the deck, "to none of which could we trace a leak caused thereby. We consider the decks seaworthy and a proper protection to cargo stowed underneath."

The above is the substance of the report made by these witnesses. Their testimony, as delivered on the stand, is on some points curiously at variance with their report. By the report we learn, or are led to infer, that the decks, though partially decayed, were still sound and seaworthy, the leaks few and slight, and that in their then condition, the decks would afford a sufficient protection to cargo. It is somewhat significant that on the stand they do not venture to make this latter assertion. Two of them add the important qualification, "provided they were well caulked." And none of them pretends that, without being well caulked, the decks would be seaworthy. As the report professes to give the condition of the decks when inspected, and not the condition they would be in, after their defects had been remedied, it is not easy to reconcile this inconsistency. Still less am I able to reconcile their statement that they merely found several stained spots, made conspicuous by whitewash, which they attributed to "small leaks through the deck," with the inexorable and undisputed fact that the cargo was greatly damaged, to what extent did not appear at the hearing, but the libel avers to the amount of $35,000, and the answer alleges that the damage was caused by stress of weather, "by reason of which the vessel was strained and damaged and made to leak in her decks and elsewhere."

In the report no mention whatever is made of any indications of straining or other damage to the vessel. If any such were observed, they were, like the necessity of recaulking, silently ignored. On the stand, several of these experts profess to have discovered signs of straining. They appear to have, probably unconsciously, abandoned the position adopted in the report that the decks, when they inspected them, were tight and seaworthy, and accepted the position assumed by the claimants, viz.: that the decks were not tight, that the oakum had been "spewed out" of the seams, and the cargo had been damaged by the leakage, but that the decks had been brought into this condition by the straining of the ship caused by stress of weather.

The indications of straining, which they profess to have discovered, are slight and inconclusive. Some of them admit that the condition of the decks might as well be referred to defective caulking as to the straining of the vessel, and they almost seem to have concluded that because she leaked she must have strained. To rebut the testimony of these experts, the libellants produce a report signed by ten of the best known and most experienced ship-masters and shipwrights in the port, of the result of their inspection of the vessel. The report states

that they "find no evidence of the vessel being any way strained by stress of weather. The main deck we find to be leaky in many places, owing partly to the decay of her timber, and partly to graving pieces having been put in, under which water has lodged and leaked down alongside of the deck fastenings. Also that the deck has been repaired in a very inefficient manner with old material, and is, in our opinion, unfit for a vessel carrying dry and perishable cargo. We also find evidence of leakage in, or close to the scuppers, but owing to their being removed before our surveys, we had no opportunity of finding out the real cause of the leakage."

All these witneses, except Captain Thomas, who was not called, reiterate and confirm on the stand the statements contained in their report. Wm. Dickie, in particular, who is a shipwright of much experience in the construction of iron ships, testifies in the most positive manner that it would be impossible for an iron ship to strain without showing it in her rivets; and that the rivets of the Compta were perfectly tight and firm. All the witnesses testify to a thorough examination of the vessel for the express purpose of ascertaining whether she had strained, and of finding out the real cause of the damage. They examined rivets, butts, seams, waterways and the side and deck beams, and every place where evidence of straining is to be sought for. They all concur in the result of their examination. They also found many evidences of rottenness in the decks, and they state not only that the deck bolts were driven down to admit of graving pieces being inserted above them, as mentioned by the respondents' experts, but they add, which those experts omit to mention, that the nuts had not been screwed up to the beams, thereby rendering the bolts loose and ineffective. To this cause they distinctly trace a portion of the leaks.

They further testify that the deck had been repaired with old and decayed timber, and that the caulking had been unskillfully and inefficiently performed. In illustration of this last defect, they state that the oakum in some places hung down from the deck, having been driven through the seams; that in some places they could insert the blade of a knife into the seams, and pass it from beam to beam, without encountering any caulking whatever; and they produce in court a piece of ratline or small cordage taken from a seam which was too wide to be filled with the usual and proper material employed in caulking. To these defects, the witnesses referred to attribute the damage sustained by the cargo.

In presence of this testimony it becomes immaterial to discuss the disputed question, whether it is possible for an iron vessel to strain to such a degree as to open her seams, "spew out" the oakum and admit water to the cargo, and afterward return so completely to her previous condition as to show no traces of the occurrence. The question is, moreover, immaterial to this discussion. All the evidence shows that the decks were unseaworthy when the vessel was surveyed. The libellants' witnesses so state in express terms, and the respondents' witnesses impliedly admit it when they state that the decks would be seaworthy, "provided they were well recaulked." The only question in the case therefore is, to what cause is this unseaworthiness to be ascribed. I think that the libellants have shown by a clear preponderance of evidence that it is to be attributed to defective material and caulking of the decks, and not to perils of the seas. Some evidence was given tending to show that the wrappings of the injured bales were insufficient, and that if they had been covered with tarpaulin the damage would have been lessened or avoided. But the mode of packing was apparent, and could have been objected to by the carrier when the goods were offered. It is, moreover, the usual and customary mode in which such goods are packed, and it would seem the invariable mode adopted in Calcutta, from whence the greater part of the supplies of bagging are imported into this city.

An order will be entered referring the cause to a commissioner to ascertain and report the damages.

[NOTE. The cause was subsequently heard on exceptions to the commissioners' report. Case No. 3,070, following.]

Case No. 3,070.

The COMPTA.

[5 Sawy. 137.][1]

District Court, D. California. April 6, 1878.

RULE OF DAMAGES—PRIVATE CONTRACT—LIABILITY—SHIPPER'S PROFITS IMMATERIAL.

1. Where goods are delivered in a damaged condition, the damage sustained is the difference between their market value, if sound, and their value in their unsound condition—both values to be computed as of the time where the goods were, or should have been, delivered.

2. The ship's liability is not affected by private contracts between the shipper and strangers for the purchase and sale of the goods.

3. It is immaterial what disposition the shipper has made of the goods since the breach of contract occurred. If he has chosen to hold them for a better market it was at his own risk and for his own account. The liability of the carrier is in no way affected by the result of the speculation. A rise in the price of the goods will not diminish his liability; nor a fall increase it.

[In admiralty. Libel for damages to cargo. There was a decree for libellant, and a reference to compute the damages (Case No. 3,069, next preceding), and the present

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

hearing is upon exceptions to the commissioner's report.]

Geo. B. Merrill, for libellants.

C. Temple Emmet, for claimants.

HOFFMAN, District Judge. The rule of damages in cases of this description is too well settled to require argument or authority. Where goods are delivered in a damaged condition, the damage sustained is the difference between their market value, if sound, and their market value in their unsound condition. Both values to be ascertained as of the time when the goods were, or should have been, delivered.

The private contract between Mr. Merrill and Mr. Kittle, in the case at bar, can have no influence on the amount to be awarded, except so far as it affords some indication of the market value at the time of delivery, and this for several reasons: (1) It does not appear that the contract was made by the libellants, or that they were bound by it; (2) the contract was rescinded as the linseed contracted for "could not be furnished;" (3) to allow the ship's liability for failure to perform her contract to be in any way affected by secret arrangements between the shipper and strangers, is wholly inadmissible. If permitted, a door to gross fraud would be opened. For the shipper might enter into pretended contracts at exaggerated values, and thus attempt to increase the liability of the ship. So on the other hand, it is of no concern to the ship if the shipper has agreed to sell the goods at a price below their real value, or even to give them away. Her master has agreed to deliver the contents of the bill of lading in good condition. He has delivered them damaged. He must therefore pay the difference in value. What the shipper agreed to sell them to a stranger for is as irrelevant as would be evidence to show that the expected purchaser, shortly after the arrival of the vessel, became bankrupt, and that the shipper, if he had delivered the goods to him, would have lost their price.

It is in like manner immaterial what disposition the shipper has made of the goods since their delivery to him, and especially since the commencement of the suit, except so far as the prices obtained by him may serve to show the market price at the time and place of delivery, or, in other words, the time of the breach of contract by the ship. If the shipper has seen fit to hold the goods for a better market, he has entered into a speculation the result of which can in no way affect the liability of the ship. If he has obtained a higher price than could have been realized at the time of the breach, the ship's liability is not thereby diminished. If he has sold them at a lower price, her liability is not increased.

With the expenses incidental to this speculation, such as storage, insurance, etc., the ship has nothing to do. The ship-owner has not authorized them. He can neither profit nor lose by the result of the expenditure. These observations are especially applicable to this case, since it appears that those expenses were incurred, and the sales made long subsequently to the filing of this libel. Neither can the rise in price of the linseed diminish the ship's liability any more than a fall in price would have increased it. The ship-owner by the bill of lading does not enter into any engagement with the owner of goods that may be damaged, to go into a joint speculative operation founded upon the anticipated state of the market at some indefinite future time, to be judged of by the shipper, who retains in his own hands the whole conduct of the adventure. Such a rule would impose on the ship-owner obligations and liabilities little suspected by persons engaged in that business, and of which his contract by bill of lading contains no hint. The only safe, rational and equal rule, is to hold, as before stated, the vessel liable for the difference between market value of the goods, if sound, and their value in their damaged condition, at the time and place of delivery.

The commissioner in his report has submitted three computations of damages based on as many different theories for ascertaining them. In his third computation he had adopted the rule herein laid down. The market price of sound linseed on or about the first of March, which was the time of delivery, he finds to have been three and a quarter cents per pound, on a credit of sixty days, which for one million one hundred and eighty-three thousand pounds gives thirty-eight thousand four hundred and forty-seven dollars and fifty cents; reducing this to cash by a rebate of interest, he fixes the sound market value for cash on that date at thirty-seven thousand six hundred and seventy-eight dollars and fifty-six cents.

To arrive at the difference between that value and the cash value of the goods in their damaged condition, the proofs furnish only two data. First. The offer made by Mr. Kittle to give for the whole shipment two and one half cents per pound, cash. This offer was declined. It may, therefore, be inferred that in the opinion of the holders, this damage did not exceed the difference between Mr. Kittle's offer and the sound value. The second means of arriving at the difference in question is furnished by comparing the amount actually realized for the goods at the subsequent sale (April 18) with the amount they would have brought, if sound, at that date. The price of linseed was at that time one quarter of a cent higher than on March 1. There is no reason for supposing that the rise in price disturbed the ratio previously existing between the values of sound and damaged seed. Both would naturally respond to the general advance of the market.

On the eighteenth of April, the market value of sound linseed was three and one

half cents per pound, at sixty days credit. This for one million one hundred and eighty-three thousand pounds would be forty-one thousand four hundred and five dollars, which reduced to cash would be forty thousand five hundred and seventy-six dollars and ninety cents. Actual sales at that date brought thirty-four thousand five hundred and ninety-eight dollars and twenty cents, which reduced to cash gives thirty-three thousand nine hundred and six dollars and thirty-four cents; difference, six thousand six hundred and seventy dollars and fifty cents, which amounts to a depreciation or difference in value on account of damage of sixteen and forty-four one hundredths per cent.

On the first of March, the cash market value of sound linseed was, as we have seen, thirty-seven thousand six hundred and seventy-eight dollars and fifty-six cents. Sixteen and forty-four one hundredths per cent. of this gives for depreciation in value, by reason of damage, six thousand one hundred and ninety-four dollars and thirty-six cents. Deduct rebate of duty allowed at custom-house, nine hundred and twenty-four dollars and twenty-five cents. Total damage, five thousand two hundred and seventy dollars and eleven cents, for which, in addition to the amount heretofore found to be due on the damage to bags and burlaps, with interest from March 1, a decree will be entered. The expenses of storage, insurance, etc., are excluded from this computation for the reasons already given.

COMPTON (DOAN v.) See Case No. 3,940.

Case No. 3,070a.

COMPTON v. PALMER.

[Hempst. 282.][1]

Superior Court, Arkansas Territory. July, 1835.

DISMISSAL OF CASE.

A case improperly dismissed by the circuit court; and Boswell v. Newton [Case No. 1,683a] cited and approved.

Error to Independence circuit court.

[At law. Action by Edward L. Compton against Thomas S. Palmer.]

Before JOHNSON, and YELL, JJ.

OPINION OF THE COURT. This is a writ of error to the Independence circuit court, to reverse a decision made at the November term of that court, dismissing the cause, on the ground that it had been discontinued by operation of law. Upon examination of the record, it is found the same question is presented for consideration, as that determined at the last term of this court, in the case of Boswell v. Newton [Case No. 1,683a], which opinion the court has examined and fully approved. The dismission of the cause for the reason set forth was erroneous. Judgment reversed.

[1] [Reported by Samuel H. Hempstead, Esq.]

Case No. 3,071.

In re COMSTOCK et al.

[3 Ben. 236; 2 N. B. R. 561 (Quarto, 171); 2 Am. Law T. Rep. Bankr. 87.][1]

District Court, S. D. New York. May 11, 1869.

BANKRUPTCY PRACTICE—CONTESTING PROOF OF DEBT.

On objection taken by a creditor to a proof of debt filed in bankruptcy proceedings, the order to show cause why the proof of debt should not be vacated must be made by the court, and not by a register.

[On certificate of register in bankruptcy.

[In the matter of Frederick S. Comstock and James M. Wheeler, bankrupts.

[Certificate of Isaac Dayton, Register:]

[2] [The undersigned, register in bankruptcy, having in charge the proceedings in this bankruptcy, hereby certifies, that on the 27th day of January, 1869, upon the objections made in writing, under oath, of Benjamin Hart, a creditor of Frederick S. Comstock and James M. Wheeler against the said bankrupts, the undersigned granted and issued an order requiring the said George M. Wheeler to show cause before the undersigned, at his office aforesaid, on the 2d day of February, 1869, at one o'clock in the afternoon, why the proof of debt made and filed in this matter by the said George M. Wheeler, on the 10th day of December, 1868, should not be vacated, and the record thereof cancelled, &c., which objections and order to show cause are thereto annexed. That, on the said 2d day of February, 1869, at his office aforesaid, the undersigned was attended by the said Benjamin Hart, by Mr. Augustus O. Brown, his counsel, and the said George M. Wheeler by Mr. Da Costa, his counsel; that upon proceeding with the said business, the objection was made on the part of the said George M. Wheeler, that the register had not jurisdiction to make the order aforesaid, and at the request of the counsel for the parties, the question is submitted to the honorable the district judge, whether the register has jurisdiction to summon and examine the bankrupt or any person tendering or who has made proof of claims, or persons capable of giving evidence concerning the proof, or the debt, under the last clause of the twenty-second section of the bankrupt act. The twenty-second section of the bankrupt act [of 1867 (14 Stat. 527)] provides that all proofs of debt against the estate of the bankrupt shall be taken before a register in bankruptcy, or before a commissioner of the

[1] [Reported by Robert D. Benedict, Esq., and here reprinted by permission. Syllabus only in 2 Am. Law T. Rep. Bankr. 87.]

[2] [From 2 N. B. R. 561 (Quarto, 171).]

circuit court, or in foreign countries before a minister, consul, or vice-consul of the United States. The section then provides as follows: "The court may, on the application of the assignee, or of any creditor, or of the bankrupt, or without any application, examine upon oath the bankrupt, or any person tendering or who has made proof of claims, and may summon any person capable of giving evidence concerning such proof, or concerning the debt sought to be proved, and shall reject all claims not duly proved, or where the proof shows the claim to be founded in fraud, illegality, or mistake." The twenty-ninth section of the act provides, that after certain time "the bankrupt may apply to the court for a discharge from his debts, and the court shall thereupon order notice to be given by mail to all creditors" to show cause, &c. It is settled "that the court" in this section is the court and not the register. In the matter of John Bellamy [Case No. 1,267], the two provisions are substantially analogous. The order to show cause was made in the present case, in accordance with a practice which has to some extent obtained, rather than upon a particular examination of the provisions of the act. Probably the correct practice is for the assignee, or creditor, or bankrupt, to apply to the court for an order rejecting a claim as not duly proved. The court will then either take the proof and make the order, or direct a reference. Practically, hardly a case can occur in which an investigation of a claim can be had without any application.] [2]

BLATCHFORD, District Judge. The order made by the register ought to have been made by the court and not by the register.

Case No. 3,072.

In re COMSTOCK.

[8 Ben. 235.] [1]

District Court, S. D. New York. Aug., 1875.

POWER OF REGISTER IN BANKRUPTCY—OATH OF CONFORMITY—EVIDENCE.

1. The oath of conformity, prescribed by section 5113 of the Revised Statutes of the United States as necessary to be taken and subscribed by a bankrupt before his discharge, may be taken by him before any register, or any commissioner of a circuit court of the United States at any place within the district of such register or commissioner.

2. Such oath is evidence, within the meaning of section 5003 of the Revised Statutes.

The register having charge of this case certified to the court as follows:

"In the above entitled matter, the bankrupt [Erwin G. Comstock], who, before and at the time of his adjudication, resided in the county of Greene, in this district, has removed out of said district, to another state. He now petitions for his discharge, and proposes, for the sake of his personal convenience, to take the oath of conformity, an essential and an indispensable requisite to his discharge, before a register not in charge of the case, and not acting for nor at the request of the register in charge, and at a time and place other than that for which notice of hearing has been published and served on the creditors who have proven debts. A register can pass the last examination of the bankrupt (Rev. St. § 4998, subd. 10), and administer the oath of conformity (section 5113). By section 5007, 'any register may act in the place of any other register appointed by and for the same district court.' It appears to me, the oath of conformity should be taken before the register in charge of the case, or a register of the same district, acting for him; that, otherwise, a register is unauthorized to act therein, and, therefore, the oath before him would be irregular and void. The remarks of Judge Lowell in Re Hazelton [Case No. 6,287], do not seem to me to harmonize with the requirements of the bankruptcy statutes."

BLATCHFORD, District Judge. The requirement of section 5113 is, that "the bankrupt must take and subscribe an oath" to a certain specified effect. The register before whom the proceedings are pending can administer such oath, for he is expressly authorized, by section 4998, "to administer oaths in all proceedings before him." But it by no means follows that the oath cannot be taken before a register other than the one before whom the proceedings are pending, even though he be a register of another district, provided he administers the oath within the district for which he is a register. Section 5003 provides that "evidence or examination in any of the proceedings under this title may be taken before * * * a register in bankruptcy * * * in writing, before a commissioner of the circuit court, or by affidavit." Section 5004 provides, that a register "shall have power to administer oaths in all cases and in relation to all matters in which oaths may be administered by commissioners of circuit courts." These sections warrant such a practice. The "oath" in question is "evidence." The expression, "a register in bankruptcy," in section 5003, is not limited to the register before whom the proceedings are pending or to a register of the district. By section 945, "affidavits, when required or allowed in any civil cause, in any circuit or district court, may be taken by a commission of the circuit court for the district." It has been the practice in this district, to allow the oath in question to be taken before a register or a commissioner of a circuit court of the United States, at any place within the district of such register or commissioner. Such practice is proper. The taking of such oath in no manner trenches

[2] [From 2 N. B. R. 561 (Quarto, 171).]

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

upon the duty or function of the register before whom the proceedings are pending, to pass the last examination of the bankrupt, nor is the officer who administers such oath to be regarded as thereby acting in place of such register, within the meaning of section 5007.

Case No. 3,073.

In re COMSTOCK.

[5 Law Rep. 163; 22 Vt. 642.]

District Court, D. Vermont. June, 1842.

BANKRUPTCY — PROVABLE DEBTS — RELEASE OF BANKRUPT FROM IMPRISONMENT UNDER STATE PROCESS.

1. Under the bankrupt law [of 1841 (5 Stat. 440)], a judgment in an action arising ex delicto, and a judgment arising in an action ex contractu, are both debts which are provable against the estate of the bankrupt.

[Cited in Re Clews, Case No. 2,891.]

2. The court cannot release a bankrupt from arrest or imprisonment for a debt which is provable, but not proved against his estate, before the decree and certificate of discharge. Thus, where a bankrupt, after a decree of bankruptcy, was arrested and committed to jail on an execution obtained previously to the decree, it was *held*, that the court had no authority to release him.

3. After the bankrupt has obtained his certificate of discharge, whether the court can interfere in a summary way in his behalf, and relieve him from imprisonment on the process of a state court,—Quaere. See opinion of Story, J., in Re Cheney [Case No. 2,636], and of Sprague, J., in Re Winthrop [Id. 17,900].

In bankruptcy. The petitioner [Edson Comstock] applied to be discharged from imprisonment on an execution issued on a judgment rendered against him by the supreme court of Vermont. He alleged that on the thirtieth of March last, after the recovery of the judgment, he filed his petition in due form to be declared a bankrupt, and on the twenty-fourth of May was declared a bankrupt accordingly; that on the fourth of April he was arrested and committed to jail on the execution, and was still held in custody. It appeared from a copy of the execution annexed to the petition, that the judgment was rendered in an action founded on tort, the cause of which was adjudged and certified to have accrued from the wilful and malicious act of the petitioner.

H. Carpenter, for petitioner.
L. B. Vilas, for creditor.

PRENTISS, District Judge. The distinction which has been insisted upon in this case, between a judgment rendered in an action on tort, and a judgment rendered in an action on contract, is wholly unavailable as against this application. The right of the petitioner to be discharged from imprisonment, if any such right exists cannot be affected by any consideration of that nature. There is no distinction, under the bankrupt law, between a judgment in an action arising ex delicto, and a judgment in an action arising ex contractu. They are both debts within the meaning of the law, and both provable against the estate of the bankrupt. In this case, the judgment, though rendered in an action founded on tort, was rendered before the decree of bankruptcy, and was consequently a subsisting debt which might be proved, like any other subsisting debt, under the bankruptcy, and like any such debt, whether proved or not, will be barred by the bankrupt's certificate of discharge. It is true, that by the law of this state, when a party is committed to jail on an execution issued upon a judgment rendered in an action founded on tort, and it is adjudged by the court, and certified upon the execution, that the cause of action arose from the wilful and malicious act or neglect of the party, he can be admitted neither to the liberties of the prison nor to the benefit of the poor debtor's oath. This law has existed many years in the state and has had, as has been justly said by counsel, a very beneficial tendency. It has, no doubt, proved a salutary restraint against the commission of malicious and mischievous trespasses. The imprisonment to which it subjects evil disposed persons, destitute of the means of making compensation in damages, or concealing and withholding their means to do so, operates as a punishment upon them, and is a great security against injuries to property, and other injuries of a personal nature, which do not amount to public offenses, and cannot be treated and punished as such. I have always regarded the law as a very judicious one, and as not at all oppressive since power is vested in the courts, after an imprisonment suited to the aggravation of the case, on application made for the purpose, to remove the disability and allow the party the privilege of the poor debtor's oath. It may be, as has been urged, that the efficiency of the law will be much impaired, and its benefits in a measure lost to the community, if it is held to be in the power of any party, after judgment against him for a malicious tort, to discharge himself from the judgment by availing himself of the benefit of the bankrupt law. This, if true, might be a very proper argument to address to the national legislature, who have full power over the bankrupt law, but can have no weight with a judicial tribunal, whose business is to say, not what the law ought to be, but what it is.

Considering, then, a judgment recovered in an action on tort, as to the purposes of the bankrupt act, as not distinguishable from a judgment recovered in an action on contract, but both alike provable under the act, the main questions are, whether the petitioner, upon the facts appearing in the case, is entitled to be discharged from custody, and whether it is competent for this court to order his discharge. The right of the petitioner to be discharged, rests upon a general right of exemption, claimed and assumed to accrue

immediately upon the decree of bankruptcy, from arrest and imprisonment for all debts provable under the bankruptcy. It is certain that no such right of exemption is expressly given by the bankrupt act, and it appears to me to be equally plain that none is impliedly given. The provisions of the act, instead of implying, seem clearly to negative any such right, as against a creditor, like the one in the present case, who does not choose to come in and prove his debt. The act declares "that no creditor or other person, coming in and proving his debt or other claim, shall be allowed to maintain any suit at law or in equity therefor, but shall be deemed thereby to have waived all right of action and suit against such bankrupt; and all proceedings already commenced, and all unsatisfied judgments already obtained thereon, shall be deemed to be surrendered thereby." This provision evidently implies an option on the part of any creditor either to come in and prove his debt under the bankruptcy, or to pursue his remedy against the bankrupt at law. It clearly supposes a right in the creditor to take either course; for instead of taking away the remedy at law as to all creditors who have the right to come in and prove their debts, it takes away only as to such creditors who actually come in and prove their debts. By the terms of the provision proof under the bankruptcy is a waiver and relinquishment of all right of action or execution against the bankrupt, and no suit or proceeding whatever can be had against him either at law or in equity. The proof itself operates as a discontinuance of any suit pending, and is a surrender of any judgment recovered for the debt proved; and if the bankrupt is in custody either on mesne process or execution, he will of course be entitled to be immediately discharged from such custody. The act, like the English bankrupt laws, allows the creditor to elect whether he will come in and prove his debt, or take his remedy at law. This right of an election is an established doctrine of the courts of equity in England, and has been invariably recognized and acted upon by them. They hold, that where a creditor comes in under the commission of bankruptcy and proves his debt, it is an election to take his remedy for the debt under the commission; and they will not allow him to imprison the bankrupt for not paying the debt, and if the bankrupt is imprisoned they will discharge him out of custody. On the other hand, where a creditor elects to proceed at law, they will not allow him to prove his debt under the commission. Thus, if a creditor, after the issuing of the commission, takes the bankrupt in execution, apprised of the disposition of the effects, and knowing that there may be a certificate, he is deemed to have made his election, and will not be allowed to prove his debt, or if he proves it, the court will order the debt to be set aside and disallowed. The principle is, that the creditor may elect either to proceed at law, taking his chance of being ultimately defeated by a certificate, or come in and take his remedy under the bankruptcy.

It has been argued that it would be unreasonable, after the bankrupt has surrendered all his estate, and thereby divested himself of all his means, to pay his creditors, that any of them should be at liberty to arrest and hold him in prison. But it should be remembered, as has been once before observed, that the question is not, what the law ought to be, but what the law is. It should be remembered, also, that the bankruptcy in most cases, as in this, is the voluntary act of the bankrupt himself, without the concurrence, and, perhaps, against the will of his creditors; and that whether he has acted fairly, and surrendered all his property, is a question which the creditors, in reason and justice, have a right to make, and which the act allows them to make. The decree of bankruptcy decides nothing in regard to this question. It divests, to be sure, the bankrupt of his estate; and the creditors who prove their debts, and thereby waive all other remedy will have the benefit, to the exclusion of all others, of so much at least as he discloses and surrenders, but he may, notwithstanding, never entitle himself to a certificate of discharge, and may never obtain one.

The act provides, that if the bankrupt shall be guilty of any fraud or wilful concealment of his property or rights of property, or shall have preferred any of his creditors contrary to the provisions of the act, or shall wilfully refuse or omit to comply with any orders or directions of the court; or shall admit a false or fictitious debt against his estate, or shall, after the passing of the act, have applied trust funds to his own use, or, being a merchant, banker, factor, broker, underwriter, or marine insurer, shall not have kept proper books of account, he shall not be entitled to any discharge or certificate. Any one of these things will prevent his getting a certificate; and who can say in advance, that a certificate will not be refused him? How, then, can any creditors, except such as elect to come in under the bankruptcy, and thereby preclude themselves, under the positive provision of the act, from any other remedy, be prevented from pursuing, in the mean time, their ordinary remedy at law?

But when a certificate is obtained, it is not absolutely conclusive in favor of the bankrupt. The act declares, that the certificate, when duly granted, shall, in all courts of justice, be deemed a full and complete discharge of all debts, contracts, and other engagements of the bankrupt, which are provable under the act, and shall and may be pleaded as a full and complete bar to all suits brought in any court of judicature whatever; and the same shall be conclusive evidence of itself in favor of the bankrupt, unless the same shall be impeached for some fraud or wilful concealment by him of his property, or rights of

property, contrary to the provisions of the act. The certificate may be impeached, and its effect wholly avoided, by proof of fraud or wilful concealment of property by the bankrupt; and how can any court say, beforehand, that such proof will not be produced by the creditor, whenever the certificate is set up against him? If the certificate only, and nothing short of it, will bar the remedy at law of a creditor, who does not come in and prove his debt, and even that may be impeached and avoided, it would seem to be very clear that his right to proceed at law remains unimpaired and unaffected, until the validity of the certificate is tried and decided against him. This right to proceed against the bankrupt by original writ or execution must carry along with it all the incidents legitimately belonging to such process; and if by the state laws the person of the bankrupt may be arrested and imprisoned by virtue of such process, on what ground can any court interpose in his behalf, before a certificate is granted, and discharge him out of custody either on mesne or final process? Except as such the property belonging to the bankrupt at the time of the decree of bankruptcy, which by force of the decree alone, and without any reference to the event of a certificate being granted or refused, is ipso facto transferred from him and vested absolutely in the assignee, so that he has no longer any title to it, the creditor remains in the possession, and may avail himself of all the rights which the laws of the state give him; and neither this nor any other court, until a certificate of discharge can release the bankrupt from arrest or imprisonment for a debt which is provable, but not proved, any more than they can release him from arrest or imprisonment for any claim which is not provable.

After a certificate is granted the bankrupt, the act provides no mode for his discharge from custody on mesne process or execution, nor does it give any express authority to this or any other court to discharge him. In this particular, the act differs not only from the English bankrupt laws, but from the former bankrupt law of this country. By the English laws, if the bankrupt was prosecuted for any debt due before the bankruptcy, he might be discharged on common bail, and plead his certificate; if taken in execution, or detained in prison, on a judgment obtained before the allowance of his certificate, so that he had no opportunity to plead it, any one of the judges of the court, in which the judgment was obtained, might discharge him from custody. Under the former bankrupt law of this country, when the bankrupt was sued and arrested, he might appear and plead without bail, and give his certificate in evidence; when taken in execution, or detained in prison, on a judgment obtained before his certificate was allowed, any one of the judges of the court in which the judgment was obtained, or any court, judge, or justice, within the district where the bankrupt was detained, having power to award or allow the writ of habeas corpus, might order his discharge. No such provision, nor indeed any provision whatever on the subject, as I have said, is contained in the existing bankrupt act; and whether, after the bankrupt has obtained his certificate, this court can interfere in a summary way in his behalf, and relieve him from imprisonment on the process of a state court, as well against a creditor who has not proved as one that has proved his debt, or whether the bankrupt must proceed by motion, audita querela, or bill in equity, as the case may require, in the state courts, it is not necessary, nor do I mean, now, to express any opinion. It may be well to observe, however, that whatever may be necessary to the full and complete exercise of the jurisdiction conferred by the bankrupt act, this court has power to do or order to be done. If, therefore, in any stage of the proceedings in bankruptcy, the personal presence of the bankrupt is necessary before the court or a commissioner, the court may undoubtedly order him to be brought up for the special purpose for which he is wanted to be remanded when the special purpose is answered.

Case No. 3,074.

In re COMSTOCK et al.

[5 N. B. R. 191.][1]

District Court, W. D. Michigan. July, 1871.

EXPENSES OF OPPOSITION TO PETITION FOR INVOLUNTARY BANKRUPTCY—ATTORNEY'S FEES.

1. A debtor has the right to appear and defend himself against a petition in bankruptcy; hence, although unsuccessful in his defence, the court has the power to allow him such expenses as may be just and proper, including attorney's fees, to be paid from the assets in the hands of the assignee.

[Cited in Re Jaycox, Case No. 7,239; Re Gies, Id. 5,407.]

2. An attorney is also entitled to be paid, out of the same fund, for services rendered to the bankrupt in securing the allowance of exemptions which were rejected by the assignee.

In bankruptcy.

[David B.] Comstock, one of the bankrupts, resisted the petition to have himself and [Van E.] Young declared bankrupts, as to himself, employing Rogers & Clay, attorneys, for that purpose. They appeared, and contested the adjudication prayed for as against Comstock. But the court adjudged the parties bankrupt. Now comes Rogers & Clay, and ask that their services for Comstock be ordered paid by the assignee, out of assets in his hands, alleging the inability of Comstock to pay, because of his having been obliged to turn over to the assignee in bankruptcy all the company property, and all his individual, except such as the law exempts. The bankrupt's assets are not

[1] [Reprinted by permission.]

equal to fifty cents on the dollar of the debts proved. Can payment be ordered from the assets in the assignee's hands?

WITHEY, District Judge. When a party is declared bankrupt in a proceeding in invitum, a warrant issues at once to the marshal to take possession of the bankrupt's property and effects; he is thereby deprived of all control over his estate, save such as is exempt; he is practically without means with which to pay his attorneys for services in defending against the petition. The amount which the bankrupt gets by exemption is, in most cases, trifling, and in no case is it so much but that he or his family are dependent for support on his personal efforts and earnings. Thus, we see, the law takes the bankrupt's property, and leaves him in no condition to pay an attorney for services rendered in contesting any doubtful questions as to the acts of bankruptcy charged in the petition; and yet the same law gives to the debtor the right to oppose, before a judge or a jury, the petition for adjudication. Suppose the debtor, in good faith, employs an attorney and pays him, (pending the litigation on the question of bankruptcy) subpoenas witnesses and pays them, obtains, it may be, documentary evidence, and disburses therefor, and is at the trial adjudged a bankrupt. Could the assignee turn round and successfully claim from the attorney, or any of the parties, any portion of the amounts so paid out, after notice of the petition filed? Would such payments by the alleged bankrupt be grounds for opposing his discharge? Clearly not. In Re Rosenfeld [Case No. 12,057], it is held no ground for refusing a discharge that the bankrupt employed and paid attorneys from his assets, for resisting the proceedings in bankruptcy. The court, in that case, suggest that the bankrupt had no right to appropriate his assets for any such purpose, or for any other, and placed the discharge on the ground that no fraud was intended.

I am aware that in Re Heirschberg [Case No. 6,329], being a voluntary case, it was ruled, that an attorney's charges for services in behalf of the petitioning bankrupt, and for necessary disbursements incident to preparing and filing the petition, could not be paid by the assignee out of the funds in his hands belonging to the bankrupt's estate, under section twenty-eight. But I am not disposed, after carefully considering the various provisions of the bankrupt act [of 1867 (14 Stat. 530)], and viewing both sides of the question, to adopt the ruling in that case. By section twenty-eight, "the fees, costs and expenses of suits, and the several proceedings in bankruptcy," are entitled to be first paid. Primarily, this may refer to such "fees, costs and expenses of suits, and the several proceedings" as go to the register, assignee and marshal, but in my opinion, when the debtor is given the right to appear and defend, and when the exercise of that right depends on the right to have of his property enough appropriated to pay the expense incident to appearing and defending, the court has the power, and of right ought to allow such expense as may be just and proper, to be paid from the assets in the hands of the assignee. For the law to lay its hands on all a man's property, and withhold it from his power to appropriate enough to meet the expense of a just defence of his rights, is equivalent to saying, "You may defend, if you can, but your property shall all be taken from you so that you cannot defend." I will not believe, nor will I hold, that congress intended to deprive a party of the right to have enough of his own property appropriated to his use, to enable him to contest the doubtful questions which may be, and frequently are, involved as to the charge of acts of bankruptcy. I will not be so tender of the rights of creditors as to deprive the debtor of all chance to assert his rights, nor do I believe the law was ever intended thus to outrage and involve the debtor class. It is true the unsuccessful party in a litigation seldom recovers costs, yet sometimes he is allowed enough to meet the expenses of prosecuting or defending, as the case may be, where all his means are out of his hands, and are so far within the power of the court to control. But the question I am considering does not range itself within the reason which governs in ordinary suits, as to costs and expenses.

The court should be satisfied, before allowing anything, that the defence was fairly justified, and should scrutinize the charges made for any such defence.

I allow twenty-five dollars for resisting the petition in this case, and the further sum of twenty-five dollars for services in securing the allowance of exemptions, which were rejected by the assignee. The assignee disallowed certain claimed exemptions, and the bankrupt was obliged to appeal to the court or lose what he was entitled to. His appeal was successful, and he should, on general principles, be allowed his necessary costs. The assignee is ordered to pay to Rogers & Clay the sum of fifty dollars, out of any funds belonging to the bankrupt's estate.

Case No. 3,075.

In re COMSTOCK et al.

[9 N. B. R. 88.][1]

District Court, E. D. Michigan. 1874.

BANKRUPTCY — MARSHAL'S ACCOUNTS — VOUCHERS — ATTORNEY'S FEES.

1. Marshals must present vouchers for the items charged in their accounts, or produce satisfactory reasons for the absence of vouchers.

2. A marshal can only be allowed a charge for a store-keeper, not to exceed two dollars

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and a half per day, on showing the necessity for his employment, the reasonableness of the price paid, and the actual payment to the storekeeper.

3. Petitioning creditors are not allowed, out of the fund, retainer paid their attorneys, or for any services rendered by their attorney after adjudication of the debtor bankrupt.

[In bankruptcy. In the matter of Eugene Comstock and others.]

On the certificate of the register, Hovey K. Clark, Esq., asking instructions as to the allowance of certain items in the assignee's account.

LONGYEAR, District Judge. First. As to the item paid the marshal as messenger, one hundred and eighty-nine dollars and four cents. By the requirement of general order number twelve, the marshal must accompany his return, whenever practicable, with vouchers for all expenditures charged by him. Whenever vouchers are omitted he must state in his return, or produce other testimony of, the reasons for such omission, in order that the court may judge of the practicability of his obtaining vouchers. In this instance no vouchers are produced, and no reasons for the omission are stated in the return. It was stated, however, on the argument before me, that this being a comparatively early case, and the law not being well understood when the business was transacted, vouchers were omitted by oversight of the deputy who did the business, and that so long a time has elapsed that it is now impracticable to obtain vouchers. The court may, no doubt, exercise a discretion in this matter, and upon its being made to appear before the register that the reasons above stated are the true and only reasons for not producing vouchers, or that it was impracticable at the time to obtain them, the register is authorized to act upon the account without insisting upon their production. As to the item charged in the marshal's return, for "storekeeper, twenty-days, at two dollars and a half per day, fifty dollars," I think the rule laid down by Blatchford, J., in Re Lowenstein [Case No. 8,572], is a very proper and judicious one, and the same is adopted by this court. It is this: "The sum actually paid a keeper to watch property in custody, not exceeding two dollars and a half a day, may be taxed, upon satisfactory proof that a prudent precaution, in regard to all concerned in the property, justified the marshal in placing a keeper over it; that the keeper actually continued in charge of it for the time specified, and that the sum charged therefor is reasonable for the service, and has been actually paid by the marshal." Upon such proof being made before the register the item must be allowed.

Second. As to the item for cash paid petitioning creditor's attorney's fees and expenses, one hundred and seventy-five dollars; the first item of the attorney's bill being for retainer, fifty dollars, and the last two items thereof being for expenses, ten dollars, and services, fifteen dollars, attending first meeting of creditors, is disallowed. After adjudication the petitioning creditor has no preference over any other creditor as to allowance of expenses incurred by him in connection with the bankruptcy proceedings. The matter is referred back to the register to proceed therein in accordance with the foregoing decision.

Case No. 3,076.

In re COMSTOCK.

[1 N. Y. Leg. Obs. 326.]

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

NECESSARIES OF BANKRUPT.

[A pew in a church cannot be included in property set apart to the bankrupt as necessaries.]

In bankruptcy. This case came before the court on exceptions to the assignee's report, setting apart necessaries, &c., to the bankrupt [E. D. Comstock], because the assignee had refused to include in property set apart a pew in the Madison-Street Church.

A. Crist, for bankrupt.

W. C. H. Waddell, in person.

BETTS, District Judge. However desirable it may be that this conveniency should be allowed a bankrupt and his family, I do not think it one of those things contemplated by the act, and which the assignee may be compelled to set apart. It is no more than desirable and convenient, and cannot be ranked with the articles classed by congress as necessaries. The other articles should be ejusdem generis as to utility to the family. This exception cannot be supported, and is overruled.

Case No. 3,077.

In re COMSTOCK et al.

[3 Sawy. 128;[1] 10 N. B. R. 451; 6 Chi. Leg. News, 413; 22 Pittsb. Leg. J. 25.]

District Court, D. Oregon. Sept. 3, 1874.

ACT OF CONGRESS NOT RETROSPECTIVE—ADJUDICATION IN BANKRUPTCY.

1. The provision of the act of June 22, 1874 (18 Stat. 181), amendatory of the bankrupt act [of 1867 (14 Stat. 536)], requiring one-fourth in number and one-third in amount of the creditors to join in a petition for an adjudication in bankruptcy, in cases commenced prior to its passage and since December 1, 1873, does not apply to any of such cases in which there had been an adjudication prior to the date of said act.

[Cited in Re Leland, Case No. 8,231.]

2. A petition in bankruptcy is an action or suit, and an adjudication of bankruptcy thereon is a final judgment, which judgment is be-

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

yond the power of congress to annul or set aside.

[Cited in Re Oregon Bulletin Printing & Pub. Co., Case No. 10,560.]

On December 16, 1873, a petition in bankruptcy was filed in this court against C. B. Comstock & Co., upon which they were adjudged bankrupts on January 9, 1874; which adjudication was affirmed in the circuit court on May 9, thereafter. On January 30, the Bank of British Columbia proved a debt against the estate, of $6,620.28, to which the assignee, on June 10, filed objections. On July 31 the bank moved to strike the objections from the files, because the court had no jurisdiction to proceed in the case since June 22, 1874, for the reason that it appeared that less than one-fourth in number and one-third in amount of the creditors had joined in the petition. Thereupon at the request of the parties, the register certified the question to the judge for decision, with an opinion against the motion.

William A. Effinger, for creditor.
William Strong, for assignee.

DEADY, District Judge. Section 39 of the bankrupt act [of 1867 (14 Stat. 536)], as amended by section 12 of the act of June 22, 1874 [supra], makes it necessary for at least one-fourth of the creditors in number and one-third in value to join in the petition to have their debtor adjudged a bankrupt; and provides that this provision "shall apply to all cases of compulsory or involuntary bankruptcy commenced since December 1, 1873."

The petition in this case was not brought by such a proportion of the creditors, either in number or value. The case having been "commenced since December 1," is within the mere letter of the act, but I do not think it is within the intent or purpose of it. This has been so held by Hopkins, D. J., in Re Raffauf [Case No. 11,525]; by Longyear, D. J., in Re Angell [Id. 386]; by Krekel, D. J., in Re Rosenthal [Id. 12,062]; by Withey, D. J., in Re Pickering [Id. 11,120]; and by Dillon, C. J., in Re Obear and Re Thomas [Id. 10,395].

A petition to have a debtor adjudged a bankrupt is to all intents and purposes an action or suit. The direct and immediate object of the proceeding is to obtain the judgment of the court that the debtor is a bankrupt. From the filing of the petition until the court pronounces upon this question, the action is pending. But so soon as judgment is given, either that the debtor is a bankrupt or not, it is no longer pending. The action has passed into judgment—not interlocutory, but final. True, there may follow long and complicated proceedings in the court concerning the settlement and distribution of the bankrupt's estate, but these are only consequences or incidents of such final judgment. Upon an execution to enforce an ordinary judgment in an action at law to recover money or specific property, there may be proceedings against third persons for the purpose of subjecting money or property due from or held by such persons to the satisfaction of said judgment.

A decree dissolving the marriage relation is a final one, so far as the direct object of a suit for divorce is concerned, although the court may thereupon be authorized and proceed to make further decrees and orders, and change and modify the same from time to time, concerning the property of the parties and the custody and maintenance of their children.

A decree admitting a will to probate is a final one so far as the validity of the will is concerned, although the court, as a consequence of such decree, may proceed to administer and distribute the estate of the testator. Admitting that the legislature can modify or change the remedy in a particular case, even after the commencement of proceedings, such modification or change would only apply to pending cases. In the cases suggested there is no longer a remedy to be affected by the legislation. It is functus—merged or passed into judgment. The rights of all parties to the proceeding have thereby become determined and vested, beyond the reach of legislative caprice or control.

So in the case at bar. The petition to have Comstock & Co. adjudged bankrupts was no longer pending when the amendment of 1874 took effect. It had served its purpose and the adjudication upon it had determined the status of the debtors, and authorized the court to distribute their estate among their creditors. Even if it were within the power of congress to annul all the many adjudications in bankruptcy that were had throughout the country between December 1, 1873, and June 22, 1874, upon petitions filed since the former date, the act would be such an unreasonable, arbitrary, and unjust one that no court would hold that congress so intended unless the intention was expressed in the plainest and most explicit language. So long as the act was capable of any other construction it should be adopted in preference to one which would lead to such monstrous and extraordinary results. See In re Obear and In re Thomas, supra.

For these reasons I conclude that the act of 1874, requiring that in all cases of involuntary bankruptcy, commenced since December 1, a certain proportion of the creditors should join in the petition, was not intended to apply to the cases determined before its passage. As was said in Re Raffauf, supra: "Its requirements are satisfied with an application of its provisions to existing cases before adjudication, and such, it seems to me, is the obvious meaning of the amendment;" and, also, in Re Angell, supra: "The enactment in question is given full effect, and in my opinion all the effect congress intended it should have, by applying and limiting it

to cases still pending, and undisposed of by adjudication."

In Re Joliet I. & S. Co. [Case No. 7,436], and in Re Scammon [Id. 12,430], it was held that the act of 1874 applied to all cases commenced since December 1, and still pending or not adjudicated at the date of its passage; and, therefore, that the petitions in such cases must be amended so as to show that the requisite number and value of creditors join in it, before the court can give judgment. In the first case Blodgett, D. J., said: "It is manifest, then, that from the time this becomes a law no person can be adjudged a bankrupt unless the requisite number of creditors join in the petition, because it must be upon their petition: * * * Taking the whole scope of the act, it seems to me, that in all petitions where adjudication has not already been passed, the allegation must come from the petitioning creditors, and it must be made to appear affirmatively that the requisite number do join in the petition;" and in the second one: "The evident spirit and intent of the amendment is that all cases pending, commenced since December 1, shall conform to and proceed upon the requirements of the law in the same manner as new cases."

Now, although this precise question was not before the court in those cases, yet the plain import of the passages quoted is, that when the cases had passed into judgment they are not pending, and therefore not within the intention of the act. But if it were manifest that it was the intention of congress that the act should apply to all cases commenced since December 1, whether they had passed into judgment or not, it is equally plain that it is not within its power so to provide. The necessary effect of such an enactment in this case, would be to annul and set aside the judgment determining Comstock & Co. to be bankrupts, and to grant them a new trial. This would be the exercise of judicial power—a power which congress does not possess. By the constitution (article 3, § 1) it is provided: "The judicial power of the United States shall be vested in one supreme court, and in such inferior courts, as the congress may from time to time ordain and establish."

In Wheeling Bridge Case, 18 How. [59 U. S.] 431, Mr. Justice Nelson says: "But it is urged, that the act of congress cannot have the effect and operation to annul the judgment of the court already rendered, or the rights determined thereby in favor of the plaintiff. This, as a general proposition, is certainly not to be denied, especially as it respects adjudication upon the private rights of parties. When they have passed into judgment the right becomes absolute, and it is the duty of the court to enforce it." In the same case, at page 440, Mr. Justice McLean says: "The congress and the court constitute co-ordinate branches of the government; their duties are distinct and of a different character. The judicial power cannot legislate, nor can the legislative power act judicially;" and at page 449 Mr. Justice Greer says: "Congress cannot annul or vacate any decree of this court. The assumption of such a power is without precedent, and, as a precedent for the future, it is of dangerous example."

Counsel for the motion has attempted to show how this act may be applied to this case without annulling the judgment, by merely staying any further proceeding herein, as upon a stet processus, until the petition has been amended in conformity with it. But this implies that the amendment can be made, whereas the petitioner may not be able to get the requisite number of persons to join in the petition, and in that event the judgment is practically annulled, because no proceedings can be taken under it or in consequence of it. But if the amendment can be made, the debtors must be allowed to controvert it, or else it is a mere fiction, which may be alleged as a matter of form, to give the court jurisdiction. If the amendment is controverted, a trial must take place on this issue, which may result in a judgment dismissing the petition, and in that case what becomes of the former judgment? In effect it is annulled from the time it is considered within the purview of the act requiring the amendment of the petition.

That such is the effect of applying the act to this class of cases, it seems to me there can be no doubt. For instance, on December 2, 1873, the law of this state being, that a party might bring an action against an absent debtor and attach his property within the state to satisfy any judgment which he might obtain therein, upon the service of a summons by publication, suppose A. commenced an action in that manner against B., and obtained judgment before June 22, 1874, when the legislature changed the law and provided that service of a summons should not be made by publication except upon conditions and under circumstances materially different and in addition to those required by the old law, and further, that this provision should be retroactive and apply to all cases commenced since December 1, 1873, can it be claimed that this act could be applied to the case of A. v. B. without practically annulling and setting aside the judgment therein? Manifestly not. The only practical solution of the question, is to hold that the act of 1874 merely applies to pending cases—cases in which the action has not been brought to a termination—and that cases which have passed into judgment are not pending ones, but res adjudicata, and therefore beyond the domain of legislation.

[NOTE. The assignee objected to proof of debt by the bank, on the ground that the bank had never complied with the Oregon statutes requiring foreign corporations to appoint an attorney within the state before transacting business therein, and the bank moved to strike out the objection, and the court held the objection

well taken and denied the motion to strike out. Case No. 3,078.

[For a subsequent decision denying the right of the bank to appear by counsel at an examination before the register, see Case No. 3,080.]

Case No. 3,078.

In re COMSTOCK et al.

[3 Sawy. 218; 11 N. B. R. 169; 7 Chi. Leg. News, 126.] [1]

District Court, D. Oregon. Dec. 7, 1874.

FOREIGN CORPORATION, ACTS OF, WHEN VOID — ESTOPPEL IN PAIS.

1. A statute of Oregon provides that "a foreign corporation before doing business in the state, must duly execute" a power of attorney, appointing an agent upon whom all process may be served in suits against such corporation. *Held*, that such a corporation before complying with said act, had no power to contract or sue in the state, and that the act was prohibitory and anything done by the corporation contrary to it, was illegal and void.

[Cited in Northwestern Mut. Life Ins. Co. v. Overholt, Case No. 10,338; Same v. Elliott, 5 Fed. 227. Approved in Semple v. Bank of British Columbia, Case No. 12,659. Distinguished in Orange Nat. Bank v. Traver, 7 Fed. 147; Oregonian Ry. Co. v. Oregon Ry. & Nav. Co., 23 Fed. 237. Cited, in brief, in Cooper Manuf'g Co. v. Ferguson, 113 U. S. 733, 5 Sup. Ct. 739.]

2. The doctrine of estoppel in pais does not extend so far as to enable a person or corporation to do in effect what is forbidden by law, or what they are otherwise incapable of doing, and therefore a party to a contract with a foreign corporation made in violation of the above mentioned act, is not estopped to show its illegality for the purpose of preventing a recovery upon it.

[Cited in Spare v. Home Mut. Ins. Co., 15 Fed. 712. Distinguished in Oregonian Ry. Co. v. Oregon Ry. & Nav. Co., 23 Fed. 237.]

Objection to proof of debt.—On September 20, 1874, the Bank of British Columbia filed an amended proof of debt against the estate of C. B. Comstock & Co., for the sum of $6,620.88. On September 26, the assignee filed an objection to such amended proof to the effect that such bank was a foreign corporation, and had never complied with sections 8 and 9 of the act of the state, of October 24, 1864, requiring a foreign corporation before transacting business in this state, to appoint an attorney upon whom all process necessary to give jurisdiction over such corporations to the courts of this state, may be served.

Counsel for the bank moves to strike out the objection, because: 1. Said objection is improperly pleaded with objections "which are substantial in character." 2. The assignee is estopped to deny that the bank is a foreign corporation authorized to do business in this state, for the reason that it appears the bankrupts "so dealt and traded with it;" and 3. Said Comstock & Co. borrowed the money of the bank "which is the subject of this proof" and "thereby did acknowledge that the bank was a foreign corporation authorized under the laws of the state of Oregon to do business in said state, and therefore the assignee of said Comstock & Co. cannot now be heard to deny the same."

The first point made in support of the motion was not argued.

[For denial of a prior motion to strike out objections by the assignee to the proof of debt, see Case No. 3,077, next preceding.]

William H. Effinger, for the creditor, cited 2 N. B. R. 131 [In re Boutelle, Case No. 1,705;] 2 Pars. Cont. 798, 799, note; 19 N. Y. 484; 3 Sandf. 170; 13 Am. Law Reg. (N. S.) 610 [Union Mut. Life Ins. Co. v. McMillen, 24 Ohio, 67]; 14 Ind. 90.

William Strong, for the assignee, cited [Bank of Augusta v. Earle] 13 Pet. [38 U. S.] 588; [Paul v. Virginia] 8 Wall. [75 U. S.] 180; 2 Paine, 516; [Warren Manuf'g Co. v. Etna, Case No. 17,206]; 8 Wend. 480; 11 Ohio St. 191; Potter, Dwar. St. 222; Herm. Estop. §§ 540, 571.

DEADY, District Judge. On the argument it was admitted by counsel for the assignee, that he stood in the same relation to the matter as the bankrupts, and could not be heard to make this objection unless they could. Without expressing an opinion upon this proposition, it is assumed for the purposes of this case that such is the law.

It was also admitted that the bank is a foreign corporation, empowered by its charter to loan money and collect the same within this state, so far as the laws thereof permit.

Two questions appear to arise in the case: 1. Does the Oregon statute prohibit the transaction of business therein by a foreign corporation until its requirements are complied with? 2. Is the assignee estopped to show a want of compliance by the bank with the statute because the bankrupts were parties to the transaction alleged to have been done in violation of it?

The existence of the foreign corporation styled the Bank of British Columbia, is admitted by the assignee. But it is denied that such corporation has the power to transact business in this state, except by its consent, and then only upon the terms of such consent; and it is claimed that a transaction in violation of such terms is illegal and void for want of power in the corporation.

A foreign corporation has no existence beyond the limits of the sovereignty which created it. As was said in Bank of Augusta v. Earle, 13 Pet. [38 U. S.] 538: "It exists only in contemplation of law, and by force of the law; and where that law ceases to operate, and is no longer obligatory, the corporation can have no existence. It must dwell in the place of its creation, and cannot migrate to another sovereignty."

Yet by the comity of nations the existence

[1] [Reported by L. S. B. Sawyer, Esq., and here reprinted by permission. 7 Chi. Leg. News, 126, contains only a partial report.]

of a foreign corporation will be recognized in other countries, and if not prejudicial to their interests or repugnant to their policy it will be permitted to transact business therein. In Story's Conflict of Laws (section 38), it is said: "In the silence of any positive rule, affirming or denying or restraining the operation of foreign laws, courts of justice presume the tacit adoption of them by their own government, unless they are repugnant to its policy or prejudicial to its interests."

The doctrine is thus stated by Mr. Justice Field in Paul v. Virginia, 8 Wall. [75 U. S.] 181: "The corporation being the mere creature of local law, can have no legal existence beyond the limits of the sovereignty where created. As said by this court in Bank of Augusta v. Earle, 'it must dwell in the place of its creation and cannot migrate to another sovereignty.' The recognition of its existence even by other states, and the enforcement of its contracts made therein depend purely upon the comity of those states—a comity which is never extended where the existence of the corporation or the exercise of its powers are prejudicial to their interests or repugnant to their policy. Having no absolute right of recognition in other states, but depending for such recognition and the enforcement of its contracts upon their assent, it follows, as a matter of course, that such assent may be granted upon such terms and conditions as those states may think proper to impose. They may exclude the foreign corporation entirely; they may restrict its business to particular localities, or they may exact such security for the performance of its contracts with their citizens as in their judgment will best promote the public interest. The whole matter rests in their discretion." See, also, Lafayette Ins. Co. v. French, 18 How. [59 U. S.] 407; Ducat v. City of Chicago, 10 Wall. [77 U. S.] 410.

The bank then has no power to make a contract within this state, without its permission or assent. If the state is silent on the subject, by the comity of nations, its permission is presumed, unless it would be contrary to its policy or interest. But the state has spoken on the subject and given its consent to the transaction of business within its jurisdiction by the bank, not absolutely, but upon a condition or a limitation. This condition or limitation is found in the first clause of section 8 of the act aforesaid, which provides that "a foreign corporation before transacting business in the state, must duly execute and acknowledge a power of attorney and cause the same to be recorded in the county clerk's office of each county where it has a resident agent."

The state having this right to permit the bank to do business within its limits or not, with or without terms, has seen proper, for the security of its citizens, to require the execution and record of this power of attorney before the transaction of such business. The purpose of this requirement as disclosed in section 9 of the act, is to thereby secure the appointment of an attorney authorized to receive service of process for the bank, so as to enable the citizens or inhabitants of Oregon who may do business here with it, to sue it in the courts of the state, and thereby avoid the delay and expense, which would often be tantamount to a denial of justice, of following it into the courts of the foreign jurisdiction where it was created.

It follows, of course, from these premises, that the bank had no power to contract in the state until it had complied with the terms upon which the permission to do business was granted. It was required to perform the condition before it transacted business. From the passage of the act of 1864, supra, the assent of the state which was implied by the comity of nations was expressly qualified, so as to be in effect as follows: "The Bank of British Columbia is permitted to transact business in this state, but before doing so it must execute and record a power of attorney," etc.

Whilst it is manifest to the most ordinary observation that it was the intention of the legislature to permit the transaction of business in this state by a foreign corporation only upon the terms provided in the act, yet as it contains no provision imposing a specific penalty for neglect to appoint an attorney as required, or authorizing a proceeding by the state against such corporation for illegal exercise of corporate powers therein, unless the appointment of an attorney is held to be a condition precedent to its right to do business in the state, the act is nugatory.

But it is said that this statute is directory, and therefore the acts of the foreign corporation done in disregard of it are not illegal and void. It is the duty of a court to give effect to the intention of the legislature as far as practicable, and such intention should be ascertained from the words used in the statute and the subject matter to which it relates. The words of this act are certainly mandatory in form. Before transacting any business the corporation must appoint an attorney. Language could not make it plainer. The purpose of the act is apparent. As has been said, it is to secure the people of the state the right to sue the foreign corporation in the courts of the state; but unless the attorney is appointed before the business is transacted it will not be attained. In Rex v. Loxdale, 1 Burrows, 447, Lord Mansfield laid down the rule that whether a statute is mandatory or not, depends upon whether the thing directed to be done is the essence of the thing required. Now the appointment of an attorney is the very essence of the thing required in this case. In fact, nothing else is required, and without this the statute would be utterly inoperative.

This act, being mandatory, is therefore a prohibition against the transaction of business by the bank in this state without first complying with its terms, and as a necessary consequence all acts done in violation of it are illegal and void. The legal effect of the act is the same as if it read: It shall be unlawful for any foreign corporation to transact business in this state before appointing an attorney, etc.

In Springfield Bank v. Merrick, 14 Mass. 324, it was held that when a statute prohibited banking corporations of that state from receiving or negotiating the bills of banks not so incorporated, a promissory note payable in such bills to a banking corporation of Massachusetts was void and no action could be maintained upon it by the payee.

In Russell v. De Grand, 15 Mass. 37, it was held that a promissory note given for the premium on a policy of insurance on a vessel bound on a voyage prohibited by the laws of the United States, was void.

In Wheeler v. Russell, 17 Mass. 280, it was held that a promissory note given in payment for shingles sold contrary to a statute requiring them to be surveyed before offered for sale was void. In delivering the opinion of the court, the chief justice said: "No principle of law is better settled than that no action will lie upon a contract made in violation of a statute or of a principle of the common law."

In White v. Franklin Bank, 22 Pick. 181, it was held, that when upon the making of a deposit in a bank the depositor received a certificate in which it was stated that the money was to remain on deposit for a certain time, and a statute provided that no bank should make or issue any certificate or contract for the payment of money at a future day certain, such certificate was issued in violation of such statute and as against the bank illegal and void.

In Belding v. Pitkin, 2 Caines, 149, Thompson, J., said, "It is a first principle, and not to be touched, that a contract, in order to be binding, must be lawful." In Shiffner v. Gordon, 12 East, 304, Lord Ellenborough laid it down as a settled rule, "that when a contract which is illegal, remains to be executed, the court will not assist either party, in an action to recover for the non-execution of it."

In Bank of U. S. v. Owens, 2 Pet. [27 U. S.] 538, the court held that a contract contrary to a clause in the act incorporating the bank, which forbid it to take a greater interest than six per cent., but did not declare such contract void, was nevertheless illegal and void. In answer to the question, "whether such contracts are void in law, upon general principles," the court say: "The answer would seem to be plain and obvious, that no court of justice can, in its nature, be made the handmaid of iniquity. Courts are instituted to carry into effect the laws of a country; how can they, then, become auxiliary to the consummations of violation of law?"

In Harris v. Runnels, 12 How. [53 U. S.] 83, Mr. Justice Wayne says: "The object of all law is to repress vice and to promote the general welfare of society; and it does not give its assistance to a person to enforce a demand, originating in his breach or violation of its principles and enactments. Contracts in violation of statutes are void; and they are so, whether the consideration to be performed, or the act to be done, be a violation of the statute." And again (page 84), he says: "When the statute is silent, and contains nothing from which the contrary can be properly inferred, a contract in contravention of it is void." Now, this statute is manifestly made "to promote the general welfare" of the people of this state. It is silent as to the consequences of its violation, and therefore the general rule applies —"a contract in contravention of it is void."

The following cases arose under statutes similar in purpose to the act of this state, and they all hold that a contract in contravention of the statute is illegal and void, unless the contrary is provided.

In Williams v. Cheney, 3 Gray, 222, it was held that a promissory note given for the premium of insurance to a foreign insurance company which had not complied with the statutes of Massachusetts upon that subject was void in the hands of the company. In Jones v. Smith, Id. 501, in a like case, it was said by the court, Metcalf, J.: "It was essential to the validity of the contract of insurance, which was the consideration of this note, that the insurance company should previously have complied with the provisions of the statutes of the commonwealth." This ruling was followed in Roche v. Ladd, 1 Allen, 441, in which, according to the syllabus of the case, the court, Hoar, J., held that "a note given for the premium upon a policy of insurance issued in violation of Stat. 1856, c. 252, concerning insurance companies, is invalid." In National Ins. Co. v. Pursell, 10 Allen, 232, it was held by the court, Hoar, J., that a contract of insurance with a foreign company in violation of the following enactment: "Every foreign insurance company before doing business in this state shall, in writing, appoint a citizen thereof, resident therein, a general agent, upon whom all lawful processes against the company may be served," was void. This statute is substantially the same as the Oregon act.

In Rising Sun Ins. Co. v. Slaughter, 20 Ind. 520, it was held that a contract of insurance made with a foreign insurance company, contrary to the statute of Indiana, was void.

In Cincinnati Mut. Health Assur. Co. v. Rosenthal, 55 Ill. 90, it was held that a contract of insurance with a foreign company made in violation of the law of Illinois was void. The statute in that case provided that it should not be lawful for foreign insurance companies to do business in that state, with-

out first procuring a certificate of authority from the auditor of the state. In the course of the opinion, the court (page 91), say: "When the legislature prohibits an act or declares that it shall be unlawful to perform it, every rule of interpretation must say that the legislature intended to interpose its power to prevent the act, and, as one of the means of its prevention, that the courts shall hold it void. This is as manifest as if the statute had declared that it should be void. To hold otherwise, would be to give the person or corporation, or individual, the same rights in enforcing prohibited contracts, as the good citizen who respects and conforms to the law. To permit such contracts to be enforced, if not offering a premium to violate a law, it certainly withdraws a large portion of the fear that deters men from defying the law. To do so, places the person who violates the law on an equal footing with those who strictly observe its requirements. That this contract is absolutely void as to appellee, we entertain no doubt."

In this case, on behalf of the insurance company, it was contended that as the act imposed a penalty upon the agent for doing business contrary to it, it thereby appeared that the legislature did not intend to make the contract void. After disposing of this objection, the court (page 92) say: "Had no penalty been provided, no one would have, for a moment, hesitated to say that the note was, under this law, utterly void." In the Oregon act there is no penalty, nothing but the unqualified command or prohibition, which has universally been held to render invalid all acts done contrary to it.

In Aetna Ins. Co. v. Harvey, 11 Wis. 395, it was held that no action could be maintained by a foreign insurance company upon a note given for a premium of insurance, where the company had neglected to comply with the statute of Wisconsin, which provided that it should not be lawful for any such company to transact business in the state without first having filed a statement of its affairs and condition with the secretary of state. In the course of the opinion the court (page 396) say: "The sole question therefore presented in the case is as to the effect of such non-compliance upon the contract, and the note sued on. It was claimed for the plaintiff in error, that inasmuch as the statute does not say that any policy issued or note taken in violation of its provisions should be void, that therefore they should not be so held. And that the only effect of the law would be to render the agent liable to prosecution for violating it or to an action for damages. But we do not see how this position can be sustained in view of the well-established rule of law that a contract made in violation of a statute is void, and that courts will never lend aid to its enforcement."

Upon these authorities, as well as upon the plain reason of the matter, I think there can be no doubt but that the Oregon act prohibited the making of the contract by the bank, which is here sought to be enforced, and therefore, as against it, it is illegal—unlawful—against law—and void. Is the assignee estopped to show the invalidity of this contract because the bankrupts were parties to the transaction? I do not think the authorities cited by counsel for the bank upon this question are in point. They are Methodist Episcopal Union Church v. Pickett, 19 N. Y. 484, and Palmer v. Lawrence, 3 Sandf. 170. In the latter case the court say: "That a defendant who has contracted with a corporation de facto, is never permitted to allege any defect in its organization, as affecting its capacity to contract or sue; but that all such objections, if valid, are only available on behalf of the sovereign power of the state." In the former one the rule is stated thus: "The rule established by law as well as reason is, that parties recognizing the existence of corporations by dealing with them, have no right to object to any irregularity in their organization or any subsequent abuse of their powers, not connected with such dealing. As long as these are overlooked or tolerated by the state, it is not for individuals to call them in question."

In this case it is admitted that the bank is a corporation, but a foreign one. No defect or irregularity in its organization is sought to be alleged or any subsequent abuse of its powers. But on the other hand, it is alleged and shown: 1. That as to this transaction it was not a corporation at all—not even a corporation de facto, and was therefore utterly without power to contract with Comstock & Co. 2. That if it was a corporation existing by the comity of nations, in this state, it was by the state expressly prohibited from making this contract when and as it did, and therefore the same is illegal and void.

This foreign corporation having no power to do business in this state, except by the consent of the state, and consent having been given upon a condition precedent, which was never performed, the power to make this contract was never in the corporation. So far as it was concerned the act was ultra vires.

The doctrine of estoppel in pais has never been carried so far as to prevent a party from showing that a corporation, even if it be one de jure, had not the power to do a particular thing, or that it was done in violation of a statute. When, in a given case, it appears there is a corporation de facto acting under a law which gives power to do the act in question, the party dealing with such a corporation so as to recognize its existence, is therefore estopped from alleging any irregularities in its organization with a view of showing that such act is illegal. But where the objection is a want of power in the corporation, and not a defect in its organization, the case is different. For instance, a corporation formed under the

laws of Oregon for the purpose of navigating the Wallamet river would have no power to engage in the manufacture of shoes, and if it did so its acts would be illegal. No one would be estopped to allege the fact whenever it became material. To do so would only be to deny its existence as a corporation to manufacture shoes, and as to this it would be neither a corporation de facto nor de jure. Again, if such a corporation was forbidden by statute to carry Indians on its boats, it could not make or enforce a contract for that purpose, and no one would be estopped from alleging the fact in bar of an action by the corporation for the passage money.

In Russell v. De Grand, supra, the voyage upon which the vessel was insured being an illegal one, the defendant, though a party to the agreement, was permitted to show its illegality to defeat a recovery upon it. So in the cases above cited, arising under the laws of Massachusetts, Indiana, Illinois and Wisconsin, concerning foreign insurance companies doing business in those states, the defendants, although parties to the transactions, were allowed to show that they were contrary to law and void. The reason of the rule is apparent and satisfactory. The maintenance of the public policy of a state, as manifested by its legislation, is of much more importance than the real or purposed equities of the parties to an illegal transaction, and therefore they are not estopped to show such illegality for the purpose of preventing the enforcement of a contract in opposition to such policy. Otherwise the public law and policy would be at the mercy of individual interest and caprice.

In 2 Pars. Cont. (5th Ed.) 799, it is said: "It must be obvious, however, that the doctrine of estoppel can go no further than to preclude a party from denying that he has done that which he has power to do;" and with like reason the converse of this proposition must be true—a party is not thereby precluded from denying that another has made a contract which he had no power to make or was prohibited from making, although he may have been a party to such illegal contract. In note w to the text of Pars. on Cont., supra, it is said: "A corporation may show its incapacity for a certain contract or course of action." "There cannot be an estoppel to show a violation of a statute, even to the prejudice of an innocent party." Steadman v. Duhamel, 1 C. B. 888. "Legal incapacity cannot be removed by fraudulent representation, nor can there be an estoppel involved in the act to which the incapacity relates, that can take away that incapacity." Keen v. Coleman, 39 Pa. St. 299.

In Lowell v. Daniels, 2 Gray, 161, it was held that a married woman was not estopped to show that her deed, which upon its face appeared to have been made when she was feme sole was in fact made when she was covert and therefore void. In the course of the opinion, Thomas, J. (page 169), says: "This doctrine of estoppel in pais would seem to be stated broadly enough, when it is said that such estoppel is as effectual as the deed of the party. To say that one may, by acts in the country, by admission, by concealment or by silence, in effect do what could not be done by deed, would be practically to dispense with all the limitations the law has imposed upon the capacity of infants or married women to alienate their estates." To the same effect, in the case of an infant, is Brown v. McCune, 5 Sandf. 224. In the same way, to allow this corporation, by means of an alleged estoppel, which grows out of the very act prohibited, to indirectly do an act for which it had neither capacity nor right, would be practically to dispense with the limitation which the state has imposed upon its power of doing business therein.

On this occasion I do not wish to be understood as expressing any opinion upon the question whether this contract or transaction is void as against the assignee, or whether, in this respect, it comes within the rule laid down by Comyns, and cited with approbation in White v. Franklin Bank, supra, which allows an action in disaffirmance of an illegal contract for the purpose of preventing "the defendant from retaining the benefit which he derived" therefrom.

The objection to the proof of debt is well taken, and the motion to strike out is denied with costs. I also suggest that this question ought to have been made by demurrer to the objection.

[NOTE. For a subsequent decision denying the right of the bank to appear by counsel at an examination before the register, see Case No. 3,080.]

Case No. 3,079.

In re COMSTOCK et al.

[3 Sawy. 320;[1] 12 N. B. R. 110.]

District Court, D. Oregon. April 6, 1875.

PURCHASE AND SALE OF WHEAT — SETTLEMENT BETWEEN DEBTOR AND CREDITOR—PREFERENCE.

1. Where L. & G., of Portland, Oregon, sold wheat to M. & H., of San Francisco, to be delivered on shipboard, at Portland, at $1.85 per cental, and then made a contract with C. & Co., wheat buyers, to purchase said wheat on joint account, each party to furnish one-half of the money necessary to make the purchase, and to receive one-half of the profits, if any: *Held*, that the joint venture and the interest of C. & Co. in the wheat ended with the delivery of the same on shipboard, and that thereafter the wheat belonged to M. & H., subject to the power of L. & G. as sellers of the same, to exercise the right of stoppage in transitu, and that when, upon the failure of M. & H., said L. & G. exercised said right and took said wheat into their own possession, it was for their own benefit as sellers of the same, and not that of C. & Co., who were not the sellers of the wheat

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

to M. & H., and had no power over it or interest in it.

2. A mere accounting or settlement between an insolvent debtor and creditor, not followed by any actual change or transfer of property, rights or credits, to the prejudice of other creditors, is not contrary to the bankrupt act [of 1867 (14 Stat. 517)], but the assignee of such debtor is not bound by such settlement, but may show that it is erroneous or fraudulent.

3. A preference will not bar the proof of a debt, unless it was given and received by the parties to such debt, and therefore where a creditor received a preference from the firm of A., B. & C., he is not barred from proving another debt against the firm of B. & C.

In bankruptcy. Objections to proof of debt.

William Strong, for assignee.

John W. Whalley and M. W. Fechheimer, for creditor.

DEADY, District Judge. On December 16, 1873, a petition in bankruptcy was filed in this court against C. B. Comstock & Co., on which they were adjudged bankrupts on January 23, 1874. Laidlaw & Gate proved a debt against the bankrupts of $24,406.30, gold coin, with interest from November 25, 1873, for money paid said Comstock & Co., on a contract to deliver said Laidlaw & Gate 10,000 quarters of wheat. Prior to June 10, 1874, a dividend of forty-three per cent. was declared but not paid upon this claim, because on that day the assignee of the estate filed objections thereto, to the effect that on December 2, 1873, Comstock & Co. being insolvent and indebted to Laidlaw & Gate in the sum of $43,809.66, with interest, to give them a preference, and in fraud of the act, delivered to said Laidlaw & Gate, in part payment of said indebtedness, 9,268.96 centals of wheat, worth about $19,403.36; and that said Laidlaw & Gate, at the time of said delivery, had reasonable cause to believe that Comstock & Co. were insolvent. The answer of Laidlaw & Gate denies the allegations of the objections, and avers that these 9,286.96 centals of wheat were delivered to Laidlaw & Gate by Comstock & Co. between November 1 and 13, 1873, upon a contract made on August 29, 1873; and that between November 6 and 10, 1873, Laidlaw & Gate advanced Comstock & Co. $31,000, upon a contract to purchase and deliver 10,000 quarters of wheat, which Comstock & Co. wholly failed to perform.

After hearing the evidence and arguments of the parties, the register, Mr. H. H. Northup, on March 6, 1875, found the facts as follows: "On the twenty-ninth day of August, 1873, Laidlaw & Gate entered into a contract in writing with C. B. Comstock and Co. to purchase on joint account a cargo of from 4,000 to 5,000 quarters of wheat, the same being already sold by Laidlaw & Gate at $1.85 per cental, to whom the wheat purchased by Comstock & Co. was to be delivered, the net profit to be equally divided." About the twelfth of September, 1873, a verbal contract was entered into between Laidlaw & Gate and Comstock & Co., or "rather an arrangement," by which Laidlaw & Gate sold to the firm of Makin & Hubbak 10,000 quarters of wheat at $2.15 per cental. On this contract no money was paid. On the thirtieth of October, 1873, Laidlaw & Gate requested and authorized in writing Comstock & Co. to purchase on their account 50,000 bushels of wheat at $1.80 per cental. The price was afterwards advanced to $1.90 per cental, Comstock reporting that he could not purchase at $1.80.

On this contract of October 30, 1873, there was advanced by Laidlaw & Gate to Comstock & Co., on the sixth of November, 1873, $6,000, and on the tenth of November, 1873, $25,000, Comstock reporting that he had purchased, and held in warehouse ready for delivery, wheat to the amount of over that sum in value. Between the third and twelfth of November, 1873, Comstock & Co. delivered on board the Fifeshire and Santa Rosa, two vessels then lying in the Wallamet at Portland, 9,268.96 centals of wheat, the delivery being noted in a book kept by Laidlaw & Gate, called "Cargo Book," and credit for so much wheat delivered, given to Comstock & Co., although no price was carried out. The agent to receive this wheat on board these vessels was one P. Cherry, who kept the book above named, an employee of Laidlaw & Gate, although his salary was charged to the "joint adventure," and thus one-half of it was paid by Comstock & Co.

On November 7, 1873, Laidlaw & Gate drew on Makin & Hubbak, the San Francisco firm to which the wheat was to be shipped, for $16,132.74, the value of 8,631.98 centals of wheat at $1.85 per cental and $42.59 interest. This draft was dishonored and protested at San Francisco, on the thirteenth of November, 1873, and Laidlaw & Gate immediately advised thereof. At this time Comstock & Co. held a large quantity of wheat, "for," Comstock says, "the failure of Makin & Hubbak left me with a large amount of wheat on hand." Immediately on receipt of intelligence of the failure of Makin & Hubbak, Laidlaw & Gate exercised the right of stoppage in transitu over the 9,268.96 centals of wheat loaded on the Fifeshire and Santa Rosa, and, under instructions, handed over the charter parties of these vessels to Henry Hewett & Co., of Portland, agreeing with said Hewett & Co. to take an equal quantity of wheat in warehouse for that placed on board those vessels; which agreement was consummated.

Some time after the thirteenth of November, 1873, or perhaps on that very day, a controversy arose between Laidlaw & Gate and Comstock & Co. about this 9,268.96 centals of wheat; not in regard to its delivery nor respecting the title (for both parties seem to have treated the delivery to Laidlaw & Gate as binding on Comstock & Co., and vesting the title in Laidlaw & Gate), but as to the contract or contracts on which this wheat

was delivered. Laidlaw & Gate claimed that it was all on the contract of August 29, 1873, at $1.85 per cental. Comstock admitted that about three-fourths of it was delivered on the contract of August 29, 1873, which filled and completed that contract, but claimed that the remaining one-fourth was on the verbal contract of September 12, at $2.15 per cental. This was denied by Laidlaw & Gate, who insisted that the verbal contract of September 13 was void, no money ever having been paid on it, and that if any wheat was delivered after filling the contract of August 29, 1873, it was delivered on the contract or request of October 30, 1873, at $1.90 per cental.

This controversy continued until November 25, 1873, Comstock & Co. refusing to deliver any more wheat until the matter was settled and claiming damages by reason of large lots of wheat purchased for the verbal contract of September 12, for which he had paid more than $1.90 per cental. On November 25, 1873, a settlement was made and all prior contracts merged in the contract of that date. On the second of December, 1873, a credit appears on the books of Laidlaw & Gate to Comstock & Co., for the 9,268.96 centals of wheat.

The real point to be decided, in my judgment, is, when did the title to the wheat in question vest in Laidlaw & Gate. From the evidence I find that on the second of December, 1873, and for some days prior thereto, Laidlaw & Gate had reasonable cause to believe that Comstock & Co. were insolvent, and if the title remained in Comstock & Co. until the entry on Laidlaw & Gate's ledger, a preference was taken under the bankrupt act. I further find that on the twelfth day of November, 1873, the last day on which wheat was delivered, Laidlaw & Gate did not have reasonable cause to believe that Comstock & Co. were insolvent, and that if the title then passed to Laidlaw & Gate, no preference was taken under the bankrupt act. Laidlaw testifies that after the wheat was delivered on shipboard, Comstock & Co. had no further control over it. This is not controverted or denied, although Comstock was put on the stand. Laidlaw & Gate also on the thirteenth of November, 1873, exercised the right of stoppage in transitu over this wheat without any question by Comstock & Co., and more than that, disposed of it without any objection.

The controversy seems to have been as to which contract the wheat was delivered under, and further than that as to the amount of damages that Laidlaw & Gate should allow Comstock for other wheat that he then held. It is a recognized principle that the sale is not complete while anything remains to be done to determine its quantity if the price depends on this, unless this is to be done by the buyer. I think the wheat delivered was treated by both parties as belonging to Laidlaw & Gate, and the fact that credit was not entered in the books of Laidlaw & Gate until December 2, 1873, is not material. Credit for so much wheat was given in the "Cargo Book" at the time of delivery, and the amount of credit, it seems to me, is not material, particularly as neither party then knew the amount of credit to be given, and by the course of business this could not be determined until sometime after. The register ruled that the proof of debt should stand as made, and the question was certified here for decision.

In the course of the inquiry before the register, all the dealings between Laidlaw & Gate and Comstock & Co., prior to August 29, 1873, consisting of contracts to purchase and deliver wheat to load particular vessels, were examined, and a great mass of testimony introduced which has no special bearing on the controversy. It being shown by the evidence, and practically admitted, that up to the delivery of this 9,268.96 centals of wheat on the Fifeshire and Santa Rosa, to wit: November 12, 1873, Laidlaw & Gate had not reasonable or any cause to believe that Comstock & Co. were insolvent, it follows that if the property in the wheat vested in them at the time of such delivery, no preference was thereby given or received.

Comstock & Co. were engaged in purchasing wheat throughout the country for delivery to third persons for shipment abroad. Laidlaw & Gate having this contract with Makin & Hubbak, of San Francisco, to deliver them 4,000 or 5,000 quarters of wheat in September and October, employed Comstock & Co., as they had done in other like instances, to purchase the wheat and deliver it on shipboard for them. Instead of agreeing to pay them a certain commission for their services, it was arranged that Comstock & Co. should have a share of the profits, if any, made by Laidlaw & Gate on the venture, and that they should also advance one-half of the money necessary to fulfill the contract. This being so, the transaction was a joint venture, commencing with the purchase of the wheat and ending with the delivery of it on the vessels at Portland. After the delivery on board, Comstock & Co. had no interest in the property, and so they seem to have understood the matter.

By the contract of August 29, Comstock & Co. did not become parties to the prior contract between Laidlaw & Gate and Makin & Hubbak, by which the former sold and were to deliver to the latter 4,000 to 5,000 quarters of wheat as above stated, at $1.85 per cental. Between Comstock & Co. and Makin & Hubbak, there was no privity or relation. If Laidlaw & Gate made a profit on the transaction with Makin & Hubbak, Comstock & Co. were entitled to half of it and Laidlaw & Gate were liable to them for such share of the profits irrespective of the failure of Makin & Hubbak to meet their engagements with Laidlaw & Gate. As the owners of the property, Laidlaw & Gate exercised the right of stoppage in transitu up-

on the failure of Makin & Hubbak, and disposed of the wheat to Hewett & Co., as they had a right to. But for this the property would have long since figured in the assets of Makin & Hubbak.

The facts being found as stated, the failure to enter the value of the wheat in the ledger of Laidlaw & Gate at the time of delivery is immaterial. An entry in the books of a party, or the absence of it, may be evidence against him of more or less weight, owing to the circumstances, but is not conclusive. In this case the receipt of the wheat by Laidlaw & Gate from Comstock & Co. appears to have been regularly and duly entered in the cargo book of Laidlaw & Gate by their agent and employee, P. Cherry. Comstock & Co. were duly credited in the ledger with the amount of the wheat, but the value of it could not be entered until the cost on board was ascertained or agreed upon. By the terms of the agreement between Laidlaw & Gate and Comstock & Co., the latter were to be credited with the wheat at the cost and charges on board, not exceeding the price at which it was sold to Makin & Hubbak. Owing to the disagreement between Laidlaw & Gate and Comstock & Co. as to what contract 636.98 centals of the wheat delivered on the Fifeshire and Santa Rosa was to be accounted for—whether that of August 29, at $1.85 per cental, or that of September 12, at $2.15 per cental, or the order of October 30, at $1.90 per cental—and the claim by Comstock & Co. for damages on account of wheat purchased at a high figure on a falling market under the contract of September 12 and not received by Laidlaw & Gate, there was a delay in ascertaining the value of this wheat and the amount with which Comstock & Co. were to be credited on account of it. Finally, on November 25, the parties had an accounting and settlement, Comstock & Co. having the advantage of being Laidlaw & Gate's debtors for $31,000 advanced to them, seem to have dictated the terms of the settlement, by which they were allowed the full price they had paid for all wheat delivered up to that time. The sum due upon the wheat to Comstock & Co. was deducted from the $31,000, and for the balance Laidlaw & Gate prove their claim. This accounts satisfactorily for the delay in making the final entry in the ledger of Laidlaw & Gate.

It is also quite possible that this settlement may have been acquiesced in by Laidlaw & Co. upon the impression that Comstock & Co. were in a doubtful condition financially, and that it was better to close with them upon their own terms before they failed. Upon its face the writing wears the look of a device intended to reach backward and give a new color to past transactions with a view of protecting them from some new and impending danger. Its language is probably the result of carelessness or ignorance, or an attempt to cover more ground than was necessary or the facts authorized. While there is no reason to doubt but that it states the result of the settlement truly, to wit, that Comstock & Co. should be allowed full cost for all the wheat delivered to Laidlaw & Gate without reference to the limitation of $1.85, $2.15, or $1.90 per cental under which it was purchased, yet it does not represent the transaction according to the facts proven by the evidence.

Here is a copy of the agreement, which appears to be in the handwriting of Comstock: "Portland, Oregon, 25 November, 1873. Messrs. Laidlaw & Gate, Portland—Gentlemen: We have this day sold you, and we confirm the sale by this letter, ten thousand quarters of good merchantable Oregon wheat, to be delivered in Portland warehouses. The price you are to pay us for it is to be the price we actually have paid, with any charges that may be incurred up to the time of delivery. Cash to be paid against warehouse receipts. We acknowledge to have received on account of this sale the sum of thirty-one thousand dollars, less the amount of your present debt to us, which is estimated at about six thousand dollars. We are, yours truly, (Signed) C. B. Comstock & Co."

No wheat was in fact sold to Laidlaw & Gate by that agreement or on that date, as therein assumed and represented. The contract of September 12, if valid and binding, was the latest one between the parties for the delivery of wheat, and the last wheat delivered by Comstock & Co. under any contract or order was delivered on November 12, 1873.

It is not necessary to the decision of the question arising upon the objections to find whether Laidlaw & Gate had reasonable cause to believe that Comstock & Co. were insolvent at the date of this settlement. But assuming that they had such cause so to believe, the rights of the general creditor, as represented by the assignee, would not be impaired by such settlement. A creditor and debtor have a right to state an account and strike a balance, although the former may know that the latter is then insolvent. A mere accounting between parties does not prefer the creditor or diminish the assets of the debtor. But if the debtor is adjudged a bankrupt, the assignee, representing the general body of creditors, is not bound by such settlement, and if found incorrect or fraudulent it will be disregarded. A settlement or accounting with an insolvent debtor, particularly where the parties, as in this case, use language calculated to make an erroneous impression as to the facts of the transaction, will naturally, if favorable to such creditor, excite the suspicions of the other creditors, and should be closely scrutinized; but in itself, if honestly and fairly conducted, there is nothing illegal or contrary to the bankrupt act. In this case the result of the settlement, however the language in which it is stated may be open to

criticism, appears to have been as favorable to Comstock & Co. as it should, and therefore the other creditors were not prejudiced by it. If, however, the assignee has reason to think otherwise, he is at liberty to raise the question whether the sum claimed —$24,406.30—was really due Laidlaw & Gate from Comstock & Co. on November 25, 1873.

Upon the hearing before the court, it was argued by counsel for the assignee that the contracts between Laidlaw & Gate and Comstock & Co., of August 29 and September 12, made them partners inter se in the purchase and delivery of wheat to Makin & Hubbak, and that therefore the property in this wheat never vested in Laidlaw & Gate, but remained the property of this special partnership, composed of Laidlaw & Gate and Comstock & Co. It is not found by the register whether this was a partnership transaction or not, and it is immaterial to the decision of the question before the court how the fact is. It is not probable, upon this evidence, that the parties intended to constitute a partnership, even between themselves, and unless they did so, none would result. In re Francis [Case No. 5,031]. But admitting they were partners, and that this fact in some way, which is not apparent, prevented a delivery of the wheat from being made to Laidlaw & Gate, and from them to Makin & Hubbak, as is claimed by the creditor, and that the wheat, therefore, remained the property of this special partnership until it was delivered to Makin & Hubbak on shipboard, and that the stoppage in transitu by Laidlaw & Gate, members of this partnership, upon the failure of Makin & Hubbak, restored the wheat to such partnership, what follows? In that case the wheat was never the property of Comstock & Co., and would not be an asset of their estate in bankruptcy; nor would their creditors be entitled to the benefit of it. On the contrary, it belonged to this special partnership of Laidlaw, Gate and Comstock & Co., whoever the Co. might be, and was an asset of such firm. The supposed firm of Laidlaw, Gate and Comstock & Co., made no profits but a loss. On November 1, Comstock & Co. owed this firm or Laidlaw & Gate, as the case may be, $12,646.66. The 9,268.96 centals of wheat placed on the Fifeshire and Santa Rosa cost on board $19,403.46, leaving a balance in favor of Comstock & Co. and against Laidlaw, Gate and Comstock & Co. of $3,378.40, that being one-half of the difference between the value of the wheat and the debit to Comstock & Co. In addition to this, Comstock & Co. owed Laidlow & Gate $31,000.

Now, this alleged firm of Laidlaw, Gate and Comstock & Co. did not owe Laidlaw & Gate anything, and therefore could not prefer them. But if there had been a preference given by such firm to Laidlaw & Gate, it could not have the effect to prevent Laidlaw & Gate from proving another debt against a different firm, to wit, that of Comstock & Co. An unlawful preference only bars the proof of a debt between the parties to the preference. The only effect that can be given to this theory of a special partnership in this case is that Laidlaw & Gate, by appropriating the proceeds of the wheat loaded on the Fifeshire and Santa Rosa, obtained the said sum of $3,378.40 of the assets of said partnership more than they were entitled to, and that they are liable to the assignee of Comstock & Co. for the same. In a suit brought to recover the amount, the question would arise whether Laidlaw & Gate could set off a like amount of the $31,000 which Comstock & Co. owed them at the time.

But it is unnecessary to further pursue this inquiry. In any view of the matter, I think Laidlaw & Gate are entitled to prove their debt as claimed by them.. I am satisfied upon the evidence that whether the transaction between Laidlaw & Gate and Comstock & Co. be considered a joint venture, or a special partnership, as between themselves, it ended with the delivery of the wheat on shipboard, and that thereafter Comstock & Co. ceased to have any interest in the property, and that the same was the wheat of Makin & Hubbak, sold to them by Laidlaw & Gate, who, in relation to it, had the rights of a seller, including that of stoppage in transitu. It is therefore ordered that the proof of debt by Laidlaw & Gate be allowed to stand, and that they be paid the dividend of forty-three per cent. heretofore declared upon it, with the interest accruing thereon, if any.

Case No. 3,080.

In re COMSTOCK et al.

[3 Sawy. 517;[1] 13 N. B. R. 193; 8 Chi. Leg. News, 82.]

District Court, D. Oregon. Nov. 16, 1875.

WITNESS BEFORE REGISTER — NOT ENTITLED TO COUNSEL—CREDITOR NOT A PARTY TO EXAMINATION— ASSIGNEE, ATTORNEY AND COUNSEL FOR —ATTORNEY, AUTHORITY OF.

1. A witness summoned before the register on the application of the assignee, to be examined under section 5087 of the Revised Statutes, is not a "party" to such proceeding, and is therefore not entitled "to take the opinion of the district judge upon any point or matter arising in the course of such proceeding."

2. A witness summoned as aforesaid, not being a "party" to the proceeding, is not entitled to be attended or represented by counsel during his examination.

3. A creditor of the bankrupt is not a "party" to such proceeding, and is therefore not entitled to interfere with it, or be represented in it by counsel.

4. An assignee can only be represented in the written proceedings by his duly appointed attorney; but this does not prevent another at-

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torney from appearing in court, as counsel for the assignee in a particular proceeding therein pending, as provided in section 1000 of the Oregon Civil Code.

5. An attorney who has no authority to appear in a proceeding instituted by the assignee, cannot be heard to question the authority of the attorney who appears in such proceeding as counsel for such assignee.

Certificate from register stating question for the opinion of the judge.

[The bank, on January 30th, proved a debt against the estate, to which the assignee filed objections. The bank moved to strike out the objections, for want of jurisdiction, and the motion was denied. Case No. 3,077. Subsequently, another motion was made to strike out objections of the assignee to the proof, and the motion was likewise denied, and the objection sustained. Case No. 3,078.]

DEADY, District Judge. On the application of the assignee, W. W. Francis was summoned before the register to be examined in the above-entitled matter. Upon the appearance of Francis before the register, he was accompanied by an attorney of this court, who offered and desired to appear as attorney for the witness and also for the bank of British Columbia, a claimant against the estate of Comstock & Co.

Counsel for the assignee objected to the appearance of counsel for the witness or the bank, on the ground that neither the witness nor the bank is a "party" to the proceeding, although it was admitted that the proposed examination of the witness had reference to "an affair of the bankrupts with the said bank on and about November 14, 1873." The register ruled that the "witness is not entitled to counsel," and that "the bank cannot appear in this proceeding by counsel," and the question: "Shall the ruling of the register be sustained?" was certified to the judge for decision. No person is entitled, under section 5010 of the Revised Statutes, "to take the opinion of the district judge upon any point or matter arising in the course of the proceedings" before the register, unless he is a "party" thereto. The witness Francis is not a party to this proceeding. The only party to it is the assignee. The law gives him the right to examine this witness with reference to the affairs of the bankrupt, so as to enable him to act intelligently in the premises. The witness is no more a "party" to the proceeding than if he was being examined on behalf of the plaintiff or defendant in an ordinary action.

Neither is the bank a party to this proceeding. The examination of the witness is ex parte, and cannot be used as evidence against the bank in any action or proceeding to which it is a party. As has been stated, it is taken solely for the information of the assignee, to enable him, as the representative of all the creditors, to understand and assert or defend their rights in the premises. In re Fredenberg [Case No. 5,075]; In re Feinberg [Id. 4,716]; In re Fay [Id. 4,708]; In re Stuyvesant Bank [Id. 13,582]. This being so, the register might properly have refused to certify this question. In re Fredenberg, supra.

Indeed, I think he ought to have refused it, and proceeded at once with the examination of the witness. But for the same reason, that the witness is not a "party" to the proceeding, he is not entitled to counsel. It is only parties who are thus entitled. In this proceeding, whatever interest he may have in the matter sought to be inquired into, if any, Francis is merely a witness, and is no more entitled to appear or be attended by counsel than he would be if called as a witness in an ordinary action.

The same is true of the bank, and for the same reason. It is not a "party" to the proceeding, and the information elicited by it is merely for the benefit of the assignee. If the examination disclosed the fact that the knowledge of the witness is or may be material in any controversy with the assignee to which the bank is or may be a party, before such knowledge could be used against the bank, he would have to be called and examined, subject to cross-examination as an ordinary witness in such controversy. The attorney who offered to appear as counsel for the witness and the bank, also objected that the attorney who appeared as counsel for the assignee was not "the attorney of the assignee," and therefore not entitled to appear for him upon this proceeding. While I have no doubt that the assignee can only be represented in the written proceedings by his duly appointed attorney, yet I see no reason why another attorney may not appear in court, as counsel for the assignee, in a particular proceeding therein pending, as provided in section 1000 of the Oregon Civil Code. But the attorney seeking to appear for the witness has no standing before the court in this proceeding, and therefore cannot be heard to question the authority of the attorney who appears as counsel for the assignee. For the same reason, the question arising upon such objection ought not to have been certified.

The rulings of the register are affirmed, and the clerk will certify a copy of this decision to him, and is hereby required, under rule 58, to tax the expenses of this certificate, together with a sum of five dollars to be paid to the assignee or his attorney, against the attorney who sought to appear for the witness.

Case No. 3,081.

COMSTOCK v. CARNLEY et al.

[4 Blatchf. 58.] [1]

Circuit Court, S. D. New York. May 5, 1857.

PROOF OF DOCUMENTS — INTERESTED WITNESS — PROVINCE OF JURY.

1. Where a witness examined by deposition, taken ex parte, under the act of congress [1 Stat. 88], on the ground that he resided more than one hundred miles from the place of trial, produced before the officer who took the deposition a copy of an original paper, to which he had access, and from which he took the copy, and testified that it was a correct copy, but the original was not produced before the officer: *Held*, that the proof was not competent evidence of the contents of the original paper.

2. The proof was no higher than parol evidence of a written instrument, the original of which was in existence.

3. J. contracted with R. to build a railroad for R., and to take in pay the bonds of R., which were to be advanced to J. on his giving security to apply the proceeds to the construction of the road. C. became such security. J. received the bonds and purchased goods with their proceeds. The goods were attached as the property of J., under process issued against him by D., a creditor of his. C. then sued D., in trover, for the goods, claiming that the bonds and the goods had been assigned to him, as his indemnity for becoming such security, by J., and were his property, until applied to the construction of the road. On the trial, J. was examined as a witness for C. Quaere, whether J. was a competent witness for C. Semble, that he was not, because, if the verdict should be for D., J. would not only be liable to C. for the property, but, as principal in the transaction, would be bound to indemnify C. for the expenses of the litigation, and thus the balance of interest would be disturbed.

4. It was a question of fact for the jury, whether the goods did not belong to J., and not to C.

At law. This was an action of trover brought to recover the value of certain property seized by the defendant [Thomas] Carnley, as sheriff, by virtue of a process of attachment issued out of a state court, against one Darius C. Jackson, in favor of the defendant [Don Alonzo] Cushman. [Addison J.] Comstock, the plaintiff in this suit, claimed to have been the owner of the property. Several questions were reserved at the trial, and a verdict was rendered for the plaintiff, subject to the opinion of the court, Jackson and his partners, of Elyria, Ohio, had entered into a contract with the Junction Railroad Company in that state, to construct a portion of their road, and, among other things, agreed to take bonds of the company and other corporations in payment for the work. A certain amount of the bonds was to be advanced to the contractors, on their giving security for the application of the proceeds to the construction of the road. It was claimed that Comstock gave the security, but insisted, as an indemnity to him, that the bonds, and also the goods purchased with any of their proceeds, should be assigned to him, and should be deemed as belonging to him, until applied in the way agreed. The goods in question were purchased with the proceeds of some of the bonds, some portion in the name of Comstock, the rest in the name of the firm of Jackson. All the goods were purchased by Jackson. One of the bonds was also attached in the possession of Jackson. The case turned a good deal on Jackson's deposition taken under the act of congress ex parte, he residing more than one hundred miles from the place of trial.

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

NELSON, Circuit Justice. The first question presented is, whether or not Jackson's deposition furnishes competent proof of the suretyship of Comstock, in behalf of Jackson's firm, to the railroad company. This proof is quite material, as it lays the foundation of the title of Comstock to the property in question. The original writing securing the company was not produced before the United States commissioner, and proved, but only a copy, which Jackson testified was a correct copy. That copy is annexed. I think the proof produced incompetent. It was no higher than parol evidence of a written instrument, the original of which was in existence. The original was in the hands of the railroad company, where as I understand from the deposition, Jackson examined it and procured the copy which he produced before the commissioner. The original should have been produced and proved before the officer, and he should have annexed a true copy, in returning the deposition to the court. Or, if Jackson could not have obtained the original, it was competent to examine the officers of the company in whose custody the paper was. Steinkeller v. Newton, 9 Car. & P. 313.

I entertain strong doubts, also, as to the competency of Jackson as a witness for the plaintiff. His competency is put upon the ground that his interest is neutralized—that is, that he is liable whichever way the case may result. But, I am inclined to think, that, as the case stands, if the verdict should result in favor of the defendants, Jackson would not only be liable to Comstock for the property, but, as principal in the transaction out of which the litigation has arisen, would be bound to indemnify Comstock, his surety, for the expenses of the litigation. This would disturb the balance of interest. It is not necessary, however, to express a definitive opinion upon this question, as there must be a new trial, and the determination of the point will depend upon the facts as they may appear upon that trial.

The case is one, also, that should have been put to the jury upon the question of fact, whether or not, under the circumstances attending the purchase of the goods in question, and the dealings with the bonds, the property did not belong to Jackson's firm, and not to Comstock, the plaintiff.

The case properly presented this question, and it belonged to the jury to determine it.

For these reasons, there must be a new trial, with costs to abide the event.

COMSTOCK v. CONNELLY. See Case No. 3,081.

COMSTOCK (KNICKERBOCKER INS. CO. v.). See Case No. 7,879.

COMSTOCK (LOCKWOOD v.). See Case No. 8,449.

COMSTOCK (PHELPS v.). See Case No. 11,-075.

Case No. 3,082.

COMSTOCK et al. v. SANDUSKY SEAT CO. et al.

[3 Ban. & A. 188;[1] 13 O. G. 230; 3 Cin. Law Bul. 73.]

Circuit Court, N. D. Ohio. Jan. 11, 1878.

PATENTS—CARRIAGE BODIES AND SEATS—VALIDITY — DATE OF INVENTION — PUBLIC USE — PRIMA FACIE VALIDITY—PLEADING AND PROOF.

1. The invention of a patented device may be fairly held to date back to the time when the inventor made models, and entered into a contract for its manufacture.

2. The mere making of an article, more than two years prior to the time of the application for a patent, is immaterial, and, where the evidence raises a doubt as to the fact of public use or sale for more than two years prior, such doubt should be resolved against the defendants, upon whom rests the burden of proof.

3. The patent is prima facie valid. It is a muniment of title. He who would overcome it must do so by a clear preponderance of evidence.

4. A defence that the invention involved simply the substitution of one material for another, and was, therefore, not patentable, not having been set up in the answer, the objection was overruled.

5. Reissued letters patent No. 4,780, granted to the complainants, assignees of S. B. Graham, for improvement in carriage bodies and seats, *held* valid.

[In equity. Bill by Theodore Comstock and others against the Sandusky Seat Company and others for alleged infringement of reissued letters patent No. 4,780, original patent numbered 95,466.]

Hatch & Parkinson, for complainants.

M. D. Leggett & Co., for defendants.

Before SWAYNE, Circuit Justice, and WELKER, District Judge.

WELKER, District Judge. This suit is brought upon reissued letters patent No. 4,-780, granted to the complainants, Theodore Comstock, Ezra Booth, and Henry F. Booth, as assignees, by mesne assignment, of Simon P. Graham, March 5th, 1872, for improvement in carriage bodies and seats.

The defences are, severally, (1) non-infringement, and (2) invalidity of the patent. The invalidity alleged being (1) anticipation, (2) prior use, (3) abandonment, (4) public use for more than two years prior to application for complainants' patent, (5) that reissue was for a different invention from the original, and (6) the existence of a prior Canadian patent, etc.

We have carefuly considered the evidence and arguments of counsel, and now state our conclusions:

1. It is not controverted that Graham's invention was perfected, and that he made two seats as described in his patent, prior to April, 1867.

2. He applied for his patent August 9th, 1869. The patent was issued October 5th, 1869, and was reissued March 5th, 1872, upon which reissue this suit is founded.

3. At the close of the argument we were satisfied that the patent of the complainants was valid unless successfully assailed (1) for want of novelty with respect to the invention, or (2) by reason of the sale and use of the thing patented more than two years prior to the application for the patent, that is, more than two years before August 9th, 1869 —in other words, before August 9th, 1867. These points we have carefully considered in our further examination of the case.

4. As to the priority of invention, our attention was particularly called to the claim in behalf of Burt. Upon examination of the testimony bearing upon the subject, it seems to us clear that it is not shown that anything that was done by Burt was not done later than April, 1867. It is clear upon the proofs that Graham perfected his invention, made models, and took them with him to Wauseon, and there entered into a contract with Stebbins for the manufacture of the seats in November, 1866. His invention, according to the record, may be fairly held to date back to that time. But this is immaterial, as nothing is shown as to any other party, which antedates the time fixed by the admission of respondents' counsel, which is before April, 1867. The other cases of alleged prior invention are unsustained. It is unnecessary to remark further in regard to them.

5. As to the use and sale of the thing patented. (1.) The Stebbins contract. This contract was entered into by Graham & Stebbins in November, 1866. No seats were completed by them. Two were partly made when the contract was put an end to, and Stebbins retired. Graham alone completed these seats. The mere making them without anything more was immaterial; but (2) Graham sold one of them, after they were completed, to Ben Smith, with a buggy, of which it was a part. The date of this sale is important in the case. The testimony upon this point is very conflicting; upon the whole, it does not satisfy us that the sale was made before August 9th, 1867. We are brought to the conclusion that it was not. If the evidence, however, raised a doubt, which we think it does not, such doubt, it is

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

well settled, should be resolved against the respondents, upon whom rests the burden of proof. Coffin v. Ogden, 18 Wall. [85 U. S.] 120. This rule is founded in justice and good sense. The patent is prima facie valid. It is a muniment of title. He who would overcome it must do so by a clear preponderance of evidence.

6. We are in some doubt as to the point whether the invention is not in substance only the substitution of one material for another, iron for wood, and whether, hence, there is not a want of patentability. Hotchkiss v. Greenwood, 11 How. [52 U. S.] 248. This defence is not set up in the answer, as it should have been; but, possibly, the bill shows no equity on its face, and perhaps the facts are such that the court can take judicial notice of them. Brown v. Piper, 91 U. S. 37. But in view of the decision in Smith v. Goodyear, 93 U. S. 486, we are inclined to think we ought to overrule this objection, and leave the respondents to raise the question, if they think proper to do so, in the supreme court, by appeal.

7. The infringement complained of is made out by the evidence.

Upon the whole case, then, we think there should be a decree for the complainant, which we direct to be entered, and the usual reference to commissioner to report account and damages.

[2] [Decree: This case having been brought on to be finally heard, on the pleadings and proofs at the April term of this court, 1877, before their honors Justice Swayne and Judge Welker, holding the said term of court, and the counsel for the respective parties having been fully heard thereon, and the case having been submitted on the oral arguments and full briefs by the counsel for the respective parties, and due deliberation having been thereon duly had, it is ordered, adjudged, and decreed, and this court, by virtue of the power therein vested, doth order, adjudge, and decree:

[First. That the reissued letters patent No. 4,780, issued to Theodore Comstock, Ezra Booth, and Henry F. Booth, of Columbus, Ohio, as assignees by mesne assignment, of Simon P. Graham, of London, Canada, and dated March 5, 1872, being a reissue of the letters patent No. 95,466, granted to Simon P. Graham, October 5, 1869, for improvement in carriage bodies and seats, are good and valid in law.

[Second. That the complainants are the sole and exclusive owners of all the rights granted or conferred by said reissued letters patent.

[Third. That the defendants have infringed and violated said reissued letters patent by manufacturing at Sandusky, Ohio, and selling in various parts in the United States, carriage-seats embodying the improvements described in said patent, and recited respectively in the third, fourth, fifth, sixth, seventh, eighth, ninth, and tenth claims thereof.

[Fourth. That the said defendants do account to the said complainants for the damages sustained by the complainants, and for the profits made by the said defendants in consequence of such infringement.

[Fifth. That an account of the said damages and said profits be taken and stated by Earl Bill, Esq., who is hereby appointed special master commissioner for that purpose; and that the defendants, their attorneys, agents, servants, and employes appear before the said master from time to time, on notification from him and under his direction; and that the complainants may examine the said defendants, their officers, employes, agents, attorneys, and servants, under oath, as to the several matters pending on the said reference; and that the said defendants produce before the said master, on oath, all such deeds, contracts, specifications, papers, writings, and books as the said master shall direct, that are in their custody or under their control, or subject to their order, and that relate to said matters that shall be pending before the said master; and that the said master have all the authority and power conferred upon masters in like cases by the 77th rule prescribed by the supreme court of the United States as rules of practice of the courts of equity of the United States.

[Sixth. That a perpetual injunction issue out of and under the seal of this court against the said defendants and each of them, commanding them, their attorneys, agents, workmen, officers, servants, and employes to desist from making, using, or vending any carriage-seats containing or embodying any inventions described in said reissued letters patent, and recited in the third, fourth, fifth, sixth, seventh, eighth, ninth, and tenth claims thereof, and from in any manner infringing upon or violating any rights or privileges granted or secured to the complainants by said reissued letters patent.

[Seventh. That the said complainants recover of the said defendants as well the damages as the profits which shall be reported by the said master herein, and that, upon the confirmation of his report, a decree shall be entered, against the defendants therefor, and also for the costs of the complainants in this suit in this court; and that the complainants have executed therefor and for the compensation of the said master, to be fixed on the coming in and confirmation of his report.

[Eighth That the parties and master may apply on due notice to the court upon the foot of this decree for such other and further order, instructions, and directions as may be necessary.][2]

[2] [From 13 O. G. 230.]

Case No. 3,083.

COMSTOCK v. SEAGRAVES.

[The case reported under above title in 1 Story, 546, is the same as Case No. 6,593.]

COMSTOCK (SHERMAN v.). See Case No. 12,764.

Case No. 3,084.

COMSTOCK v. WHEELER.

[The case reported under above title in 2 N. B. R. 561 (Quarto, 171), and 2 Am. Law T. Rep. Bankr. 87, is the same as Case No. 3,071.]

Case No. 3,085.

In re CONANT.

District Court, S. D. New York. July 7, 1862.

SETTING ASIDE SALE BY ASSIGNEE IN BANKRUPTCY.

In 1858, the official assignee in bankruptcy of Conant conveyed certain land in Illinois to one Brown, who conveyed it to one Jones. One Taggard had bought the same land in 1843, and obtained a deed of it, and had gone into possession of it, and held it until he died, in 1851. His heirs, having sued Jones in trespass, in Illinois, to establish their title to said land, petitioned the district court, in 1861, for relief against the deed of the assignee. The assignee and Brown and Jones were cited to answer. The court found that it had been induced to order the sale by the assignee under the impression on the part of the court that the land was without value, and that the sale was to be made only to relieve the land in the hands of Taggard from any cloud or technical infirmity of title; that the court had given the title gratuitously to a party who might use it in fraud of the estate of the bankrupt or of an honest purchaser of it; and that the order of sale ought not to stand, but should be rescinded, as having been obtained by a party cognizant of all the facts impeaching its equity and justice.

The above state of facts was recited in an order which the court made July 7, 1862, vacating and declaring void the order of sale made in 1858, and declaring null and void the deed from the assignee to Brown, and ordering the assignee and Brown and Jones to deliver the deed to the clerk of the court to be canceled.

[Cited in Re King, 3 Fed. 842; Re Hyde, 6 Fed. 592.]

[NOTE. Nowhere reported; opinion not now accessible. The above statement of the case and the decision were taken from 6 Fed. 592.

[Prior to the decree herein, on a question adjourned from the district court, as to whether the limitation of two years in the eighth section of the bankrupt act applied to the case at bar, the circuit court held that it did not. Case No. 3,086, next following.]

Case No. 3,086.

In re CONANT.

[5 Blatchf. 54.][1]

Circuit Court, S. D. New York. May 19, 1862.

LIMITATION OF SUITS AGAINST ASSIGNEE IN BANKRUPTCY.

1. The two years' limitation in regard to the bringing of suits by or against an assignee of a bankrupt, prescribed in the 8th section of the bankruptcy act of August 19, 1841 (5 Stat. 446), applies only to suits growing out of disputes in respect to property and rights of property of the bankrupt, which come to the hands of the assignee, and to which adverse claims existed while in the hands of the bankrupt and before the assignment.

[Cited in Smith v. Crawford, Case No. 13,030; Walker v. Towner, Id. 17,089.]

2. Such limitation has no reference to suits growing out of the dealings of the assignee with the estate after it comes into his hands.

[Cited in Phelan v. O'Brien, 13 Fed. 657.]

This was a question adjourned into this court by the district judge, for hearing and determination, under the 6th section of the bankruptcy act of August 19, 1841 (5 Stat. 445). A petition was filed in the district court, by M. T. Taggart and others, for the purpose of vacating an order made on behalf of the general assignee of Frederick J. Conant, a bankrupt, for the sale of a certain lot of land in the state of Illinois, as belonging to the estate of the bankrupt, on the ground that it was made through inadvertence and misapprehension of a true statement of the facts, without notice to the petitioners or to the person whom they represent, and to his or their prejudice. The purchaser of the lot under the sale by the assignee appeared and opposed the petition. The petitioners claimed title to the lot under a prior sale, by an order of the chancellor of the state of New York, upon a creditor's bill.

[For a statement of the facts in the case in the district court, see Case No. 3,085, next preceding.]

NELSON, Circuit Justice. It is not important to state the facts relied on in the petition, to maintain it upon the merits, as the only question which has been adjourned to this court by the district court for decision is, whether or not the short bar of two years' limitation to suits, prescribed in the 8th section of the bankruptcy act, applies to the case. That section provides, that the circuit court shall have concurrent jurisdiction with the district court of all suits at law and in equity, which may and shall be brought by any assignee of the bankrupt, against any person or persons claiming an adverse interest, or by such person against such assignee, touching any property, or rights of property, of said bankrupt, transferable to, or vested in, such assignee; and no suit at law or in equity shall, in any case, be maintainable by or against such assignee, or by or against any person claiming an adverse interest touching the property and rights of property aforesaid, in any court whatsoever, unless the same shall be brought within two years after the declaration and decree of bankruptcy, or after the cause of suit shall first have accrued.

It is obvious, from a careful perusal of this section, that the limitation applies only to suits growing out of disputes in respect to property and rights of property of the bankrupt which come to the hands of the assignee, and to which adverse claims existed

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

while in the hands of the bankrupt, and before the assignment. These disputes or claims affect the assets of the bankrupt, and an adjustment of them either by compromise or suit is indispensable to a settlement and distribution of the estate among the creditors. A short bar, by limitation, to suits brought either by the assignee or the adverse claimant, furnishes a fit and appropriate remedy against delay, where compromise is impracticable. The last clause of the section seems conclusive in favor of this construction. The time from which the two years' limitation begins to run, is the date of the declaration and decree of bankruptcy, or if the cause of action had not then accrued, two years after it had. The first clause of the limitation could apply only to adverse claims existing before the assignment, and the second applies to the same, but provides for the case where the right to institute the suit did not accrue till after the date of the decree. The limitation has no reference to suits growing out of the dealings of the assignee with the estate after it comes into his hands. These are matters for which he may be made personally responsible, and no reason existed for changing the general period of limitation any more than in the case of any other trustee dealing with trust property. There certainly could be no reason for applying the short term in favor of persons dealing with the assignee in respect to the estate of the bankrupt after it comes into his hands, and the statute makes the limitation mutual.

I am of opinion that the limitation in the 8th section of the statute does not apply to the case presented, and shall direct it to be so certified to the district court.

[NOTE. The decree of the district court subsequently made (July 7, 1862) vacated the order directing the assignee to sell, also the assignee's deed to the purchaser, and directed the deed to be delivered up for cancellation. See Case No. 3,085, next preceding.]

CONANT (UNITED STATES v.). See Cases Nos. 14,843 and 14,844.

Case No. 3,087.

CONANT v. WILLS et al.

[1 McLean, 427.][1]

Circuit Court, D. Indiana. May Term, 1839.

ACTION ON PROMISSORY NOTE — PLEADING AND PROOF—STRIKING OUT ENDORSEMENTS—ASSIGNMENT.

1. An unsubstantial variance between the note and the declaration, where the note is described in effect, will be disregarded.

2. The holder of a negotiable note is presumed to have the right, and being the payee may strike out the endorsements on it, and bring the action in his own name.

3. A plea that the note had been assigned, should be supported by some proof that the right was in the assignee.

4. Assignments to cashiers, as in this case, it is known are often made, for the mere purpose of collection.

[Action at law by Conant against Wills and Bradley.]

Fletcher & Butler, for plaintiff.

Mr. Ingram, for defendants.

OPINION OF THE COURT. This is an action of assumpsit on a promissory note. The defendants plead non assumpsit, and also that the note was assigned by Conant, the plaintiff, to White. The jury having been sworn, the note was offered in evidence. The defendants proved that the note was indorsed in blank, and filled up to White in his hand writing; but this indorsement is now struck out. This was done since the commencement of this suit. The declaration describes Conant of the city of New York, generally; but the note describes him of Pearl street, New York. For this variance, the defendants' counsel object to the note as evidence. This variance is not material, the note being set out in substance. It leads to no uncertainty, and may therefore be disregarded. The counsel for the defendants then prayed the court to instruct the jury, that if they should find the note to have been assigned, they must find for the defendants.

The holder of a note is presumed to have the beneficial interest in it; and he has a right to strike out any indorsement made on it, and being the payee, to bring the action in his own name. A plea that a note has been assigned, should be supported by some proof that the beneficial interest in the note was still in the assignee. Indorsements, it is known, are often made to the cashiers of banks and others, for the mere purpose of collection. The indorsement, in such case, operates as a power of attorney to the assignee to receive the money. The assignee in this case was the cashier of a bank. And the note not being paid, it is afterwards found in the hands of the payee, who brings a suit against the drawers, in his own name, and strikes out the assignment. We think, the presumption of right, in the absence of other proof, is in favor of the plaintiff. And that he had the power and right to strike out the indorsement. If White be injured, he has his recourse against the plaintiff. In no event can the defendants be injured. A recovery in this suit will bar any future suit against them, on the note.

The possession of a bill by the indorsee, who had indorsed it over to another, is, unless the contrary appear, evidence that he is the bona fide holder and proprietor of such bill, and he is entitled to recover thereon, notwithstanding there may be on it one or more indorsements in full, subsequent to the indorsement to him, without his producing any receipt or indorsement back from either of the subsequent indorsers, whose names he may strike out or not as he thinks proper. Dugan v. U. S., 3 Wheat. [16 U. S.] 172; U. S.

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

v. Barker [Case No. 14,517]. Possession of a bill by the payee which he had indorsed over, is evidence that he has paid to the person who had a right to call upon him, though it is not re-indorsed. Lonsdale v. Brown [Id. 8,492]; Buzzard v. Flecknoe, 1 Starkie, 333; Barbarin v. Daniels, 7 La. 479.

Verdict for the plaintiff and judgment.

Case No. 3,088.

CONARD v. ATLANTIC INS. CO.

[See Case No. 627.]

CONARD (PACIFIC INS. CO v.). See Case No. 10,647.

CONCEPTION, The (CONSUL OF SPAIN v.). See Case No. 3,137.

Case No. 3,089.

CONCKLIN et al. v. The HARMONY.

[1 Pet. Adm. 34, note.][1]

District Court, D. New York. 1797.

SALVAGE—COMPENSATION.

The brigantine Harmony found on shore on the Bahama bank, deserted and abandoned, —with very great labor, difficulty and danger, she was brought into N. York by the libellants. One moiety of the net proceeds of vessel and cargo allowed as salvage.

[Cited in The Waterloo, Case No. 17,257; The Henry Ewbank, Id. 6,376; The Massasoit, Id. 9,260; Evans v. The Charles, Id. 4,556; Sewell v. Nine Bales of Cotton, Id. 12,683.]

In admiralty.

Libel: "To the Honourable Robert Troup, Esquire, Judge of the District Court of New York.—The Libel of Richard Conklin, Owner of a Moiety of the Sloop Betsey, and Master of the said Sloop, Strong Conklin, Owner of the other Moiety, and Mate of the said Sloop, Enoch Conklin and Nathan Smith, Mariners on Board the said Sloop, against the Brigantine Harmony, her Tackle, Apparel, Furniture and Cargo. The said libellants give this honourable court to understand and be informed that, proceeding on a certain voyage from New Providence for the port of New York, with a quantity of merchandize loaded on board the said sloop called the Betsey, viz. a large quantity of pine-apples and yams, of the value of five thousand dollars, or thereabouts, on the twentieth day of May last, in the Bahama straits, they discovered the said brigantine, called the Harmony, lying on a rank heel, with her sails flying, and main boom in the water, in great apparent distress, at the distance of about eleven leagues from the northwest point of Bahama island, on a certain bank of sand interspersed with rocks, which runs along the western and northern coasts of the said island. That these libellants thereupon made sail to the said brigantine, and, finding the same abandoned by the crew, were induced to go on board of the same. That, on examining the said brigantine, all her hatches, except the main hatch, being open, they found she contained a cargo consisting of sugar and molasses; but that the same had not, as far as these libellants examined, been then considerably damaged: that there were no papers on board by which they could learn the names of the proprietors of the vessel; that they found six feet and a half of water in the hold of the said brigantine. And these libellants further shew that determining to effect, if possible, the preservation of the said brigantine and her cargo, they immediately cast anchor at a small distance from the said brigantine, notwithstanding two rocks appeared above water, within two hundred yards of their station, and continued at anchor alongside, or near the said brigantine, all that night and the three succeeding days; during which time these libellants, by great exertions of labour, and with severe fatigue, were continually employed in throwing the said cargo of the said sloop the Betsey into the sea, and carrying and removing a part of the said cargo of the brigantine into the said sloop, and in pumping the said brigantine; by means whereof the said brigantine, on the twenty-third day of May, became buoyant in her fore part, and these libellants, by throwing out her anchor astern, and heaving with great and unremitted exertions on her cable, were enabled to bring round the head of the said brigantine; and, having cast out her sheet anchor, at the whole length of the cable, threw from the aft part of the said brigantine a part of her cargo into the sea, whereby the said brigantine became afloat; and these libellants further show that, on the evening of the said twenty-third of May, and the morning of the twenty-fourth, the weather being squally and tempestuous, these libellants returned to and continued in the said sloop near and about the said brigantine in the most imminent danger, the wind blowing from different quarters and sometimes upon the said bank. But these libellants, being resolved to risque their lives for the safety of the said brigantine, returned to the same and made sail upon her on the twenty-fourth day of May, the said vessel having then six feet and a half of water in her hold, and that part of her cargo which remained on board being very much shifted into the side, and causing the said brigantine to heel and labour very much in sailing. That, a strong current setting upon the bank, these libellants were again compelled to anchor with the said brigantine and sloop on the same day; and, continuing so at anchor, on the next day a certain sloop, called the General Green, commanded by Captain Stein, bound from the Havanna to Providence in Rhode Island, fell in with these libellants, and, in consideration of

[1] [Reported by Richard Peters, Jr., Esq.]

twenty-three boxes of sugar, being part of the cargo of the said brigantine, which were then and there delivered to him by these libellants, in full satisfaction for assistance, was induced to cast anchor alongside of the said brigantine, and with the crew of his vessel to assist these libellants in stowing and trimming the cargo of the said brigantine, and pumping out the water therefrom. And these libellants further shew that two of the mariners on board of the said sloop, bound from the Havanna to Providence in Rhode Island, with the permission of the said Captain Stein, and in consideration of the sum of two hundred dollars, paid to them by this libellant, Richard Conklin, undertook to assist in navigating the said brigantine to the port of New York; that, these libellants, Enoch Concklin, and Strong Concklin, with the said two mariners, on the twenty-sixth of May last, took charge of the said brigantine, and weighed anchor, and arrived at New York, on the seventh day of this present month of June, together with a considerable part of her cargo, on which day also the said sloop called the Betsey also arrived at the port of New York, with the residue of the said brigantine's cargo so saved from loss and destruction by these libellants as aforesaid. And these libellants further shew that, on their arrival at this port, this libellant, the said Richard Conklin, duly entered the said brigantine and sloop with their lading at the custom-house of this district of New York, and have since, together with Isaac Moses, of the city of New York, auctioneer, and Nicholas Low, as their securities, become bound to the United States for payment of the duties thereupon, and are now proceeding to land the same, delivering it as landed into the possession of the said Isaac Moses, as a counter-security for the engagements so entered into by him, as surety for your libellants for the said duties; and to the end that he may keep and dispose of the same, under the direction of this honourable court. And your libellants do further shew, that a considerable part of the said cargo on board the said brigantine being damaged and perishable, it is the interest of those whom it may concern, that the same should be immediately sold. Wherefore, these libellants pray the aid and advice of this honourable court in the premises, with the customary process thereof; and that the said brigantine and the cargo thereof, so saved and brought into this port, may be sold by a decree of this honourable court, and that this honourable court will adjudge and decree to these libellants the whole or so much thereof, after deducting all charges, and in such proportion to these libellants, as this honourable court shall think proper. M'-Kinnin, Proctor for Libellants."

Decree: THE COURT, having taken time to advise in this cause until this day, doth now order, sentence and decree, and it is hereby ordered, sentenced and decreed by the court, that out of the sum of fifty-six thousand five hundred and twenty-three dollars and thirty-eight cents, arising from the sale of the said brigantine Harmony and her cargo, and brought into court, the clerk pay the costs of the libellants, and those of the several claimants in this cause to be taxed, and also the costs accruing upon the petition of Thomas Sheafe to this court for a remission of foreign duties charged upon the said brigantine and cargo, and also the fees and costs of the several officers of this court to be likewise taxed; and it is further ordered, sentenced and decreed by the court, that the clerk also pay to the collector of the district of the city of New York, out of the sum so as aforesaid brought into court, the sum of seven thousand seven hundred and sixty-four dollars and one cent, being the amount of duties secured to be paid to the United States upon the said brigantine and her cargo. And, as a compensation for the saving of the said brigantine and her cargo, it is further ordered, sentenced and decreed by the court, that the clerk pay one moiety of the residue of the sum so as aforesaid brought into court, in manner following, that is to say, to the libellants Richard Conklin and Strong Conklin, as owners of the sloop Betsey, one third part of the said moiety; and that the clerk, after dividing the remaining two third parts of the said moiety into thirteen equal shares, pay four shares and a half to the said libellant Richard Conklin, four of the said shares being in consideration of his quality of master of the sloop Betsey, and the half of a share in consideration of the services rendered by his negro boy Charles in saving the brigantine and her cargo; and that the clerk pay three other shares to the said libellant Strong Concklin, as mate of the said sloop Betsey, and three other shares to the libellant Enoch Concklin, as a mariner on board of the said sloop Betsey, and who acted as master of the said brigantine after she was got off the Bahama bank, and navigated her into the port of New York; and that the clerk pay the two remaining shares and a half to the libellant Nathan Smith as a mariner on board of the said sloop Betsey. And it is further ordered, sentenced and decreed by the court, that the other moiety of the residue of the sum so as aforesaid brought into court, be retained by the clerk to be paid under a future order of the court to the several claimants in this cause, according to their respective interests in the said brigantine and cargo, or either of them.

Case No. 3,090.

CONCKLIN v. The SYLVAN SHORE.

[39 Hunt, Mer. Mag. 74.]

District Court, S. D. New York. April, 1858.

MARITIME LIENS—SUPPLIES—STATE STATUTES—"PORT" DEFINED.

[1. Materials obtained on the credit of a vessel, and used in her construction, give rise

to a lien, under 3 Rev. St. N. Y. c. 8, tit. 8, § 1, whether the builder obtained them in his character of owner or builder.]

[2. The statute provides (section 2) that the lien shall cease immediately after the vessel leaves the port at which the debt was created, unless the creditor shall, within 10 days after such departure, file specifications of his lien in the county clerk's office of the county in which the lien was created. *Held*, that the word "port," as employed in this and like statutes, is not used in any technical sense, such as port of entry, free port, etc., but in the familiar and popular sense, which covers any place along the shore where a vessel may need repairs or supplies.]

[3. Whenever the vessel departs from the county in which the lien was created and is required to be recorded, she "departs from the port," although she merely goes to a port of a neighboring county.]

In admiralty. This was a libel filed to recover the price of lumber furnished by the libelant to F. I. A. & L. H. Boole in July, 1856, and applied by them in building the steamboat at Mott Haven, in Westchester county. The steamboat was built under a contract between L. H. Boole and the claimants, the New York and Harlem Navigation Company, by which the hull and joiner work were to be completed before August 17, and to be delivered at a wharf in New York City. The hull of the boat was taken to New York August 22, and after receiving her machinery and making a trial trip or two she returned to Mott Haven, October 25, and on November 10 began her regular trips between Harlem and New York. On November 5 the builder was paid the contract price in full. The lumber was not sold to or for the vessel, and the charges on the libelant's books were to the firm alone, not naming the boat. This suit was commenced November 25, 1856. No specification of lien was filed in the county clerk's office of Westchester or New York.

[The lien was claimed under 3 Rev. St. N. Y. p. 493, tit. 8, c. 8, which provides as follows: "Section 1. Whenever a debt amounting to fifty dollars or upwards, shall be contracted by the master, owner, or his agent, builder or consignee of any ship or vessel within the state, for either of the following purposes: On account of any work done, or materials or articles furnished in this state, for or towards the building, repairing, fitting, furnishing or equipping such ship or vessel; * * * such debt shall be a lien upon such ship or vessel, her tackle, apparel and furniture; and shall be preferred to all other liens except mariner's wages."

["Sec. 2. When the ship or vessel shall depart from the port at which she was when the debt was contracted, such debt shall cease to be a lien at the expiration of 60 days after the return of such vessel to such port, and in all cases such lien shall cease immediately after such vessel shall have left such port, unless the person having such lien shall, within 10 days after such departure, cause to be drawn up specifications of his lien, the correctness of which is to be sworn to by such person, his agent, or his legal representatives, and filed in the county clerk's office of the county in which such lien shall be created."]

Beebe, Dean & Donohue, for libelant.
Benedict & McGowan, for claimant.

Before BETTS, District Judge.

HELD BY THE COURT: That a lien was indisputably created in favor of the libelant by the purchase made by the builder, if the materials were obtained on the credit of the vessel, whether he procured them in the character of owner or builder, subject to the condition expressed in the statute of filing a specification within ten days after leaving the port. That the term "port" used in this class of enactments has never been understood or employed in a technical or restricted sense, as limited to ports of entry, free ports, or those bearing any special qualification. These municipal lien laws especially are adapted to occasions which would naturally occur in places along the shores of our inland waters, wherever a vessel may need repairs or supplies, and the word "port" would naturally be used in its most familiar and popular sense. That the second section of the lien law of the state fixes the county within which the lien is created as the place where legal proof of it shall be recorded, and thus indicates unmistakably that when the vessel leaves such county, she departs from the port where the privilege accrued to her, and it is the same where her removal in point of distance is merely nominal, in going, for instance, into a port in the county of New York, as to one in Richmond or Suffolk county. That the libelant, not having filed his specification within ten days after the departure of the vessel from the port, his right of action was barred in this case.

Libel dismissed, with costs.

CONCORD, The (HOME INS. CO. v.). See Case No. 6,659.

Case No. 3,091.

The CONCORDA.

[See Case No. 3,092.]

Case No. 3,092.

The CONCORDIA.

PENT v. The CONCORDIA.

[5 Adm. Rec. 400.]

District Court, S. D. Florida. Dec. 17, 1855.

SALVAGE—COMPENSATION.

[1. Salvors, having no means of saving a cargo of cotton but by rafting, have no right to exclude others having vessels on the spot from participating in the salvage service.]

[2. The first salvors should be allowed 8 per cent. on the value of the cotton saved by the second set for saving it from fire by scuttling or cutting a hole in the side of the ship.]

[Cited in The Tolomeo, 7 Fed. 501.]

[In admiralty. Libel by Anthony Pent and others against the ship Concordia, her cargo, etc., for salvage services.]

O. B. Wart, for libellants.

S. J. Douglas, for respondent.

MARVIN, District Judge. It is ordered, adjudged, and decreed, that the libellants and petitioners have and recover in full compensation for their services in saving said cargo and materials, the one half of the net proceeds. It is ordered, that the bills for costs and expenses of this suit and for all other charges upon the property, be brought into court with the proper proofs or vouchers, on or before Wednesday next, at ten o'clock in the forenoon, to be submitted to the court, and allowed or disallowed, and that the costs, expenses and charges allowed by the court, except the proctor's fee for defending this suit, be deducted from the gross proceeds of sales, and the remainder be considered the net proceeds, the one half of which is hereby allowed for salvage. That the clerk pay out of said proceeds the costs, expenses and charges allowed by the court, and the salvage ascertained as aforesaid, and pay the residue to Captain Cushing, late master of said ship; and that he be admonished that he receives said residue discharged of any claim upon them for any pretended charges not allowed by the court, and that he ought not to pay any such charges, all legal charges being made by this decree a charge upon the gross proceeds. That the division of said salvage be reserved for a further decree.

Afterwards, to wit, on the 20th day of said month, the judge made and filed an order in this case on the salvage, costs, and charges, in the words and figures following, to wit:

It is the opinion of the court in this case that the first set of salvors had no right to exclude the second set from saving the cotton in their vessels, the first set not having at the time the means to save it, except by rafting; and they had no right to expose the property on the raft when there were wrecking vessels on the spot, ready to receive it. It is also the opinion of the court that the first set have a claim upon the cotton saved by the second set for saving it from the fire by the scuttling or cutting of a hole in the side of the ship, and letting in the water, as by them alleged, and that eight per cent. upon the salvage of the second set ought to be allowed for this service to the first set. It is ordered and decreed that the portion of costs and charges to be paid by the salvors be apportioned among them according to their respective interests; that eight per cent. of the salvage allowed the second set be deducted from their salvage and assigned to the first set; and that it be referred to Commissioner Baldwin to divide the salvage; and that he allow Edward Percey, mate of the ship, two shares out of the salvage of the second set.

The costs and charges upon the proceeds of the said property having been brought into court in pursuance of the decree lately pronounced, it is now ordered that the following bills be allowed against said proceeds:

The bill of the clerk of the court	$113 39
The marshal's bill	101 39
Libellant's proctor's fee	20 00
O'Hara & Wells, bill for wh'fge & storage	268 18
California House for boarding crew	47 45
Bill for provisions for crew	26 49
Notary public's fees	21 57
Bowne & Curry's bill for house for crew	5 10
One witness fee	1 50
	$604 97

—Making the aggregate bills allowed six hundred and four dollars and ninety-seven cents, which deducted from seven thousand one hundred and thirty-nine dollars and ninety-nine cents, leaves as a net proceeds six thousand five hundred and thirty-five dollars and two cents, the one half of which, or three thousand two hundred and sixty-seven dollars and fifty-one cents, is allowed to the salvors, and the same sum (less one hundred and forty-eight dollars, the respondent's proctor's fee, which is to be paid out of the residue by the clerk), or three thousand one hundred and nineteen dollars and fifty-one cents to be restored and paid to the late master for and on account of whom it may concern.

Case No. 3,093.

CONCORD R. CORP. v. TOPLIFF.

[21 Int. Rev. Rec. 74.]

Circuit Court, D. New Hampshire. Oct. Term, 1874.

INTERNAL REVENUE—CORPORATE SECURITIES—REPEAL OF INCOME TAX.

The tax on bonds, coupons, interest, dividends and profits of railroads and other corporations has in all the enactments since 1861 been kept entirely distinct and separate from the income tax proper, and the act of 1867 [14 Stat. 480], terminating the income tax with the year 1870, does not, therefore, apply to the former tax, which continued in force until the 1st day of August, as provided by the 17th section of the act of July 14, 1870 [16 Stat. 261].

[At law. Action by the Concord Railroad Corporation against E. M. Topliff.]

Isaac W. Smith, for plaintiffs.

Henry P. Rolfe, U. S. Atty., for defendant.

SHEPLEY, Circuit Judge, and CLARK, District Judge. Assumpsit to recover back from the defendant, who is internal revenue collector for the second district of New Hampshire, the sum of $4,351.28, alleged to have been illegally collected of the plaintiffs by the defendant. Plea, general issue, with brief statement. The hearing was had

upon a case agreed: "That the plaintiffs, a railroad corporation organized under a charter from the legislature of New Hampshire, on the 22d day of April, 1870, declared a dividend of $78,947.37 out of the net earnings for the six months ending March 31, 1870, inclusive of the tax thereon, payable to the stockholders May 2, 1870. The profits over the dividend for the same period were $3,934.13. On the 7th day of June, 1870, the plaintiffs made return to the assistant assessor of the seventh division of said district of the dividends declared upon the earnings for the said period, and of the profits over the dividend. On the 15th day of June, 1870, the assistant assessor of the seventh division of said district assessed against the plaintiffs a tax of 5 per cent. on said sum of $78,947.37, amounting to $3,947.37, and a tax of 5 per cent. on said sum of $3,947.37, amounting to $196.70, making a total of tax of $4,144.07, and returned the same to the assessor for said district, who, on the 20th day of June, 1870, committed the same, with his list of taxes for that month, to the defendant, who was the collector for said district. Said sum of $4,144.07, upon the demand of the defendant, and upon his threat to distrain upon the property of the plaintiffs if payment should be refused, the plaintiffs paid to said defendant on the 30th day of July, 1870, with 5 per cent. additional, to wit, $207.20, as penalty exacted by the defendant for non-payment of said tax in the month of June, 1870, making a total of $4,351.28 so paid by the plaintiffs to the defendant, and which was paid by them under protest, in writing, that they were not liable to pay the same, nor any part thereof, and which was delivered to the defendant at the time of payment. April 18, 1871, the plaintiffs appealed from said assessment and collection to the commissioner of internal revenue, according to the provisions of law in that regard and the regulations of the treasury established in pursuance thereof, and praying for the refunding of the several sums paid as aforesaid; and the decision of the commissioner was had thereon June 14, 1871, rejecting the claim of the plaintiffs for refunding the several sums aforesaid. On the 20th day of September, 1871, the day before this suit was brought, the plaintiffs demanded the repayment of said several sums, which was refused." It was also agreed "that if the court shall be of opinion that the plaintiffs are entitled to recover of the defendant, judgment shall be rendered for the plaintiffs for such sum as the court shall find to be due, and costs; otherwise judgment shall be rendered for the defendant for his costs."

The question here is, were these taxes legally assessed and collected of the plaintiffs? The earnings of the plaintiffs' corporation, upon which the tax was laid, and out of which it was collected, accrued in the six months from October 1, 1869, to March 31, 1870. It does not appear precisely how much was earned in the last three months of 1869, nor how much in the first three months of 1870; but if the monthly earnings were uniform one-half of the sum of $78,947.37, to wit, $39,473.68, was earned in 1869. As to this one-half, it is not now contended that it was not subject to taxation. Since this suit was brought, in September, 1871, the cases of Barnes v. The Railroads, 17 Wall. [84 U. S.] 294, have been decided by the supreme court at Washington, and are so far decisive of this case. But as to the other one-half of the earnings, to wit, the sum of $39,473.68, accruing in the year 1870, the plaintiffs contend that the tax was illegal and without authority; that although, as decided in Barnes v. Philadelphia & R. R. Co. (Dec. Term, 1872) 17 Wall. [84 U. S.] 294, a tax of 5 per cent. might be assessed upon dividends declared subsequent to December 31, 1869, upon net earnings prior to that date, yet there is no authority by law for assessing taxes upon dividends declared out of earnings that accrued subsequent to that date, on which the tax was not assessed by the 1st day of March, 1870. Such was his position on the argument of the case, and he relied upon the act of March 2, 1867 (14 Stat. 480). "That the taxes on incomes herein imposed shall be levied on the 1st day of March, and be due and payable on or before the 30th day of April in each year, until the year 1870, and no longer." But if the position of the plaintiffs is correct, that this tax was illegal because it was not assessed until after March 1, 1870, then it is difficult to see—though not so claimed by plaintiffs—how the tax on the earnings of the last three months of 1869 was legal, because the dividend on the whole six months' earnings was not declared until the 22d day of April, 1870, and the tax was not assessed on any portion thereof until the 17th of June following. All the earnings of the road, in that particular, are in the same category. Since the argument in this case, the supreme court has decided in the Stockdale Cases [Stockdale v. Doswell, 16 Wall. (83 U. S.) 156; Same v. Atlantic Ins. Co., 20 Wall. (87 U. S.) 323] that the income of corporations, accruing between the first day of January, 1870, and the 1st day of July of the same year, is liable to taxation; and they based their decision upon the 17th section of the act of July 14, 1870, which is as follows, so far as it is material to this case: "And be it further enacted, that sections one hundred and twenty, one hundred and twenty-one, one hundred and twenty-two, and one hundred and twenty-three of the act of June 30, 1864, entitled 'An act to provide internal revenue to support the government, to pay interest on the public debt, and for other purposes,' as amended by the act of July 13, 1866, and the act of March 2, 1867, shall be construed to impose the taxes therein mentioned to the

first day of August, 1870, but after that date no further taxes shall be levied or assessed under said sections." This act was passed July 14, 1870, and the report of the Stockdale Cases [supra] is silent as to the time the taxes under consideration therein were assessed, whether before or after the passage of the act. But in this case it is agreed that the tax was assessed on the 10th day of June, 1870, which was before that act was passed; and so the assessment of the tax cannot be supported under it, as the act provides distinctly that it "shall not be construed to affect any act done, right accrued or penalty incurred under former acts; but every such right is hereby saved."

Now, it is very manifest that if this assessment was not legal before that act,—if there was no authority for it,—then it was not legal afterwards, because, being made before the act passed, it was, by expressed terms, not to be affected by it. This tax, then, so far as laid upon the earnings of the road accruing, subsequently to Dec. 31st, 1869, if supported at all, must be upon different grounds from those on which were placed the Stockdale Cases, by a majority of the court, and we think it may be so supported; and in the Stockdale Cases two of the judges (Bradley and Chief Justice), while concurring in the opinion of a majority of the court, did so expressly upon, to them, the more satisfactory ground that the 120th and 122d sections of the statute of 1864 (13 Stat. 283, 284), amended by the act of 1866, had not been repealed or limited in duration by the 119th section of the same act, as amended by the act of 1867 (14 Stat. 480), limiting the income tax to the year 1870, as the plaintiffs contend.

The opinion of Mr. Justice Bradley, delivered in the Stockdale Cases, shows clearly the ground on which he and the chief justice placed their concurrence in the judgment of the court, and, if that opinion is sound, then the tax assessed in this case upon the earnings of the railroad accruing in the first three months of 1870, were rightfully assessed and judgment must be for the defendant. Did, then, the provision in the act of 1867 (14 Stat. 480), "That the taxes on incomes herein imposed shall be levied on the first day of March, and be due and payable on or before the thirtieth day of April in each year, until and including the year eighteen hundred and seventy and no longer," repeal section 122 of the act of 1864 (13 Stat. 284), as amended by the act of 1866, which provides for the assessment of a tax upon any dividend of any railroad, canal, turnpike, canal navigation or slackwater company as part of the earnings, profits, income, or gains of such company, and of all profits carried to the account of any fund, or used for construction, etc.? To answer this question satisfactorily an examination of the history of the income taxes, and of taxes upon railroads and other corporations, with the various statutes creating or modifying the same, becomes necessary. The income tax first appeared in the act of August 5, 1861 (12 Stat. 309, § 49), in these words: "That from and after the first day of January next, there shall be levied, collected and paid, upon the annual income of every person residing in the United States, whether such income is derived from any kind of property, or from any profession, trade, employment, or vocation carried on in the United States, or elsewhere, or from any other source whatever, if such annual income exceeds the sum of eight hundred dollars, a tax of three per centum on the amount of such excess of such income above eight hundred dollars; provided, that upon such portion of said income as shall be derived from interest upon treasury notes or other securities of the United States, there shall be levied, collected, and paid a tax of one and one-half per centum. Upon the income, rents, or dividends accruing upon any property, securities or stocks owned in the United States by any citizen of the United States residing abroad, there shall be levied, collected and paid a tax of five per centum, excepting that portion of said income derived from interest on treasury notes and other securities of the government of the United States, which shall pay one and one-half per centum. The tax herein provided shall be assessed upon the annual income of the persons hereinafter named for the year next preceding the time for assessing said tax, to wit, the year next preceding the first day of January, eighteen hundred and sixty-two; and said taxes, when so assessed, shall become a lien on the property, or other sources of said income for the amount of the same, with interest and other expenses of collection, until paid; provided, that in estimating said income, all national, state, or local taxes assessed upon the property, from which income is derived, shall be first deducted."

It will be observed, that here are three distinct income taxes,—one of three, one of one and one-half and one of five per centum,—and the only deduction is that of taxes paid. An examination of the whole act shows, that nothing is said in it concerning the taxation of the earnings, dividends or bonds of corporations or companies; but all "sources of income whatever" were included in the provisions of the one section. This tax was made payable on or before the 30th day of June, 1862, and had no limitation as to the time of its continuing in force. If there had been, it is manifest, that the tax must have ceased on all incomes alike; whether derived from bonds, dividends, earnings of railroad companies or otherwise. In 1862 congress again dealt with the income tax and provided it should be assessed on the first day of May, 1863, on the income of the year ending the 31st day of December preceding, and so thereafter, until and including the year 1866, and no longer. Here is the first limitation as to the time of its duration. The tax was

made payable on the 30th day of June in each year of its continuance. But in this year, 1862, there appeared (12 Stat. 469, § 81,) a distinct provision for the taxation of railroad bonds and dividends, which is as follows: "And be it further enacted, that on and after the first day of July, 1862, any person or persons owning or possessing, or having the care or management of any railroad company or railroad corporation, being indebted for any sum or sums of money, for which bonds or other evidences of indebtedness have been issued, payable in one or more years, upon which interest is, or shall be stipulated to be paid, or coupons representing the interest shall be or shall have been issued to be paid, and all dividends in scrip or money, or sums of money thereafter declared due or payable to stockholders of any railroad company, as part of the earnings, profits or gains of said companies, shall be subject to pay a duty of three per centum on the amount of all such interest or coupons or dividends whenever the same shall be paid; and said railroad companies or railroad corporations, or any person or persons owning, possessing, or having the care or management of any railroad company or railroad corporation, are hereby authorized and required to deduct and withhold from all payments made to any person, persons, or party, after the first day of July, as aforesaid, on account of any interest or coupons, or dividends due and payable as aforesaid, the said duty or sum of three per centum, and the duties deducted as aforesaid, and certified by the president or proper officer of said company or corporation shall be a receipt and discharge, according to the amount thereof of said railroad companies or railroad corporations, and the owners, possessors, and agents thereof, on dividends and on bonds or other evidences of their indebtedness, upon which interest or coupons are payable, holden by any person or party whatsoever, and a list or return shall be made and rendered within thirty days after the time fixed when said interest or coupons or dividends become due or payable and as often as every six months, to the commissioner of internal revenue, which shall contain a true and faithful account of the duties received and chargeable as aforesaid, during the time when such duties have accrued or should accrue, and remaining unaccounted for; and there shall be annexed to every such list or return a declaration under oath or affirmation in manner and form as may be prescribed by the commissioner of internal revenue, of the president, treasurer, or some proper officer of said railroad company or railroad corporation, that the same contains a true and faithful account of the duties so withheld and received during the time when such duties have accrued or should accrue, and not accounted for; and for any default in the making or rendering of such list or return, with the declaration annexed as aforesaid, the person or persons owning, possessing or having the care or management of such railroad company or railroad corporation making such default, shall forfeit as a penalty the sum of five hundred dollars; and in case of any default in making or rendering said list, or of any default in the payment of the duty or any part thereof accruing, or which should accrue, the assessment and collection shall be made according to the general provisions of this act,"—and by section 91 of the same act, such gains, income, or profits as were derived from companies, corporations, or savings institutions, which had been assessed or paid thereon the tax, were deducted from the annual income tax.

Here we have a distinct method and time for assessing the bonds, dividends and profits of railroad companies and corporations different from the method and time of assessing the income tax, properly or usually so called,—and an exception of such bonds, dividends and profits out of it. In 1861, such bonds, dividends and profits made a part of the income subject to taxation, and were assessed once a year in the same manner as other sources of income; but in 1862 they were assessed in a different manner, at different times, and were expressly excepted out of the income tax, and so continued until after the assessment of the tax in this suit. In 1864, congress again modified the income tax, and provided it should be continued beyond 1866; and "that the duties or incomes herein imposed shall be levied on the first day of May, and be due and payable on or before the thirtieth day of June in each year, until and including the year 1870, and no longer"—(substantially the same provision as to the duration of the tax, as in the act of 1867, on which the plaintiffs rely to show the illegality of the tax in this suit). But the same act continued the tax on the bonds, dividends and profits of railroad and other companies, carried to any fund, substantially as in 1862, with a provision that the list or returns should be made and rendered to the assessor or assistant assessor in duplicate, "and one of said lists or returns shall be transmitted and the duty paid to the commissioner of internal revenue within thirty days after the time when said interest, coupons or dividends become due and payable, and as often as every six months." It also authorized the deduction of such dividends, etc., out of the income tax proper. In 1865 and 1866 respectively alterations were made in the income tax. But the bonds, dividends and profits of corporations and companies continued to be taxed in a distinct manner from the assessment of the income tax, properly so called, as before substantially. In 1867, further modifications were made; but no alterations were made in regard to the tax on bonds, dividends or profits of railroads or other corporations. They continued to be taxed in the same way and manner as before, and no limitation was made other than that in regard to income

taxes. In 1870 (16 Stat. 261), congress enacted "that sections one hundred and twenty, one hundred and twenty-one, one hundred and twenty-two, and one hundred and twenty-three of the act of June thirty, eighteen hundred and sixty-four, entitled," etc., "as amended by the act of July 13th, 1866, and the act of March 2d, 1867 (and these are the sections which impose taxes on dividends of banks, railroads, and other corporations, and on salaries of officers), should be construed to impose the taxes therein mentioned to the first day of August, 1870, but after that date no further taxes shall be levied or assessed under said sections."

In looking through the legislation from 1862 to 1870, it is very obvious that in all the enactments since 1861 the income tax, properly so called, has been kept entirely distinct and separate from the taxation of bonds, dividends, and earnings of corporations. It has been assessed at a different time and in a different manner—the one, once a year; and the other, usually twice: always as often as a dividend was declared, and as often as once in six months. The one was upon the annual income of each year, ending Dec. 31st; and the other, whenever the dividend was declared. The one went usually into the annual list for collection, and the other into the monthly, but never into the annual, and the one is known and recognized in the statute as the income tax, or the tax on incomes, and the other never so. Again, by the statute of 1862 (12 Stat. 474, § 92), it is provided that "the duties on incomes herein imposed shall be due and payable on or before the 30th day of June in each year thereafter, until and including the year eighteen hundred and sixty-six and no longer." Now this could not include and apply to the tax on dividends, for which railroad corporations were assessed, because the very same statute of 1862 fixed a different time for their assessment, showing very clearly that the provision applied to the income tax properly so called, and to that alone. So in 1864 (13 Stat. § 119), it was provided "that the duties on incomes herein imposed shall be levied on the first day of May, and be due and payable on or before the 30th day of June in each year, until and including the year eighteen hundred and seventy and no longer." Now, this could only be applied to incomes proper, and not to taxes on bonds and dividends of corporations; because, in a subsequent section of the same act, the one hundred and twenty-second (13 Stat. 284), it was provided, in regard to said taxes, that "a list or return shall be made and rendered to the assessor or assistant assessor in duplicate, and one of said lists or returns shall be transmitted, and the duty paid to the commissioner of internal revenue, within thirty days after the time when said interest, coupons, or dividends become due and payable and as often as once in six months." Now if the provision of the one hundred and nineteenth section of the act of 1864, to wit, "that the duties on incomes herein imposed shall be levied on the first day of May, and be due and payable on or before the 30th day of June, in each year, until and including the year 1870, and no longer," applies to the income tax proper, and not to bonds and dividends of corporations, it is difficult to see how the provision of the act of 1867, which is relied upon by the plaintiffs, can have a wider application, because it is in almost the same words as the act of 1864, and is equally inapplicable to the tax on bonds and dividends of railroads and other corporations. Again, in 1866, congress struck out the provision of the act of 1864, in regard to the assessment on the income tax, so called, and re-enacted, in almost the same words, "that the taxes on incomes herein imposed shall be levied on the first day of May, and be due and payable on or before the 30th day of June in each year, until and including the year 1870 and no longer." But this provision could not apply to the tax on bonds and dividends, and profits of railroads or other corporations, any more than the similar provisions of the act of 1864, because, in the same act of 1866, congress provided in a subsequent section for a tax on such bonds, dividends, and profits in a distinct and different manner and time; to wit (14 Stat. 139), it says, "and a list or return shall be made and rendered to the assessor or assistant assessor on or before the 10th day of the month following that in which said interest, coupons, or dividends become due and payable, and as often as every six months." Next comes the act of 1867, which amends the 119th section of the act of 1864, and provides as follows: "That the taxes on incomes herein imposed shall be levied on the first day of March, and be due and payable on or before the thirtieth day of April, in each year, until and including the year 1870, and no longer." But this we think must be confined to the income tax proper, the same as in years before, and cannot be extended or applied to the tax on bonds, dividends or profits of railroads or other corporations, because the act of 1867 did not in any way amend, change, alter, or repeal the provision of the act of 1866, that such bonds, dividends or profits shall be subject to a duty of five per centum on the amount of all such interest, or coupons, dividends or profits, whenever and wherever the same shall be payable . . . and that a "list or return shall be made and rendered to the assessor or assistant assessor on or before the tenth day of the month following that in which said interest, coupons, or dividends become due and payable, and as often as every six months." The different time and manner of the assessment of the tax in the two cases make it evident that the limitations, until the year 1870, in the act of 1867, must be confined to the income tax proper,

and that the taxation of bonds, dividends and profits of railroads and other corporations as provided for by the act of 1866 (14 Stat. 139), was not limited thereby, and so continued in force until the 1st day of August, 1870, as provided by the 17th section of the act of July 14th of that year (16 Stat. 261), which was after the tax in dispute in this case was assessed.

It is contended that the tax on bonds, coupons, dividends and profits is an income tax, and so is within the provision that taxes on incomes should be assessed in March, 1870, and no longer. See opinion of Strong, J., in Barnes v. The Railroads, 17 Wall. [84 U. S.] 310. But it is a sufficient answer to say that other provisions of the statute make it evident that the provision was intended to apply to the income tax proper, and that the tax on bonds, coupons, interest, dividends and profits of railroads and other corporations was not known or called a tax on incomes, and was assessed in an entirely different manner and time or times. Again, if the provisions of the act of 1867, that the taxes on incomes therein imposed shall be levied on the first day of March, and be due and payable on or before the thirtieth day of April, in each year, until and including the year 1870, and no longer, applied to the tax on railroad dividends, and the bonds and profits of corporations, then, between 1867 and 1870, the tax on such dividends should have been levied in March, and collected in April of each year, instead of whenever the dividend was declared, or before the tenth day of the next month thereafter. But such, it is believed, has never been the practice or understanding of the law.

Judgment for defendant for costs.

Case No. 3,094.

In re CONDICT.

[19 N. B. R. 142;[1] 2 N. J. Law J. 82.]

District Court, D. New Jersey. Jan. 21, 1879.

DISCHARGE IN BANKRUPTCY—SPECIFICATIONS.

1. A specification which charges the offence in the words of the act is too vague and general. The particulars in which the bankrupt has offended should be so set forth that he may be apprised of the precise matters wherein it is claimed he has transgressed.

[Cited in Re Graves, 24 Fed. 551.]

2. A specification which simply charges the bankrupt with having concealed his estate and effects, and with having concealed, removed, altered, and destroyed the books and writings relating thereto, is insufficient for want of an averment that such acts were done with intent to defraud creditors, and in not more particularly specifying what property was concealed, or what books and writings were destroyed.

On specifications against discharge.

T. N. McCarter, for opposing creditors.

C. E. Hill, for bankrupt.

[1] [Reprinted from 19 N. B. R. 142, by permission.]

NIXON, District Judge. Nine specifications are filed against the bankrupt's discharge. The counsel for the bankrupt in the argument moved to strike out six, to wit: the second, fourth, sixth, seventh, eighth, and ninth, as being vague and insufficient. The second is in these words: "Because the said Frederick K. Condict, with the said other bankrupts, contrary to the provisions of the said bankrupt act [of 1867 (14 Stat. 517)], and its several supplements, did conceal his and their estate and effects and did conceal, remove, alter and destroy the books and writings relating thereto." The defects in this specification are (1) the want of an averment that the acts complained of were done with intent to defraud his creditors, and (2) in not more particularly specifying what property was concealed, or what books and writings were destroyed. No matters are presented in which the bankrupt can raise an issue. The third specification is obnoxious to the first objection stated in regard to the second. Perhaps the reference to Schedule A would be sufficient as to the past entries in the cash-book and journal, but there is no allegation that the things done were with any fraudulent intent. The fourth charges the bankrupt with being privy to the making of false, fictitious, and fraudulent entries in the books of account with intent to defraud the creditors, and by an amendment thereto, afterwards allowed by the court, it is specified that they were made in the cash-book and journal, and refers to Schedule A, filed with the specification, as containing a large portion of such entries. I think this is sufficiently definite to disclose to the bankrupt the charges which he is to meet, and the motion to strike out is overruled. The objections to the sixth, seventh, eighth, and ninth specifications are well taken, and the case must stand as if none such were filed. It has been the uniform practice under the bankrupt act to consider all specifications as too vague and general which charge the offence in the words of the act. The particulars in which the bankrupt has offended should be so set forth, that he may be apprised of the precise matters wherein he is alleged to have transgressed. Blum. Bankr. 504; In re Butterfield [Case No. 2,247]; In re Hill [Id. 6,482]; In re Marston [Id. 9,142]; In re Son [Id. 13,174]; In re Eidom [Id. 4,314]. The case rests then upon the first, fourth, and fifth specifications. The first charges a preference contrary to the provisions of the bankrupt act, in transferring to one Stephen H. Condict, the father of the petitioner, in the month of November, 1869, their whole stock of merchandise for the purpose of preferring him as a creditor; the fourth with making or causing to be made false and fictitious entries in the books of account of the firm; and the fifth with giving fraudulent preferences to a number of their creditors, whose names are enumerated in Schedule B.

I have examined the evidence with care, and am of the opinion that the opposing creditors, upon whom the burden of proof rests, have failed to establish the truth of these specifications. It does not appear that Stephen H. Condict was a creditor of the firm when the sale of the merchandise was made to him, and if he had been, such a transfer, two or three years before the petition in bankruptcy was filed, was not against the provisions of the bankrupt act in regard to preference to honest creditors. In re Jones [Id. 7,446]. The entries in books complained of, although irregular, seem to have been necessary to make them express the business of the partnership and to conform to the facts of the transactions as they actually existed, and the alleged fraudulent payments, as exhibited in Schedule B, were made to their bona fide creditors in the regular course of their business during the years 1869, 1870, and 1871, before any act of bankruptcy is shown to have been committed. The petitioner is entitled to his discharge.

CONDON v. MURRAY. See Case No. 5,193.

Case No. 3,095.

In re CONE et al.

[2 Ben. 502;[1] 2 N. B. R. 21 (Quarto, 10).]

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

PLEADING IN BANKRUPTCY—FRAUDULENTLY STOPPING PAYMENT.

Where a petition in involuntary bankruptcy alleged as an act of bankruptcy that the debtors had "fraudulently stopped and suspended, and not resumed payment of their commercial paper for a period of fourteen days," but no facts were stated in the petition or in the affidavit which accompanied it, to show that such stoppage, &c., were fraudulent, *held*, that no order to show cause could be issued.

[Cited in Baldwin v. Wilder, Case No. 806; Re Hercules Mut. Life Assur. Soc., Id. 6,402.]

In bankruptcy. This was an application for an order to show cause why the debtors should not be adjudged bankrupts. The petition was filed by Wright Gillies and James M. Gillies, and alleged that they were creditors of William S. Cone and William M. Morgan, and that in April last said Cone & Morgan made in their favor a promissory note, payable in two months, for $618.19; that at the time said note became due, payment was demanded and refused; and that within six months before the filing of the petition, the said Cone & Morgan suspended payment of their commercial paper for a period of fourteen days.

BLATCHFORD, District Judge. The petition merely states a legal conclusion that the debtors "have fraudulently stopped and suspended, and not resumed payment of their commercial paper, for a period of fourteen days." This is stated substantially in the language of the thirty-ninth section [of the act of 1867 (14 Stat. 536)]. The affidavit to sustain the allegations of the petition merely states the same legal conclusion. The stoppage and non-resumption are sufficiently shown, but no facts are set forth to judicially satisfy the court that such stoppage and non-resumption were fraudulent. Mere stoppage and non-resumption for fourteen days are not sufficient, nor is fraud inferable therefrom. The order to show cause is refused.

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

Case No. 3,096.

CONE v. MORGAN ENVELOPE CO.
SAME v. WHITING PAPER CO.
SAME v. POWERS.

[4 Ban. & A. 107;[1] Fent. Pat. 63.]

Circuit Court, D. Massachusetts. Jan., 1879.

PATENTS—"RULED PAPER"—VALIDITY—INVENTION.

1. Embossed lines on writing paper being old, and ogee lines embossed on paper being also old, the mere change of the spaces of the ogee lines, so that they might be used for writing paper, does not constitute invention.

2. Mechanical and design patents, distinguished.

3. Letters patent No. 158,249, granted to Henry D. Cone, December 29th, 1874, for ruled paper, *held* invalid.

[In equity. Bills by Henry D. Cone against the Morgan Envelope Company, by same against the Whiting Paper Company, and by same against Lewis J. Powers, to restrain infringement of patent.]

Causten Browne and Chas. F. Blake, for complainant.

J. P. Buckland and A. K. P. Joy, for defendants.

LOWELL, Circuit Judge. The case numbered last upon the docket is named first, because most of the evidence was taken in that case, though all three were argued together.

It appears by the bill that the plaintiff, Cone, took out two patents; one for a new article of writing paper, and the other for an improvement in the method of making the paper. The plaintiff proceeded against the Morgan Envelope Company upon both of his patents, and, a demurrer for multifariousness having been interposed, he amended his bill, giving in evidence only patent No. 158,249, dated December 29, 1874, in which the claim is: "As a new article of manufacture, writing-paper whereof the lines are embossed by or with an ogee pattern, which exposes a like face on opposite sides."

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

In amending, the charge of infringement was changed, and now reads as follows: "But that the respondent, the Morgan Envelope Company, in violation of your orator's rights, has manufactured and sold to others large quantities of paper like that secured to your orator in and by his said letters patent of December 29, 1874, No. 158,249, which manufacture of said paper was by the use of the invention secured to your orator by his letters patent of February 10, 1874, No. 147,239." This second patent having been left out of the case, the defendants object that it is impossible for the court to decide whether they have infringed or not, within the allegation of the bill. The plaintiff contends that the charge includes both patents, jointly and severally, and that he may prove an infringement of either, as well as of both. It appears to me that the allegation is, that the paper which has been made and sold was made by the patented method. It is analogous to the case in which it appeared that the patentee had discovered a new kind of oil and a new way of making it, and the courts expressed the opinion that he might have claimed both; yet, his claim being for "the above-described new manufacture of deodorized heavy hydrocarbon oils * * * by treating them substantially as hereinbefore described," they decided that he had not claimed the new article, as distinct from the mode of its preparation. Merrill v. Yeomans [Case No. 9,472], affirmed, 94 U. S. 568.

This objection, however, applies to only one of the three cases; and a decision of the merits will be necessary.

The "ogee" form of ruled paper described and claimed, means that there is embossed upon the surface an elevation and depression, which will be interchanged on the two sides (the embossing being, I suppose, made by a single operation), so that when cut, the transverse section will present the appearance or pattern known in architecture and other arts as an ogee pattern. The advantage of the paper itself is that it corresponds on both sides, and presents, on both, an elevation and an accompanying depression, which take the place of other forms of ruling.

Ink lines of various colors, to aid in writing, were, of course, old and well-known. It is proved that writing paper had been made before 1874 with several kinds of lines formed in or upon the substance of the paper. There was paper for writing, embossed upon one side, with a corresponding depression on the other. Wall papers, which might have been used for writing, had been embossed with an ogee pattern; but the ogee lines were so close together as to form a corrugated surface, and there was nothing in the mode of spacing of those papers to assist the eye or hand in writing.

In this state of the art, the first question is: Whether a patent can be sustained for a new article, independently of the means of making it, which has the ogee lines, at suitable distances, for aid in writing?

I am of opinion that such a patent cannot be sustained. Embossed lines on writing paper being old and well-known, and ogee lines embossed on paper being equally so, there was no room to claim invention for a distinct and new product, merely by changing the spaces of the ogee lines so that they might be used for writing paper. The utility was of the same kind as in the older products. Of late years the supreme and circuit courts have had many occasions to pronounce upon patents which claim a new product or article. Among these are some which resemble the case at bar: See Smith v. Nichols [Case No. 13,084], affirmed, 21 Wall. [88 U. S.] 112; Union Paper Collar Co. v. Van Deusen [Case No. 14,395,] affirmed, 23 Wall. [90 U. S.] 530; Milligan Glue Co. v. Upton [Case No. 9,607]; Needham v. Washburn [Id. 10,082]; Brown v. Piper, 91 U. S. 37. In one of these cases, cited by the defendants, Mr. Justice Clifford says: "New articles of commerce are not patentable as new manufactures, unless it appears in the given case that the production of the new article involved the exercise of invention or discovery beyond what was necessary to construct the apparatus for its manufacture or production." [Union Paper Collar Co. v. Van Deusen] 23 Wall. [90 U. S.] 563. Paper having been ruled with ink on both sides, and with embossed lines on one side, it did not require invention to emboss it on both sides.

It was suggested in the argument for the defendants, that the plaintiff's paper came within section 4929 of the Revised Statutes, authorizing patents to be issued for designs, which mentions, among other things, any original impression or ornament to be printed, painted, cast, or otherwise placed on or worked into any article of manufacture. The plaintiff, admitting this as one possible view of the case, maintains that the patent which he already holds may answer as a patent for a design. Patents for designs are not granted for a uniform term of seventeen years like those for articles of manufacture, but for three years and six months, or seven years, or fourteen years, as the applicant may in his application elect. I do not know but this patentee might have elected a shorter term, which has now expired. A still more serious objection is that the rule of infringement is different in the two classes. A patent for a new article of manufacture is trespassed upon by an article having the same sort of utility arrived at by the same or similar means, whereas the test in a patent for a design is similarity to the eye. Gorham Co. v. White, 14 Wall. [81 U. S.] 511. It would, therefore, be unfair to the public, not only as respects the term of the patent, but the nature of the grant, to construe one sort of patent as being of the other sort; and I think it clear that the statute intends the

particular kind of grant to be set out in the deed.

For these reasons, the entry in all the cases must be: Bill dismissed with costs.

CONE v. POWERS. See Case No. 3,096.

CONE v. WHITING PAPER CO. See Case No. 3,096.

CONESTOGA, The (LYLE v.). See Case No. 8,622.

Case No. 3,097.

The CONFISCATION CASES.

[1 Woods, 221.][1]

Circuit Court, D. Louisiana. April Term, 1872.[2]

CONFISCATION — RIGHTS OF THE UNITED STATES— ACCRUAL OF RIGHT—PLEADING—PROCEEDINGS— PRACTICE—SALE—REVIEW — AID OF REBELLION —LOAN BY NEUTRAL—LIEN OF TENANT.

1. Although proceedings for confiscation of lands are proceedings at law, and are to be reviewed by writ of error, yet proceedings by way of intervention in the course thereof, setting up a lien on the property, are often in the nature of a bill of equity, and may be reviewed by way of appeal.

2. Letters of credit given to a Confederate agent to enable him to prosecute his mission abroad in aid of the Confederate government are to be considered as given in aid of the rebellion, and void.

3. Loans made by a Frenchman in Paris to a Confederate agent, unless knowingly made for the express purpose of carrying on hostilities against the United States, are to be regarded as made by an innocent neutral, and valid.

4. But such agent could not transfer to such neutral, property within the Union lines, as security for the loan, after it became subject to confiscation, so as to defeat the right of the United States to seize and confiscate the same.

5. Such right of confiscation accrued in this case on the passage of the confiscation act of July 17, 1862 (12 Stat. 590).

6. A covenant by a landlord to pay for improvements erected by a tenant does not constitute a lien upon the premises for the value of the improvements.

7. The proceedings under the fifth, sixth, seventh and eighth sections of the confiscation act of July 17, 1862, are in rem, conforming as near as may be to proceedings in admiralty when the seizure is on water, and to revenue cases when the seizure is made on land.

[See note at end of case.]

8. If a claimant of land or property, seized on land, contests the material facts alleged in the libel of information, the issue is to be tried by a jury.

9. When no answer is filed, judgment by default may be taken, and the court may proceed to ascertain the material facts in the case ex parte and without a jury.

10. If a third person intervenes for the purpose of setting up some charge or lien upon the property and not of resisting the confiscation, collateral proceedings may be taken suitable to the nature of the case.

11. A belligerent has the right to take such course and impose such conditions with regard to the confiscation of enemies' property, as it sees fit.

12. The rights of a government against its own citizens in rebellion are not less but rather greater than those it may exercise towards a foreign enemy.

13. By the act of July 17, 1862 [12 Stat. 589], congress directed property to be seized and confiscated as enemies' property. A proceeding under this act is not, therefore, a criminal proceeding, and many rules which must be observed in criminal prosecutions have no application.

14. A libel of information filed for the confiscation of property as enemies' property which charges the acts of the owner of the property in the alternative, thus: "did act as an officer of the army or navy of the rebels in arms against the government of the United States, or as a member of congress, or as a cabinet officer of the so-called Confederate States," etc., is bad, for ambiguity and uncertainty, and in fact contains no charge at all, and a decree of confiscation rendered thereon by default will be reversed.

15. The general rule, that a judicial sale under a judgment which the court had jurisdiction to render, will stand, although the judgment itself be reversed for error, applies to sales made by virtue of a decree of confiscation.

16. The constitutional provision which declares that "no attainder of treason shall work corruption of blood or forfeiture, except during the life of the person attainted," does not apply to the confiscation of enemies' property even though those enemies be rebels against the government and, therefore, guilty of treason.

17. But under the confiscation act of July 17, 1862, as explained by the joint resolution of congress of the same date (12 Stat. 627), the forfeiture of real estate confiscated as enemies' property does not extend beyond the natural life of the party whose property is confiscated.

Heard on appeals from and writs of error to the district court for the district of Louisiana.

[Libels of information by the United States to condemn and forfeit certain property of John Slidell and of Charles M. Conrad and of Francis H. Hatch, under the act of congress of July 17, 1862 (12 Stat. 589).

[On the presentation of the libel of information in the Slidell Case, the district court directed a warrant to issue to the marshal, commanding him to seize the property described, and to cite and admonish the owner or owners, and all other persons having or pretending to have any right, title, or interest in or to the same, to show cause, if any, why the property should not be condemned and sold according to the prayer of the libelants. The marshal returned on the 3d of October, 1863, that he had seized the property, posted copies of the libel of information, warrant, and judge's order, and published a monition, as directed by the court; and on the 18th day of April, 1864, after due monition and proclamation, no claim or defense having been interposed, a default was entered, and the information was adjudged and taken pro

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

[2] [Principal cases reversed in The Confiscation Cases, 20 Wall. (87 U. S.) 92, 22 U. S. (Lawy. Ed.) 326, 328. Cases of the interveners affirmed in Citizens' Bank v. U. S., Id. 327.]

confesso. Depositions were then taken and filed, and on the 18th of March, 1865, after consideration of the law and the evidence, the district court adjudged and decreed a condemnation and forfeiture of the property to the United States. Subsequently, a venditioni exponas was issued, under which portions of the property were sold.

[On the 17th day of March, 1870, the case was removed to this court by writ of error.

[There were likewise appeals by the several interveners, also writs of error by Conrad and Hatch, from the judgment of the district court against them.]

J. R. Beckwith, U. S. Atty., L. M. Day, and R. Waply, for the United States.

T. J. Semmes, Robert Mott, Thos. A. Clark, T. L. Bayne, H. Renshaw, Jr., A. Pitot, C. M. Conrad, C. A. Conrad, E. C. Billings, A. de B. Hughes, G. Breaux, and C. E. Fenner, for various defendants.

BRADLEY, Circuit Justice. Under the act of July 17, 1862 [12 Stat. 589], entitled "An act to suppress insurrection, to punish treason and rebellion, to seize and confiscate the property of rebels, and for other purposes," the marshal of the United States for the district of Louisiana, on the 15th of August, 1863, seized the property in question in this case, as the property of John Slidell; and on the 15th of September, 1863, the district attorney of the United States for the same district filed a libel or information for the confiscation of said property. The libel charges that Slidell, subsequently to the passage of the act, "did act as an officer of the army or navy of the rebels in arms against the government of the United States, or as a member of congress, or as a judge, or as a cabinet officer, or as a foreign minister, or as a commissioner of the so called Confederate States of America; or that, while owning property in a loyal state or territory, etc., he did give aid and comfort to the rebellion." Other charges were made against him of the same general character, and it was claimed, that by reason of the premises, the property described in the libel was forfeited to the United States, and ought to be condemned to their use; and prayed process against the property and the owner thereof, and all persons interested or claiming an interest therein, to warn them to appear and answer the information. Process was accordingly issued and duly published. Several persons appeared and filed petitions of intervention, setting up title to certain portions of the land seized, or liens by way of mortgage or otherwise upon portions thereof. John Arrowsmith claimed title to several squares in New Orleans as having been purchased by him many years before. The Citizens' Bank of Louisiana claimed a mortgage upon a portion of the property to secure a stock note for $4,104, due the first of June, 1863; and also a mortgage on another portion to secure it for advances upon a letter of credit given to Slidell on the 3d of September, 1861, upon Messrs. F. Ad. Marcuard & Co. of Paris, upon which he had drawn $25,000, prior to the 13th of May, 1862. The latter mortgage was registered May 2, 1862. F. A. Marcuard, a citizen of France, claimed a mortgage lien upon certain portions of the property to secure certain loans of money made by him to Slidell in Paris, namely, 250,000 francs, on the 4th of June, 1862, payable in one year, which mortgage was received at New Orleans by Eugene Rousseau, agent of Marcuard, July 14, 1862, and recorded on the same day, before the appointment of a register by Gen. Butler; and, afterwards, again recorded on the 29th of July, 1862, by a recorder appointed by him, and deposited with a notary, August 4, 1862; and again recorded, with the act of deposit, on the 9th of August, 1862. On the 11th of August, 1862, Gen. Butler issued an order for the confiscation of Slidell's property, and the rents were afterwards received by the military authorities on the property mortgaged. Nicholson & Co. claimed a lien on certain property for laying the Nicholson pavement. The state of Louisiana claimed a lien for certain taxes due. Mrs. Gaines claimed to be the owner of certain lots specified in her petition. The Merchants' Bank of New Orleans claimed a certain brick building in which their banking business had been carried on, and an equitable interest in the lot on which, etc., by virtue of a certain agreement. Oritz Huppenbauer, a tenant of two lots, claimed to have largely increased their value by making permanent improvements, and desired an equitable allowance therefor.

In the principal cause of confiscation a default was taken on the 18th of April, 1864; and a decree of condemnation rendered on the 18th of March, 1865. Various proceedings were had and considerable evidence was taken upon the several interventions, and decrees were made by the district court in each case favorable or unfavorable to the claims presented. Amongst others, a decree was made July 7, 1865, dismissing the claim of the Citizens' Bank to a mortgage lien for 100,000 francs, or $25,000, advanced upon their letter of credit given to Slidell in September, 1861. Another decree was rendered on the same day dismissing the claim of Marcuard to a mortgage lien for 250,000 francs lent to Slidell in Paris. On the 5th of May, 1866, the court dismissed the claim of the Merchants' Bank of New Orleans. From all these decrees appeals were regularly taken by the interveners; and one of the questions before this court is, whether an appeal lies in such cases. A motion has been made to dismiss the appeals on the ground that the proper remedy for revising the judgment or decree of the district court is a writ of error, and not an appeal.

It has undoubtedly been decided by the

supreme court in the case of Armstrong's Foundry, 6 Wall. [73 U. S.] 766, and other cases, that the proceedings for confiscation are proceedings at common law, and not in admiralty or equity; and, therefore, require a jury for the trial of issues of fact, and a writ of error to revise the judgment. This view is corroborated by the recent cases of Garnett v. U. S. [11 Wall. (78 U. S.) 256]; McVeigh v. U. S. [Id. 259]; and Miller v. U. S. [Id. 268]. But interventions of third parties, made during the course of the proceedings, setting up some claim to, or lien upon the property, are often in the nature of a bill in equity, and require an equitable proceeding to ascertain and establish the rights of the parties. They are especially so when they seek to establish a lien upon the property or any portion thereof, and to subject it or the proceeds of it to the payment of a debt or other claim having priority over the claim of the government, or constituting a legal charge upon the property when the cause of confiscation occurred. I conceive the claims of the interveners in this case, who have appealed as before stated, to be of this kind. Hence, in my judgment, no trial by jury was requisite in reference to those claims; and the decrees rendered in reference thereto are subject to appeal rather than to writ of error. Whether they would come up as outbranches of the record, and be subject to review upon a writ of error brought to the principal judgment in the case, it is, perhaps, unnecessary to decide. I hold, therefore, that the appeals taken in this case by the interveners above named were properly taken and should not be dismissed.

The next question is whether they were well taken. As the district judge has not assigned his reasons for dismissing the claims, I am somewhat at a loss to know the precise grounds on which his decision was founded. In the case of the Citizens' Bank, I presume the ground must have been that the letter of credit was manifestly given to Slidell to enable him to accomplish his mission to France in the service of the Confederate cause. It has been repeatedly decided at the circuit, and, in the cause of Hanauer v. Doane, 12 Wall. [79 U. S.] 342, by the supreme court, that a contract made in furtherance of the rebellion or in aid of the Confederate cause, is void, and cannot receive the aid of the courts. The furnishing of Slidell with a letter of credit when he went to Paris as the emissary of the Confederacy was so manifestly intended to subserve this end that I cannot disturb the decree dismissing the claim.

The case of Marcuard, however, is different from any which has yet been decided. The precedents have all been cases in which the transaction was between citizens of the United States, owing allegiance to the government thereof. But Marcuard was a citizen of France, and the loan made by him to Slidell was made in Paris. It was a a loan of money made by a neutral on neutral territory, to an enemy, or, at most, to a citizen of the United States engaged in hostile operations against the United States. An innocent loan made to such a person, unless made for the purpose of enabling him to carry on hostilities, is a valid transaction everywhere. And the neutral is not bound to presume that such hostile use is to be made of the money loaned. One witness states that there was a general notoriety that Slidell was purchasing gunboats in Paris for the use of the Confederacy; but there is no direct evidence on the subject; and there is no evidence, except the amount of the loan, that the money was borrowed for other than private purposes. And the amount is hardly sufficient to throw the burden of proof on the lender. It seems to me that the case does not show sufficient evidence of notice to Marcuard, that any unlawful use was to be made of the money loaned by him, to defeat his claim. Supposing the debt to be a valid one, was it a lien or a charge upon the property in question when the cause of confiscation occurred? This cause cannot be said to have occurred before the passage of the act of congress, July 17, 1862; but from that moment it existed, and the general rule is, that a judgment of confiscation relates back to the act which causes it. The question, then, is reduced to this: whether Marcuard's lien on the property in question had become complete on the 17th day of July, 1862? New Orleans was then in the possession of the United States forces. Military rule prevailed. All civil authority emanated from the power, or existed at the sufferance of the United States military authorities from the occupation of the city early in May, 1862. Could Slidell, a declared rebel and enemy, in Paris, during this period, transfer or incumber property located in New Orleans, within the military lines of the United States? If he could do it as to third persons, could he do it as to the United States? Had he been in the Confederacy he could not have done it at all. For in that case, every attempt to deal with property within the Union lines would have been abortive and void. It was forbidden by public proclamation of the president, and by the usages of belligerents. Did his residence in France give any greater validity to his acts as against the government of the United States? In my judgment it did not. And Marcuard, in taking a mortgage from Slidell on property within the Union lines, took the risk of the exercise by the government of the United States of its right as a sovereign power engaged in war, to confiscate the property of its enemies. I am therefore of opinion, that the decree upon the intervention of Marcuard must be affirmed.

The next case is that of the Merchants'

Bank of New Orleans. This company held a lease granted by Slidell in 1850 to John Robb & Co. for ten years, at a certain rent. The lessees covenanted to put up on the lots leased, buildings to cost at least $15,000. At the end of the term, Slidell was to pay them the value of the buildings, at an appraisement. The bank claimed a lien by virtue of this contract, for the value of the buildings. The district court rejected the claim. It is difficult to see on what ground a lien for this sum can be maintained. The matter existed simply in covenant. The lease does not contain a word which looks like the creation or expectation of a lien on the property itself. The bank complains that Fish, the purchaser of the property, was permitted to except to the intervention; whereas, he had no right to appear in the suit at all, because the sale had been suspended, and the marshal had not been ordered to proceed. But it matters not that Fish had no interest. The question is, had the bank any interest? Fish, as amicus curiae, might call the court's attention to the want of interest which the bank had. Unless the bank had a lien, the court cannot reverse the decree. In my judgment the bank had no lien, and therefore the decree is affirmed.

I have not adverted to certain general questions applicable to the entire proceedings for confiscation, because they have been settled by adjudications of the supreme court, made since the argument of these cases. That court has disposed of the constitutionality of the act, the power of congress to pass it, and the character of that part of it under which the proceedings are taken. In the case of Miller v. U. S., 11 Wall. [78 U. S.] 268, it has decided that the act has two distinct parts, each part having a separate object. The first four sections provide for the punishment of treason and rebellion as criminal offenses, and are permanent in their character. The remaining sections provide for the confiscation of the property of certain designated parties as enemies' property, and are temporary in their character, being intended for the purpose of insuring the speedy termination of the rebellion. The proceedings under these sections are proceedings in rem, conforming, as near as practicable, to proceedings in admiralty, in cases of admiralty and maritime jurisdiction; and to revenue cases, where the seizures are made on land. In the latter case after seizure, an information is filed by the law officer of the government, setting forth the facts upon which the confiscation is claimed. Whether the information is called a libel of information, or simply an information, is of no consequence. The same court has cognizance of the case whether it is an admiralty or a different revenue proceeding. The nature of the case determines its character. If a claimant of the property appears and contests the material facts alleged, as, for example, the guilt of the owner, or his ownership of the property, the issue is to be tried by a jury. If no person appears to answer the merits, a judgment is taken by default, and the court proceeds to examine witnesses or other evidence ex parte, by way of inquest, to ascertain the principal facts in the case. This examination does not require the intervention of a jury, being only intended to inform the conscience of the court. If a third person intervenes for the purpose of setting up some charge or lien upon the property, and not of resisting the confiscation, collateral proceedings are had, suitable to the nature of the case, as before stated. See the cases of Garnett v. U. S., McVeigh v. Same, and Miller v. Same [supra], and of Union Ins. Co. v. U. S. [6 Wall. (73 U. S.) 759]; Armstrong's Foundry [supra]; and U. S. v. Hart, 6 Wall. [73 U. S.] 770.

This general view of the nature of the proceedings will serve to answer, at once, many of the objections which were so elaborately argued when these cases were heard. A belligerent has a right to take such course, and impose such conditions, with regard to the confiscation of enemies' property, as it sees fit. The rules which it prescribes are not to be questioned by any code except the law of nations, and its own constitution. The rights of a government against its own citizens in insurrection are not less, but are rather greater than those it may exercise towards a foreign enemy. But in either case, the enemies' property may be confiscated simply as such, if the government so determine. Congress, by the act of July 17, 1862, (12 Stat. 587), directs property to be seized and confiscated as enemies' property; but only the property of certain classes of persons. This discrimination renders necessary, when issue is taken upon the information, an inquiry into the guilt or innocence of the owner; not for the purpose of a criminal conviction and sentence, but for the purpose of determining the status of the property seized. Hence many rules, constitutional and otherwise, which require to be observed in criminal prosecutions, have no application to these proceedings. The case is altogether unlike that of an attainder. There the criminal prosecution and conviction are the principal thing. The attainder, like disqualification to be a witness after conviction of perjury, follows as an incident of the conviction. Here the confiscation is the principal thing; and an inquiry into the acts or conduct of the owner of the property may, or may not, be required by the law. If it is required, it is only as a subsidiary thing, and involves no personal sentence or condemnation. Hence, all those objections which are founded on the necessity of a regular indictment, of the personal presence of the accused, of a trial by jury, etc., are out of place. Where the information is traversed, a trial by jury is necessary, it is true, but for another reason, and not because the proceeding is a

criminal one; for the reason, namely, that the seventh amendment to the constitution requires a trial by jury in all suits at common law where the value in controversy exceeds twenty dollars. These considerations render it unnecessary to examine more in detail the various points that were raised on the argument. Having held the appeals taken by the Citizens' Bank, by Marcuard, and by the Merchants' Bank, to be properly taken, the several writs of error sued out by those parties will be dismissed.

The next case to be considered is the writ of error of John Slidell. The final judgment of condemnation was rendered on the 18th of March, 1865, and the writ of error was sued out on the 17th of March, 1870. It was sued out, therefore, just in time to save the statute of limitations. The supreme court in the case of McVeigh v. U. S., 11 Wall. [78 U. S.] 259, decided that the owner of the property, though a rebel and within the Confederate lines, was entitled to appear and contest the proceedings, or bring a writ of error upon the judgment. The writ, therefore, is regularly brought, and we are obliged to examine the record. Many of the questions raised have been already disposed of, and need not be again adverted to. There is one objection, however, that has given me some trouble, namely, the insufficiency of the information. It is one of the most remarkable specimens of loose pleading and uncertain statement that I remember ever to have seen. After having duly alleged the seizure of the property and fully described it, it states that John Slidell was, at the time of filing the information, and on the 17th of July, 1862, and previously, the owner thereof. Then, having stated the existence of the rebellion, and the passage of the confiscation act, it proceeds to allege: "V. That the said John Slidell subsequently to the said 17th of July, 1862, did act as an officer of the army or navy of the rebels in arms against the government of the United States, or as a member of congress, or as a judge of a court, or as a cabinet officer, or as a foreign minister, or as a commissioner, or as a consul, of the so called Confederate States of America; or, that, while owning property in a loyal state or territory of the United States, or of the District of Columbia, he did give aid and comfort to the rebellion against the United States, and did assist such rebellion." Now, from this allegation, can any mortal man tell what John Slidell did?

The next article is of the same ambiguous and inconsequential nature. The extreme ambiguity of these charges is something more than a matter of form; it amounts to a substantial defect. There is, in truth, no charge at all. There is no charge that Slidell acted as a foreign minister of the Confederacy. The allegation is that he either did that or something else; but we are not informed what. If the defect were one of form, it might be amended; but being substantial, it seems to me it is fatal. The other articles of the information do not save it. The seventh article alleges that John Slidell, subsequently to the 17th of July, 1862, within a state or territory of the United States, was engaged in armed rebellion against the government, and did not within sixty days after the proclamation of the president, made on the 25th of July, 1862, cease to aid and abet such rebellion, etc. And the eighth article is of similar character to the seventh. Now, not only is the same ambiguity kept up in these articles, as in the previous ones, but they do not set forth any of the offenses which, in the statute, are made the basis or cause of confiscation. They are evidently meant to be assigned under the 6th section of the act. But that section refers to persons who, in any state or territory of the United States, other than those named as aforesaid, were engaged in the rebellion. Now, the states named as aforesaid were the loyal states, which had just been named in the last clause of the 5th section. Therefore the states or territories, other than those, were the disloyal or rebellious states. So that the 6th section of the act only refers to persons who, within any disloyal or rebellious state or territory, were engaged in the rebellion. Yet the seventh article of the information merely alleges that John Slidell, within a state or territory of the United States, was engaged in rebellion. It does not make a charge within the statute. The whole information, therefore, is substantially defective, and the judgment must be reversed. The same defect is fatal to the judgments in the cases of Conrad v. U. S., and in Hatch v. U. S., and the judgments in those cases must also be reversed.

It is, perhaps, not necessary, at this time, to decide what will be the effect of reversing those judgments which have been reversed. But as the subsequent proceedings may depend on a solution of the question, and as the parties in interest will be desirous of knowing the position in which they stand, it is proper that I should give my opinion on the point. It is a general rule that a judicial sale under a judgment which the court had jurisdiction to render will stand, although the judgment itself be subsequently reversed for error. I see no reason why that rule should not apply in these cases. It is true that a judgment of reversal usually contains a direction that the plaintiff in error be restored in all things to that which he hath lost by reason of the erroneous judgment. But the mode of making this restoration, where a sale of property has taken place under the reversed judgment is by awarding to the plaintiff in error the proceeds of the sale. This will be the proper course in these cases.

One question to which considerable attention was given upon the argument was, whether anything more than an estate for the life of the owner was transferred by the

confiscation proceedings. Indeed, it was alleged as a ground of error that all the right, title and estate of the owner was condemned and sold. I do not regard this form of judgment as material; although on looking at the judgments, it will be found that the form of judgment pursued was, "that the said sixteen lots of ground, the property of A. B. be, and the same are hereby condemned as forfeited to the United States," without any definition or limitation of the estate forfeited. I regard the judgments as to be construed by the law which authorizes the confiscation to be made; and am of opinion that the several sales by the marshal had the effect of transferring only such estate as it was lawful to sell. What that estate is, is the question. The joint resolution approved at the same time with the confiscation act provides, that no punishment or proceedings under the act shall be so construed as to work a forfeiture of the real estate of the offender beyond his natural life. It seems to me that this provision extends to the whole act, and to "the proceedings," for confiscation, as well as to the prosecution for the crimes of treason and rebellion. It may be very true, and I am inclined to think it is true, that the constitutional provision, which declares that no attainder of treason shall work corruption of blood, or forfeiture, except during the life of the person attainted, does not apply to the confiscation of enemies' property, even though those enemies be rebels against the government and, therefore, guilty of treason. But whether it applies or not, congress, from respect to the scruples of the president, or for other reasons which seemed to it sufficient, did enact, as it had a right to do, that no proceedings under the confiscation act should be so construed as to work a forfeiture of real estate beyond the natural life of the offender. And I can see no way in which this limitation can be confined to criminal proceedings under the act. It seems to me that by a fair interpretation, it extends to all proceedings by which a forfeiture is effected or adjudged.

NOTE [from original report]. These causes were heard on error by the supreme court of the United States at the October term, 1873. That court reversed the judgment in the Slidell Case, holding that the information was sufficient after default made and final judgment of condemnation, and disposed of the other cases upon that view, affirming some and reversing others. See The Confiscation Cases, 20 Wall. [87 U. S.] 92.

[NOTE. Mr. Justice Strong delivered the controlling opinion, and assigned as the grounds of reversal that, while the information was inartificially drawn, yet, after default and final judgment of condemnation, the judgment should not be disturbed for mere formal and unimportant faults of pleading.

[The court then proceeded to notice other objections urged as error in the action of the district court, and disposed of them by holding that in view of the decision of Miller v. U. S., 11 Wall. (78 U. S.) 268, the default established the truth of all the material averments in the information, and, among others, that there had been an executive seizure, as required by the confiscation act, before the information was filed; that the averment in the information that the seizure was made by the marshal, under authority of the district attorney in pursuance of instructions issued by the attorney general by virtue of the act, sufficiently showed that it was caused to be made by the president, as he, only, was empowered by the act to cause it, and the direction by the attorney general was to regarded as a direction by the president; that the proceeding, though nominally on the admiralty side of the court, was in fact a common-law proceeding in rem, and, there being no issue of fact to be tried, it was immaterial that no jury trial was had, and consequently the proceeding was within the requirements of the act.

[The court further held that the service by the marshal by posting copies of the information, the warrant, and of the order of the judge, and the publication of the citation, were a sufficient compliance with the order requiring posting or publication; that the information was not defective in failing to aver that the causes of forfeiture were contrary to the form of the statute or statutes of the United States in such case provided, as, the proceeding being a civil one, such an averment was unnecessary; that the signing of the warrant, citations, and monition by the deputy clerk was sufficient, the process being attested by the judge, and sealed with the seal of the court; that in accordance with the decision in Miller v. U. S., supra, it would be presumed in support of the judgment that the court had found on sufficient evidence that the property condemned belonged to a person engaged in the rebellion, or who had given aid or comfort thereto, as well as all other facts necessary to the rendition of the judgment, and that the proclamation of amnesty of 1868 did not have the effect to repeal the confiscation act, as there was no power in the president to repeal an act of congress; and, moreover, the property condemned became vested in the United States in 1865, and the subsequent proclamation could not have the effect to divest the rights thus vested. The Confiscation Cases, 20 Wall. (87 U. S.) 92.

[The cases of Conrad and Hatch, the judgments in which were reversed by the circuit court with that in the Slidell Case, were heard by the supreme court at the same time, and a like judgment of reversal rendered on the same grounds as assigned in the Slidell Case. U. S. v. Six Lots of Ground, 22 U. S. (Lawy. Ed.) 326, and see page 328.

[The Citizens' Bank of Louisiana, the Merchants' Bank of New Orleans, and F. A. Marcuard, interveners, likewise appealed to the supreme court, and the action of the circuit court was affirmed in each of the cases, the court holding that the appellants should not have been allowed to intervene, as their interest, if any, was that of lien holders, and that the decree of condemnation and sale thereunder in no way disturbed their liens, if any they had. Citizens' Bank v. U. S., 22 U. S. (Lawy. Ed.) 327.]

Case No. 3,098.

CONFRAMP et al. v. BUNEL.

[4 Dall. 419.]

Circuit Court, D. Pennsylvania. 1806.

ACTION ON FOREIGN JUDGMENT — CONSTRUCTION OF FRENCH LAW—SUSPENSION.

[1. An action between French subjects on a foreign judgment, recovered in 1789, for the purchase price of negroes, commenced after 1803, is within the French law of September 6, 1802, and the law of April 12, 1803, explanatory thereof, suspending suits for debts contracted for negroes prior to 1792, and al-

lowing creditors to take conservatory steps for the preservation of their rights, and to liquidate their debts by judgment, but staying execution thereon.]

[2. The suspension applies as well to the commencement of a suit as to the issuance of execution.]

Mr. Moylan, for plaintiffs.
Du Ponceau & Dallas, for defendant.

Capias. On a rule to show cause why the defendant should not be discharged on common bail, the following facts were established by the plaintiffs: That in the year 1787, the defendant gave his note for 55,000 livres to a person of the name of Horguetand, payable in two instalments, for value received in 55 negroes. On the 8th of February, 1787, the note was assigned to the plaintiffs, and several partial payments were afterwards indorsed upon it. In November, 1789, a suit was instituted at Port-au-Prince, to recover the balance; and a judgment, by default, was entered for 36,666 livres; to recover which was the object of the present action.

For the defendant it was shown, that all the parties to the contract were French subjects, resident in the island of St. Domingo, at the time the contract was made; that they continued French subjects at this time; that in August of the year 1793, the French commissioners (Polverel and Santhorax) had proclaimed, at Port-au-Prince, the abolition of slavery, and the freedom of the negroes; which the national convention ratified in the February ensuing (4 Edw. History West Indies, 146, 219); that, in consequence of this emancipation, the very negroes who had been purchased by the defendant had been taken from him; and that with a view to the calamitous situation of the colony, the following laws had been enacted by the French government:

1st. Extract from the law of the 6th of September, 1802. "Sec. 1. Until the 1st of Vendemaire, 16th year, all suits are suspended as well against the principal debtors as their securities for debts contracted prior to the 1st of January, 1792, for the purchase of real property, or of negroes." "Sec. 6. The creditors may, however, take all conservatory steps for the preservation of their rights, and even have the amount of their debts liquidated by judgments, but the execution thereof shall be stayed according to the first section."

2d. Supplement to the above law, of the 12th of April, 1803. The preamble states that doubts have arisen as to the construction of the 6th article; and the supplement declares: "Sec. 1. That by the words 'conservatory steps' (actes conservatoires) are not to be understood any acts, which would prevent the effect of the suspensive clause of the law, such as attachments of property, levies on real or personal estate, oppositions to the payment of rents, or other debts, &c. Sec. 2. Oppositions (in nature of attachments) made to the payment of principal sums due to the debtors, shall not prevent such payments, but the debtor shall be bound to make it appear within six months, that he has employed those capitals, in improving his St. Domingo plantation, otherwise he will not be entitled to the benefits of the law."

Upon these premises, the defendant's counsel contended: 1st. That the contract of the parties was to be expounded and enforced according to the laws of France. 1 Bos. & P. 138; 3 Ves. Jur. 446; 4 Ves. Jur. 577; 1 H. Bl. 258; Id. 665, 690; 4 Term R. 184. 2d. That upon the general principles of the French law, the defendant was not liable to be personally arrested on this contract, which does not constitute a commercial debt. Ord. of Com. p. 386, tit. 7, art. 1. 3d. That the right of action to recover the debt was expressly suspended by the law of the 6th of September, 1802; and it was as irregular to commence the suit, before the suspension had run out, as it would be to obtain judgment and issue execution.

The plaintiffs' counsel answered: 1st. That this was a commercial debt, within the terms of the authority cited, for which a personal arrest was authorized by the law of France. 2d. That the law of the 6th of September, 1802, applies to original causes of action, and not to cases in which judgment had been previously rendered. 3d. That even where the lex loci governs the contract, it is the law of the country in which the suit is brought that must furnish the form of the remedy. Kames, Eq. 567, 568; 2 Vern. 540; [Hamilton v. Moore] 3 Dall. [3 U. S.] 373; 1 Bos. & P. 139, 140. 4th. That the utmost benefit which the defendant can reasonably claim from the law of September, 1802, is a stay of execution till the specified period has elapsed: but, in the meantime, the plaintiffs should be permitted to proceed to obtain judgment, and to secure the defendant's appearance eventually to answer it.

THE COURT were clearly of opinion that the parties were bound by the law of the 6th of September, 1802; that the present case was within the law; and that the suspension of the law applied as well to the commencement of the suit, as to the issuing of the execution. The rule made absolute.

The defendant's counsel, proceeding on the grounds above stated, did not make, on this preliminary question, the objection, that the circuit court has no jurisdiction of a cause in which both parties are aliens; an objection that has repeatedly been adjudged to be fatal.

CONGER (BARNARD v.). See Case No. 1,001.

Case No. 3,099.

The CONGRESS.

[1 Biss. 42.][1]

District Court, D. Wisconsin. March Term, 1854.

GENERAL AVERAGE — CLAIM FOR CONTRIBUTION ONLY A QUALIFIED LIEN—WHAT CONSTITUTES A CASE FOR GENERAL AVERAGE.

1. The court in admiralty will not entertain jurisdiction in cases of general average, unless all the parties in interest are before it.

2. A lien created by the maritime law, as salvage, etc., is absolute and unconditional; but a claim for contribution is but a qualified lien, depending upon the possession of the goods by the master or ship-owner, and ceases when they are delivered to the owner or consignee.

3. The maritime law does not imply on the part of the owner receiving the goods a promise for contribution.

4. To constitute a case for general average, three things must concur: A danger in which ship, cargo, and crew all participate—imminent and apparently inevitable, except by voluntarily incurring the loss of a portion to save the remainder; a voluntary jettison of some portion for the purpose of avoiding this common imminent peril; this attempt to avoid the imminent common peril must be successful.

In admiralty. This libel is for general average contribution. It propounds that the schooner Congress, on a voyage from Buffalo to Milwaukee, having on board a miscellaneous cargo on account of various consignees, on or about the 24th November, 1853, encountered a storm on Lake Michigan, and on the 26th of the same month her masts and rigging were carried away, and she was entirely disabled; all her sails were gone but her mainsail, and that was badly split, and she came to anchor near the dock of the South Manitou island, on or about the first of December; that during the storm, for the purpose of lightening the schooner, and saving the balance of the cargo and the vessel, a portion of the cargo stowed on deck was thrown overboard; that soon after said schooner was anchored, the master and crew left her, and departed for their homes, the first mate, William Blyburn, alone remaining in custody of the vessel and cargo. That the libellant, having an insurance upon a part of said cargo, with the consent and at the request of the consignees, chartered the propeller Rossiter, with a competent and skillful master and crew, to go to the relief of said schooner, and to secure the vessel and cargo. The said propeller proceeded to the vessel, and took on board a portion of the cargo, rigged the schooner with a new jury-mast, supplied her with men, and towed her fifteen miles into the lake, whence, with the aid of these men and the first mate, she proceeded to Milwaukee, her port of destination. The propeller brought in that part of the cargo put on board of her. That by this means so much of the cargo was saved to the owners; that the libellant expended $2,087.75-100, which is alleged the proper subject matter of general average contribution upon the vessel, cargo, and freight, with the prayer of a decree for compensation and award by way of general average contribution.

Finch & Lynde, for libellant.

J. Downer, for claimants.

MILLER, District Judge. Has this court, in admiralty, jurisdiction in cases of general average? and, if so, is this a case of general average? In England, the court of admiralty has no jurisdiction in such cases. La Constancia, 2 W. Rob. Adm. 487. That court has been confined in its jurisdiction by the common law courts. Such has not been the case in America. Under the constitution of the United States, the district courts are vested with admiralty and maritime jurisdiction, and they have not been restricted within the narrow limits of the English admiralty. Waring v. Clark, 5 How. [46 U. S.] 441; New Jersey Steam Nav. Co. v. Merchants' Bank of Boston, 6 How. [47 U. S.] 344; The Genesee Chief, 12 How. [53 U. S.] 443; Fretz v. Bull, Id. 466; Cutler v. Rae, 7 How. [48 U. S.] 729. But in the case of The Constancia a substantial requisite to the jurisdiction is asserted, that in all cases of average, it is essential that the tribunal which is to adjust it should have the power to compel all parties interested to come in and pay their quota. The court of admiralty possesses no such power. It is very clear that this court would not entertain this jurisdiction unless all parties in interest were before it, for it could not adjust a general average, which is a proportionate contribution by all.

Jurisdiction has been entertained by the district court for the southern district of New York, in Mutual Safety Ins. Co. v. The Georgia [Case No. 9,981], and in The Packet [Id. 10,654], by the circuit court of the first circuit. The court of admiralty has jurisdiction in cases where the vessel or cargo is subject to a lien created by the maritime law, such as seamen's wages, bottomry, prize, salvage, etc. In these cases the maritime law attaches an absolute and unconditional lien, and the possession of the property is not necessary to its validity. Such liens follow the vessel or cargo into whose hands soever they may pass by title or purchase from the owner. Sheppard v. Taylor, 5 Pet. [30 U. S.] 675. But in general average, the party entitled to contribution has no absolute and unconditional lien upon the goods or property liable to contribution. Possession may be retained until the general average with which the property is charged has been paid or secured. This right of retainer is a qualified lien, to which the party is entitled by the maritime law; but it depends on the possession of the goods by the master or ship-owner, and ceases when they are delivered to the owner or consignee. It does not follow the property into their hands, nor adhere to the proceeds. Upon re-

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ceipt of the property by the owner, the law implies a promise that he will pay his contribution, as the owner is liable, because at the time he receives the goods, they are bound to share in the loss of other property by which they have been saved; and he is not entitled to demand them until the contribution has been paid. This promise is not implied by the maritime law, which gave the lien, but upon the principles of the common law courts, upon the ground that in equity and good conscience he is bound to pay the money, and is therefore presumed to have made the promise when he received the goods. It is, for these reasons, decided, in Cutler v. Rae [supra], that a libel in personam for a contribution by way of general average, cannot be sustained in the admiralty courts of the United States. In the conclusion of the opinion, the chief justice remarks: "Whether the court of admiralty might not have proceeded in rem to enforce the maritime law before the goods were delivered, is a question which does not arise in this case, and upon which, therefore, we express no opinion." From this remark a doubt as to the jurisdiction may be inferred. But as the courts are not limited in their jurisdiction as in England, I have little doubt but in cases wherein all interests are represented, the court in admiralty may decree contribution upon a libel for general average. Now as to this case, I will not stop to inquire whether all the property bound to contribute has been libelled and is before the court or not. This case does not require this inquiry.

Salvage charges are deemed a general average when incurred for the benefit of all concerned. It is properly a charge apportionable upon all the interests and property at risk in the voyage which derive any benefit therefrom. But still these charges may be a simple average or partial loss. The circumstances of the case are to be looked to, to ascertain whether they be the one or the other. Fland. Adm. 284, 285, and cases cited. Salvage services are an unconditional lien upon the property saved, and all must contribute toward its payment. But we have stated that such is not so in cases of general average. The one is a claim for the preservation of property; the other is a claim of contribution for a loss, voluntarily sustained for the common safety. The latter cannot be confounded with, or converted into the former. It is the deliverance from an immediate impending peril, by a common sacrifice, which constitutes the essence of a claim of general average. It is the safety of the property, and not the voyage, which constitutes the foundation of general average. This principle is decided in Caze v. Reilly [Case No. 2,538], Sims v. Gurney, 4 Bin. 513, and Gray v. Waln, 2 Serg. & R. 229, and is sustained in Columbian Ins. Co. v. Ashby, 13 Pet. [38 U. S.] 331. This last case settles several principles upon the subject of general average, but not necessary to be stated here. Bernard v. Adams, 10 How. [51 U. S.] 270, settles the case under consideration conclusively against the libellant. The court in that case again adheres to the decision in the case of The Hope, 13 Pet. [38 U. S.] 331, and again affirms the decisions in Caze v. Reilly, Sims v. Gurney, and Gray v. Waln [supra]. In the opinion by Mr. Justice Grier, it is stated that "The law of general average has its foundation in equity. The principle that what is given for the general benefit of all shall be made good by the contribution of all, is recommended not only by its equity but also by its policy, because it encourages the owner to throw away his property without hesitation in time of need. In order to constitute a case for general average three things must concur: 1. A common danger; a danger in which ship, cargo and crew all participate; a danger imminent and apparently inevitable, except by voluntarily incurring the loss of a portion of the whole to save the remainder. 2. There must be a voluntary jettison, jactus, or casting away of some portion of the joint concern, for the purpose of avoiding this imminent peril, 'periculi imminentis evitandi causa,' or, in other words, a transfer of the peril from the whole to a particular portion of the whole. 3. This attempt to avoid the imminent common peril must be successful." It is not necessary to proceed further to show that the Commercial Insurance Company has not brought itself within these requirements. The libel does not present a case for general average.

NOTE [from original report]. See Dike v. The St. Joseph [Case No. 3,908]; Campbell v. The Alknomac [Id. 2,350]; Potter v. Ocean Ins. Co. [Id. 11,335]; Rea v. Cutler [Id. 11,599]. For an extended discussion of the law of general average and contribution, and full reference to authorities, see 1 Pars. Adm. 338 et seq. Vessel and cargo in hold not liable to contribution for deck load jettisoned. Triplet v. Van Name [Case No. 14,176]; The Paragon [Id. 10,708]; The Milwaukee Belle [Id. 9,627]. The loss must be voluntary. Sims v. Gurney, 4 Bin. 524; Peters v. Warren Ins. Co. [Case No. 11,034]; Arnold, Ins. 881; 3 Kent, Comm. 232–240; Spafford v. Dodge, 14 Mass. 74. Attempt must be successful. Williams v. Suffolk Ins. Co. [Case No. 17,739]; Rossiter v. Chester, 1 Doug. [Mich.] 154; Scudder v. Bradford, 14 Pick. 13; Bradhurst v. Columbian Ins. Co., 9 Johns. 9; Whitteridge v. Norris, 6 Mass. 125; Sims v. Gurney, 4 Bin. 513, 524. Sacrifice must be necessary. 3 Kent, Comm. 233; 1 Pars. Adm. 409, and authorities there cited. It seems that if it were expressed in bill of lading that general average was to be paid, the person receiving the goods would be liable for contribution. Scaife v. Tobin, 3 Barn. & Adol. 523. Owner's remedy against consignee is not lost by the latter's receiving the cargo at the port of necessity, and forwarding it himself to its destination. Sherwood v. Ruggles, 2 Sandf. 55. Master has a lien on all goods for their contributory shares. U. S. v. Wilder [Case No. 16,694]; Sherwood v. Ruggles, 2 Sandf. 55; Gillett v. Ellis, 11 Ill. 579; Chamberlain v. Reed, 13 Me. 357; Dupont de Nemours v. Vance, 19 How. [60 U. S.] 162. The practice is for the captain to demand of the consignee an average bond before delivery of the goods. This he has a right to do. Cole v. Bartlett, 4 La. 130. See, also, Scaife v. Tobin, 3 Barn. & Adol. 523. If by the neglect of the master the shipper loses

the contribution to which he is entitled, the ship-owner is liable. Gillett v. Ellis, 11 Ill. 579. In the case of Eckford v. Wood, 5 Ala. 136, the court ruled that if the master voluntarily part with goods which he is authorized to retain, and afterwards pay the contribution for which he could have retained them, an implied assumpsit is raised that he shall be repaid by the owner. The supreme court, in the case of Cutler v. Rae, 7 How. [48 U. S.] 729, decided that though the master had, by the maritime law, a lien upon the goods as security for the payment of their just contribution, that this lien was lost by their voluntary delivery to the consignee, and that the implied promise to contribute could not be enforced by an action in personam against the consignee in admiralty. And in the case of Dupont de Nemours v. Vance, 19 How. [60 U. S.] 162, the supreme court, referring to the former case, say that this lien is put on the same footing as a maritime lien on cargo for the price of its transportation, which, it is well known, is waived by an authorized delivery without insisting on payment.

CONGRESS, The (JENKINS v.). See Case No. 7,264.

Case No. 3,099a.

CONGRESS RUBBER CO. v. AMERICAN ELASTIC CLOTH CO.

D. Pennsylvania. 1857.

PRESUMPTION OF VALIDITY OF PATENT—INFRINGEMENT—ENJOINING PATENTEE—ACT OF 1836.

1. Every man who stands upon a patent has a prima facie title, which upon a preliminary question will not be pronounced good for nothing.

2. Where on a motion for a preliminary injunction, the defendants claimed to act under a patent regularly issued from the patent office, *held*, that the court would not on such a motion decide against such a patent, and grant the injunction prayed for.

3. Since the act of 1836 [5 Stat. 117], patents stand upon a different footing from that upon which they stood formerly. Upon an application for a patent, the officers of the patent office give their judgment, and that judgment is prima facie a good one; when one party contests that, and offers another patent in opposition to it, both parties stand upon an equal footing.

[NOTE. The points stated as above are taken from Law, Pat. Dig. 386, 515. Nowhere more fully reported; opinion not now accessible.]

CONGRESS RUBBER CO. (GOODYEAR v.). See Case No. 5,565.

CONGRESS & EMPIRE SPRING CO. (KNOWLTON v.). See Cases Nos. 7,902 and 7,903.

CONINE v. The DEER. See Cases Nos. 3,737–3,739.

CONINGHAM (NEALE v.). See Case No. 10,067.

CONKLIN (UNITED STATES v.). See Case No. 14,845.

Case No. 3,100.

CONKLING v. BUTLER et al.

[4 Biss. 22.][1]

Circuit Court, D. Indiana. May Term, 1865.

RECEIVER—JURISDICTION TO COMPEL ACCOUNTING.

1. A receiver cannot be called on to account before any court but that which appointed him.

2. Where a state court, on a petition under the Indiana statutes to dissolve a corporation, has taken jurisdiction, thereby decreed a dissolution of the corporation, appointed a receiver, and taken the custody of the assets, no national court can take jurisdiction of a bill to call on the receiver to render an account, and to collect the assets under the direction of the United States court.

[Cited in Walker v. Flint, 7 Fed. 436.]

William Henderson, for complainant.

R. C. Gregory, for defendants.

McDONALD, District Judge. This is a bill in equity, filed by Edgar Conkling against John M. Butler and the New Castle and Danville Railroad Company. The defendants have demurred to the bill; and the point to be decided is, whether the demurrer ought to be sustained. The bill alleges that the complainant subscribed and paid into the capital stock of said railroad company fifty thousand dollars, and received certificates of stock to that amount; that the total stock subscribed was about one million five hundred and eighty-two thousand three hundred dollars and eighty-three cents; that about a million of this is "unavailable and valueless;" that about forty-five per cent. of the stock has been collected, and the residue subscribed has not been paid; that the legal liabilities of the company are about eighteen thousand dollars; that the unpaid solvent subscriptions of stock are about two hundred and twenty-five thousand dollars; that the construction of the road has been abandoned, and the corporation put in liquidation; that, on the first of December, 1862, the defendant, "John M. Butler, was appointed receiver of said New Castle and Danville Railroad Company, who duly qualified as such, and took upon himself the duty imposed by said appointment as such receiver, and who is now in the full possession of all the books, papers, vouchers, moneys, bonds, records, and other evidences of indebtedness of said New Castle and Danville Railroad Company; that the said Butler, as such receiver, though specially requested by the complainant so to do, is making no effort to collect any more of the uncollected stock subscribed to the said road than will pay the said $18,000 indebtedness, after which he contemplates a final settlement of said trusts, as appears by Exhibit A filed as a part of this bill."

The foregoing is the substance of the bill. It prays for an account, for the equalization

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of the losses among the subscribers to the stock, &c. The bill is clearly defective as failing to show by what authority Butler was appointed a receiver, unless that is shown by Exhibit A already named. Whether the language of the bill, as above copied, amounts to an averment that Butler was appointed receiver by the Hamilton circuit court (Indiana), as appears by Exhibit A, may well be doubted. Indeed, I think it does not. Rather, I suppose that the true construction of the reference to Exhibit A, is, that after Butler has paid off said $18,000, he means to collect no more of the subscriptions to the capital stock, but intends then finally to close his labors as a receiver. But as the bill could easily be so amended as to make this point clear, it is of little importance. The exhibit is made part of the bill, and must be looked to in determining the demurrer.

Let us then examine Exhibit A. It purports to be a transcript of a proceeding commenced on March 1st, 1859, in the Hamilton circuit court of this state, and, so far as anything appears, still pending in that court. It was an information by the state of Indiana on the relation of David Nation, prosecuting attorney, against the New Castle and Danville Railroad Company, charging a forfeiture of the charter of that company, and seeking a judgment of ouster. A judgment of forfeiture and ouster was rendered, and thereupon the Hamilton circuit court appointed one O. S. Hamilton as receiver in that case. Hamilton acted as such receiver till September 8, 1862, when he resigned his place, and the defendant, Butler, was appointed by the court as receiver in the place of Hamilton, and, so far as appears, still continues so.

These proceedings were evidently had under the 44th article of the Indiana Code of Practice and Pleading. 2 Gavin & H. St. 322–325. That Code plainly contemplates that the receiver to be appointed, in case of a judicial dissolution of a corporation, shall act under the direction of the court appointing him, and shall, in all his doings, be controlled by such court, and account to it. If that cause is still pending in the Hamilton circuit court, and if Butler has not yet made final settlement therein of the trust of that court reposed in him, he might at any time be compelled by that court to render account of his doings to the same; and if he failed to do it, he would be liable on the bond which, it seems, that court exacted to secure the faithful performance of his duties as receiver.

By the bill demurred to, it is proposed to call Butler away from the court which appointed him,—which exacted his official bond, to which he must, by the terms of his bond and of the Indiana Code, account, and whose directions he is bound to obey,—and require him to account to, and obey, another court, which never had anything to do with his appointment or with the case under which he was made a receiver. The mere statement of the case thus made by the bill is enough to show the impossibility of sustaining it. Butler is sued here as a receiver, and called upon to here account as a receiver. He never, in any case, was a receiver of this court, and cannot be called on to answer as such in it.

The same may be said of the other defendant,—the railroad company. This company was called before the Hamilton circuit court to answer to a charge of forfeiture of its franchises. That court declared them forfeited, took away all its property, and put it into the hands of a receiver. That property is now, in legal contemplation, in the custody of the Hamilton circuit court. Can it be possible that Mr. Conkling has a legal right to call on this court to drag this defunct corporation before us, and to urge here that we should interfere with property now in the custody of a state court of competent authority to do full justice in the whole matter? If the present complainant has rights, he ought, instead of applying here, to apply in the Hamilton circuit court, cause himself to be made a party to the proceeding pending there, and look for justice against the receiver to the court that made him a receiver, and controls him as a receiver.

The bill is bad for another reason. It asks a contribution to the complainant from various other stockholders of the company. Yet these stockholders are not made parties to the bill. There are various other fatal objections to the bill. Indeed, of the six causes set out in the demurrer, every one is fatal to the bill. But as the one first above considered goes to the question of the jurisdiction of this court, it is unnecessary to consider the others minutely.

The demurrer is sustained, and the bill is dismissed at the complainant's costs.

Consult, also, Aston v. Heron, 2 Mylne & K. 396; Chalie v. Pickering, 1 Keen, 749. The same principle is held in reference to executors, that they cannot be proceeded against outside of the jurisdiction by which they were appointed. Security Ins. Co. v. Taylor [Case No. 12,607].

CONKLING (CROMPTON v.). See Cases Nos. 3,407 and 3,408.

Case No. 3,101.

Case of CONLEY.

[See Case No. 3,102.]

Case No. 3,102.

In re CONLEY.

[24 Leg. Int. 21.][1]

District Court, S. D. New York. Dec. 5, 1866.

BOYS IN THE ARMY—LAW OF ENLISTMENT IN RELATION TO MINORS.

[Under Act Feb. 13, 1862 (12 Stat. 339), authorizing enlistments in the army, the oath of a recruit as to his age is conclusive, and on habeas corpus other evidence thereof is inadmissible.]

[On habeas corpus. Application for the discharge of Michael J. Conley from service in the United States army.]

H. P. Herdman, for petitioner.

Lieut. A. B. Gardner, 9th U. S. Infantry, for the United States.

Before BETTS, District Judge.

This was an argument in relation to the right of the United States government to retain in the army a minor who had enlisted without the consent of his parents, and it arose from an application for a writ of habeas corpus to produce the body of Private Michael J. Conley, United States army, upon the petition of his mother, Catharine Conley, praying for his discharge on the ground of his minority. The writ was served on Brev. Maj. Gen. Daniel Butterfield, superintendent general recruiting service. H. P. Herdman, Esq., for petitioner; Lieut. Asa Bird Gardner, 9th United States infantry, for United States. The prisoner was brought up from Fort Columbus, and produced in court with the return of Gen. Butterfield. The government proved the enlistment of Conley, through Brevet Brig. Gen. J. M. Robertson, 2d artillery, and by the original enlistment papers, in which it appeared that Conley made oath to being over 18 years of age, and further declared himself to be 19 years and 11 months old.

The attorney for petitioner offered to prove by Conley's parents that he was only 16 years old. Lieut. Gardner objected. 1st. That, as the constitution confers upon congress the power to raise and support armies and make all laws necessary thereto, it was quite clear that congress may declare what shall constitute a valid contract of enlistment. 2d. That congress have a constitutional right to enlist minors into the army without the consent of their parents. 3d. That public policy required that a minor shall be at liberty to enter into a contract to serve the state whenever such contract is not positively forbidden. 4th. That since the passage of the act of February 13th, 1862 [12 Stat. 339], a minor, between the ages of 18 and 21 years, may be enlisted without the consent of his parents, and that the oath of enlistment taken by him as to his age, was conclusive in evidence and binding upon the courts.

THE COURT held that the oath of enlistment taken by the recruit as to his age, under this act, was conclusive and binding and that the writ must be discharged, and the soldier remanded to the custody of his officers. The decision in this case was looked to with great interest, as establishing a precedent in similar cases as to the "law of enlistments."

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Case No. 3,103.

CONLEY v. The G. C. BARRAS.

[6 Ben. 12.][1]

District Court, E. D. New York. March, 1872.

SEAMEN'S WAGES—FREIGHT—IRREGULAR PRACTICE.

1. A libel was filed against a cargo of coal on board of a canal-boat and against her master, to enforce a lien for seaman's wages, upon freight money alleged to be due from E. & M. on the cargo. The cargo was seized, and was claimed by the C. S. Company. But the only answer put in was one by E. & M. It appeared that E. & M. had chartered the boat of her master for a specified rate, and that, before the commencement of the action, and without notice of the libellant's demand, they had paid to the master all the money due from them under the charter. It also appeared that the cargo was shipped by the C. S. Co. under an agreement with E. & M. for freight payable to E. & M., which was due and unpaid at the filing of the libel. *Held*, that the practice had been irregular, but the irregularity would not be noticed, as no objection had been taken to it.

2. It was not necessary to determine whether the libellant could maintain an action to charge the charter money payable by E. & M. with a lien for wages, as such charter money had been paid over to the master without notice before the commencement of the suit.

3. The freight money due from the C. S. Co. to E. & M. could not be held, because the libellant had not in his libel sought to charge it.

4. The libellant was entitled to a decree against the master.

[In admiralty. Libel by Pardon Conley against the freight of the canal-boat G. C. Barras, and Frank Williams, her master.]

A. Nash, for libellant.

Goodrich & Wheeler, for claimants.

BENEDICT, District Judge. This is an action by Pardon Conley to enforce a lien for wages upon certain freight money, alleged to be due for the transportation of a cargo of coal from Baltimore to New York in the canal-boat G. C. Barras, during which transportation the libellant was employed in navigating the boat. The master of the boat is likewise made a party defendant, and a decree in personam against him is also prayed for.

The cargo in question, which has been seized, is claimed by the Cunard Steamship Company. But the only answer interposed is that of the firm of Easton & McMahon, who, without objection, have interposed an answer, and have proved that they chartered

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the boat G. C. Barras to go where they might elect to send her, and carry such freight as they might desire to ship, for the compensation of five dollars per day, the master agreeing on his part "to keep at all times on said boat one able-bodied seaman besides the captain thereof;" and that before the commencement of this action, and without notice of the libellant's demand, they paid to the master all the charter money due from them under such charter. It also appears in evidence that the coal in question was shipped by the Cunard Steamship Company, to be transported under an agreement with Easton & McMahon for freight payable to Easton & McMahon, and that of such freight money, a greater sum than the amount claimed by the libellant was due at the time of filing the libel and the seizure of the cargo. Upon these facts the court is asked to decree that the freight money due from the Cunard Steamship Company is charged with a lien to the extent of the libellant's demand.

It is unnecessary to notice here the irregularities of practice which this case discloses, as no objection has been taken to the mode of procedure. Nor is it necessary to determine whether under any circumstances the libellant could maintain an action to charge the charter money payable by Easton & McMahon, it appearing in evidence that all such money had been in good faith and without notice paid over to the master before the commencement of the suit. And in respect to the liability of the freight money, which, at the time of the seizure of the cargo, was due by the Cunard Steamship Company to Easton & McMahon, it is sufficient to say that the libel nowhere seeks to charge that fund. The cargo was indeed seized, but the action is against the money due by Easton & McMahon. No other freight is mentioned in the libel, and that is mentioned as the fund which the libellant seeks to charge with a lien. But, as before stated, the evidence shows that no part of that fund remained unpaid at the commencement of this action. The libellant must therefore fail so far as his action relates to freight moneys. He is entitled to a decree against the master, by default, no appearance or defence having been interposed by him.

Case No. 3,104.

CONN et al. v. PENN et al.

[Pet. C. C. 496.][1]

Circuit Court, D. Pennsylvania. April Term, 1818.

RIGHTS OF PROPRIETORS OF PENNSYLVANIA — APPROPRIATIONS—PATENTS—SURVEYS—BOUNDARIES —PRESUMPTION OF PAYMENT — RATIFICATION OF ACT OF AGENT—WAR—ABATEMENT OF INTEREST —FOLLOWING STATE PRACTICE.

1. Title of the proprietaries of Pennsylvania, to the soil of the province previous to the Revolution. The proprietaries had an unquestionable right to dispose of the soil as they might think proper, and to reserve to their own use, such portions as they might select, and in such manner as they might please to prescribe.

2. In what manner parts of the province of Pennsylvania were appropriated by the proprietaries to their private use, as manors, &c. Proceedings under which the manor of Springetsbury was laid off and appropriated by the proprietaries.

3. The courses and distances laid down in a survey, especially if it be ancient, are never, in practice, considered conclusive, but are liable to be materially changed by oral proof, or by other evidence, tending to prove that the documentary lines are those not actually run. Reputed boundaries are often proved by the testimony of aged witnesses, and the hearsay evidence of such witnesses has been admitted to establish such lines, in opposition to the calls of an ancient patent. It is not the lines reported, but the lines which have been actually run by the surveyor, which vest in a patentee the area included in those lines.

[Cited in Clement v. Packer, 125 U. S. 324, 8 Sup. Ct. 914.]

4. When the mistakes of a surveyor are shown by satisfactory proof, courts of law as well as courts of equity, look beyond the patent to correct them. If a mistake is apparent upon the face of a survey, and natural or artificial marks, or the reputation of the neighbourhood, have fixed the boundaries of the land different from those delineated in the survey, a subsequent location is so far affected by the real boundaries, that a court of equity will not permit a title derived under such location, to be set up against the owner of the land intended to have been located by the first survey.

5. A recognition of the acts of an agent by his principal, is equivalent to an original grant of authority.

6. It has always been customary in Pennsylvania, to include in surveys made under grants from the proprietaries, a greater quantity of land than the warrant specified, and to pay for the excess at the same rate as the original quantity was paid for. This custom did not extend to grants of lands within the proprietary manors.

7. Interest on debts due by the citizens of the United States, to the subjects of the king of Great Britain, ceased during the Revolutionary war, and during the war of 1812; but the mere circumstance of war existing between two countries, is not a sufficient reason for abating interest upon the debts due by the subjects of one belligerent, to the subjects of another.

[Cited in Hamilton v. Mutual Life Ins. Co., Case No. 5,986.]

8. A prohibition of all intercourse with an enemy during war, furnishes a just reason for the abatement of interest on debts due to the subjects of the belligerent, until the return of peace.

[Cited in Hiatts v. Brown, 15 Wall. (82 U. S.) 186.]

9. The rule, as to the abatement of interest during war, does not apply when the creditor, although a subject of the enemy, remains in the country of the debtor, or has a known agent residing there, and who is authorised to receive the debt.

[Cited in Ward v. Smith, 7 Wall. (74 U. S.) 453; New York Life Ins. Co. v. Davis, 95 U. S. 429.]

10. A presumption that the purchase money for land has been paid to the proprietaries, cannot arise from length of time, when the claimant of the land does not produce a patent or does not show that a patent was issued for the land.

[1] [Reported by Richard Peters, Jr., Esq.]

11. The practice in the courts of Pennsylvania, for the jury to find a special verdict, in a cause where the parties have not legal but have equitable claims, does not apply in the circuit court of the United States, that court having equity powers.

[See note at end of case.]

[In equity. Bill by Daniel Conn, Francis Grove, Isaac Grove, and others against John Penn and William Penn.]

Mr. Ingersoll and Edward Ingersoll, for complainants.

Mr. Rawle, Mr. Binney, and W. Rawle, for respondents.

WASHINGTON, Circuit Justice. This is a suit on the equity side of the court, brought by a number of persons, claiming by various titles equitable estates in the manor of Springetsbury, praying that the defendants, in whom the legal estate in the said manor is vested, may be compelled to convey the same according to their respective interests, upon such terms as the court may deem equitable.[2]

It will be proper, in the first place, to state the title of the proprietaries of Pennsylvania to the soil of the province, previous to the Revolutionary war, and the various acts performed by them or their agents, so far as they are connected with this cause, or have any bearing on the titles asserted by the plaintiffs; and secondly, the titles of the respective plaintiffs, so far as they have been laid before the court.

By the charter of Charles I., to William Penn, dated 4th of March, 1668, he became entitled, in his private and individual capacity, to the fee simple interest in the soil of the province, as well as to the government thereof in his political capacity. Hence it followed, that the proprietary had an unquestionable power to dispose of the soil, in such manner as he might think proper, and to reserve to his own use, such portions as he might select, and in such manner, as he might please to prescribe. But as his individual interest, not less than the policy which directed the grant to him, pointed out the necessity of encouraging the population and settlement of the province, as speedily as possible, the original proprietary, on the 11th of July, 1681, entered into an agreement with those who should wish to become purchasers of land within the province, the effect of which was, to render the proprietary a trustee for such individuals, as should acquire equitable rights to certain portions of land under general or particular promises, or such rules and regulations as he or his agents might, from time to time, establish; and for the sake of certainty, and to render public these rules by which purchasers were to be bound, an office was erected, and rules established for the government of the same, as well as of those who might incline to obtain rights to unappropriated lands within the province; reserving to the proprietaries, a right to appropriate one-tenth of the province to themselves, for their private and individual use. By force of this agreement (as was said by this court in the case of Penn v. Klyne) all persons complying with the terms thus held out, acquired a right to the proportion of lands thus appropriated, not only against third persons who might thereafter attempt to appropriate the same lands, but even against the proprietary himself, unless he had previously, and by some act of notoriety, evinced his intention to withdraw such land from the general mass of property, and to appropriate it to his own use. As a necessary consequence of this principle, whenever such was his intention, it was made known by a warrant of appropriation, and a survey of the land so withdrawn. This was notice to all the world, that no right to the land thus laid off for the proprietaries, could be acquired by individuals without a special agreement with the proprietaries, which might or might not be on the common terms, as the proprietaries might please. But if before such special appropriation, an individual had, in compliance with the rules of the office, appropriated a tract, within the bounds of that laid off for the proprietaries, by settlement or otherwise, such prior appropriation was to be preferred to the title of the proprietaries, as to that particular tract, but no further.

By the recitals in the warrant from Governor Hamilton to the surveyor general, dated the 21st of May, 1762, which will be more particularly noticed hereafter, it appears, "that for the purpose of appropriating the tenths, as they were called, which the first proprietary by his concessions above mentioned reserved to himself, as well as to his successors, general warrants were regularly issued to the surveyor general, for the time being, by the successive proprietaries, to survey for the said proprietary, 500 acres in every township of 5,000 acres and generally the proprietary one-tenth of all the land laid out, or to be laid out; but that the tracts surveyed, for the proprietaries, had fallen far short of their due proportion." For this reason, probably, as well as for those assigned in the warrant itself, Sir William Keith, the governor of the province, on the 18th of June, 1722, issued a warrant to John French, Francis Worley, and James Mitchell, directing them to cross the Susquehanna, and to survey, mark and locate 70,000 acres of land, in the name and for the use of Springet Penn, which should bear the name and be called the manor of Springetsbury: "Beginning upon the south-west bank, over against Conestogoe creek; thence W. S. W. ten miles; thence N. W. by N. twelve miles; thence E. N. E. to the uppermost corner of a tract called Newbury; thence S. E. by S. along the head line of Newbury, to the southern corner

[2] [The case of Penn v. Klyne, Case No. 10,937, is published as a note to this case in Pet. C. C. 496.]

tree of Newbury; thence down the side line of Newbury E. N. E. to the Susquehanna; and thence down the river to the place of beginning; and to return the warrant to the governor and council of Pennsylvania." The survey, stated to have been made on the 19th and 20th of the same month was returned to the council on the 21st, according to the following boundaries: "From a red oak, by a run side called Penn's run, marked S. P. W. S. W. ten miles to a chestnut by a run side, called French's run, marked S. P.; thence N. W. by N. to a black oak, marked S. P. twelve miles; thence E. N. E. to Sir William Keith's western corner tree in the woods eight miles; thence along the S. E. and N. E. of Sir William Keith's tract called Newbury to the Susquehanna; and thence along the river side to the place of beginning; containing 75,520 acres. The council being of opinion, as they declared in answer to the governor's communication on the subject, that that board had nothing to do with surveys of the proprietary lands, declined to accept the return of the above survey, nor does it appear that it was ever returned to the land office. It was, however, together with the warrant, and the decision of the council, placed upon the minutes of the proceedings of the governor and council, of which an attested copy is filed as an exhibit in this cause. On the 11th of January, 1733, a commission was issued by Thomas Penn, one of the proprietaries, to Samuel Blunston, which after reciting, that "several persons had lately applied to the proprietaries, for liberty to settle on certain quantities of land to the westward of Susquehanna river, and have obtained licenses for the same, but as no warrants of survey have yet been granted, by which each tract could be exactly bounded, several disputes and differences have arisen between the said claimants;" the commission authorises the said Samuel Blunston, "to hear and determine, in the most just and equitable manner, all such differences and disputes," and it also empowers him, "to give licenses unto such persons as should apply to him for settlements in those parts, under such regulations, as to him should seem necessary." By virtue of this commission, Blunston granted licenses to a number of persons, to take up certain specified tracts of land on the west side of the Susquehanna; and among others to Michael Springle for 500 acres in Manchester and Codorus townships.

The Indian title to the lands on the west side of the Susquehanna, having been extinguished by a treaty, on the 11th of October 1736, Thomas Penn, on the 30th of the same month, granted to fifty-two persons, what have been termed licenses; which after reciting "that sundry Germans and others had seated themselves on the west side of the river Susquehanna, within the county of Lancaster, and within the boundaries of a tract of land surveyed on the 19th and 20th days of June 1722, containing about 70,000 acres, commonly called the manor of Springetsbury, and that a confirmation to the persons seated on the same for their several tracts, had been delayed by reason of the claims of the Indians to the land, and that they had applied for a confirmation of their title to the lands; it proceeds to certify, that he will order a patent to be drawn to the several persons for a certain number of acres, on the common terms other lands on the west side of the Susquehanna river were granted, as soon as the quantity specified shall be surveyed out of the abovementioned tract, and a return thereof made." The appropriation of the country on the west side of the Susquehanna, by settlements and under warrants of various denominations, which took place after the extinguishment of the Indian title, and the difficulties likely to ensue at a future period, in consequence of the loss of the plot and survey of this manor, made under the above warrant, of 1722, suggested to Governor Hamilton, the necessity of having the manor again surveyed, and the boundaries thereof ascertained and perpetuated. For this purpose, he, on the 21st of May 1762, issued a warrant of re-survey, directed to the surveyor general, which after setting forth "that in pursuance of the primitive regulations, for laying out lands in the province, W. Penn had issued a warrant, dated the 1st of September 1700, to Edward Pennington, the surveyor general, to survey for the proprietor, 500 acres of every township of 5,000 acres; and, generally, the proprietary one-tenth of all lands laid out, and to be laid out; that like warrants had been issued by the successive proprietaries, to every succeeding surveyor general; that the tracts surveyed, however, are far short of the due proportions of the proprietary; that, therefore, by order of the then commissioners of property, and in virtue of the general warrant aforesaid to the then surveyor general, there was surveyed, for the use of the proprietor, on the 19th and 20th of June 1722, a certain tract of land, situate on the west side of the river Susquehanna, then in the county of Chester, afterwards of Lancaster, and now of York, containing about 70,000 acres, called and now well known by the name of the manor of Springetsbury; that sundry Germans and others afterwards seated themselves, by leave of the proprietor, on divers parts of the said manor, but confirmation of their titles was delayed on account of the Indian claim; that on the 11th of October 1736, the Indians released their claim, when (on the 30th of October 1736) a license was given to each settler, (the whole grant computed at 12,000 acres,) promising patents after surveys should be made; that the survey of the said tract of land is either lost, or mislaid; but that from the well known settlements and improvements, made by the said licensed settlers therein, and the many surveys made round the said manor, and other proofs and circumstances, it ap-

pears that the said tract is bounded E. by the Susquehanna; W. by a north and south line, west of the late dwelling plantation of Christian Elstor, called Oyster, a licensed settler; N. by a line nearly east and west, distant about three miles north of the present great roads, leading from Wright's ferry through York-Town by the said Christian Oyster's plantation to Monockassy; S. by a line near east and west, distant about three miles south of the great road aforesaid; that divers of the said tracts and settlements within the said manor, have been surveyed and confirmed by patents, and many that have been surveyed remain to be confirmed by patents, for which the settlers have applied; that the proprietor is desirous, that a complete draft, or map, and return of survey of the said manor shall be replaced and remain for their and his use, in the surveyor general's office, and also in the secretary's office; that by special order and direction, a survey for the proprietor's use was made by Thomas Cookson, deputy surveyor, (in 1741,) of a tract on both sides of the Codorus, within the said manor, for the site of a town, whereon York-Town has since been laid out and built, but no return of that survey being made, the premises were re-surveyed by George Stevenson, deputy surveyor (in December 1752) and found to contain 436½ acres." After this recital, the warrant directed the surveyor general "to re-survey the said tract, for the proprietor's use, as part of his one-tenth, in order that the bounds and lines thereof, may be certainly known and ascertained." Under the authority of this warrant, a survey of the manor of Springetsbury was made, from the 12th to the 30th of June 1768, and was returned into the land office, and also into the secretary's office on the 12th of July 1768, containing 64,520 acres. As to the act of the assembly of Pennsylvania of 1779, vesting the estates of the late proprietaries in the commonwealth, and its effect in this cause, the court refers to what was said in Penn v. Klyne [Cases Nos. 10,935 and 10,937].

The claims of the complainants, have been arranged by their counsel under the six following heads, and one or two cases have been presented, under each head, to exemplify the titles of the others, belonging to each class respectively: 1. Those who claim under licenses issued by Samuel Blunston. 2. Those claiming under Thomas Penn's grants in 1736. 3. Those claiming under warrants, at the stipulated price of 15l. 10s. per 100 acres. 4. Claimants under warrants, at 9l. per 100 acres. 5. Under applications. 6. Under settlements and improvements, without other title. In order to bring these various cases within the operation of general principles, it will be necessary to arrange them under the following heads: First, those who acquired or purchased titles, upon the common terms applicable to the territorial lands, and yet located themselves within the boundaries of the manor, as ascertained by the survey or re-survey; and, secondly, those who purchased expressly within the boundaries of the manor.

First. The broad ground of equity, upon which the claimants under this head must fix their pretensions is, that they acquired their equitable titles without notice of the prior legal title of the proprietary to those lands; and whether they did so or not, must depend upon a view of all the circumstances which have been proved, on either side, to establish or to negative that fact. This in the opinion of the court, constitutes the great difficulty in the cause. The warrant of 1722 is special, and not only describes with tolerable precision the place of beginning, but limits the length of the line, to the westward, to ten miles, and the north and south line, to twelve miles. If this warrant was executed in strict conformity to the terms of it, and such conformity is professed by the return, it would fix the western boundary of the survey, many miles within that of the survey of 1768, and as it is contended by the defendants, to have existed and to have been known, as far back at least as the year 1736. That the putative boundary of this manor, was such as the defendants' counsel contend it was, at the period abovementioned and afterwards, is established by a chain of evidence not to be resisted. This evidence is composed of the licenses granted by Blunston in 1734; Thomas Penn's grants in 1736; the warrants of 1741, for laying out the town of York, within the manor of Springetsbury; the letter of Secretary Peters to Mr. Penn, in the year 1743, in which he speaks of York-Town, as lying nearly midway of the manor; the warrants to agree, and the recitals in the warrant of 1762; and lastly the actual settlements and improvements made by the licensed settlers within the manor, and the surveys made around and adjoining the different lines of the manor, as proved at the hearing of this cause by Mr. Spangler, who made a survey and plot of this manor; the result of all which is, that the reputed boundaries of the manor, from the year 1736, if not from an earlier period, correspond with the survey of 1768. How it happened, that the reputed boundaries of the manor should vary so extravagantly from those mentioned in the warrant of 1722, and the return, is a question of considerable difficulty. That the former stands upon a more solid foundation, than the mere assertions of the proprietaries and their agents, and the credulity of the settlers and of the neighbourhood, is rationally to be inferred. This reputation must have originated in some act of public notoriety, or it would soon have sunk into oblivion. The defendants' counsel have attempted to account for a circumstance, which it is admitted is involved in no small degree of mystery, by supposing that an intermediate survey must have taken place, between the year 1722 and the years 1734 or 1736, when

those putative boundaries were first brought into notice. But such a presumption is opposed by arguments which are almost irresistibly conclusive. If there ever existed such a survey, it may fairly be asked what has become of it, and of the warrant to authorise it. It is expecting too much of the court, to support such a presumption by another, that these documents have shared the fate of the survey of 1722. But the truth is, that this presumption is repelled by facts of the most persuasive influence. For, not only is there no evidence to countenance this presumption, but we have not even a dictum of the proprietaries or of their agents to support it; neither the commission to Blunston, in 1733, nor his licenses point at such a survey. But on the contrary, Thomas Penn, in the licenses granted by him in 1736, refers expressly to the surveys made on the 19th and 20th of June 1722, as descriptive of the boundaries of this manor. No notice of a posterior survey, is taken in the commission issued in May 1754, to Robert Hunter Morris, the lieutenant governor of the province, in which the manor referred to, and the warrant of re-survey issued by Governor Hamilton in 1762, which is not sparing in its recitals, refers altogether to the survey of 1722, the licenses granted by Thomas Penn in 1736, and the well known settlements and improvements, made by the said licensed settlers and others on and adjoining the manor, as proving the actual boundaries of the manor.

It appears to the court, that the only rational mode of solving the difficulty is, by supposing that the lines of the survey, but particularly of the first, were not actually measured in 1722, but were guessed at, and that little more was done, than to run the courses and to fix the corners. The short period of time in which the work was accomplished, although not affording positive proof of this fact, is sufficiently strong to countenance this supposition. That the courses were run, particularly of the first and third lines, is fairly to be inferred from the circumstance, of their strict agreement with the same or corresponding lines, as laid down in the survey of 1768. But, before this supposition can be admitted as warranting conclusions upon which it would be safe to found an opinion, it will be proper to consider, first, whether the evidence in support of it, is sufficient for the purpose; and, secondly, whether the validity of such a survey is liable to any serious objection.

First. No gentleman of the profession, who is at all conversant with land trials, can be ignorant, that the courses and distances laid down in a survey, especially if it be ancient, are never in practice considered as conclusive, but, that on the contrary, they are liable to be materially changed by oral proof, or other evidence, tending to prove that the documentary lines are those not actually run. How often have we known reputed boundaries, proved by the testimony of aged witnesses, and even by the hearsay evidence of such witnesses, established in opposition to the most precise calls of an ancient patent. Such evidence has been constantly received, and distances have been lengthened or shortened, without the slightest regard to the calls of the patent. The reason is obvious. It is not the lines reported, but the lines actually run, by the surveyor, which vests in the patentee a title to the area included within these lines. The survey returned, or the patent, is the evidence of the former; natural marks or reputation is in almost all cases, the evidence of the latter. The mistakes committed by surveyors and chain carriers, more particularly in an unsettled country and wilderness, have been so common, and are so generally acknowledged, as to have given rise to a principle of law, as well settled as any which enters into the land titles of this country, which is, that, when the mistake is shown by satisfactory proof, courts of law, as well as courts of equity, have looked beyond the patent to correct it. It will be readily admitted, that such evidence should be cautiously received, if it should have a preponderating influence in determining the question of boundary. Subsequent locators, look in the first instance, to the survey as made and returned, for a demarkation of the tract, with which they must not interfere. But, if a mistake is apparent upon the face of the survey, taken in connection with the natural and artificial marks on the ground, if the reputation of the neighbourhood, has assigned to the tract of land, so surveyed, boundaries different from those delineated on the survey returned, a subsequent location is so far affected by notice of the real boundaries of the tract on which it would adjoin, that a claimant under it cannot, even in a court of equity, set up his posterior equitable title, against the legal, or equitable title of the first locator. In short, he cannot assert that he was a purchaser without notice, in the face of strong evidence to the contrary.

Let us next consider the nature of the testimony, rested on to establish the reputed boundaries of this manor. Suppose, that the persons who received grants from Thomas Penn in 1736, and others, who claim under warrants to agree for lands acknowledged to be within the manor of Springetsbury, according to its reputed boundaries, were now in life, and upon their examination in court, should testify, that the boundaries of the manor were always understood to be those laid down by the survey of 1768, with the exception of that part bordering upon the southern line, excluded by the latter survey; who could doubt, that the survey of 1722 corresponded with those reputed boundaries? Upon what other foundation could such a reputation be built, than that of a demarkation, in some way or other, made, so as to become notorious in the neighbourhood of this manor? An opinion so generally enter-

tained, can be accounted for only upon the supposition, that those were known to be the boundaries of the manor, as actually run by the surveyor, or as designated upon the plot returned by him; and, which it is reasonable to presume, was carefully examined by those who felt an interest in understanding it before it was lost. The court, it is true, have not the benefit of this testimony, but is not this defect more than supplied by the acts of those persons? They received grants of land within the manor of Springetsbury, and by their locations, designated the boundaries of the manor, as they were subsequently laid down by the survey of 1768. Is it to be credited, that men who stipulated for grants of lands to lie within this manor, and who had previously settled on the land at the hazard of incurring the heavy penalties of the law, if they did not confine themselves within the boundaries of the manor lines, would be satisfied with any thing short of the most positive evidence of the real boundaries of the manor? This was the case of all those who received licenses from Blunston, and certificates from Thomas Penn, who we are informed by the preamble to the last mentioned document, had formerly seated themselves, by leave of the proprietaries, within the bounds of the manor of Springetsbury, surveyed the 19th and 20th of June 1722, and consequently at a period antecedent to the Indian cession, when it was criminal for any person to settle on the territorial or public lands, lying within the Indian limits. As little can it be believed, that in the year 1741, the surveyor would have been directed to lay off a tract of land, within the manor, for the site of York-Town, and that it would have been so surveyed, upon a mere imagination that the western line of the manor extended beyond the tract so located. In short, whenever the proprietaries or settlers have spoken or acted in reference to this manor, they have furnished evidence confirmatory of the recitals in the warrant of 1762, in relation to its boundaries as established by the survey of 1722.

Second. The plaintiffs' counsel, assuming as a fact, what the court is ready to admit, that the lines of the manor were not actually measured and marked on the ground, have contended, that the survey was for this reason void. Under this head they have also insisted, that it was void because the warrant was not directed to the surveyor general, and because it was not returned into the land office.

The obvious answer to these objections is, that the rules of the proprietaries' land office were established for the purpose of enabling individuals to appropriate lands offered for sale, with the least possible inconvenience, and to avoid the confusion which might otherwise arise, among conflicting locators; but, that neither in their terms or designs, were they applicable to the proprietary, the paramount lord of the whole soil. He had confined himself by no contract, and he was bound by no law, to appropriate to his private use such tracts of land as he might please to reserve, in any particular form; or by the agency of any particular person. It is true that the successive proprietaries were in the habit of issuing a general warrant to the surveyor general, to lay off the tenths which they had reserved for their private use; and that the surveys of tenths and manors were usually, possibly invariably, returned into the land office. But, if they chose to depart from this customary form established by themselves for their own convenience, and to authorise any private individual to make those surveys, and to return them into any other public office than the land office, the court has yet to learn, by what laws the surveys so made and returned were invalidated. Neither has any law or usage been pointed out, by which a survey was deemed invalid, because the lines were not measured and marked on the ground. Third persons, are no otherwise concerned in relation to these matters, than as their rights might be affected by the want of notice of such prior appropriation, a reason which cannot, with any propriety be urged by the complainants, against the validity of the survey of 1722. A more general objection however has been made, to this survey, which may as well be noticed under this head. It is said Sir William Keith had no authority to issue the warrant under which this survey was made, and consequently, that every thing done in execution of it is void. Whether the governor had or had not such authority, is more than can be confidently affirmed by any person at this day, with the little light afforded by the evidence given in the cause. That he did possess it, is fairly to be presumed from the subsequent recognition of the proprietaries; and it is not to be questioned, but that such a recognition, upon a well established maxim of law, is to every intent and purpose equivalent to an original grant of authority.

Upon the whole, the opinion of the court is, that the survey of 1722, ought to be considered as having been made according to the reputed boundaries of the manor of Springetsbury, as laid down in the map or diagram which was given in evidence in the cause, with the exception of that part on the southern line, which was not included in the survey of 1768; and that all subsequent purchasers and settlers, are bound to take notice of these boundaries.

Secondly. As to those who purchased expressly within the manor, or upon condition not to interfere with it; or who took warrants to agree, and the like: their cases will now be considered. The following is an examination of the particular claims of each class.

First. The first class of cases embraces such of the plaintiffs as claim under licenses granted by Blunston, and the title of P. Springle, is exhibited as an example of such of the titles as come within this class. On the 6th of April 1734, Blunston, under a commission to him of the 11th day of January 1733, granted to M. Springle, 500 acres, in Manchester and Codorus townships, on the west side of Susquehanna. This grant is recited in the warrant of acceptance, dated 8th May 1769, which also recites, that by the death of M. Springle, the title to said land, and also to the land taken up by virtue thereof, became vested in his sons Peter and Michael; that under said grant, 606 acres were surveyed, as appears by a re-survey according to the old lines, on the 1st of May 1767; and that by said re-survey, 405 acres were laid off for Peter, and 201 for Michael; and that the said Peter had applied for a warrant of acceptance of his part, on his paying the purchase money of £15 10s. per 100 acres for the said tract, with interest and quit rents, commencing on the 1st of March 1742. The warrant then proceeds to require the said survey to be accepted .and return thereof made, in order for confirmation on the terms aforesaid. The title is then regularly deduced to the plaintiff P. Springle.

Second. Under this class is exhibited the cases of George Beard, and Caleb Kirk, each of them claiming under what has been denominated grants from Thomas Penn, bearing date the 30th of October 1736, the general nature of which has been already stated. The former claims under a grant to C. Strickler, one of the fifty-two persons mentioned in the list of Thomas Penn's licenses, for 350 acres; and the latter claims under a similar grant to Killian Smith, (another of the persons mentioned in the said list,) for 200 acres. On the 30th of January, 1767, a warrant of acceptance was issued by John Penn, which recites the license, dated the 30th of October, 1736, to Charles Strickler for 350 acres, which he had settled within the manor of Springetsbury, to be surveyed and confirmed to him on the then common terms; that it being represented by Jacob Strickler, that Charles Strickler procured a survey of 378 acres 135 perches, to be made in virtue of the said grant, and had by deed dated the 29th of July, 1766, granted to the said Jacob, 182 acres 95 perches, by metes and bounds, being part of the said 378 acres 135 perches, of which part he had procured a survey to be made, and having paid the purchase money, interest and quit rents due for the same, had requested a warrant of acceptance, which was accordingly granted. The title to this tract of land, not being deduced lower down than to Jacob Strickler, no decree can be made in relation to it, favourable to the plaintiff, unless the links, which are missing in the chain of title, can be supplied before the final decree. But the title of Beard to 196 acres, the residue of the grant to Charles Strickler, is fully made out, with the exception of the release from the co-heirs of Ulrick Strickler to him, which in his deed to Beard was stated to have been recorded, and may without doubt be produced on the final hearing. The claim of Kirk, is to 245 acres, being part of a survey for 429 acres 105 perches, made upon a grant of Thomas Penn to Killian Smith, of 200 acres. There is no objection to the regularity of his title.

Third Class. Under this class, the titles of Andrew Rutter, and George Leitner, have been adduced as examples. On the 13th of January, 1747, a warrant was issued, under the signature of the president of the land office, to survey for John Smith, 300 acres, including his improvement in Manchester township on the west side of Susquehanna, for which he agrees to pay £15 10s. per 100 acres with interest, and the yearly quit rents of a half penny sterling per acre, to commence on the 1st of March, 1757. Under this warrant, there was surveyed on the 18th of October, 1748, the quantity of 321 acres, the title to which, is regularly brought down to the plaintiffs Rutter and Leitner.

Fourth Class. The example under this class is Christian Stoner, who claims 145 acres 25 perches, under a warrant bearing date the 13th of April, 1763, granted to Hugh Patten for 255 acres, lying in Hallam township, provided it do not interfere with the manor of Mark of Springetsbury, or any other of the appropriated lands of the proprietary, the said Patten agreeing to pay £9 per 100 acres, and also the yearly quit rents of a penny an acre. Under this warrant there was surveyed in the same year, the quantity of 363 acres, besides 79½ acres to George Snallus, included. The title to the quantity claimed by Stoner is regularly deduced.

Fifth Class. Jacob Strickler is brought forward as representing such of the complainants as claim under applications for warrants. The title in this case commences with a certificate of survey, bearing date the 19th of May, 1767, made for Daniel Piedler, containing 39 acres 130 perches in Hallam township, on an application dated the 29th of December, 1766, No. 2255. On the 14th of March, 1755, Piedler paid fifty shillings in part for 50 acres of land to be surveyed to him, adjoining his other land in Hallam township. On the 5th of April, 1784, Steiner and Fitz, executors of Daniel Beither, (reciting a warrant dated 14th of March, 1755, under which was surveyed for him 91 acres in Hallam township, and also an application of said Beither, No. 2255, for 50 acres in said township dated 26th of December, 1766, under which there was surveyed for him, another tract, adjoining the above containing 37 acres,) conveyed both tracts to Henry Strickler, and on the 5th of April, 1784, Henry Strickler conveys to Jacob Strickler, 89 acres, being part of a tract conveyed by Steiner and Fitz, executors of Beither, to the said Henry Strickler by deed dated the 5th

instant. On the 1st of April, 1807, Henry Strickler by a deed, reciting the above mentioned conveyances, granted to Jacob Strickler other tracts of land, one containing 45 acres, another containing 73 acres 20 perches, another containing 106 acres, and one other containing 25 acres, 40 perches, amounting in the whole to 249 acres 60 perches. But it is impossible to discover, from the title papers before the court, whether the land surveyed under the application, No. 2255, which it is presumed is the land in question, is amongst the tracts conveyed by Henry to Jacob Strickler. Unless this matter is agreed by the parties, the court will refer it to the master commissioner to report upon it, in order that either party may have an opportunity to except.

Sixth Class. The last class of cases, embraces those who claim under settlement and improvement rights, without other title, and the case of the widow Tryckler and Jacob Strickler, are stated as the examples. As to the former, it may be sufficient for the present to observe, that the papers with which the court have been furnished, do not bring down the title regularly from Knab, the first settler, to these plaintiffs, and therefore it may be necessary to refer this title also. The same objection does not exist against the title of Jacob Strickler, who claims under a settlement and improvement made by one Bassett, as long ago, as the year 1758, from whom, by mesne conveyances, the title became vested in the plaintiffs. The settlement and improvement, is fully proved in both these cases, that of Knab being fixed as early as the year 1753.

Having thus stated the legal title of the proprietaries to the manor of Springetsbury, and the asserted equitable titles of the plaintiffs, or such of them as have been laid before the court, it becomes proper to consider the two questions which immediately present themselves.

First. Whether these plaintiffs, or any and which of them, are entitled to conveyances of the legal estate, which it is admitted by their counsel is vested in the defendants, and is not now to be called in question? And, secondly, Upon what terms such decrees ought to be made?

First. Peter Springle. Whether Blunston's licenses extended to the manor lands or not, need not be decided, since the only claimant under his license, who is before the court, has had his survey accepted. There can therefore be no question but that this plaintiff is entitled to a conveyance of the legal estate, upon such terms as may hereafter be decided to be equitable, when the court comes to the consideration of the second point.

Second. George Beard and Caleb Kirk. The equitable title of these plaintiffs is not, and cannot be questioned. By the express terms of their grants, they were to lie within the manor, and they purchased upon the common terms on which other lands on the west side of the Susquehanna, were granted. It will be unnecessary to examine the remaining cases separately, since they all come within the operation of the same principle. These plaintiffs are to be considered in the light of purchasers with notice of the reputed boundaries of the manor, under the survey of 1722, and this principle applies a fortiori against those whose title commenced subsequent to the warrant of survey. Being purchasers with notice, they have no equity to demand conveyances.

Second. The next question is, upon what terms are such of the plaintiffs, as have equitable titles to the lands they respectively claim, entitled to a decree for the conveyance of the legal estate.

Under this head the following points have been raised by the counsel for the plaintiffs: First. That they are entitled to a conveyance of all the surplus land, within their respective surveys, upon the same terms with those that may be legally demanded of them for the quantity expressed in their warrants, Second. That they are entitled to an abatement of interest. 1st. On account of the disturbances occasioned by the controversy with Lord Baltimore, and the consequent incursions of the borderers claiming under Maryland, during the continuance of these disturbances. 2d. On account of the Revolutionary and late war with Great Britain, and during the continuance thereof.

First. That it has always been customary in Pennsylvania to include in the survey of the common, or territorial lands, a greater quantity than the warrant specified, and to pay the same price for the excess; which is admitted on both sides. The toleration of such a practice by the proprietaries and their agents, was entirely consistent with the great object they had in view, of settling the province as rapidly as could be effected, and of raising from the lands the greatest possible revenue; and although about the year 1764, some attempts were made by the governor of Pennsylvania, to limit the excess to ten per centum, yet the practice of comprehending a larger quantity, had become so inveterate, that subsequent relaxations of these orders were found necessary. But it is also contended, that a similar custom prevailed in respect to the manors and other reserves of the proprietaries; to establish which custom, the following evidence is relied upon. Twenty cases are cited, in which it appears that the surplus was settled for, upon the same terms with those exacted for the quantity granted. Upon these cases the court deem it proper to make the following observations. Four of them only, viz. Spangler, Seigler, Worley and Comfort, appear to relate to lands not lying within any of the proprietaries' reserved lands. Two others state expressly, that the grantees are to comply with the proprietaries' demand, without any limitation whatever; of the remainder of the

cases, four are of lands lying in Hallam township, one in Manheim township, two in York county, and in three neither county nor township is mentioned. It was stated at the bar, that Hallam township lies within the manor of Springetsbury, but whether the fact be so or not, was not proved, and even if it had been, the complainants would have had but eight cases to establish the existence of this alleged custom.

In opposition to the cases relied on by the plaintiffs to prove this custom, the defendant produced a number, in which the surplus land was paid for at a much higher price than for the quantity granted; and amongst these, eight of them are stated expressly to lie within the manor. These are quite sufficient to defeat the alleged custom, as applicable to manor lands; and they leave the court necessarily to draw the conclusion, that in the few instances in which it appears, that the quantity surveyed was disregarded, the proprietaries did so from mere favour, or from other considerations, which it is impossible at this remote period for us to penetrate. To establish a custom, so full of absurdity, because so inconsistent with any imaginable motive which could influence the proprietaries to withdraw certain portions of land from the public stock, and appropriate them to their private use, the evidence ought to be clear, strong and uniform. The settlement of the lands surrounding these reserves, could not fail in a short time to enhance the price of the latter, and consequently increase the value of the reserves of the proprietaries. Partial settlements within the manors, would tend still further to produce this effect: but if a license to make such settlements, however limited in its extent, so as to meet the calculations of the proprietaries, could have authorised an extension of the privilege at the will of the grantee, it is most obvious, that such reserves would be merely nominal, or that the proprietaries would be deprived of all the advantages to which they were entitled, of permitting for their own advantage, partial settlements, within their manors.

Second. Abatement of interest.

First. On account of the inroads of the borderers claiming under Maryland. Candour, we think, must admit, that there is not such evidence laid before the court, as would warrant us in deciding upon any general principle, that this claim ought to be allowed. That an irregular and partial state of hostility existed at certain periods, and to a limited extent between the settlers under the two proprietary governors of Pennsylvania and Maryland, is a matter of general history; but that any one of the persons under whom these complainants claim, was at any period disturbed or driven from his farm, is not proved, or even asserted. Even if it were proved, that one or more of them had been so disturbed, how could such a case influence any other to which similar proof did not apply. We think that the reasons urged by Mr. Thomas Penn in his letter to Mr. Peters, of the 12th of February, 1762, against this claim, are replete with so much good sense, that we hesitate not to adopt them. After consenting, obviously as a matter of favour, to abate interest and quit rents due upon the lands which Mr. Peters had purchased from improvers within the manor, from the year 1755, when the devastations commenced, to the year 1762, he observes "with regard to other people, we propose to forgive interest and quit rents to such as have been disturbed and obliged to go off their plantations or have had their cattle killed, or their houses, or out-houses burned, from that time to the time when they might return in safety; but not to the settlers in general, many of whom kept their settlements, and by their situations have got estates, having sold the produce of their plantations and let their waggons at great prices." For what reasons he charged quit rents and interest, from a period subsequent to the grant of title, it is impossible for this court to conjecture; possibly there may have been circumstances of equity, known to the proprietary, which induced him to grant the indulgence. Those persons may have been disturbed in their possessions, by the Maryland intruders, and may have sustained losses, so as to bring their cases within the terms of the indulgence held out in the above letter. It may have been granted in consideration of the payment of the principal, at the particular period when it was received, and without exposing him to the trouble and expense of law suits. But these abatements were irregular in their extent, and prove that no usage on the subject existed, and that no general principle was established applicable to all cases. Surely the present complainants, upon the mere ground of a favour, come with a bad grace into a court of equity, to ask an extension of it to them.

The second claim is of an abatement of interest during the Revolutionary and late war. This question has never been decided, it is believed, in the supreme court of the United States. We know not what have been the decisions in the different circuit courts, and in the state courts, not having access to any of the ordinary means of information, except such as the Pennsylvania and Virginia reports furnish. In those states, the law seems to be settled, that where the creditor was absent during the war, and had no known agent within the United States, interest, during the war, should be deducted. It would appear, from the justly celebrated answer of Mr. Jefferson to Mr. Hammond, that interest during the war had been disallowed in some of the state courts, and allowed in others. This court, finding itself unshackled by authorities, is left to form its opinion of this question upon general principles, and we feel no hesitation in de-

ciding, that the mere circumstance of war existing between two nations, is not a sufficient reason, for abating interest upon the debts due by the subjects of the one belligerent to those of the other. It is admitted, that wars in their mildest form are productive of great national calamity to both belligerents, and especially to that one which happens to be invaded. If this were per se, a reason for abating interest, it would operate with equal force, whether the creditor were a fellow citizen of the debtor, an enemy, or the subject of a foreign friendly government.

A prohibition of all intercourse with an enemy, during the war, and the legal consequence resulting therefrom, as it respects debtors on either side, furnish a sound, if not in all instances, a just reason for the abatement of interest, until the return of peace. As a general rule, it may safely be laid down, that wherever the law prohibits the payment of the principal, interest during the existence of the prohibition is not demandable; and no reason is perceived, why the rule should not be the same in courts of equity, as in courts of law. But, the rule can never apply in cases where the creditor, although a subject of the enemy, remains in the country of the debtor, or has a known agent there, authorised to receive the debt; because the payment to such creditor or his agent, could in no respect be construed into a violation of the duties imposed by a state of war, upon the debtor. The payment in such cases is not made to an enemy, and it is no objection, that the agent may possibly remit the money to his principal; if he should do so, the offence is imputable to him, and not to the person paying him the money. As the evidence upon the point to which the exception to the general rule applies, was not as full as it ought to have been, and possibly is susceptible of being made, the parties on each side will have an opportunity before the auditor, to produce evidence to show, whether during the Revolutionary and the late war, or for any and what part thereof, the proprietaries had in the United States, a known agent, or agents, authorised to receive the purchase money and quit rents, due to them from the complainants.

The court, in giving the above opinion, has taken no notice of the agreement of compromise, offered by the defendants to the complainants in 1804, because then, and even at the hearing of the cause, it was rejected.

Decree.

This cause came on to be heard, at the last session of the court, upon the bill, answer, replication and exhibits, and the oral examination of witnesses, and was then argued by counsel; whereupon the court having taken time to consider of the same, are of opinion:

First. That Peter Springle, and such of the complainants as claim under licenses issued by Samuel Blunston, whose surveys have been accepted, are entitled to conveyances, for the quantity of land mentioned in their licenses, upon their paying therefor the principal sum due by the terms of the license or warrant, with interest and quit rents from the date of the license, subject, as to the interest, to the decision which the court may hereafter make on that subject.

Second. George Beard, (in case his title should be regularly deduced down to him,) Caleb Kirk, and such of the complainants as claim under licenses or grants from Thomas Penn, in 1736, or whose warrants express that the land is to be within the manor of Springetsbury, or who claim under warrants to agree, are entitled to conveyances of the quantity of land mentioned in their respective grants, licenses or warrants, on the payment of the sum mentioned in the same, with interest and quit rents from the date of the said grant, licenses or warrants, subject, as to the interest, as in the preceding case.

Third. Such of the complainants as do not come within the above description, have no equity, and the bill as to them, must be dismissed.

Fourth. In every case where a conveyance, according to the principles of this decree, is to be made, of the quantity of land mentioned in the warrant or other evidence of title, the surplus land ought always to be conveyed to such plaintiff, upon his paying the present value of such surplus, clear of the improvements; the quantity of such surplus to be laid off, and the said value to be ascertained, by commissioners to be appointed by the court, unless the parties can agree as to the said quantity and value. The court reserves the decision of the following point, until the evidence of the facts thereupon be exhibited in the report of the auditor or otherwise.

Fifth. It must appear, whether or not the defendants had a known agent, authorised to receive the monies due by the complainants or any of them, either for the whole or any part of the periods during the existence of the Revolutionary or late war; and if for any part, what portion of those periods, such agent or agents, was or were in the state for the purposes mentioned.

Whereupon, it is decreed and ordered, that such of the complainants, as according to the above principles are entitled to conveyances, do lay before the auditor of this court, abstracts of their respective titles, together with their title papers where the same are called for by the defendant, or required by the said auditor, who is directed to report the said titles, or such of them as may be disputed by the defendant. And it is further ordered and decreed, that the said auditor do state and report an account of the sums to be paid by the respective complainants, according to the principles above laid down; and for ascertaining facts material to the

said account, either of the parties to this cause are at liberty to take affidavits, upon reasonable notice to the adverse party, his attorney or solicitor, of the time and place of taking the same. And it is further decreed and ordered, that Edward Crawford of Franklin county, William Graydon of Dauphin county, John Boyd of Northumberland county, John Anderson of Bedford county, and Adam Reigart of Lancaster county, or any three of them, do ascertain and lay off the quantity of surplus land comprehended within the surveys of such of the complainants, as, according to the principles before stated, are entitled to conveyances, and that they do also appraise the said several portions of surplus land, according to their present value, exclusive of the improvements thereon, and make report of the same to this court; and to enable the said commissioners to execute this order, Samuel Baird and Peter Spangler are appointed to make the necessary surveys, under the directions of the said commissioners, and the parties are authorised to take affidavits, upon notice, as aforesaid, to enable the said commissioners to perform the duties assigned them.

[NOTE. Certain of the complainants refused to comply with the requirements of the decree as to the exhibition of proofs and appearance before the commissioners and on the coming in of the report the bill was dismissed as to them.

[From the decree of dismissal they appealed to the supreme court, which reversed the circuit court decree because of irregularity, in that it was made without the presence of the defendant William Penn. Conn v. Penn, 5 Wheat. (18 U. S.) 424.

[For the final disposition of this case and the rights of the several parties, see Case No. 3,105.]

Case No. 3,105.

CONN et al. v. PENN.

[4 Wash. C. C. 430.][1]

Circuit Court, E. D. Pennsylvania. April Term, 1824.

APPROPRIATION BY PROPRIETORS OF PENNSYLVANIA—NOTICE—RE-SURVEY—RIGHTS OF PURCHASERS AND SETTLERS.

1. What does not constitute constructive notice of the appropriation of the manor of Springetsburg under the warrant of 1722.

2. The appropriation of Springetsburg manor was not sufficiently notorious, prior to the warrant of re-survey in 1762, to affect with constructive notice subsequent purchasers and settlers.

3. The warrant of re-survey of this manor of 1762, affected all persons with notice of the existence of the manor.

4. A survey of land under a special descriptive warrant, was no more necessary to constitute a proprietary manor under the divesting law, than in the case of a private individual. If the survey was made and returned prior to the 4th of July 1776, it was sufficient.

5. Those who acquired titles within the manor of Springetsburg, after the warrant of re-survey, are to be considered as purchasers with notice, and not entitled to conveyances, except on the terms offered by the proprietaries.

6. Those who acquired titles within the manor, prior to 1762, without notice of the re-survey of the manor, on common warrants, applications, and settlements; are entitled to the surplus, as well as to the quantity stated in their warrants, on paying for them on the common terms.

[In equity. Bill by Daniel Conn, Francis Grove, Isaac Grove, and others against William Penn and John Penn, for conveyances of the legal title to lands claimed by complainants under equitable titles.

[There was an interlocutory decree directing certain proofs and appearances before commissioners, and, certain of the complainants refusing to comply with the requirements of the decree, the bill was dismissed as to them. They thereupon appealed to the supreme court, which reversed the decree of dismissal on the ground of its irregularity. See Case No. 3,104, next preceding, and note at the end thereof.]

Mr. Chauncey, Mr. Peters, and J. R. Ingersoll, for plaintiffs.

Mr. Rawle, Mr. Binney, and John Sergeant, for defendants.

WASHINGTON, Circuit Justice, now delivered the opinion of the court. When this cause was heard at the April term 1818 (see Pet. C. C. 496 [Case No. 3,104]), the nature of the proprietary title to the soil of Pennsylvania generally, and to the asserted manor of Springetsburg in particular, was fully examined in discussed by the court; and to the opinion delivered in that case, in relation to those parts of it, we now refer for the purpose of avoiding the unnecessary repetition of the same matter. It was then stated that, by force of certain concessions, or agreements made, and rules and practices of the land office adopted by the original proprietary, all persons complying with the prescribed terms on which the territorial lands of the province were offered for individual appropriation, acquired a title to the portion of land so appropriated by them; not only against other private individuals who might thereafter attempt to appropriate the same lands, but even against the proprietary himself, unless he had previously and by some act of notoriety, evinced his intention to withdraw such land from the general mass, and to appropriate it to his own use, in satisfaction of what was denominated his tenths, and that such intention was made known by a warrant or order to survey such reserves, and surveys thereof were accordingly made for his use. But that after such notorious appropriation of any particular portion of the land for the use of the proprietary, no individual could acquire a title to any portion of the tract so reserved without a special agreement with the proprietary, which

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

might, or might not be in the common terms, as he might please.

In the examination of the various claims of the plaintiffs, the court will arrange them under the two following heads: 1. Those who acquired titles upon the common terms applicable to the territorial lands, and yet located themselves within the boundaries of the manor, as ascertained by the warrant of survey of 1722, under the authority of Governor Keith, or of the warrant of 1762, issued by Governor Hamilton, and the re-survey made in pursuance thereof, in 1768. 2. Those who acquired titles within the boundaries of the manor, as designated by the survey of 1722, or the warrant of 1762, and the survey made under it, with notice of its existence, either actual or constructive. Under these general heads the present inquiry will be pursued.

1. In the former opinion, it was stated, that the equity upon which the claimants, coming under the first head, could rest their pretensions, was, that they acquired their titles without notice of the legal title of the proprietary to this asserted manor. The correctness of this position we believe to be unquestionable. But since there may be a material difference between the cases of those persons, who acquired titles to lands within this manor before, and those who acquired them after the date of the warrant of re-survey; the inquiry under this head will be confined, in the first place, to those who claim under titles which commenced prior to the 21st of May, 1762; and secondly, to those whose titles originated after that period.

As to the first. That the plaintiffs are equally affected by constructive, as by actual notice of the title of the proprietary to this manor, is a point very properly conceded by the plaintiffs' counsel; but then it is insisted by them, that the warrant and survey of 1722 ought not, under the circumstances which attended those acts, and the evidence appearing in the cause, to be considered as amounting to constructive notice to any of the plaintiffs, whose claims originated by common warrants, applications, or settlements. The difficulty in which this part of the case is involved, was felt by the court at the former hearing of the cause, and we are by no means prepared to say that it is altogether removed by the ingenious and able arguments which have been urged on the present occasion. Nothing can be more improbable, as it would seem, than that the re-survey in 1768 should represent the survey made under Keith's warrant in 1722. The latter warrant is special, and describes, with such apparent precision, the place at which the survey was to begin, that it would seem to us impossible that it could have been mistaken; it is, upon the S. W. bank of Susquehanna, over against Connestogo creek. The courses and distances are plainly marked out: W. S. W. ten miles; thence N. W. by N. twelve miles; thence E. N. E. to the uppermost corner of the Newbury tract; thence S. E. by E. along the head line of Newbury to the southern corner tree of that tract; and thence down the side line thereof to the river. In this description of the tract to be surveyed, there are no calls for natural or artificial corners which could reasonably have warranted a departure from the prescribed courses and distances, and thereby to countenance the supposition that they were departed from for the purpose of accommodating the survey to other, and more important calls. In addition to all this, the return of survey professes generally to have been executed in conformity to the warrant, and the courses and distances stated in the return are precisely the same as those mentioned in the warrant. The only difference between the authority given, and its execution, is, that the former makes the beginning to be over against Connestogo, and the latter commences at a run called Penn's run, and takes no notice of Connestogo. Whether this be any thing more than a mere verbal difference, does not, and probably cannot, appear at this remote period. It is in proof, that this is a run over against Connestogo; but whether it was ever called Penn's run, or whether there be a run on that side of the river which ever was designated by that name, does not appear, even by traditionary evidence. The boundaries of this tract of land, as asserted in the warrant of re-survey, and the survey made under it, are irreconcilably variant from those stated in the warrant of 1722. The former disregards Connestogo creek as entirely as if no such creek had ever existed, being at a point so high up the river as to leave that creek entirely out of sight. The line to the westward, instead of ten miles, turns out to be seventeen; and the north line, instead of being twelve miles in length, is but the half of that distance. There is another difference which is remarkably striking; provided, the mine tract, surveyed by order of the board of property, was the same which had been previously surveyed for Governor Keith, under the name of Newbury; of which we have very little doubt. It is, that the north line of the survey, under Hamilton's warrant, is considerably to the north of the most northerly line of the above mentioned tract; whereas the warrant of 1722, called expressly for that tract, and was, in some of its lines, to be bounded by it. Were there no other evidence in the cause in relation to this mysterious portion of it, there could scarcely exist a doubt in any mind that the boundaries of Keith's survey, as laid down on the map exhibited at the trial, and contended for by the plaintiff's counsel, are correctly delineated. But the following facts, which are in proof, afford such a mass of positive and circumstantial evidence of the identity of the two surveys, as asserted by the defendant's counsel, as strongly to incline the judgment to embrace this latter

position. The facts alluded to are the following: 1. The recitals contained in the warrant of re-survey in 1762, a period of only forty years subsequent to the original survey, when it is at least probable that Governor Hamilton, and the officers of government and of the land office, had the advantage, not only of the testimony of living witnesses as to the actual lines of the survey, but of their own recollection of the plat which had been made and returned, although it was then lost or mislaid. 2. The agreement of Thomas Penn in 1736, with the fifty-six persons who had previously settled on this manor, with the consent of the proprietaries; and who were so located on, or near to its western, northern, and southern lines, as designated by the warrant of re-survey, and in other parts of the area included within those lines, as strongly to countenance the assertions in that warrant. 3. The warrant of 1741, for laying off the town of York within the manor of Springetsburg. 4. The letter of Mr. Secretary Peters to Mr. Penn, in the year 1743, in which he speaks of York as lying nearly mid way of the manor. 5. A considerable number of surveys made under Thomas Penn's grants, or under warrants to agree, prior to the date of the warrant of re-survey, in all, or most of which, the land is expressly stated to be within this manor. 6. The fact, indisputably established by the evidence in the cause, that there is not a single survey which notices the manor that was located to the south of the south line of Hamilton's survey. 7. The letter of Stevenson, a deputy surveyor, to Mr. Peters, dated in 1759, stating that it was time to sell the lands about York, and the reasons assigned by him why the step should be adopted. His letter to Scull in 1761, in which he complains of certain unauthorised surveys within the survey of 1722, of the manor of Springetsburg, and his account in April 1762 against the proprietaries, for his care of Springetsburg manor from the year 1750. These facts are very inconsiderably weakened by evidence of a negative character given on the part of the plaintiffs, and they were relied upon by the defendant's counsel to prove, not only the truth of the recitals in the warrant of re-survey, but also the notoriety of the existence of the manor as therein asserted, so as to affect with notice all persons who acquired titles within this manor prior to the warrant of re-survey. The weight of this evidence in maintaining the first of these positions, was felt and admitted by this court on the former hearing, and we are compelled to acknowledge that our minds still incline, though with much less confidence than formerly, to the same conclusion.

The second position which these facts are supposed to maintain, remains now to be considered. Admit that the real boundaries of this manor did in fact correspond with the boundaries of the re-survey made in 1768, does it follow that those who acquired titles to the land within them, prior to May 1762, under common warrants, applications, or settlements, are in equity to be affected with constructive notice of the existence of the manor? This is the great, the perplexing question in the cause. Its solution must rest mainly upon the establishment of the fact, that the asserted manor was withdrawn from general appropriation, by some act of sufficient notoriety to guard those who might desire to acquire lands in that part of the province, against invading this proprietary reservation, and of which they might, and therefore ought to have taken notice. What were the acts which constituted the tract of country, included within the asserted boundaries of Keith's survey, a manor, or proprietary reservation? They were the warrant, the survey, and the return. Were any of these of a nature to afford constructive evidence of their existence to the persons here described? 1. The warrant—that was, contrary to the practice of the proprietaries in appropriating their tenths, issued by the governor, and directed, not to the surveyor-general, to whom all persons looked as the executive officer in land appropriations, but to three private gentlemen, who, though of highly distinguished standing in society, were not the official characters to whom the executions of warrants to survey lands, either for the proprietries or for individuals, had ever before been directed. The warrant was not of record in the land office. 2. The survey—this was not, and could not have been made on the ground, in the usual way, so as to give notice of its execution even to the vicinage, since it was performed in two days, which the evidence of an experienced surveyor, who many years after attempted to retrace its lines, has shown to be impossible. The surveyor may have advanced by the direction of the compass to certain corners, and marked them; but it is nearly impossible that he could have stretched the chain or marked the lines; and in confirmation of this hypothesis, it is proved, that not a marked tree of that survey was found, when Mr. Spangler, at a late period, attempted to retrace the lines of that survey.[2] 3. the return of this survey—this was made, not to the land office, but to the secretary of state's office, where its acceptance was refused. It was, however, together with the warrant and the decision of the counsel, placed upon the proceedings of that body, but was never returned into the land office. It is the opinion of the court that such a warrant, so created, directed, executed, returned, and recorded, cannot reasonably be considered

[2] It is not intended to here intimate an opinion that the proprietors were bound to conform to the ordinary rules of the land office, applicable to private individuals in appropriating their tenths, provided the acts by which their reservations were made, were of a nature to give reasonable constructive notice of their existence to subsequent purchasers and settlers.

as constructive notice to any person of this proprietary reservation.

But there is a much stronger point of view in which this part of the case is to be considered,—namely, the reputation of the manor, independent of those acts which had created it, which the defendant's counsel insist was sufficient to excite inquiry as to the existence and limits of the manor, and to affect, with the consequences of constructive notice, all those who might attempt to appropriate land within those boundaries. That such a reputation prevailed to a certain extent, cannot be questioned; it is abundantly proved by the facts before enumerated as to the asserted existence of this manor. But although these facts may prove that this tract of country was laid off for a manor in 1722, and was so reputed; were they of such a character as to visit with the consequences of constructive notice those who might afterwards wish to acquire lands within that section of country? The strongest evidence in relation to this question, is the acknowledgment of the fifty-six grantees under Thomas Penn, that they were located within the manor of Springetsburg; and yet, the weight of this evidence is greatly diminished by the circumstance that, as they were to pay for their lands on the common terms, it was of little consequence to them, as to the quantity to which they were entitled, whether they were within or without a manor. Besides which, that instrument ascertained no boundaries of the manor. The assertions of the warrant of re-survey as to the boundaries of this manor, being long subsequent to the settlements and appropriations which form the subject of out present inquiry, are of course inapplicable. The letter of Mr. Secretary Peters to Mr. Penn, and those of Stevenson, the deputy surveyor, and his account against the proprietaries, were merely private communications; and the surveys of lands within the manor under warrants which recognized the manor, might be totally unknown to others who located themselves under common warrants, or to settlers in general.

The opinion of this court at the former hearing, proceeded mainly upon the ground that the reputation of the existence of this manor, according to its asserted boundaries in the warrant of re-survey, was so general and well established, as to amount to notice to all those who settled, or obtained common warrants prior to 1762; and this opinion was in no small degree influenced by the supposition, that the settlements and improvements made by the licensed settlers within the manor, and the surveys made around and adjoining the different lines of the manor, so conformed to those lines as designated by the warrant of re-survey, as to afford strong evidence of their being the real lines. But it now appears, by the evidence of the surveyor who ran and plotted the lines of the manor, according to the calls of Keith's warrant, that there is not a single warrant, survey or settlement, within or without the manor, which respected, in the slightest degree those lines, by calling for or conforming to them as a boundary. The idea of a general reputation, sufficiently strong to affect subsequent purchasers, is greatly repelled by other evidence, now before the court, which was rot exhibited at the former hearing. Many ancient persons, born and brought up within the manor, have been examined, who depose that they never heard of this manor until after the year 1762 or 1768; and there is not a single witness who deposes in favour of the asserted reputation of the manor previous to those years.

After the most anxious examination of the evidence upon this intricate question, we have come to this conclusion: that, although the settlers, under the special license of Thomas Penn, and many others, acknowledged themselves to be located within the manor of Springetsburg, still, the reputation of the existence of the manor was not so generally diffused as to warrant the court in affecting with notice of that fact, persons who acquired titles within the manor, prior to the warrant of re-survey. But suppose the reputation of this manor was so general as to have imposed upon such subsequent purchasers and settlers, the necessity of making such inquiries as might enable them safely to avoid locating themselves within the manor; where were they to obtain the desired information? If they applied to the land office, the only legitimate or known source of information in relation to land titles, they would have found there no evidence of the existence of this manor. Admit, which is going to the verge of the strictest doctrine of constructive notice, and of presumptive evidence, that they should, at that office, have been referred to the secretary of state's office, what information would the warrant and return of survey of 1722 have afforded them? They would have found that the southern line of the manor commenced over against, or opposite to Connestogo creek, and ran westwardly but ten miles, and that the northern line was bounded by a certain point of the Newbury tract, which had not long before been surveyed. But those lines were so entirely at variance with the reputed lines of the manor, that they might naturally distrust the latter, and confide in the former, as indicating the real boundaries of the manor. But in this conflict between the written evidence of the boundaries, and the reputed boundaries, can it be fairly affirmed, that this manor was appropriated by such an act of notoriety as ought to affect subsequent purchasers? We think not. And even in arriving at this extreme point of the case, we have made suppositions which the doctrine of notice to subsequent purchasers does not warrant. The agreement of Thomas Penn in 1736,

with the licensed settlers, being of record in the land office, was, we admit. notice of the existence of this manor. But at what time was this agreement deposited in the land office? Of this there is no evidence. And even if it were proved to have found its way into that office before the year 1762, it would, nevertheless, be a harsh doctrine in a court of equity, to affect subsequent purchasers with constructive notice of the contents of a paper, not otherwise on file, than as being copied into Blunston's license book, with which it formed no necessary, or natural connection. After the most deliberate examination of this intricate question, we have come to the conclusion: that the appropriation of this district of country as a manor, was not sufficiently notorious to affect with constructive notice, subsequent purchasers and settlers. Our opinion upon this point was different at the former hearing of the cause. But as it is not less our wish, than our duty, to decide correctly according to the best of our judgment, we can never feel mortified in correcting a former opinion which we believe to be erroneous. The evidence upon the present hearing, of which we had not the benefit when the former decree was pronounced, has tended, in no inconsiderable degree, to change our opinion upon this point. The second inquiry, under the first head, embraces all those who acquired titles to land within the boundaries of the manor, as designated by the re-survey in 1768, subsequent to the date of the warrant of re-survey in 1762. As to those claimants the court cannot entertain the slightest doubt. This warrant was special, and so certain in all its calls, from the beginning to its close, that the survey could not render it more so. It was impossible that every individual who was desirous to appropriate land on the west side of the river, and who used ordinary caution, could innocently locate himself within the boundaries designated in this warrant. It issued from the land office; was directed to the surveyor general, and was of record on the warrant book of that office. It was, consequently, legal notice to all the world. If facts, occurring in pais, tending to prove that the existence of this manor was notorious in that part of the province, were at all necessary in support of this position, the evidence in the cause furnishes them abundantly. Twenty-eight surveys were made in the manor under Thomas Penn's grants, between the dates of the warrant of re-survey, and the return of the survey under it. Forty-two warrants to agree, for land within the manor, were purchased within the same periods. Three warrants of acceptance, referring to the manor, issued in 1763, 1766, and 1767. Twenty-three surveys under warrants to agree, were made subsequent to May 1762. Twenty-six warrants, excluding this manor by name, were issued within the same period. The plaintiffs' counsel indeed, could not, consistently with the candour which belongs to their characters, controvert the notoriety which this manor acquired subsequent to the date of the warrant of re-survey; but admitted that from that period, the evidence to establish the existence of the manor, thickened from year to year.

The argument relied upon by the counsel on this side of the cause was, that, to the perfection of a proprietary manor, a survey duly made and returned into the land office, was indispensable; and that, until these acts were performed, there was no appropriation of the tract of land designated by the warrant to the use of the proprietaries, which barred the rights of individuals to locate lands within the boundaries specified in the warrant. The warrant, or order to survey a designated tract of country as a manor, was treated by the counsel as amounting to nothing more than the declaration of an intention to constitute the same a manor, which intention might be afterwards abandoned; and consequently, that the mere indication of such an intention, so uncertain as to its completion, did not create such an appropriation as to interfere with the condition expressed in all warrants, viz. "that the lands to be located should be waste and unappropriated." This, we believe, is a correct statement of the principles contended for by the plaintiffs' counsel, in aid of which, many ingenious arguments were urged. We think that, upon general principles, this argument cannot. for a moment, be sustained. It places the lords of the soil of Pennsylvania upon a ground so unequal with, and inferior to the condition of private individuals. whose rights to portions of that soil grew out of proprietary concessions, as to require, for its support. a practice sufficiently uniform and established to constitute a local law applicable to the subject. But the practice was of a different character. Without encumbering this opinion by an examination of all the evidence upon that point, it may be sufficient to notice that which is directly applicable to the manor of Springetsburg. The numerous warrants to agree, not only for the quantity of land which the warrantees were authorized to appropriate, but for surplus land, upon titles acquired after the year 1762, afford abundant proof that the appropriation of the manor was considered, both by the proprietaries and the claimants, as having been consummated by the warrant of re-survey. There is no opposing evidence to weaken these stubborn and conclusive facts. If a private person obtained a special warrant for land, it was sacred, not only as against other individuals, but as against the proprietaries. They might abandon their rights, or might be guilty of such laches in consummating their titles as to subject their equitable titles to

be postponed in favour of subsequent purchasers without notice. But, except in these instances, the warrant, if special, vested a title which was transmissible by conveyance, devise, or descent; and we need go no farther than the case now under consideration to prove that a survey was not considered essential to the consummation of the title obtained by warrant or settlement, since the majority of the plaintiffs claim under warrants more than half a century old, which either never have been surveyed, or the surveys have not been returned.

Where is the principle of general law which gives validity to those titles against the proprietaries, and yet denies to them similar rights? We know of none, unless it is maintained by the following argument, which has been strongly pressed upon the court: that the divesting law of 1779 has defined a manorial title to be, "a survey of the tract so appropriated, duly made, and returned into the land office." The conclusion drawn from this legislative declaration is, that the territorial lands were not withdrawn from general appropriation before they were surveyed and returned into the land office, and consequently that, until the title of the proprietaries was consummated by this last act, private individuals had a right to treat the tract of country designated by the warrant for a manor as common land. This interpretation of the statute, which has been given to it for the first time on the present hearing, is not, in the opinion of the court, warranted either by the letter or intention of the act. It contains no expressions which look to the definition of a manor, or proprietary reservation. It leaves, and professes to leave, untouched by the general divestiture of proprietary interest in the soil of Pennsylvania, their private lands, whereof they were possessed or entitled to in 1779, and such as were known by the name of their tenths or manors, which had been surveyed and returned into the land office before the 4th of July 1776. These expressions are purely descriptive, not of tenths or manors generally, but of such of them as had been surveyed and returned before a specified day. So far from bearing the construction which is contended for, they plainly admit the existence of manors which had not been surveyed and returned, because it saves those only which were distinguished by those acts. If this law was intended to give a legislative definition of a manor or proprietary reservation, would it not be absurd to make the character of the thing described to depend, not upon those acts which consummated all titles, but upon the time when they were performed? If the return of survey was that act, why was it not a perfect one, if it was made on the 5th as well as on the 4th of July 1776? As a matter of definition merely, time was quite unimportant; as it described the particular property which was intended to be excepted from the general scope of the act it was indispensable, or at least was deemed so by the legislature. It was well known to the legislature that the title of the proprietaries to their reservations had therefore no more depended upon surveys and returns than the rights of private individuals to their lands. If a new principle of law was intended to be introduced and applied to the former, is it conceivable that general expressions would have been employed, which could only, by a forced construction, give effect to the intention?

But it is said that in the former opinion delivered in this cause, this court considered the survey and return as essential to the constitution of a manor. We think that no such view was expressed in that opinion, and we are quite confident that it was not entertained by the court, or intended to be expressed. It was stated, and we believe truly, that, by the practice of the officers of the land office, when a portion of land was intended to be withdrawn from the general mass for the use of the proprietaries, it was made known by a warrant of appropriation, and a survey to mark out and locate the ground thus withdrawn. This was merely the statement of an historical fact. But we did not say, much less did we mean to say, that a special warrant did not constitute an appropriation for the proprietaries, which it did in respect to private persons, until it was surveyed and returned into the land office. If the warrant to lay off a manor had been general, a survey was indispensable to the title, as well in the one case as in the other. But it was not so in either, where the warrant was so special as to point out its location. Upon this point then we are of opinion, that all such of the plaintiffs as claim under titles, of whatever kind, which originated subsequent to the date of the warrant of re-survey, are to be considered as affected with notice, and that they have no equity beyond that which is offered to them by the defendants, and upon the terms which accompany that offer.

2. Nothing remains to be said under this head, as it is settled by the previous part of this opinion, in relation to those who acquired titles to land within the manor after the date of the warrant of re-survey. Being purchasers with notice of the manor, they have no equity other than what is offered to them. The laches of most of the plaintiffs in perfecting their titles has been strongly urged against them by the defendant's counsel, not as the court understood, for the purpose of controverting altogether their right to the equitable interposition of the court in their favour, but of diminishing their claim to come in upon other terms than such as the court might think equitable, without regard to the common terms. The court cannot but admit that the neglect alleged by the counsel against the plaintiffs, or many of them, is fully proved, and would be inexcusable in the view of any person who

does not feel, as the benevolent proprietaries of the province seem always to have felt towards those who settled and improved the soil, and who is not disposed to act in the benign spirit by which they were influenced. But we think that the tribunals of justice acting on this subject, and exercising, not a capricious judgment, but that which legal duty imposes, are bound to regard the uniform conduct of the proprietaries as furnishing a rule of decision founded in the practice and common law (so to speak) of the province. To attempt, at this time, to set up more rigid rules against the purchasers and settlers of that remote period, than the proprietaries practically imposed, would be to take them by surprise, and to affect their rights by something very much resembling the justly reprobated principle which pervades all retrospective laws. Our opinion upon this part of the case may be charged with being over indulgent to the plaintiffs who stand in the predicament described; but we could not reconcile it to our sense of justice, to be more strict.

The remaining subjects of inquiry are, first, the overplus lands; and second, the claim of an abatement of interest upon the purchase money to be paid by such of the plaintiffs as seek conveyances of legal titles.

1. As to overplus lands. The same arrangement of the plaintiffs in relation to this subject seems to be proper, as has already been made of them in respect to their titles to the quantity of lands expressed in their warrants and applications; namely, those who acquired titles upon the common terms, and yet located themselves within the manor, without notice of its existence; and those who acquired titles with notice of the manor, either actual or constructive. As to the former, we entirely agree with the plaintiffs' counsel, that their right to the overplus land is an incident to that which they have to the quantity specified in their warrants, or were entitled to by the practice of the land office, in relation to settlements and improvement rights; and that the two stand precisely upon the same ground in point of law. Why are they not entitled to the overplus on the same terms? The answer given, is, because their warrants expressly stipulated that they were to be located upon vacant and unappropriated land, and the overplus here was not vacant, but had been appropriated by the proprietaries. But it may be replied, that the reason is no more applicable to the overplus land, than it is to the quantity stated in the warrant; and that, if it be a sound one as to the latter, it is equally so as to the former. Why are the plaintiffs, who claim under common warrants, applications, and settlements, prior to the date of the warrant of re-survey, entitled to conveyances upon paying for them upon common terms? It is, and can be upon no other ground than this, that as to them there was no manor; and they intruded, not into appropriated land, because the appropriation had not been made by such an act of notoriety as could affect their titles. Does not the same reason apply, with precisely the same force, to their overplus land? Considering the manor, as to them, common territorial land, they were justified in treating it as such; and to avail themselves of the benefit of a universal practice which prevailed throughout the whole of the province, except in those districts which were appropriated to the proprietaries, of paying for overplus land upon the common terms applicable to the quantity specified in their warrants. As to the latter description of persons, those who acquired titles, or who located themselves within the manor, with notice of its existence; nothing can be more obvious than that they have no equitable titles to their overplus, and that they must agree with the defendants respecting it, as they would have been obliged to do with the proprietaries antecedent to the passage of the divesting law, as is abundantly proved by the numerous warrants to agree for surplus and other lands, which were given in evidence in the cause. We will not repeat what was said by the court upon the former hearing of this cause, but will merely refer to that opinion, which, in this respect, has not been changed.

2. As to abatement of interest on account of the inroads of the borderers claiming under Maryland, and the revolutionary and late war with Great Britain, the court has nothing to add to the opinion formerly given on this point. In the former decree, the court referred it to the master to report, whether the defendants had, or had not a known agent in this country, authorised to receive the moneys due to them by the plaintiffs, or those under whom they claim, either for the whole, or any part of the period of the revolutionary, or late war with Great Britain. The report made under this order is, that, during the whole period of five wars, the defendants had a known agent in the state of Pennsylvania, authorized to receive all moneys due to them by the complainants, and those under whom they claim, as well as by all other persons. In consequence of this report, the plaintiffs' counsel have declined arguing this point, and submitted it to the court. We are clearly of opinion that no abatement of interest ought to be allowed.

CONNECTICUT, The. See Cases Nos. 6,391–6,393.

CONNECTICUT GEN. LIFE INS. CO. (McMURDY v.). See Case No. 8,903.

CONNECTICUT LIFE INS. CO. (BIDWELL v.). See Case No. 1,393.

Case No. 3,106.

CONNECTICUT MUT. LIFE INS. CO. v. BOWLER.

SAME v. PLUMMER.

[Holmes, 263.][1]

Circuit Court, D. Maine. Oct., 1873.

EXTENT OF LIABILITY OF SURETY OF PARTNERSHIP—DISSOLUTION.

1. A surety upon a bond given by a partnership to an insurance company to secure the faithful performance by the firm of the duties of agents of the company, and payment to it of the amounts received by the firm as such agents, is liable in an action on the bond, brought after the dissolution of the firm by death of one of the partners, only for amounts received by the firm as agents of the company, before the dissolution.

2. The surety is not liable on the bond for amounts received after the dissolution, by the surviving partner, then acting as agent of the company.

3. Nor for amounts received by sub-agents before the dissolution of the firm, and after the dissolution paid by them to the surviving partner, then acting as agent of the company.

[Actions at law by the Connecticut Mutual Life Insurance Company against James H. Bowler, and by the same plaintiff against Patience C. B. Plummer.]

J. S. Rowe, for plaintiff.

E. F. Hodges, for defendants.

SHEPLEY, Circuit Judge. This is an action at law against the defendant, Bowler, as surety in a bond, given to secure the faithful performance of their duty, as agents of the plaintiff corporation, by the firm of B. Plummer & Sons, composed of Patience C. B. Plummer and Watson E. Plummer. The condition of the bond is as follows: "Now, therefore, if the said B. Plummer & Sons shall promptly pay to said company the amount received from time to time, and shall well and truly perform all and singular the duties as agents of said company, as directed, according to the provisions of the charter, by-laws, rules, and regulations of said company, now existing, or which may be adopted by said company, for and during the time he officiates as said agent, and shall deliver all the property which he may receive and hold as agent to his successor in said office, or to such other person as the said company or its authorized officers may direct, then this obligation shall be null and void; otherwise remain in full force and virtue."

On the 18th of March, 1871, Watson E. Plummer, one of the firm, died suddenly at Quebec, leaving Patience C. B. Plummer sole surviving partner of said firm. The firm of B. Plummer & Sons, among other things incumbent on them as agents, received from the plaintiff company receipts for moneys to be paid by parties insured in the company, as premiums upon the renewal of policies. These receipts were forwarded monthly to meet the premiums falling due the succeeding month. On the 18th of March, when Watson E. Plummer died, the firm had collected, on renewal receipts for that month of March, the sum of $2,933.96, from which they were entitled to deduct as commission $346.35, leaving due to the company the sum of $2,587.61. This amount, not having been paid to the company, and having been collected by the firm prior to the decease of Watson E. Plummer, is unquestionably covered by the bond; and for this amount, with interest from the 18th of March, 1871, the company is entitled to judgment against the surety.

On the 18th of March, the company forwarded to the address of said firm at Bangor, Maine, the renewal receipts for the month of April. These in due course were received at the Bangor office on the 22d of March, four days after the death of Watson E. Plummer. Patience C. B. Plummer continued to transact the business of the agency at Bangor, in the same manner as it had been previously conducted by the firm, until the last day of April, 1871, when the agency was revoked, and F. S. Coffin was appointed agent in place of said firm, and the business was conducted by him from that time forward, Patience C. B. Plummer receiving the premiums on the renewal receipts for the time previous to the month of May.

The collections of premiums upon the April renewal receipts were made during the months of April, May, June, and July; and on the twenty-fourth day of August, according to a final account rendered to the company, there was due to said company for such collections, after deducting charges and commissions, a net amount of $29,955.70, for which sum demand was made on the defendants; and, on refusal, an action was brought against Bowler, the defendant in this suit, and another against the surviving partner.

The sum of $29,955.70 includes the sum of $2,587.61, due for collections prior to the death of Watson E. Plummer. It also includes the collections on the April renewal receipts, received after the death of Watson E. Plummer, and also some money (the amount of which does not appear) which was collected by sub-agents on receipts which came into the hands of the firm prior to the eighteenth day of March, 1871, and had been transmitted to the sub-agents, and not returned to the Bangor office until after that day. For these collections the company claims that Bowler is responsible to the extent of the penal sum in the bond. Upon the facts agreed and proved in the case, it seems clear, upon careful examination of the facts and application of the law, that the liability of Bowler cannot justly be extended beyond the sum of $2,587.61, due from the

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firm at the time of the death of Watson E. Plummer. When he died, the partnership, for whose acts and omissions alone Bowler had become surety, was dissolved, and his liability was terminated. All subsequent payments to a surviving member of the firm by policy-holders or sub-agents, whether on receipts transmitted by the firm for collection before the decease of one of the partners, or by the surviving partner after the decease, were payments to parties other than the firm of B. Plummer & Sons; they were not received by that firm "from time to time" during the agency or existence of the firm, nor received "for and during the time he officiates as said agent." All such collections were acts to which the surety was a stranger, and respecting which he had assumed no responsibility. On the death of Watson E. Plummer, the sub-agents ceased to be sub-agents of the copartnership. If they ever stood in that relation to B. Plummer & Sons, as sub-agents of theirs rather than of the company, the death of one of the principals would have terminated the agency. Watson E. Plummer's representatives clearly were not responsible for the moneys collected by the surviving partner after his decease; and Bowler, the surety, could have no claim upon the estate of Watson E. Plummer for any sum he might be compelled to pay as surety for the faithful application of funds which did not come into the hands and possession of the firm before his decease. Bowler might have entered into the contract of suretyship, relying solely on his knowledge of the business capacity and personal integrity and pecuniary responsibility of Watson E. Plummer. Whether he did so or not, he is entitled to the benefit of that, so far as it is a protection to him; and when death deprives him of that, his liability for subsequent acts is terminated eo instanti with the dissolution of the partnership.

Where a copartnership is dissolved by the death of one of the copartners, no notice of the dissolution is necessary; and the surviving members are not bound by any new contract entered into by one of the firm in the copartnership name after such dissolution, although it is made with a person who had previously dealt with the firm, and who had no notice or knowledge that it was terminated by the death of one of the members. Nor can the estate of the deceased partner, nor his heirs or personal representatives, be held on a contract entered into in the name of the firm subsequently to his death, although no notice of the dissolution of the firm has been given. Marlett v. Jackman, 3 Allen, 290; Washburn v. Goodman, 17 Pick. 526; 3 Kent, Comm. (6th Ed.) 67; Griswold v. Waddington, 15 Johns. 57, 16 Johns. 438.

It is claimed that Bowler is liable on the ground that funds in the hands of the sub-agents on the 18th of March, 1871, are to be treated as constructively in the hands of B. Plummer & Sons, so as to charge the surety. There is nothing in the case tending to show that, in the absence of default of payment, or embezzlement by agents, B. Plummer & Sons were liable to pay to the company, until they received the money of the sub-agents. These sub-agents were appointed by them to be sub-agents of the company, and acted under their instructions; but the appointment was made, and the instructions were given, by them as agents of the company. Even if they were personally responsible for any default of the sub-agents, the case does not find any such default occurring before the death of Watson E. Plummer or afterwards. If, after they had ceased to have any relation of agency to B. Plummer & Sons, they paid money to the surviving partner, it would not be on the responsibility of Bowler, especially when such surviving partner, as in this case, was recognized as the agent of the company so that a payment to her was, so far as the sub-agents were concerned, a payment to the company itself. The damages in this case. according to the agreement of the parties, are assessed at the sum of $2,587.61, with interest from the eighteenth day of March, 1871. In the case of Connecticut Mut. Life Ins. Co. v. Plummer, the damages are assessed at the sum of $29,955.70, with interest from August, 1871. This sum includes the sum for which Bowler, the surety, is also liable on the bond given by Plummer & Sons. Judgment accordingly.

CONNECTICUT MUT. LIFE INS. CO. (BUELL v.). See Cases Nos. 2,103 and 2,104.

CONNECTICUT MUT. LIFE INS. CO. (COVERSTON v.). See Case No. 3,290.

CONNECTICUT MUT. LIFE INS. CO. (HARDS v.). See Case No. 6,055.

Case No. 3,107.

CONNECTICUT MUT. LIFE INS. CO. v. HOME INS. CO.

[17 Blatchf. 142.][1]

Circuit Court, D. Connecticut. Sept. 1, 1879.

CANCELLATION OF LIFE INSURANCE POLICY.

1. A mutual life insurance company issued to B. and to H. a policy insuring the life of B. for the benefit of H., for a premium to be paid on a specified day, annually. By the policy, it was to become void if B. should become so far intemperate as to impair his health. The premiums were paid for six years. Two months after the last payment the company cancelled the policy because it learned that B. had become so far intemperate as to impair his health, and notified H. of such cancellation, and offered to pay the surrender value of the policy. H. refused to recognize such cancellation, or to surrender the policy, and tendered to the company the annual premium every year, the tender

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

being always refused. The company filed a bill in equity against H., praying that the policy be declared null, and be surrendered on payment of its surrender value. On demurrer: *Held*, that the bill would lie.

2. A court of equity will exercise its power of setting aside contracts for defects not apparent on their face, although such defects arose after the execution of the contracts, in cases where special circumstances render it inequitable or unjust, or a hardship, to compel the plaintiff to await a suit at law at the instance of the other party.

3. The rule, that a court of equity will not aid to enforce a forfeiture, or to divest an estate for breach of covenant or condition subsequent, is not applicable to the cancellation of a policy of insurance on the life of a living person.

Henry C. Robinson, for plaintiff.
Richard D. Hubbard, for defendant.

SHIPMAN, District Judge. This is a bill in equity, which alleges, in substance, as follows: On June 20th, 1870, the plaintiff, a Connecticut corporation, duly authorized to issue policies of insurance upon lives, issued to Henry H. Bigelow, and to the defendant, a New York corporation, a policy of insurance, whereby the plaintiff insured the life of said Bigelow, in the sum of $6,000, for the benefit of the defendant, upon the payment of a premium of $180.54, and upon the agreement of the insured to pay a like sum on or before June 20th, in every year, during the continuance of the policy. By said policy it was agreed, that, if the assured should become so far intemperate as to impair his health or induce delirium tremens, the policy should become null and void. The premium payments were made by the insured, or by the defendant, until and including the payment maturing June 20th, 1876. About August 28th, 1876, the plaintiff was first apprised that the insured had become so far intemperate as to impair his health. On said day said policy became null and void by said intemperance, and thereupon, on August 29th, 1876, the plaintiff cancelled said policy, and notified the defendant of said forfeiture and cancellation, and offered to pay, in cash, the surrender value of said policy, upon its surrender. Afterwards, the defendant, who is the true owner of the policy, and has acted as the exclusive owner thereof, on or about the —— day of ——, 1877, refused to recognize said cancellation, and declared that it should treat the contract as valid and outstanding against the plaintiff. The plaintiff offered to reinstate the policy, provided it should appear, upon a fair medical examination, that the health of the insured had not been impaired by intemperance since the date of the policy. The defendant refused to assent to such examination, and has the policy in its possession, and refuses to surrender the same, and has, ever since said cancellation, tendered to the plaintiff, on June 20th in each year, the amount of the annual premium, which tender has always been refused. The defendant holds the contract as, in fact, a valid obligation of the plaintiff, and apparently valuable to any person to whom it may be negotiated. The plaintiff is a mutual company, and, by its charter, each policy holder is entitled to a voice in the election and management of the company. It is important, to the proper management of the company, and to a just distribution of its surplus, that the real holders of its policies be known absolutely. All the defences depend upon facts which do not appear upon the face of the instrument. There are, at present, within reach of legal process, a sufficient number of competent and credible witnesses to fully prove the avoidance of the policy, but the plaintiff fears that these witnesses, by death or other causes, may become unavailable for the purpose of resisting a suit upon the policy, at some future time, at the instance of the defendant. The plaintiff offers to pay the full surrender value of the policy at the time of its avoidance. The bill prays that the policy may be declared null, and that the defendant be ordered to surrender it to the plaintiff for cancellation, upon payment of its surrender value, or for other relief. To this bill the defendant has demurred generally. The ground of the demurrer is the alleged want of power in a court of equity to cancel the policy at the instance of the insurance company; and it is insisted (1) that, while a court of equity has power to cancel instruments which are void by reason of fraud in their inception, it has no jurisdiction to cancel instruments which have ceased to be binding since their execution; (2) that while, at the instance of the assured, a court of equity may compel an insurance company to reinstate a cancelled contract, equity will not interfere to enforce a forfeiture.

1. Upon the first proposition, it is true, that a court of equity has not, or will not exercise, jurisdiction to cancel a contract, merely because it has become void or inoperative by reason of some fact which has taken place since its execution. Such an exercise of power would give a court of equity concurrent jurisdiction with courts of law over all contracts which one contracting party may allege to have been broken by the other. Thornton v. Knight, 16 Sim. 509. But, while relief from the consequences of fraud is peculiarly the province of a court of equity, it has not refused to cancel contracts which have been performed, or which have become inoperative, when the special circumstances of the case rendered it unjust or oppressive that the contract should be an outstanding claim against the plaintiff. The reasonable rule is, that a court of equity will exercise its power of setting aside contracts for defects not apparent on their face, although such defects arose after the execution of the contracts, in cases where the special circumstances render it inequitable or unjust, or a hardship, to compel the plaintiff to await a suit at law at the instance of the other party.

Hamilton v. Cummings, 1 Johns. Ch. 517; Hoare v. Bremridge, 8 Ch. App. 22; City of Hartford v. Chipman, 21 Conn. 488; Ferguson v. Fisk, 28 Conn. 501. Chancellor Kent was inclined to think, in Hamilton v. Cummings, that a court of equity had jurisdiction to set aside a bond or other instrument, whether the instrument was void for matter appearing on its face, or from the proofs, "and that these assumed distinctions were not well founded." He says: "Perhaps all the cases may be reconciled on the general principle, that the exercise of this power is to be regulated by sound discretion, as the circumstances of the individual case may dictate; and that the resort to equity, to be sustained, must be expedient, either because the instrument is liable to abuse from its negotiable nature, or because the defence, not arising on its face, may be difficult, or uncertain at law, or from some other special circumstances peculiar to the case, and rendering a resort here highly proper, and clear of all suspicion of any design to promote expense and litigation. If, however, the defect appears on the bond itself, the interference of this court will depend on a question of expediency, and not on a question of jurisdiction."

2. It is true, that courts of equity will not aid to enforce a forfeiture, or to divest an estate for breach of covenant or condition subsequent, unless, perhaps, under extraordinary circumstances. Horsburg v. Baker, 1 Pet. [26 U. S.] 232; Livingston v. Tompkins, 4 Johns. Ch. 415; 2 Story, Eq. Jur. § 1319. When an estate has been forfeited, or when a pecuniary penalty has been incurred, by reason of the happening of a condition subsequent, or of the breach of a covenant, there is usually an immediate remedy at law to regain possession of the estate or to recover the penalty. There being such a remedy, equity will not interfere. "The great principle is, that equity will not assist in the recovery of a penalty or forfeiture, when the plaintiff may proceed at law to recover it." Livingston v. Tompkins, 4 Johns. Ch. 432. In this case, there is no estate to be regained, there is no sum in damages to be recovered. The insured is still living, and a cancellation of the contract is the only result which is to be attained. The plaintiff has now no remedy at law, and, unless it can resort to a court of equity, it must wait and become a defendant at the future suit of the holder of the policy. When such a suit will be commenced is a matter of uncertainty. The rule is not applicable to the cancellation of a policy of insurance upon the life of a living person.

The expediency of interference by a court of equity is apparent from the following considerations: The cancellation of the policies of delinquent policy holders is a duty which a life insurance company owes to its other policy holders. All the insured have an interest that the covenants of each insured person as to health and the payment of premium shall be performed, and that the lives of the insured and the prosperity of the company shall not be impaired by any act which the insured person has agreed shall not be committed. The company insures the policy holders at a rate based upon the estimated average mortality of ordinary healthy persons at the ages of the insured respectively, and the insured agree, among other things, that they will not impair their health by the immoderate use of intoxicating liquors. If the insured are permitted, with the knowledge of the company, to indulge in practices which notoriously invite disease, the system of insurance and the safety of the investment of other policy holders are endangered. Each insured person has an interest in the continuance of the life of every other insured person. In New York Life Ins. Co. v. Statham, 93 U. S. 24, Mr. Justice Bradley says: "The insured parties are associates in a great scheme. The associated relation exists whether the company be a mutual one or not. Each is interested in the engagements of all; for, out of the coexistence of many risks arises the law of average, which underlies the whole business."

But, it is said, the corporation possesses, by contract, the power of declaring that policies have been cancelled for the cause of intemperance. The plaintiff has already exercised this power, and has protected itself and its policy holders. It is not necessary that the policy should be judicially declared to be cancelled, and there is no exigency which requires this court to aid or assist in the cancellation. It is important both to the company and to the insured that the company should be able to know, in the life time of the insured, whether it has made an error in the cancellation of his policy, and whether it is still bound to receive the premium, and whether he has a right to share in the dividends, or profits, or surplus. The insured is annually tendering his premium, and the company is annually refusing to accept the tender. The postponement till the death of the insured of knowledge whether or not the company is under obligation to receive the tender is inequitable and unjust to both parties, because it is a postponement for an uncertain time, a postponement to the pecuniary damage of one party, and a postponement to a time when the ascertainment of the truth of the facts upon which the action of the company was based may have become doubtful by lapse of time and the death or removal of witnesses. It is important that neither party should be left in doubt, during a series of years, as to his or its pecuniary rights in the policy. These special circumstances seem to me to be sufficient to justify the plaintiff in its resort to a court of equity.

The demurrer is overruled, without costs, with leave to answer over.

CONNECTICUT MUT. LIFE INS. CO. (JARVIS v.). See Case No. 7,226.

CONNECTICUT MUT. LIFE INS. CO. (LORIE v.). See Case No. 8,509.

CONNECTICUT MUT. LIFE INS. CO. (MOORE v.). See Case No. 9,755.

Case No. 3,108.

CONNECTICUT MUT. LIFE INS. CO. v. PLUMMER.

[See Case No. 3,106.]

CONNECTICUT MUT. LIFE INS. CO. (PLUMMER v.). See Case No. 11,232.

Case No. 3,109.

CONNECTICUT MUT. LIFE INS. CO. v. TYLER et al.

[8 Biss. 369.][1]

Circuit Court, N. D. Illinois. Dec., 1878.

ASSUMPTION OF MORTGAGE BY GRANTEE—LIABILITY FOR DEFICIENCY.

1. An assignment by the mortgagor of his interest in the mortgaged premises, to a third party, who agrees to pay off the mortgage, will not prevent a deficiency decree being entered against him unless he has been released by the mortgagee.

[Cited in Jarboe v. Templer, 38 Fed. 216.]

2. And the acceptance by the mortgagee of a second mortgage upon the same premises, from such assignee, would not constitute a release of the first mortgagor from his personal liability to pay a deficiency.

[In equity. Bill by the Connecticut Mutual Life Insurance Company against James E. Tyler and others.]

Isham & Lincoln, for complainant.

Monroe, Bisbee & Ball, for defendants.

DRUMMOND, Circuit Judge. This is an application made for a decree, payable in money, for the balance that has been found due to the plaintiff, over and above the proceeds of the sales on mortgage foreclosures, in pursuance of the 92d rule in equity. This motion is opposed by the owner of one of the lots mortgaged, and which has been sold.

The facts are substantially as follows: There were four lots on Monroe street, in Chicago, and which for distinction we will call numbers 1, 2, 3, and 4. No. 1 was on the corner of Dearborn street and owned by Mr. Shepard. The estate of Albee owned No. 2, and Prickett & Drysdale 3 and 4. Shepard made a mortgage of his lot to the plaintiff. Prickett & Drysdale also made a mortgage of No. 3 to the plaintiff.

After these mortgages were made, Tyler purchased the whole of the four lots, of course subject to the mortgages made by Shepard, and by Prickett & Drysdale. He then mortgaged the whole of the four lots to the plaintiff. The plaintiff thus became the owner of three mortgages on the property, from Shepard, lot No. 1; from Prickett & Drysdale, lot No. 3, and from Tyler of all the lots, 1, 2, 3 and 4. The plaintiff filed a bill of foreclosure on all the mortgages in one suit, and obtained a decree, and the lots were sold separately. Lot No. 1 was sold and bid in by the plaintiff for about $8,000 less than the amount due on the Shepard mortgage. Lot No. 3 was bid in for a sum greater than was due on the Prickett & Drysdale mortgage; and the other lots were bid in at prices which caused a large deficiency on the Tyler mortgage. And the principal question is whether the plaintiff is entitled to a personal decree against Shepard for the full amount of the balance due on his mortgage.

It seems to me clear that the plaintiff is entitled to this money decree. It is said that there was a novation made by the parties, because Tyler purchased the property, subject to the two prior mortgages, and agreed to pay them off, and that when the mortgage was made by Tyler to the plaintiff, there was a ratification and recognition of the two mortgages already made. But there is nothing upon the face of the papers, or in the proofs to show that the plaintiff ever released Mr. Shepard from the obligation of his mortgage, and, of course, there could not be a novation unless there was a release of his obligation, and some other person substituted for the payment of what was due by him, for instance, Mr. Tyler; but there is nothing to show that the plaintiff agreed to look to Mr. Tyler for the payment of the Shepard mortgage, and to release the latter. Consequently, one of the main elements of a novation was wanting in the case. The property having been sold for less than the amount of the debts due, the plaintiff is clearly entitled to a personal decree against Mr. Shepard, and also against Mr. Tyler for the balance due. The 92d rule in equity, under which this motion is made, authorizes a personal decree against the mortgagor for the balance due above the price paid on the sale of the property in a foreclosure case; and consequently under the facts in this case, the plaintiff is entitled to the decree which he asks against Mr. Shepard and Mr. Tyler respectively.

CONNECTICUT MUT. LIFE INS. CO. (WHITE v.). See Case No. 17,545.

CONNECTICUT MUT. LIFE INS. CO. (WOLF v.). See Case No. 17,924.

CONNECTICUT MUT. LIFE INS. CO. (WOLFF v.). See Case No. 17,929.

CONNECTICUT PEAT CO. (LEAVITT v.). See Case No. 8,170.

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

Case No. 3,110.

In re CONNELL.

[3 N. B. R. 443 (Quarto, 113).][1]

District Court, S. D. New York. Feb. 7, 1870.

DISCHARGE IN BANKRUPTCY—OMISSION IN SCHEDULES.

Where a bankrupt had omitted to include in Schedule B statement of an interest in an estate in expectancy under a will, *held*, discharge must be denied until the same be amended, for which leave is granted, with reference to the register for that purpose.

[In bankruptcy. In the matter of Frederick F. Connell, Jr.]

J. P. C. Cotterill, for bankrupt.
C. C. Beaman, Jr., for creditor.

BLATCHFORD, District Judge. The first specification does not allege anything which is made by the 29th section [of the act of 1867 (14 Stat. 531)] a ground for withholding a discharge. The third specification is not sustained by the evidence. As to the second and fourth specifications, the bankrupt ought to have included in Schedule B to his petition his interest under the will of Henry Vanderveer, in the estate left by said Vanderveer, as an estate in expectancy and as property assignable, under the act, to the assignee. But I do not think, on the evidence, that the omission to so include such interest can be held to have been willful, or that either of those two specifications is sustained, or that there is any ground established for withholding a discharge if such interest be included in Schedule B. But as long as such interest is not included in that schedule, it cannot be said, on the evidence, that the bankrupt has conformed to his duty under the act, or has conformed to all the requirements of the act. The case will be referred back to the register, with leave to the bankrupt to amend Schedule B to his petition in the particular indicated, under the direction of the register.

CONNELL (The BOB.). See Case No. 1,587.

Case No. 3,111.

CONNELLY'S CASE.

[2 Cranch, C. C. 415.][2]

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

DISCHARGE OF INSOLVENT DEBTOR—PRACTICE.

1. The allegation filed to deprive a debtor of the benefit of the insolvent act [2 Stat. 237] must be specific and certain.

2. The refusal of a judge to discharge a debtor, if the proceedings were irregular, is no bar to his discharge upon a subsequent application.

3. All the orders and proceedings must be by the judge to whom the application is made.

John Connelly applied to the Hon. J. S. Morsell, one of the judges of this court, on the 22d of November, 1823, for the benefit of the insolvent act of the 3d of March, 1803 (2 Stat. 237), and the usual notice was given for the creditors to attend on the first Monday of December, when Michael Murray, one of the creditors of the insolvent, filed allegations under the 7th section of the act, charging, 1. "That the said Connelly was refused heretofore, namely, on the first Monday in October, 1823, by his honor Judge Thruston, at the suit on ca. sa. of said Murray, the benefit of the statute for the relief of insolvent debtors upon proof that the said Connelly had given a preference to one or more of his creditors." 2. "That he hath given a preference to his creditors." 3. "That the said Connelly hath not set out in his schedule a true account of all his real and personal property." 4. "That he has lessened his right to real estate in the county of Montgomery, Maryland, by disposing of the same with the view of defrauding his creditors." 5. "That the said Connelly has not accounted in his schedule for his interest to real property that he is entitled to in the county of Montgomery, Maryland." 6. "That the said Connelly is not now entitled to the benefit of the insolvent law, having been previously refused the benefit of it upon proof before his honor Judge Thruston that he had sold his real estate, or his right to real estate, in Montgomery, Maryland, with the view of defrauding his creditors, or for the purpose of giving some one or more of them an illegal and undue preference."

Mr. Key, for debtor, objected to the five last allegations, that they were too vague, and general, and that the debtor ought not to be put to answer them. As to the first allegation, that the debtor has been denied the benefit of the act upon the former petition, he contended that the proceedings upon that petition were irregular, and that the refusal of the judge to discharge the debtor upon that petition can be no bar to his present application. That petition was addressed to the chief judge; the order for the creditors to appear on the first Monday of October, indorsed upon the petition, is signed in the name of Morsell [Circuit Judge], and Thruston [Circuit Judge] himself attended on the first Monday in October and heard the case and refused to discharge the debtor. By the insolvent act no judge has jurisdiction of the case but the judge to whom the application by petition in writing is made. Here the petition in writing was addressed to the chief judge, and no order could be lawfully made upon it but by him, or in his name; yet the order appointing the day for the debtor's discharge and for the meeting of the creditors, was made in the name of Judge Morsell; and Judge Thruston himself attended and took cognizance of the case, and refused

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

the discharge. Besides it does not appear that the allegations were tried either upon interrogatories, or an issue, and no judgment unless upon such a trial, can be a bar to relief under the act. The words of the law are, "and if upon the answer to the said interrogatories, or upon the trial of the issue or issues such debtor shall be found guilty," &c., "he shall be precluded from any benefit under this act." The interrogatories or the issue must be "touching the substance of the said allegations;" and the only allegations which, if true, can deprive the debtor of the benefit of the act, are 1st, "That he had, at the time of his application, conveyed, lessened, or disposed of any part of his property, rights, or credits, with intent to defraud his creditors;" or 2d, "had, within 12 months," &c., "lost by gaming more than $300;" or 3d, "had assigned or conveyed any part of his property, rights, or credits, with intent to give a preference to any creditor or creditors, or any surety." The allegations filed in that case, were only two. 1st, "That the said John Connelly has embezzled and concealed certain real estate, the property of the said Connelly, and also been guilty of fraud and perjury in the rendition of his schedule, and the oath annexed to the same;" and 2d, "that the said Connelly did give preference to one of his creditors after he considered himself insolvent." The "specification," of the first allegation is, that at the time of his making oath to his schedule he possessed real estate in Montgomery county, Maryland, of the value of $400, not included in his schedule; and the "specification" of the second allegation is, that on or about the 4th of October instant, and subsequently to his application for the benefit of the act, and the filing of his petition and schedule, the said Connelly did convey the Montgomery land to Michael Connelly, one of his creditors, and his near relative, in satisfaction of the debt which he owed him; thereby giving a preference to one of his creditors over the others.

The absolute payment of a debt due to one of the creditors of an insolvent, has never been understood as being sucn an assignment of property with intent to give preference to a creditor or surety, as is prohibited by the act; so that neither of the two allegations, if proved, was sufficient, in law, to deprive the debtor of its benefit.

Fleet Smith, for creditor, however, still contended that the decision of the judge, that the debtor was not entitled to his discharge, was conclusive, and forever barred him from the benefit of the act.

But THE COURT was of opinion that the five last allegations now filed were too vague and immaterial to deprive the debtor of the benefit of the act, if proved, and that the judgment of the judge who refused to discharge him was not a conclusive bar to his present application for relief.

CONNER (BRADLEY v.). See Case No. 1,774.

Case No. 3,112.

CONNER v. COCKERILL et al.

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

JUDGMENT AGAINST ONE JOINT DEFENDANT—DAMAGES FOR TORT.

If several damages be assessed upon a writ of inquiry on a judgment by default, in an action of assault and battery, against two, the plaintiff may enter a nolle prosequi against one and take final judgment against the other.

This was a joint action of assault and battery against the master and mate of a vessel. There was judgment by default, and a writ of inquiry, and several damages assessed, namely, one cent against Cockerill, and —— dollars against Gault.

Mr. Neale, for plaintiff, moved for leave to enter a nolle prosequi against Cockerill, and take judgment against Gault.

Mr. Hewitt, for defendants, opposed the motion, and cited Hill v. Goodchild, 5 Burrows, 2790.

Mr. Neale cited Ammonett v. Harris, 1 Hen. & M. 488; Mitchell v. Milbank, 6 Term R. 199; Miner v. Mechanics' Bank, 1 Pet. [26 U. S.] 73; 1 Wheaton's Selwyn.

THE COURT (nem. con.) was of opinion that the plaintiff had a right to enter a nolle prosequi as to Cockerill, and take judgment against Gault.

Case No. 3,113.

CONNER et al. v. The COOSA.

[Newb. 393.][2]

District Court, E. D. Louisiana. Dec., 1846.

PRIZE—VIOLATION OF BLOCKADE—PRACTICE.

1. If, upon the return of the monition, no person appears to assert a claim to the vessel and cargo, the proctor of the captors may move for a decree upon the evidence as it appears on the record.

2. A violation of a blockade, rigorously enforced, is a good ground for the seizure and condemnation of both vessel and cargo.

3. To constitute a violation of blockade, three things must be proved: 1st, the existence of the blockade; 2d, the knowledge of the party supposed to have offended; and 3d, some act of violation, either by going in or coming out with a cargo laden after the commencement of the blockade.

4. One of the immediate consequences of the commencement of hostilities is the interdiction of all commercial intercourse between the citizens of the states at war, with the license of their respective governments.

5. The law of prize is a part of the law of nations. By it a hostile character is attached to trade, independent of the character of the trader who pursues or directs it; and condemna-

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

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

tion to the captors is equally the fate of the enemy's property and of that found engaged in an anti-neutral trade.

6. If the claimant be a citizen or an ally, at the same time that he makes out his interest, he confesses the commission of an offence, which, under a well known rule of the civil law, deprives him of a right to prosecute his claim. Ex turpi causa, non oritur actio.

[In admiralty. Proceeding by Commodore David Conner and others to condemn the bark Coosa as prize.]

C. A. Stewart and Thomas A. Clarke, for captors.

T. J. Durant, Dist. Atty., for the United States.

McCALEB, District Judge. The monition in this case has been returned, and no person having appeared to claim either the vessel or cargo, the proctor for the captors has moved for a decree of condemnation upon the facts as they appear upon the record. In granting that motion it is proper that those facts should be briefly detailed. On the 3d of October last, the vessel seized in this case cleared for the port of Havana and left this port under the command of Captain Hinckling. Instead of proceeding to the port of destination she steered for the coast of Mexico. According to the evidence of the mate given in answer to the standing interrogatories, "she sailed for no port or place before she was taken, except that she anchored five miles off the bar of Alvarado, where she lost her anchor. Her last voyage began at New Orleans and deponent expected it to end at Havana, but cannot say where it would have ended. He thinks the vessel is insured in New Orleans for the voyage on which she was taken, that is, from New Orleans to Havana. He thinks so, from the fact that the captain and himself had some difficulty about the manner in which the log-book was kept, and it seemed to be the object of the captain to have it kept in a way to save the insurance. He knows not to what place the Coosa was destined by her papers; he thought when he joined her, that she was going to Havana. To the best of his recollection (without seeing the log-book) the winds were favorable to a voyage to Havana without making a tack. The course of the Coosa was not at all times directed to Havana. If she was destined by her papers to that port, she did, before taken, steer wide of the port to which she was destined; but at the time she was taken, she was steering a course towards Havana from where she was then. She was then, as far as he can guess, five or six hundred miles from Havana. He knows not for what reason her course was altered from the course to Havana. He was told by the captain that they were destined for Havana, and it was never hinted to him that they were to go elsewhere until about twenty-four or thirty hours out from the Balize, he remarked to Captain Hinckling that they seemed to be steering "pretty well south for Havana;" to which the captain replied, "I don't know, perhaps we may hit Mexico." From the evidence of this witness, it appears that the vessel sailed under American colors, but that she had on board English colors. This fact is also established by the testimony of Purdy, who further states that she hoisted English colors off Alvarado bar, and also a flag of truce. The captain when interrogated on this point, declared that there were no colors except American colors on board; but that there were one or two signals. This captain, whose fraudulent conduct is conclusively established by the evidence, declares that the vessel "sailed to no port after leaving New Orleans on the voyage on which she was taken;" that "at the time of being pursued and taken, she was steering off shore to get an offing. She was steering for no particular port or place at the time, but was bound for Havana." He declares that Mr. Fairweather of this city, is the owner of the vessel, as appears by the registry, and that Wylie & Egana were the shippers of the cargo. He says that the only papers delivered from the vessel after she left New Orleans, was a package of newspapers which was delivered to some fishermen off the Alvarado river about the 14th of October last; while the witness Brown declares that Captain Hinckling delivered several letters, four or five in number, to a person who came from shore to the Coosa while she was at anchor off Alvarado bar. The witness Purdy says that some of the men sold some tobacco off Alvarado. There are two letters in evidence signed by one Louis Diaz and dated at Vera Cruz on the 21st and 26th of October last. The one bearing date the 21st of October is addressed to Captain Hinckling, and is as follows: "By letters from New Orleans which have been addressed to me by Messrs. Wylie & Egana, merchants of said city, I have learned that you had sailed in the bark Coosa destined for Havana; and having been informed that the vessels of the United States squadron had met you on this coast and compelled you to drop anchor at Anton Lizardo, I have arranged to send you this letter by a fishing boat, in order that you should, in answer, state the cause of your detention, and be left to proceed with your vessel to the place of destination designated by the interested parties. If permitted by Commodore Conner to write, I will thank you, without losing a moment, to inform me of all that has occurred in relation to the detention of your vessel, in order to communicate the facts to Messrs. Wylie & Egana."

The letter under date of the 26th of October, is addressed to Commodore Conner. In it the writer says: "I am the consignee of the bark Coosa, which was boarded on the 17th of this month five miles from Alvarado bar, and taken to your station, where she is detained. It is my duty, on behalf of the

interested parties, to declare to you that said vessel carried nothing but cotton from New Orleans, which cotton was to be introduced into this country in virtue of a permit granted by the government in the month of January last, without payment of duties. It has been said that the bark carried warlike weapons. This is a chimera which can easily be destroyed by merely observing that the cargo occupies the entire hold and deck, leaving no room for another bale; and consequently I think that any slight suspicions of such a nature will at once be disregarded. The existence of the blockade cannot, I think, be with a view to prohibit the commerce of the United States with this country, but on the contrary, it should favor it, inasmuch as it can be carried on with the products of said nation (the United States) and in her vessels. Under this impression the parties interested have acted in relation to the Coosa. These parties trade almost exclusively in American produce and manufactures, and have now several vessels in the Mexican gulf and the Pacific, with which they carry on speculations which benefit the United States; which circumstance induces them to claim protection in their undertakings. If these reasons, and others which I cannot confide to paper, are entitled to your consideration, I beg you will order that the bark Coosa be immediately released, so that she may proceed to the destination which suits the parties interested; and also that Captain Hinckling be permitted to hold communication with me to receive my instructions."

A letter from Commodore Perry to Commodore Conner, referred to in the deposition of Mr. Rodgers, the prize master, shows clearly that the Coosa was discovered on the morning of the 17th of October off the bar of Alvarado, "evidently endeavoring to pass into the river." From this letter it also appears that Captain Hinckling acknowledged that he had communicated with the enemy by receiving a pilot on board. The master declares that the reason he altered the course of the vessel was, that after getting out, or rather while going out of the Southwest pass, he heard from a steamboat of the victory of Gen. Taylor at Monterey, and as the cargo was consigned "to order," he thought it best to go to the Mexican coast, as in consequence of the victory he was in hopes the blockade would be raised or would cease, and that he would be permitted to land the cargo. For these reasons he took it upon himself to sail for the coast of Mexico. This story, if true, could not save the vessel from condemnation; but when I consider it in connection with the testimony of other witnesses examined, I am compelled to regard it as extremely improbable. The information received from the steamboat, which had the effect of inducing the master to assume the responsibility of changing the course of the vessel from Havana to the coast of Mexico, was, it seems, never communicated even to the first mate, who declares that it was never hinted that the destination of the vessel was to any other port than Havana, until they were out from the Balize from twenty-four to thirty hours, when, in reply to a remark made by himself that they seemed to be steering "pretty well south for Havana," the master said, "I don't know, perhaps we may hit Mexico."

After an attentive consideration of all the evidence, I am satisfied that the vessel was not cleared at this port with any serious design of sending her to Havana; but on the contrary, that she sailed with the intention of proceeding to some port in Mexico. The letters of Diaz, whose effrontery is only equaled by his ignorance of the subject upon which he assumes the privilege of enlightening the mind of the commander of the American squadron, show clearly that the master in going to a Mexican port, was acting in accordance with the instructions, and executing the wishes and intentions of the shippers of the cargo. The nominal clearance of the vessel for the port of Havana was a scheme to elude the vigilance of the officers of the customs; and I regret to say that there is no feature in the transaction which entitles the parties concerned to the favorable consideration of the court. The vessel and cargo are equally implicated in the fraud, and must share the same fate.

There are two grounds upon which condemnation must be decreed. First, there had been a violation of the blockade now rigorously enforced by the American squadron against the ports of Mexico. To constitute a violation of blockade three things must be proven: 1st, the existence of the blockade; 2d, the knowledge of the party supposed to have offended; and 3d, some act of violation, either by going in or coming out with a cargo laden after the commencement of blockade. The Betsey, 1 C. Rob. Adm. 93. The existence of the blockade of the ports of Vera Cruz and Alvarado is a matter of public notoriety, and the declarations of the master show that he was aware of it. The letter of Commodore Perry shows that the vessel was taken in delicto. It was, moreover, clearly the intention of the parties concerned, to send the vessel to a port of Mexico; and the act of sailing to a blockaded port with a knowledge of the blockade, is a violation of that blockade, and works a condemnation of the vessel. These well settled principles of the laws of war I had occasion to consider in the case of The Nayade [Case No. 10,060].

The second ground upon which condemnation must be decreed is, that there has been a trading with the enemy. One of the immediate consequences of the commencement of hostilities, is the interdiction of all commercial intercourse between the subjects of the states at war, without the license of their respective governments. In Sir William Scott's judgment in the case of The

Hoop [1 C. Rob. Adm. 196], this is stated to be a principle of universal law, and not peculiar to the maritime jurisprudence of England. It is laid down by Bynkershoek as a universal principle of law. "There can be no doubt," says that writer, "that from the nature of war itself, all commercial intercourse ceases between enemies. Although there be no special interdiction of such intercourse as is often the case, commerce is forbidden by the mere operation of the law of war." Quaest. Jur. Pub. lib. 1, c. 3. In the case of The Hoop, Sir William Scott declared that "no principle ought to be held more sacred than that this intercourse cannot subsist on any other footing than that of the direct permission of the state. Who can be insensible to the consequences that might follow, if every person in time of war had a right to carry on commercial intercourse with the enemy, and under color of that, had the means of carrying on any other species of intercourse he might think fit?" Again; in the same case he says: "Another principle of law of a less politic nature, but equally general in its reception and direct in its application, forbids this sort of communication, as fundamentally inconsistent with the relation existing between the two belligerent countries; and that is, the total inability to sustain any contract by an appeal to the tribunals of the one country on the part of the subjects of the other. In the law of almost every country, the character of alien enemy carries with it a disability to sue, or to sustain, in the language of the civilians, a persona standi in judicio. A state in which contracts cannot be enforced cannot be a state of legal commerce. If the parties who are to contract have no right to compel the performance of the contract, nor even to appear in a court of justice for that purpose, can there be a stronger proof that the law imposes a legal inability to contract? To such transactions it gives no sanction—they have no legal existence; and the whole of such commerce is attempted without its protection, and against its authority." The same principles were applied by the American courts, and especially by the supreme court of the United States, to the intercourse of our citizens with the enemy on the breaking out of the late war with Great Britain. In the case of The Rapid, 8 Cranch [12 U. S.] 155, the supreme court determined, that whatever relaxation of the strict rights of war the more mitigated and mild practice of modern times might have established, there had been none on this subject. The universal sense of nations had acknowledged the demoralizing effects which would result from the admission of individual intercourse between the states at war. "The whole nation," says Mr. Justice Johnson, who delivered the opinion of the court, "are embarked in one common bottom, and must be reconciled to one common fate. Every individual of the one nation must acknowledge every individual of the other nation as his own enemy—because the enemy of his country. This being the duty of the citizen, what is the consequence of a breach of that duty? The law of prize is a part of the law of nations. By it a hostile character is attached to trade, independent of the character of the trader who pursues or directs it. Condemnation to the captors is equally the fate of the enemy's property, and of that found engaged in an anti-neutral trade. If the claimant be a citizen or an ally, at the same time that he makes out his interest, he confesses the commission of an offence, which under a well known rule of the civil law, deprives him of his right to prosecute his claim." In this case it has been satisfactorily shown that the vessel not only left this port with the intention of landing her cargo at some port in Mexico, but that there was also an actual communication with the enemy, by the reception of a pilot on board and the delivery of letters and papers to a person who boarded the vessel from the shore while she lay at anchor off the bar of Alvarado.

For the reasons here given I shall condemn both vessel and cargo as prize of war to the captors.

Case No. 3,114.

CONNER v. LEVERING.

[2 Cranch, C. C. 163.] [1]

Circuit Court, District of Columbia. April Term, 1819.

NEGLIGENCE OF MATE—FORFEITURE OF WAGES.

If goods are lost from the ship, by the negligence of the mate, he cannot recover his wages; but he is not liable for a mere mistake in returning to the master a bale more than was actually received.

At law. Assumpsit, by [Owen Conner] the mate of the ship, [against Septimus Levering, master], for his wages. Defence, that a bale of goods was lost.

Mr. Swann, for plaintiff.
Mr. Taylor, for defendant.

THE COURT instructed the jury, that if they should be satisfied, by the evidence, that the bale of goods was delivered to the plaintiff, or put on board of the vessel, and was lost by the negligence or fraud of the plaintiff, he could not recover in this suit; the value of the goods being more than the amount of his wages.

THE COURT refused to instruct the jury that the plaintiff was liable for a mere mistake in returning to the master a bale more than was actually received. See Crammer v. The Fair American [Case No. 3,347]; and Lewis v. Davis, 3 Johns. 18.

CRANCH, Chief Judge, gave no opinion upon the last point.

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

CONNER (LONG v.). See Case No. 8,479.

Case No. 3,115.

CONNER et al. v. The SARAH SANDS.

[30 Hunt, Mer. Mag. 714.]

District Court, S. D. New York. April 11, 1854.

CONTRACT OF AFFREIGHTMENT — DELIVERY—DAMAGES.

[1. A carrier, upon delivery of only a part of goods shipped under one complete contract, is liable only for the part not delivered unless the consignee, within a reasonable time after discovering the defect, tenders the carrier the goods already delivered.]

[2. Where part of the goods delivered are destroyed by fire the consignee should in like manner tender the part not destroyed.]

[In admiralty. Libel by James Conner and William C. Conner against the steamship Sarah Sands to recover upon a contract of affreightment.]

Sanxay & Shepard, for libellants.

Owen & Betts and Mr. Evarts, for claimants.

INGERSOLL, District Judge. About the 10th of December, 1849, the libellants shipped on board the Sarah Sands, then at this port, bound for San Francisco, forty-two boxes, barrels and packages, containing type and printers' materials, to be carried to Panama, and there delivered in like good order, to be forwarded to San Francisco, and there delivered to Messrs. DeWitt & Harrison or their assigns, at the ship's tackles alongside, and a bill of lading in that form was assigned. The ship arrived at Panama, and afterwards, with the goods on board, sailed for San Francisco, where she arrived in June, 1850. Three of the packages, containing important parts of the invoice, were not found on board to be delivered. All that could be found were lightered from the ship by the direction of some one besides the consignees, and landed upon the beach. Eight of these were, by the consignees, placed in a storehouse belonging to Everett & Co., the consignees of the vessel, and afterwards the goods were sold by invoice, at auction, for $8,500, but the purchaser finding that all were not delivered from the ship, refused to complete his purchase. Negotiations were entered into between him and the consignees in reference to the delivery of the missing packages, but before the negotiations were terminated, a fire, on the 14th of June, destroyed all the goods which were then deposited at the landing-place. The libellants, thereupon, brought suit to recover the whole value of the invoice.

HELD BY THE COURT: That an entire contract for the transportation and delivery of several articles is not performed at all unless all are delivered; that if the consignee refuses or neglects to receive them when all are offered, the carrier may discharge himself by storing them; that if a part only are delivered, and the consignee accepts them as a performance of the contract in part, he cannot afterwards claim damages for the nondelivery of the whole, but is limited to the damages which he has sustained by the nondelivery of that which he has not received; that if the consignee receives a part, with the understanding that he is to receive the whole, and finds afterwards that the delivery is not complete, he may repudiate the partial delivery, but must, in that case, return or tender to the carrier within a reasonable time, the goods that he has received, or show some good reason for not doing so. He cannot retain a part, and claim damages for its nondelivery. Held, upon the evidence, that no part of these goods were delivered before they were landed on the shore; that the landing all but the three missing packages did not affect the rights of the libellants to recover the full value of all; that the acts done by the consignees, after the goods were landed, amount to an acceptance of them in the expectation that all would be delivered, and on that condition; that the goods were never returned or tendered to the carriers; and that the fire is not a sufficient reason to excuse this, as it consumed only those that were left on the beach, and not those that were stored. Held, therefore, that the ship is liable to the libellants only for the damage which they have sustained by the nondelivery of the three missing packages; that damage is the difference between the value of the whole invoice at San Francisco, when the ship arrived, and the value of the invoice, exclusive of the missing packages.

Decree therefore for libellants, with a reference to a commissioner to compute the damages.

CONNER (UNITED STATES v.). See Cases Nos. 14,846 and 14,847.

CONNESTOGA, The (The MARGARET v.). See Case No. 9,070.

Case No. 3,116.

CONNINGHAM v. LACEY.

[1 Cranch, C. C. 101.][1]

Circuit Court, District of Columbia. Dec. Term, 1802.

NONRESIDENT BAIL.

Bail residing in Alexandria county cannot be received in an action in Washington county.

Bail was refused who lived in Alexandria; THE COURT being doubtful whether an execution from this county can be served in that.

KILTY, Circuit Judge, absent.

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

CONNISON (POMEROY v.). See Case No. 11,259.

Case No. 3,117.

CONNOLLY v. BELT et al.

BELT v. PICKERELL et al.

[5 Cranch, C. C. 405.][1]

Circuit Court, District of Columbia. March Term, 1838.

SALE UNDER DEED OF TRUST — SETTING ASIDE— ENJOINING PAYMENT OF SURPLUS—PLEADING— PRAYER FOR RELIEF—PROOF.

1. If the property of a debtor be sold under a deed of trust, to a greater amount than the debt, the surplus cannot be enjoined and stayed, in the hands of the trustee, to answer damages which the plaintiff may recover against the debtor at law, for not delivering up the possession of the property according to his agreement, unless the debtor is insolvent.

2. If the terms of a deed of trust be, that if the debt be not paid at the time appointed, the trustee shall sell the property, and it be sold accordingly, the sale will not be set aside because a sale of part of the property would have been sufficient to raise the money, especially if the property consists of a single lot of ground, and there are subsequent incumbrancers who agree that the whole shall be sold.

3. The trustee, in such case, cannot sell a part only, without the consent of all parties concerned.

4. A sale made by an agent of the trustee, according to the terms and conditions, and at the time and place prescribed, is a sale by the trustee; there being no law requiring him to be personally present at the auction.

[Cited in Smith v. Black, 115 U. S. 318, 6 Sup. Ct. 55.]

5. A complainant is not entitled, under the prayer for general relief, to a decree inconsistent with his own statement in his bill.

6. The relief granted must always be consistent with the allegations in the bill.

7. If the complainant cannot support his bill upon the grounds which he has assumed, the bill must be dismissed.

These causes were heard together, on the bills, answers, general replications, and evidence.

R. S. Coxe and Mr. Jones, for Thomas J. Belt, contended, that the sale made under Belt's deed of trust was void, and ought to be set aside, because, (1) the trustee was not personally present at the sale; (2) that the whole lot was sold, when the sale of a part only would have been sufficient to pay the debt due to Pickerell under the deed of trust; (3) that it was sold for $1,620, when the price limited by consent of the creditors was $1,800. In support of the first objection, Mr. Coxe cited the case of Heyer v. Deaves, 2 Johns. Ch. 154, and in support of the second he cited the case of Delabigarre v. Bush, 2 Johns. 490.

C. Coxe was of counsel for the other parties.

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

Before CRANCH, Chief Judge, and MORSELL, Circuit Judge (THRUSTON, Circuit Judge, absent).

CRANCH, Chief Judge. The bill of Owen Connolly states that he purchased lot No. 3, in square No. 403, in Washington, at a sale made by Raphael Semmes under a deed of trust from Thomas J. Belt to the said Raphael Semmes, to secure a debt due to John Pickerell, from whom Belt had purchased the lot. That by the deed of trust, it was the duty of the trustee, in a certain event, "to sell the premises at public auction, after giving twenty days notice, at such time and place, and upon such terms and conditions as the said trustee shall deem most for the interest of all parties concerned in said sale. That he sold accordingly with the assent of Belt, who promised to deliver up possession of the premises to the plaintiff on the 1st of February thereafter, on the faith of which the plaintiff paid the purchase-money, $1,620; but Belt refused to deliver up the possession; whereupon the plaintiff brought his action at law for damages for not delivering possession according to his promise; and also an ejectment, in the name of Raphael Semmes, the trustee, to recover the possession. That there will be a surplus of purchase-money in the hands of the trustee, after paying all liens and expenses, of from $360 to $400, payable to Belt. The bill suggests his insolvency, and prays for an injunction to stay that surplus in the hands of the trustee, to satisfy the damages and costs which the plaintiff may recover in his action at law, and for general relief.

The main object of this bill, and the relief prayed, is to stay the surplus in the hands of the trustee, to meet those damages and costs; and I do not see that any other relief can be granted upon the bill; and even that relief depends upon the insolvency of Belt; for upon no other ground can the court be justified in detaining it from him. The answer of Belt positively denies his insolvency; and this answer, being responsive to the allegation of the bill, must be taken to be true, and thus takes away all ground of relief. Doctor Dawes, indeed, says in his deposition, that he believes that the pecuniary circumstances of Belt were bad at the time of the sale. He had two small judgments against him, which were unpaid. But this evidence is not sufficient to rebut the positive denial in the answer. The answer, it is true, denies the validity of the sale, because made for less than the price limited by the verbal agreement at the time of sale. But this is unimportant, as the plaintiff does not seek to have his purchase confirmed. His complaint is, that Belt will not surrender the possession; but for this he has sought his remedy in another forum, in a court of law, and therefore cannot now ask it in equity. If the plaintiff recovers judgment for his damages and costs at law, the law is competent to en-

force it. The only equity in the bill, is the supposed insolvency of Belt, and that is denied in the answer, and not supported by sufficient evidence. I think, therefore, that this bill of Connolly against Belt and Semmes should be dismissed.

The cross-bill of Belt v. Pickerell, Semmes, and Connolly, seeks to avoid the sale to Connolly:

1. Because the conditions of said deed of trust were not complied with, "inasmuch as the property was not offered for sale at such time and place, and upon such terms and conditions, as the trustee thought most advantageous to all parties concerned." This averment is directly and positively denied by the answer of the trustee, and this denial being responsive to the allegation in the bill, is evidence.

2. Because the whole lot was sold, when a part would have satisfied this incumbrance of Pickerell's; and although he was requested to offer the corner division of the lot for sale to satisfy his lien. The fact that a proposition was made by the friends of Mr. Belt to Mr. Pickerell, to sell only a part of the lot, seems to be supported; and also that a sale of that part of the lot would have produced money enough to satisfy the claim of Mr. Pickerell; but it is evident that the subsequent incumbrancers would have proceeded against the residue of the lot, at an increased expense; and it is very doubtful whether it would have produced as good a price, thus divided, as if sold entire. There was no obligation upon the trustee thus to divide it; nor had he authority so to do, without the consent of all who were interested in the property, including the subsequent incumbrancers. His duty, under the deed of trust, was to sell "the premises," not a part of the premises.

The case of Delabigarre v. Bush, 2 Johns. 490, was upon a common mortgage, and one of the questions was, whether the court, in the exercise of its equitable jurisdiction, upon the foreclosure of the mortgage, should order the whole of the mortgaged premises to be sold, or only so much as should satisfy the mortgage debt. The premises consisted of two farms, the property of the mortgagor, and sundry city lots, the property of his wife. The court decided that it was not "a matter of course to order a sale of all the mortgaged premises." "That there can, perhaps. be no general rule upon the subject; each case must depend upon its own circumstances." Considering that a sale of the whole of the mortgaged premises might materially injure the wife of the mortgagor, by converting her real estate into personal, whereby, if not necessary to pay the debt, it would become the absolute property of her husband, the court of errors reversed the decree for the sale of the whole, and ordered the husband's property to be first sold; and if that should not be sufficient, then so much of the wife's as should be necessary.

The present case is not that of a common mortgage, but a deed of trust, where the trustee is bound to pursue his powers strictly; and although a court of equity would probably sanction a sale of part only, yet the deed of trust itself authorizes and requires the trustee to sell "the premises;" and where there was a contest between the cestuis que trust whether he should sell the whole, or a part only, his safest course, perhaps, was to sell the whole, especially as it consisted of a single lot. His refusal to yield to the wishes of the debtor in that respect, contrary to those of the creditor and subsequent incumbrancers, cannot make the sale void as against the purchaser, who had nothing do do with that question, and who was encouraged to bid, by the debtor himself.

3. The third ground for avoiding the sale, as urged by Mr. Belt, in his cross-bill, is, that it was agreed on the day of sale, that the property should not be sold under $1,800, but it was knocked off to Connolly at $1,620. But this allegation is not sustained by the evidence, and the objection therefore fails.

Another objection was made in the argument, but not suggested in the bill, namely, that the sale was void because the trustee, Mr. Semmes, was not personally present. This objection was not made at the sale. In support of it, the case of Heyer v. Deaves, 2 Johns. Ch. 154, was cited. That was a sale of mortgaged premises, made under a decree of the court of chancery of New York, in the absence of a master, who, being sick, did not attend, but deputed a competent agent, who attended and sold the land. The statute of that state requires "that all sales of mortgaged premises, under a decree, shall be made by a master." The chancellor says: "The statute intended that such sales should be under the immediate direction of a known and responsible public officer. An under, or deputy-master, is not an officer known in law." Neither that statute nor that case is applicable to the present case, which is a sale under a common deed of trust. The time, place, terms, and conditions, were such as were deemed by the trustee most for the interest of all the parties concerned in the said sale, as appears by the answer of the trustee; and a sale made by an agent of the trustee, according to the terms and conditions, and at the time and place prescribed, is a sale by the trustee, there being no law requiring him to be personally present at the auction. No objection having been made by Mr. Belt, or his friends, on account of the absence of Mr. Semmes, the trustee, who was represented by Mr. C. Coxe, as his agent, at the sale, and their suffering the sale to go on, is, I think, a waiver of the objection; it would have been otherwise valid. But the objection, in itself, is of no avail. If the sale was valid, it is not important in this suit to inquire how the trustee has applied the purchase-money. The bill seeks to avoid the sale altogether, and does not ask for a decree

for the surplus money in the hands of the trustee; and the plaintiff is not entitled to such a decree under the prayer for general relief; for it would be inconsistent with his own statement of his case. The relief granted must always be consistent with the allegations of the bill. If the sale was void, as the plaintiff contends, he is not entitled to any part of the proceeds of the sale; and if he cannot support his bill upon the grounds which he has assumed, it must be dismissed.

Upon the whole, I think both bills must be dismissed.

CONNOLLY (GRISWOLD v.). See Case No. 5,833.

Case No. 3,118.

In re CONNOR et al.

[1 Lowell, 532.][1]

District Court, D. Massachusetts. Jan., 1871.

MORTGAGE BY BANKRUPT — PROOF OF DEBT BY PREFERRED CREDITOR—ABANDONMENT OF SECURITY.

1. A mortgage given by a trader under circumstances which make it a preference, will not be made valid by the existence of a general oral understanding, entered into when the debt was contracted, to give security when required.

2. If a preferred creditor abandons his security, and is admitted to prove his debt under section 23 [of the bankrupt act of 1867 (14 Stat. 528)], the preference is condoned and cannot be set up in bar of the bankrupt's discharge.

In bankruptcy. The facts in this case were that the bankrupts, retail dealers in trimmings, &c., borrowed several sums of money of one Sanborn, in June, July, October, and November, 1869, and gave their notes payable on demand, with an oral agreement that they would give a mortgage of their stock, if requested. On the 21st of December, Sanborn became alarmed by what he heard of the failure of other persons in the same trade with the bankrupts, and demanded his money, and not being able to obtain it, insisted on the mortgage, which was given. About a month afterwards, the defendants filed their petition in bankruptcy. The stock came into the possession of the assignee, who applied to the court for leave to sell it, and hold the proceeds until the validity of the mortgage should be ascertained; and to this the mortgagee assented. Sanborn was afterwards applied to by Connor to give up his security and come in as a creditor, on the ground that it would help him with his creditors, and this he did on receiving a promise of indemnity from Connor's father. A majority in value of the creditors, including Sanborn, assented to the discharge, which was opposed by a dissenting creditor on the ground of a fraudulent preference having been given to Sanborn by the mortgage.

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

T. F. Nutter and J. O. Teele, for creditor, cited Blodgett v. Hildreth, 11 Cush. 311.

Asa Wellington, for bankrupts. This was no preference, (1) because not voluntary, and (2) because given in pursuance of a valid promise.

LOWELL, District Judge. It has not been contended that the defendants were not insolvent on the twenty-first of December, and under such circumstances a mortgage of the whole stock to secure a pre-existing debt is prima facie a preference. By our law it is no sufficient answer that an oral agreement to give security at some indefinite future period, if demanded, was made at the time the debt was contracted. Such an agreement, resting only in oral contract, without possession of the property or any such circumstances as would create a legal or equitable lien, cannot be enforced against the assignees after bankruptcy, nor make a conveyance before bankruptcy but after insolvency legal, which would otherwise be a preference. I have always held that it would be too dangerous to permit such a contract to be carried into effect after the debtor had become insolvent, and feared that he might be obliged to fail. Such a promise really amounts to little more than an agreement to give a preference if occasion should arise for it. In charging the jury I have always guarded my ruling on this point by the qualification that if it was fairly and really one transaction, the creditor should not be injured by the insolvency of the debtor, occurring or ascertained after the creditor's part of the contract had been carried out by advancing the money. Nor does the pressure of the creditor relieve the transaction of the character of a preference. Both these points have been repeatedly ruled by me; and they were so adjudged under the last bankrupt act. In the case of Charles Maynard, in bankruptcy in this court in September, 1842, Mr. Justice Story, in answer to certain questions duly certified under the bankrupt act of 1841, decided that it was wholly immaterial whether the mortgage was voluntary and spontaneous on the part of the mortgagor, or was given upon the request or demand of the mortgagee, or upon a verbal promise made in general terms, when the debt was contracted, to give security upon request, if at the time of giving the mortgage the mortgagor knew that he was insolvent and could not continue his business, and intended to give the mortgagee a priority over the other creditors. See Arnold v. Maynard [Case No. 561].

But our law permits a creditor who has received a preference, to surrender the property or money to the assignee, without suit, and to prove his debt, share in the dividend, and exercise all the rights of a general creditor. Section 23. This mortgagee adopted that course. It may be said that the as-

signees were put to the trouble of petitioning the court. But it is evident that the assignees themselves did not regard this as any fault or obstruction on the part of the mortgagee, for he has proved his debt without objection. In this state of the case, does the law require me to refuse the debtor his discharge? Section 29 says that a bankrupt who has given a fraudulent preference, shall not receive the benefit of the act. And in Massachusetts it was held in a case entirely analogous to this, that giving up the security would not avail the insolvent. Blodgett v. Hildreth, 11 Cush. 311. But the statute of that state in the section corresponding with section 23 of the bankrupt law, gave no right of repentance to the preferred creditor, but prohibited him from proving his debt in any event. Our act appears to be intended to hold out an inducement to such repentance; and this case shows that the supposed interests of the debtor may be brought in aid of that purpose, for it was through his friends that the arrangement was brought about. There is no evidence, indeed, that these objecting creditors were informed of the understanding which must have existed in respect to the operation of this surrender, or that they are in any way estopped. The question is simply of the law in such a case. I am of opinion that section 29 ought to be construed with reference to section 23, and that where under the latter section a preference has been fully condoned, so far as the preferred creditor is concerned, and the general creditors have been restored to the position they would have occupied if there had been no preference, the law does not intend the preference to be regarded as still subsisting against the bankrupt. The general creditors are not technically estopped, because they have no choice but to accept the surrender, but they have received a dividend out of this very property, in accordance with the policy of the law, which condones the fault of the preferred creditor, in consideration of his voluntary action, and I cannot think the law intended to give to him who is usually the active party to the technical fraud, and the only one benefited by it, all the advantages of the repentance, and withhold them from the other party. There are a great many doubtful cases in which an intent to prefer can only be presumed or inferred, and that somewhat violently, and there are many others in which there is not only no moral fraud, but even a strong moral obligation to pay the particular debt. The policy of the law appears to be to hold out a motive for the prompt settlement of all cases of this kind in favor of the general creditors, by forgiving mere preferences, when voluntarily abandoned, even after bankruptcy. In this forgiveness, the bankrupt, as it seems to me, may share; and he may lawfully reply to these specifications, that there was no preference such as section 29 contemplates, but only an attempted preference, abandoned before it was too late. A preference is the payment or security of a just debt, which becomes voidable only when bankruptcy intervenes within a few months. Now the legal effect of section 23 is to extend the time, and permit a voluntary rescission of the voidable agreement, or the refunding of the voidable payment, even after the general rights of all parties are fixed by the filing of the petition. Whether this rule would hold if it were proved that the parties intended to defraud the general creditors unless they were found out, I do not decide. Discharge granted.

CONNOR (SABIN v.). See Cases Nos. 12,196 and 12,197.

Case No. 3,119.

CONNOR v. SCOTT.

[4 Dill. 242;[1] 3 Cent. Law J. 305.]

Circuit Court, W. D. Arkansas. 1876.

REMOVAL OF CAUSES—PRACTICE—EFFECT OF FILING PETITION AND BOND.

1. To a bill filed in a state court to enforce a vendor's lien, the defendant set up a sale of the land in question to him, by the assignee in bankruptcy of one C., the maker of the notes constituting the lien, and filed his petition for the removal of the cause to the United States court: *Held*, that this involves the construction of the bankrupt law, and is therefore properly removable; and it does not alter the case that there are other questions of law to be settled, which depend on general principles, and not on the laws of congress.

2. The petition, under the act of 1875 [18 Stat. 470], is not required to be sworn to.

3. The mere filing of the petition and bond removes the cause ipso facto, if the cause is removable and the petition and bond are filed in due time and are in due form.

[Cited in Re Iowa & M. Const. Co., 10 Fed. 405.]

This is an action brought in the circuit court of the state of Arkansas, in Little River county, to enforce a vendor's lien upon land in the possession of defendant Scott, arising upon two notes, amounting to upwards of $20,000, executed by James M. Carr to Benjamin F. Ryburn, for the purchase money of the tract of land sued for. George S. Scott claims the land by virtue of a deed from John Wassell, assignee of James M. Carr in bankruptcy. On the 20th day of July, 1875, the defendant Scott filed his petition in open court for the removal of the cause to the district court of the United States for the western district of Arkansas, on the grounds that his defence to said action arises under the laws of the United States, and by and through the force of the bankrupt law. This petition, on motion of plaintiffs' attorneys, was stricken from the files of the circuit court, and, on the 21st day

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

of July, 1875, the defendant filed his amended petition for removal to the federal court. On the 20th day of July, 1875, a bond was filed by defendant Scott, as is required by the act of congress of the 3d day of March, 1875. The plaintiffs, by their attorneys, filed a motion to strike out and remove from the files of the Little River circuit court this amended petition, for the following reasons: "Said pretended petition was not sworn to; that such pretended petition does not show sufficient grounds for such transfer; that the petition shows on its face that this is not a case falling within the act of congress; that said pretended petition is evasive, and does not clearly state any reasons for removing this cause without the jurisdiction of this court."

This motion was sustained, and the defendant Scott then obtained a transcript of the petition and answer filed in the above entitled cause, and filed the same in the district court for the western district of Arkansas, on the first day of the November term, 1875. Whereupon the plaintiffs, by their attorneys, appeared and filed their motion to strike from the docket this cause, for the following reasons: "That this court has no jurisdiction herein. The pretended transfer of said cause has not been made according to law. The case was docketed herein without the order of any court; and the proceedings are irregular, informal, and without the authority of any law."

PARKER, District Judge. Two questions arise here. The first is, taking them in the order of these proceedings, did the defendant Scott comply with the requirements of the law of congress of the 3d day of March, 1875, in making his application for a removal of a cause from a state court to a federal court? And, second, does the court have jurisdiction of the cause after it gets here?

On the first question, I am of the opinion that the petition for the removal of the cause is in the form required by the act of congress of March 3d, 1875; that, under said act, it need not, in a case of this kind, be sworn to, and that the bond filed in the case is such a bond as is required by said act of congress. The petition and bond being such as are required by law, the mere filing of the petition and bond ipso facto removes the cause, and it is not necessary for the state court to act on the application. This view of the law, I think, is sustained in Osgood v. Chicago & V. R. Co. [Case No. 10,604]; First Nat. Bank of Manhattan v. King Wrought Iron Bridge Co. [Id. 4,803], decided by Mr. Justice Miller, and a decision of Mr. Circuit Judge McKernan, in the United States circuit court for the eastern district of Pennsylvania, all of which are reported in the Central Law Journal. The supreme court of Missouri, in the case of Herryford v. Aetna Ins. Co., 42 Mo. 151–153, say that "when a party makes an application for a removal of the cause in the manner required by the act of congress, it is error in the state court to proceed further in the matter, and any subsequent step is coram non judice." Mr. Circuit Judge Johnston, while sitting in the circuit court for the southern district of New York, in the case of Merchants' & Manuf'rs Nat. Bank v. Wheeler [Case No. 9,439], held that the rule was well settled that the application, if sufficient by law, is effectual to remove the cause, however it may be disposed of by the state court.

I am of the opinion, on the first point in the case, that the defendant Scott complied with the law of congress in making his application for removal of the cause from a state to a federal court; and the state court, when the petition and bond were filed, should have gone no further, but should have ordered the clerk to send a transcript of the case to the federal court, leaving to that tribunal the decision of the question as to whether it was such a case as, under the laws of the United States, was within the jurisdiction of the federal courts.

The next question is, does this court have jurisdiction of this action? The field of jurisdiction is a wide one, and one in which there are frequently to be found many difficulties in the way of a correct solution of the question.

The question involves the relative powers of the two systems of courts, which are a part of our duplex system of government. The source of jurisdiction in the federal courts is the second section of the third article of the constitution of the United States. Jurisdiction is given to the courts of the Union in two classes of cases. In the first, their jurisdiction depends on the character of the cause; in the second, the jurisdiction depends entirely on the character of the parties.

The first class comprehends all cases in law and equity, arising under the constitution, the laws of the United States, and treaties made, or which shall be made, under their authority. This is the language of the constitution. It will be observed that the part of the second section of the act of congress of the 3d of March, 1875, which provides for the removal of a certain class of causes, dependent upon the subject matter of the same, is identical in meaning with the clause of the second section of the third article of the constitution, which gives jurisdiction to federal courts over a certain class of cases, dependent upon their subject matter. Then, if this part of the constitution has received a construction, it may be used as a correct rule of interpretation, and applied to the second section of the removal act.

This section goes further than any act of removal heretofore passed has done. It goes as far as it can go and keep within the purview of the constitution. It provides that the courts created by the constitution of the United States shall have jurisdiction of any

case which, under that constitution, might be brought in the federal courts, although such case may regularly be commenced in the court of a state, provided either party to the suit desires to avail himself of the constitutional privilege of trying his case in the federal court.

What is meant by a suit of a civil nature, at law or in equity, arising under the constitution or laws of the United States? A case is a suit in law or equity, instituted according to a regular course of judicial proceedings. If a case is a suit then a suit is a case, and the meaning of the second section of the third article of the constitution, and the second section of the removal act, is the same, and when such case or suit involves any question arising under the constitution, treaties, or laws of the United States, it is within the judicial power committed to the courts of the Union. Marshall's Speech, 5 Wheat. [18 U. S.] Append. 16, 17; Osborn v. Bank of U. S., 9 Wheat. [22 U. S.] 819; 1 Tuck. Bl. Comm. 418-420; Madison's Virginia Resolutions and Report, Jan., 1800, p. 28; Marbury v. Madison, 1 Cranch [5 U. S.] 137, 173, 174; Owing v. Norwood, 5 Cranch [9 U. S.] 344; 2 Elliott's Debates, 418, 419; Martin v. Hunter, 1 Wheat. [14 U. S.] 304; Cohens v. Virginia, 6 Wheat. [19 U. S.] 264, 378, 392; Story, Const. §§ 1647, 1656. A suit or case consists of the right of one party, as well as the other. Cohens v. Virginia, 6 Wheat. [19 U. S.] 379.

Chief Justice Marshall, in the case of Cohens v. Virginia, 6 Wheat. [19 U. S.] 379, said a case arises, under the constitution or laws of the United States, whenever its correct decision depends on the construction of either, or when it involves any question arising under the constitution, treaties, or laws of the United States.

If, therefore, it be true that the second section of the removal act is co-extensive with the judicial power of the federal government, as to the class of cases therein specified, whenever a case is brought in a state court where the matter in dispute exceeds five hundred dollars, exclusive of costs, the correct decision of which depends on the construction of either the constitution or a law of congress, or where it involves any question arising under the constitution, treaties, or laws of congress, the same can be removed to a federal court, provided the machinery for the removal, as prescribed in the act of the 3d of March, 1875, is properly set in motion.

It matters not that other questions may arise in the case, which depend on the general principles of the law, and not on the laws of congress. Chief Justice Marshall, in Osborn v. Bank of U. S., 9 Wheat. [22 U. S.] 256, says: "If this were sufficient to withdraw a case from the jurisdiction of the federal courts, almost every case involving the construction of a law would be withdrawn, and a clause in the constitution relating to a subject of vital importance to the government, and expressed in the most comprehensive terms, would be construed to mean almost nothing. There is scarcely any case every part of which depends on the constitution, laws, or treaties of the United States." Further on, in the same case, he says: "We think, then, that when a question to which the judicial power of the courts of the Union is extended by the constitution forms an ingredient in the original cause, it is in the power of congress to give the circuit courts jurisdiction of that cause, although other questions of fact or of law may be involved in it."

Does the correct decision of this case depend on the construction of a law of congress? Or does the case involve any question arising under a law of the United States?

The plaintiffs state in their petition, among other things, that defendant Carr, in the year 1868, upon his own application, was declared a bankrupt by the district court for the eastern district of Arkansas, and that the lands in controversy were set out in his schedule of assets filed by him as charged with the encumbrance of the two notes mentioned in the petition; that said lands were, by the order of said court, sold by Wassell, the assignee, to defendant Scott, subject to the lien of the two notes. The answer of said Scott admits the bankruptcy of Carr, the sale of the lands by the assignee mentioned in the petition, and the purchase by himself of said lands at the sale, but denies that he purchased said lands subject to any lien arising out of two promissory notes held by Connor and Hawkins; that Carr obtained a full and complete discharge from all his debts and liabilities; that said notes were not a lien upon said lands, and that they were not proven up against the estate of Carr.

Suppose these notes were an equitable lien upon the land named, how are we to ascertain the effect of Carr's bankruptcy upon this lien but by a construction of the bankrupt law? If it was a lien, should it be proved up as other claims? Or, could the holders of the notes stand aloof and enforce their lien at pleasure? We must look to the bankrupt law to determine this. Does not this involve a question arising under this law of congress? Or, suppose that the vendor's lien has been lost by the assignment of these notes—that they were scheduled as a part of the debts of Carr, and that their owners failed to prove them up against the estate of Carr—how are we to ascertain what effect this had as to these notes but by a reference to the bankrupt law? Or, suppose they were proved as debts against the estate without their having behind them a vendor's lien, and Carr received a complete discharge from all his liabilities, how can we tell how this would affect the rights of the holders of these notes, and the purchaser of this land, but by going to the bankrupt law? That law

points out plainly the status of legal and equitable liens against the property of a bankrupt. How can we tell whether a secured creditor must prove his demand, but by a construction of the bankrupt law? How can we tell whether he can stand by and not prove his debt, but wait until bankruptcy proceedings are closed, and then enforce his lien in a state court, except by reference to the law of bankruptcy? Is a vendor's lien preserved in bankruptcy? How do we know whether it is or not? By simply construing the bankrupt law. Is it ever forfeited? If so, what will work a forfeiture? How do we know the answers to these questions? By going to the bankrupt law. Does the assignee ever sell free from the lien, or does he always sell subject to the same? How are we to know, but by a construction of this law of the United States? Can the holder of a lien enforce it after discharge? If so, how? Can any one answer without placing a construction on the bankrupt act?

These are questions that come up in this case. Their correct decision depends on the construction of a law of congress. If they do come up in this case, then it is a suit which involves questions arising under a law of the United States and dependent for their settlement on a construction of that law, and, therefore, within the judicial power confided to the courts of the Union.

I cannot pass this case without making a remark as to the delicate position in which a judge of the federal court is placed when called on to settle a question of jurisdiction arising between his own court and the court of a state, especially when that question has been passed on by the judge of that court. Yet, with due deference to the judge of the state court, and with high regard for his opinions, I adopt the language of Chief Justice Marshall, in Cohens v. Virginia [supra], while speaking with reference to the jurisdiction of the supreme court: "It is most true that this court will not take jurisdiction if it should not, but it is equally true that it must take jurisdiction if it should. The judiciary cannot, as the legislature may, avoid a measure because it approaches the confines of the constitution; we cannot pass it by because it is doubtful. With whatever doubts, with whatever difficulties a case may be attended, we must decide it if it be brought before us; we have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given; the one or the other would be treason to the constitution. Questions may occur which we would gladly avoid, but we cannot avoid them. All we can do is to exercise our best judgment and conscientiously perform our duty."

In doing this in this case, I find this court having jurisdiction; the motion to strike the case from the docket will, therefore, be overruled.

Motion denied.

Case No. 3,120.

CONOVER v. DOHRMAN et al.

[6 Blatchf. 60; 3 Fish. Pat. Cas. 382.][1]

Circuit Court, S. D. New York. March 9, 1868.

PATENTS—"MACHINE FOR SPLITTING WOOD"—INFRINGEMENT.

The first claim in the letters patent granted to Jacob A. Conover, May 13th, 1855, for a machine for splitting wood, namely, "a movable bed or carriage, for carrying and advancing the blocks of wood, in combination with the reciprocating cutters operating at right angles with the surface of the bed or carriage, substantially as and for the purpose specified," is infringed by the use of a machine for splitting wood, which contains every feature of the patented machine that is essential to the performance of the same result in substantially the same way, although the reciprocating cutters in it do not operate at right angles with the surface of the bed or carriage.

In equity. This was a final hearing, on pleadings and proofs, on a bill [by Jacob A. Conover against John H. Dohrman and John H. Peipho], founded on letters patent [No. 12,857], for a machine for splitting wood, issued to the plaintiff on the 13th of May, 1855. In the body of the specification, the machine was called a machine for splitting kindling wood, and this was the particular work for which it was fitted.

Charles M. Keller and P. Van Antwerp, for plaintiff.

Edwin W. Stoughton, for defendants.

SHIPMAN, District Judge. The bill in this case charges, that the defendants have infringed the first and second claims of the patent. The first claim is for "a movable bed or carriage, for carrying and advancing the blocks of wood, in combination with the reciprocating cutters operating at right angles with the surface of the bed or carriage, substantially as and for the purpose specified." The second claim reads thus: "In combination with the bed or carriage and reciprocating cutters, substantially as specified, the employment of the clearing plate through which the cutters pass, substantially as and for the purpose specified." There is a third claim in the patent, but that is not in controversy here.

The construction and operation of the machine described in the patent are substantially as follows: A bed or carriage, composed of sections linked together in the form of an endless chain, is made to travel over a tackle and around drums or wheels placed at each end. Blocks of wood, of the required length of material for fuel, are placed upright on this bed. Over the bed, at the point where the block is to receive the blow which splits it, is a cutter, made in the form of a cross, so that the block may be split into small sticks, instead

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

of slabs or boards, as would be the case if the cutter were composed of only one straight blade. The bed, with the block thereon, is put in motion by an intermittent feed, and the block is advanced under the cutter, at every throw of the feed mechanism, a distance measured by the range at which the feed mechanism is set. The cutter, firmly fastened above to a stock, works up and down with a reciprocating motion as the block passes under it, splitting the block as it descends, and then rising from it, so that it may be carried by the bed a step forward, when the cutter descends and splits again. As the blades of the cutter rise, they are cleared of any pieces of wood that may be clinging to them, by a clearing plate fixed above, and into which the cutter plays freely, as it rises and falls, through apertures or notches in the plate. When the machine is in motion, the bed not only carries the blocks to the point where they are split by the cutter, but it also carries off the wood after it is split. Of course this movable bed could not, of itself, resist the blow of the cutter, as it is a mere series of sections linked together, and would yield downward at every blow, unless it were supported by a firm table underneath. Now, it will be seen, that the carrying bed moves horizontally, the block to be split stands vertical or upright, and the cutter, as it rises and falls, operates vertically, and at right angles with the bed or carriage. When the cutter descends, the block is easily split, as the table over which the bed moves furnishes that resistance which a solid chopping block does to the common axe, as ordinarily used, in splitting short pieces of wood.

In the alleged infringing machine there is also a combination of parts, consisting of a movable bed or carriage, on which the block to be split is placed, a cutter, and a clearing plate, but these parts are differently distributed, so far as location is concerned, from the same parts in the plaintiff's combination. The carrying bed in the defendants' machine, as compared with that in the plaintiff's, moves across the machine instead of lengthwise, or, in other words, at right angles to the line of motion of the plaintiff's bed. This bed of the defendants' forms the bottom of a trough, the back side of this trough presenting an upright wall. The block is laid horizontally on this bed, with the base or heel of the block against the upright wall, and the top or end which is to first receive the blow of the cutter forward. Of course, the cutter is not placed over the block, but forward of it, not in a vertical, but in a horizontal position, so as to move in a line with the grain of the wood. In other words, as the block to be split lies in a horizontal position, the blade that is to split it from end to end must have a horizontal motion. The block being placed horizontally on the bed, the latter, by an intermittent feed motion, carries it into line with the cutter, and the latter, by a reciprocating movement, enters the end of the block and splits it. The upright wall or back side of the trough, being firm, furnishes a resistance which enables the cutter to cleave the block.

Now, by a recurrence to the language of the first claim in the plaintiff's patent, it will at once be seen, that there is one feature of the description which is not found in the defendants' machine—to wit, the operation of the cutters at right angles to the bed or carriage; and I am asked to so construe this feature of the description, as to hold the patentee to it as an essential element in his invention. It would follow, from such a construction, that, inasmuch as the defendants' cutters operate, not at right angles to the carrying bed, but in the same horizontal plane with it, there is no infringement. But, in my judgment, this feature of the operation of the plaintiff's machine, as it appears in his specification, is merely descriptive of that which is incidental rather than essential. The defendants have caused it to disappear by a transposition, or different distribution, of the active elements of the organized mechanism, while they have retained every feature of the plaintiff's machine which is essential to the performance of the same result in substantially the same way. Placing their block horizontally, they must give their cutter a horizontal line of motion; and, as the point of resistance, in order to be effective, must be in the same plane, they are obliged to shift it from under the carrying bed to the rear of it, and to give its face a vertical instead of a horizontal position. In so doing, they have, in my judgment, introduced no essential element that is not found in the plaintiff's machine, nor have they omitted any. They have simply avoided embracing an incidental and unimportant feature, which is no more vital to the plaintiff's invention, than is the shadow cast by a body vital to the body itself. I hold, therefore, that the change effected by the defendants in the mechanism is colorable and not material, and does not relieve them from the charge of infringement. As that part of the claim of the patent which describes the feature in question, relates to a nonessential matter, I do not feel called upon to hold the plaintiff strictly to it. The shape of the defendants' knives is not like that of the plaintiff's; but the latter confines himself to no particular form of cutting instrument. In his patent he describes one form as preferable, but the defendants' are plainly equivalent.

I have examined the various patents put in evidence to antedate the plaintiff's invention, and compared them with it, but I do not find any which, in my judgment, embraces the same construction and ar-

rangement. A perpetual injunction must, therefore, issue, with an order of reference to a master to take an account.

[NOTE. For other cases involving this patent, see note to Conover v. Roach, Case No. 3,125.]

Case No. 3,121.

CONOVER v. MASSACHUSETTS MUT. LIFE INS. CO.

[3 Dill 217;[1] 4 Ins. Law J. 93; 1 Cent. Law J. 597; 4 Bigelow, Ins. Cas. 187.]

Circuit Court, W. D. Missouri. Nov. Term, 1874.

LIFE INSURANCE—WARRANTY—REPRESENTATIONS.

1. Where no specific and distinct reference was made in the policy to the written application, the statements in the latter, although it referred to the policy, and contained a warranty, were considered as representations, and not as warranties. The recent leading cases on this subject cited.

2. Where the policy itself contains a condition that if the statements made by the applicant in the negotiations for the policy shall prove untrue, the policy shall be void, untruthful answers, to material questions relating to the health and habits of the assured, will defeat the right to recover thereon, though the matters misrepresented did not cause or contribute to his death.

[Cited in White v. Insurance Co., Case No. 17,545.]

3. The act of the Missouri legislature of March 23, 1874, commented on and *held* not to apply to the case in judgment.

The defendant [John Conover], through an agency in Missouri, issued a policy for $5,000 upon the life of Eli Barnum, the plaintiff's intestate, dated June 10, 1871, and which stated that "this policy is made and accepted upon the following conditions: In case the statements made by, or on behalf of, or with the knowledge of, the said assured to the said company, as the basis of, or in the negotiations for, this contract, shall be found in any respect untrue, this policy shall be null and void."

The policy was issued upon an application therefor, dated May 27, 1871, signed by the applicant, and containing thirty-two special questions to be answered, and which were answered by him. The 7th question was, "Does the party use alcoholic stimulants?" Answer.—"No." 8th.—"If so, state how often? In what quantities?" Answer.—"None." 9th.—"Has the party at any former time used alcoholic stimulants?" Answer.—"No" 15th.—"Has the party ever had inflammatory rheumatism?" Answer.—"No." 17th.—"Has the party now, or has he ever had, an habitual cough?" Answer.—"No." In the application or declaration was the following: "And I do hereby agree that the answers given to the following questions, and the accompanying statement, and this declaration, shall be the basis and form part of the contract or policy between me and the company, and I warrant such answers and statements as true and correctly stated, and agree that if the same be not so in all respects, the said policy shall be void, and all moneys which may have been paid on account thereof, and all dividend credits, shall be forfeited to said company."

The last question was, "Is the party and the applicant aware that any untrue or fraudulent answers to the above queries * * * will vitiate the policy and forfeit all payments thereon, and has he carefully read the questions and answers thereto?" To which he answered in writing, subscribed by himself, "Yes."

The assured died within one year after the date of policy, and this is an action by his executor to recover the amount insured by the policy. The company defends the action on several grounds, but it is only necessary to state those on which the judgment of the court rests. The company pleads that the statements in the application as to the health and habits of the assured are untrue in these several particulars; viz.: at the time of signing the application, and for years previously he had habitually used alcoholic stimulants; that he had had inflammatory rheumatism, and for years labored under an habitual cough. He did not die of rheumatism or any pulmonary disease, nor, so far as appeared, in consequence of the use of alcoholic drinks.

The action was tried by the court, a jury having been waived. Without recounting the evidence of the various witnesses adduced by the parties, it is sufficient to state that the witnesses on both sides all concurred in the statement that the assured was habitually given to the use of alcoholic drinks; that he not unfrequently became intoxicated, though he would often, for weeks at a time, not drink at all. He was in the army, as a lieutenant of the fifty-seventh Illinois regiment, and it is clearly proved that he had a severe attack of inflammatory rheumatism in 1862, so severe that he had to leave his regiment and be taken to the hospital. It is also shown that he labored under an habitual cough while in the army. On the other hand, there is testimony to the effect, that at and about the time of his effecting the insurance in question, his general health was good.

After his death, and after this suit was brought and an answer was filed, the legislature of the state of Missouri passed an act, approved March 23, 1874, as follows:

"Sec. 1. No misrepresentation made in obtaining or securing a policy of insurance on the life or lives of any person or persons shall be deemed material, or render the policy void, unless the matter misrepresented shall have actually contributed to the contingency or event on which the policy is to become due

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

and payable; and whether it so contributed in any case, shall be a question for the jury.

"Sec. 2. In suits brought upon life policies heretofore or hereafter issued, no defense based upon misrepresentation in obtaining or securing the same, shall be valid, unless the defendant shall, at or before the trial, deposit in court for the benefit of the plaintiffs, the premiums hereafter received on such policies, with six per cent interest per annum from date of receipt."

Henry Flanagan, John Conover, and W. S. Everett, for plaintiff.

H. K. White, for defendant.

DILLON, Circuit Judge. Much of the discussion at the bar was directed to the point whether the statements in the application concerning the health and habits of the assured were, under the language of the policy in connection with the language of the application, to be considered as warranties as maintained by the defendant, or representations as maintained by the plaintiff. It was not seriously denied by counsel that these statements were not true in point of fact, and hence if they are warranties, it is plain the plaintiff has no case. The plaintiff's position was that the statements were not part of the policy by insertion therein, or by distinct and specific reference in the policy itself to the application as part of the policy, and hence these statements in the application could, at most, only be representations; and being such, it was further claimed by the plaintiff that their untruthfulness, although relating to matters material to the company, on preliminary inquiries, were, in fact, as the event showed, immaterial, since the death was not caused by the diseases or habits to which the untruthful answers related.

Inasmuch as the policy itself does not distinctly identify and refer to the written application and make it part of the policy, I am inclined, in view of the established and reasonable rule, that warranties are not to be created or extended by construction, and the doctrine of the later and best considered cases, to hold, that the statements in the application are representations and not warranties. Campbell v. New England Ins. Co. (1867) 98 Mass. 381; followed in Price v. Phoenix Ins. Co. (1871) 17 Minn. 497 [Gil. 473]; May, Ins. §§ 164, 165.

As this is the view most favorable to the plaintiff, the case will be decided on the assumption that it is correct.

It will be seen by reference to the statement of the case, that the policy itself contains a condition that if any "statement made by the assured to the company, as the basis of, or in negotiation for, this contract shall be found in any respect untrue, this policy shall be null and void;" and in the application the statements therein contained, "shall," it is declared, "be the basis and form part of the contract or policy" to be entered into between the parties. In the application the applicant declared that he had carefully read the questions and his answers to them, and that he was aware that if any of the answers were untrue or fraudulent, it would vitiate the policy.

The representations upon which the company grounds its defense, relating as they do to the habits of the assured, in respect to the use of alcoholic stimulants, then and previously, and to whether he had ever been afflicted with inflammatory rheumatism (which it is well known often leads to fatal diseases of the heart), or had ever had an habitual cough (known to precede or indicate pulmonary diseases), were material, to enable the company or medical adviser to form an accurate opinion as to the risk which the insurer was asked to assume. Now the policy itself contains the express provision, that if the statements of the assured, in the negotiations for the policy, shall be found untrue, the policy shall be void. This is the contract the parties made, and it is binding upon them; and if the representation shall be found untrue, the policy shall be void. This is the contract the parties made, and it is binding upon them; and the case is governed by and falls precisely within Anderson v. Fitzgerald (1853) 4 H. L. Cas. 484, in which eleven of the judges of England attended the summons of the house of lords, and where the unanimous judgment was, in a case like the present, that it was erroneous to leave it to the jury to say whether certain answers were material as well as false, and if not material to direct them that the plaintiff was entitled to recover. It was expressly decided that by the contract of the parties, the truth of the representations and not their materiality were alone in question, and if untrue, the insurer was not liable. That decision was followed in Cazenove v. British Assur. Co. (1859) 95 E. C. L. 437, and by the leading case of Campbell v. New England Ins. Co., 98 Mass. 381, 403, and in the well considered judgment in Price v. Phoenix Ins. Co., 17 Minn. 497 [Gil. 473].

These cases hold that where the insurer puts specific questions touching the risk, under conditions like those here agreed upon, the inquiries are conclusively made material and that false answers avoid the policy. It is not necessary in the case at the bar to go to the extent of affirming that all possible questions and answers are material, or may be made so, for here it is manifest that the questions, upon the answers to which the defense is based, pertaining to the habits of the applicant, in a matter material to health and to diseases he had had or was liable to have, were reasonable, and correct answers to which were essential, that the risk to be assumed by the company might be understood. In Anderson v. Fitzgerald, supra, Lord Chancellor Cranworth observed, that "whether certain statements are or are not material,

where parties are entering into a contract of life assurance, is a matter upon which there must be a divided opinion Nothing, therefore, can be more reasonable than that the parties entering into that contract should determine for themselves what they think to be material, and if they choose to do so, and to stipulate that unless the assured shall answer a certain question accurately, the policy or contract which they are entering into shall be void, it is perfectly open for them to do so, and his false answer will then avoid the policy. Now it appears to me, my lords, that this is precisely what has been done here. The question for the jury to decide was simply whether it (the answer) was false or not. In that narrow compass the whole case lies."

I cannot refrain from observing, that it may be questionable whether the practice of the companies is, after all, so entirely reasonable, as it appeared to the lord chancellor. Life insurance has grown to such immense proportions as to have important public relations. It is the method which has been largely adopted to make provision for wife and children, and for those dependent upon the life of the assured. The judgments of courts touching the validity of policies cannot be too carefully considered, so as not to work injustice either to the insurer or the insured. Courts, by a too liberal extension of the doctrine of warranties, and by recognizing the validity for provisions of forfeiture of the rights of the assured, and particularly in allowing the parties, by sweeping language, not fully understood or considered by the assured, when the policy is effected, to make immaterial questions and answers material, have, in my judgment, inclined too much in favor of the companies, and hence the judicial tendency of late is to uphold, rather than overturn the contract, when substantial justice requires it.

In view of the fact, that the tables upon which the expectation of life is calculated, give the average mortality of persons as they run, while the companies select their risk, so that the actual mortality falls below the assumed mortality, and in view of the practice of the companies to put a multitude of questions to the applicant, and to make correct answers to all of them material, I am inclined to consider the legislation of Missouri as well-timed and necessary to prevent the unfair practice of the companies in framing their policies, though it is perhaps too broad, if it prevents the companies from providing that wilful misrepresentation as to material facts will avoid the policy, although it may chance that the misrepresented matters did not actually contribute to the death of the assured. But as the act does not apply to the case in hand, I forbear further remarks upon its policy or meaning.

As the questions in this case were material, and the answers untruthful in material respects, and as the parties, in the policy itself, agreed that this should vitiate the policy, the judgment must be for the defendant.

Judgment accordingly.

[NOTE. Conover v. Phoenix Mut. Life Ins. Co., Case No. 3,143, is published in 3 Dill. 217, as a note to this case.]

Case No. 3,122.

CONOVER v. MERS.

[11 Blatchf. 197; 6 Fish. Pat. Cas. 506.] [1]

Circuit Court, S. D. New York. June 16, 1873.

INFRINGEMENT OF PATENT—ACCOUNT OF PROFITS.

In taking an account of profits, in a suit in equity for the infringement of a patent for machinery, the gain or saving arising from the use of the infringing machinery cannot be applied to make up losses sustained by the defendant on other branches of his business.

[Cited in Webster Loom Co. v. Higgins, 43 Fed. 676.]

[See note at end of case.]

[In equity. Hearing on exceptions to master's report. Suit brought [by Jacob A. Conover against Henry Mers] upon letters patent [No. 12,857] granted to Jacob A. Conover, May 15, 1855, for a "machine for splitting kindling-wood." The case is a continuation of the case of Conover v. Mers [Case No. 3,123], where there is a full description of the patented machine [and in which case a provisional injunction was granted]. The devices are also described in the case of Conover v. Dohrman [Id. 3,120]; Conover v. Roach [Id. 3,125]; and Conover v. Rapp [Id. 3,124]. In the present case the master reported no profits, and as the case was brought prior to the act of July 8, 1870 [16 Stat. 198], therefore the recovery was confined to profits only. Though the testimony showed that the use of complainant's machine made a saving of eighty cents per cord of wood over the process of splitting by hand, yet when taken in connection with the other sales of uncut wood and wood sawed but not split, by defendant, it was shown that upon the whole business defendant had made no profit.] [2]

Peter Van Antwerp, for plaintiff.

Frederick S. Stallknecht and Elial F. Hall, for defendant.

WOODRUFF, Circuit Judge. The complainant, having obtained a decree establishing his rights under a patent for a wood-splitting machine, and adjudging that those rights had been infringed by the defendant, by using a machine without license or authority from the complainant, and that he recover the gains and profits made by the defendant by the use of such infringing machine, the usual reference was made to a master, to ascertain the amount of such

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

[2] [From 6 Fish. Pat. Cas. 506.]

gains and profits. The master, after taking proofs, has reported that no gains or profits were made by the defendant. To this report the complainant has filed exceptions.

The proofs showed that the defendant was a dealer in wood, from the 8th of March, 1866, and thence onward, and that he kept a wood yard, making sales therefrom, of wood, in three forms: 1st, uncut wood, (i. e., in the condition in which it was purchased); 2d, wood sawed by the defendant into short pieces, but not split; and, 3d, wood sawed, split, and tied into bundles. The proofs showed that all the wood tied into bundles was split by the machine. A distinguishing feature of the machine, embraced in the complainant's patent, appears to have been a device for the automatic feeding of the wood to the splitting instrument, by a movable platform or apron, moved by an endless chain; and it was conceded, on the argument of the exceptions, that the complainant is not entitled to, or, at least, that he does not claim, any profits of splitting wood by the machine, where such chain was not used to feed the wood to the splitting instrument or knives. The balance of the evidence before the master is, that such chain was not used after the 24th of May, 1869. There is some reason to doubt whether it was used, save for one day only, down to so late a date.

The testimony is quite distinct and uncontradicted, that there is an actual saving of eighty cents per cord in the use of the machine for splitting, over the cost of splitting by hand, or splitting by a hand machine—by which latter I understand the witnesses to mean a machine, to the knives of which the wood is fed by hand, i. e., without the use of the endless chain and apparatus for automatic feeding. The quantity of wood split on the machine, as well as the before-named period of its use, is not very precisely shown, but the proofs from the defendant's own books do show the amounts he paid for wood for his whole business, and he himself gives the average cost per cord. Two of his employees testified that one-eighth was split and made into bundles. So that, by these elements, if the defendant's books show the times of purchase, there are some data upon which to calculate, with reasonable precision, the quantity split in each year. Besides this, I do not perceive that the defendant would have any just ground of complaint, if the proof in regard to the number of bundles made by each cord, and the number of strings purchased by the defendant and used for tying the bundles each year, were taken as the test of quantity, with such allowance for waste as the proof may show to be usual. Clearly, here were, by the aid of both sources or means of estimate, materials out of which a just conclusion could be reached, touching the number of cords of wood split by the defendant by the use of the infringing machine; and, that number being found, the sum of eighty cents per cord would, on the proofs as they now stand, be the saving to the defendant by the use of the complainant's invention.

The report of the master seems to have proceeded on the ground, that, because the aggregate business done by the defendant did not result in a profit, the complainant is entitled to recover nothing. If so, the master was in error. It is quite true, in cases in which gains and profits alone are to be awarded, that, where the defendant has used the infringing machine so unskilfully, or in a manner so unbusiness-like, that he has made no profits; the complainant can recover none; but, on the other hand, the defendant cannot prejudice the complainant by applying the gains arising from the use of an infringing machine, to make up losses on other branches of his business. Here, the defendant was dealing in wood generally, selling wood unsawed, wood sawed, and wood sawed and split and tied in bundles. For the purposes of his general business, it cost him eighty cents per cord more to split his wood by hand, or by a hand machine, than it did by using the infringing machine. He actually saved to himself eighty cents per cord on all that he split by that machine and made into bundles, and this without increasing his other expenses in any degree. There would seem to be distinct and definite profit realized by the defendant by the violation of the complainant's rights—profits ascertained and realized day by day, quite irrespective of the inquiry, what were the aggregate results of his whole business. If there were any general or other expenses, apportionable to this department of his business, the proofs do not show them.

The proofs are not so clear as to the precise time when the defendant ceased to use the endless chain, and, therefore, not so definite as to the quantity of wood split, as to make it safe for me to fix the amount of profits. Obviously, the proof shows that the use of the chain continued till suit brought, and to that time the complainant's right to recover seems clear. I deem it most prudent to set aside the report and refer the matter back to the master, to hear the parties further on the proofs already taken, and such further proofs as either party may desire to give.

[NOTE. The master subsequently reported, and, among other things, found that by the use of the infringing machine "there was saved to the defendant 75 cents per cord in wood split by him and made into bundles." This report was confirmed, and a final decree entered for complainant. Defendant then appealed to the supreme court, assigning as error that the report was erroneous, and not supported by the evidence.

[This decree was affirmed by the supreme court, Mr. Justice Strong stating that the evidence fully supported the finding, within the rule laid down in Mowry v. Whitney, 14 Wall. (81 U. S.) 651; i. e. that the profits of the use of an infringing machine are the worth of the advantage obtained by such use, and that the

fact that the machine used was old and defective, and that in fact no profits were realized from its use, but, on the contrary, a loss, was immaterial, as, conceding that defendant was a loser by the use of the machine, his loss, according to the testimony, was less, to the extent of 75 cents a cord, than it otherwise would have been.

[It was suggested by the defendant on the argument that, since the decree in the circuit court, the defendant had surrendered his patent, and obtained a reissue, and the court said that, assuming that fact to be true, it was nevertheless immaterial, for the reason that a surrender of the patent after final judgment could have no effect upon a right which had previously passed into judgment. Mers v. Conover, 23 U. S. (Lawy. Ed.) 1008; also note by Mr. Justice Gray to Tilghman v. Proctor, 125 U. S. 144, 8 Sup. Ct. 894.]

Case No. 3,123.

CONOVER v. MERS.

[3 Fish. Pat. Cas. 386; 1 Am. Law T. Rep. U. S. Cts. 42.][1]

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

FORMER ADJUDICATION AS TO INFRINGEMENT—INJUNCTION.

1. Where an injunction had been granted in a former case against another defendant, and the defendant in the case at bar did not deny by his own affidavit, or that of any expert, that his machine was identical with that used by the defendant in the former case, or that it was an infringement of the plaintiff's patent, but his solicitor made affidavit that he was advised by his client, and by experts, that there was no infringement, and asked time to show that the machine did not infringe the patent: *Held*, that for the purposes of a provisional injunction, the machine of the defendant must be regarded as an infringement of the plaintiff's patent.

2. Where the patent has been sustained by a full hearing, and the infringement is clear, and especially where the very form of the machine used by the defendant has been passed upon by the court on the question of infringement, the plaintiff is entitled to have his rights promptly protected by injunction, although the defendant may be perfectly responsible, and be willing to give security for the payment of any decree that may be obtained against him.

[Cited in Farmer v. Calvert Lith. Eng. & Mep. Pub. Co., Case No. 4,651.]

In equity. This was a motion for a provisional injunction to restrain defendant [Henry Mers] from infringing letters patent [No. 12,857] granted to complainant [Jacob A Conover] May 15, 1855, and more particularly referred to in the case of Conover v. Dohrman [Case No. 3,120].

P. Van Antwerp, for complainant.

G. R. Thompson, for defendant.

BLATCHFORD, District Judge. This is an application for a provisional injunction to restrain the defendant from infringing letters patent granted to the plaintiff May 15, 1855, for a "machine for splitting kindling wood." The moving papers show that the machine in use by the defendant, in his kindling-wood factory in Avenue B. between Fifteenth and Sixteenth streets, in the city of New York, is in all its essential and material features, identically the same as a machine which has been put under injunction by this court, on a final hearing in a suit brought by the plaintiff, on the same patent, against Dohrman and Peipho. In that suit the plaintiff's patent was attacked for want of novelty, and was sustained, and the machine used by the defendants in that suit was found to be an infringement of it.

The defendant does not deny, by his own affidavit, or by that of any expert, that his machine is identical with that used by Dohrman and Peipho, or that it is an infringement of the plaintiff's patent. But the application is opposed on an affidavit made by the solicitor for the defendant, setting forth that the defendant says that his machine is in many respects entirely dissimilar to the plaintiff's, and that the solicitor is unable, without much investigation, to show to the court the dissimilarities which he believed to exist between the two, but he is advised by experts, and believes, that in many respects the defendant's machine is different from that adjudicated upon in the case against Dohrman and Peipho, and he believes that if a reasonable time were granted to him he would be able to show that the defendant's machine is not the machine adjudicated upon and declared to be an infringement of the plaintiff's patent in the former action. On these statements the court is asked to allow the defendant time to show that his machine is unlike the one already adjudged to be an infringement of the patent. No reason is given why the defendant does not himself swear to the dissimilarity of his machine, or why some competent machinist does not do so, nor are any dissimilarities pointed out. It must, therefore, for the purposes of this application, be regarded as established that the defendant's machine is an infringement of the plaintiff's patent.

An attempt is made, by affidavit, to show that a portion of the evidence on the part of the defendants in the former suit, was not before the judge who decided the cause, and that such evidence was material, and that if such evidence had been considered, the result in the case would have been different. The evidence referred to is a patent granted in England to Henry Oswald Weatherley, November 14, 1825, for "machinery for cutting wood, and forming the same into bundles." But it appears by a certificate from the judge by whom the case was heard and decided, that the patent was in evidence before him on the trial and decision of the case. It was put in to affect the validity of the plaintiff's patent on the question of novelty, and it is one of several patents which the court, in its opinion, given in that case, referred to in these words: "I have examined the various patents put in evidence to antedate

[1] [Reported by Samuel S. Fisher, Esq., and here reprinted by permission. 1 Am. Law T. Rep. U. S. Cts. 42, contains only a partial report.]

plaintiff's invention, and compared them with it, but I find none which in my judgment, embraces the same combinations and arrangements." In this connection an affidavit is put in, made by an expert, who was a witness on the part of the defendants in the former suit, to the effect that before he was examined as a witness in that case, he had ascertained, by an actual experiment, which was satisfactory, that it was practicable to feed wood to the splitting-knife by the means shown in the Weatherley patent; that such experiment consisted in the temporary alteration of a machine built according to the plaintiff's patent, so that the carrying-apron would transfer the wood upon a fixed table, and would push it forward thereon in the same manner as in the Weatherley patent; that this experiment proved to the full satisfaction of the witness that such mode of feeding forward, to wit: the pushing the wood along on a plate or table by the force transmitted from a quantity of wood behind it, which latter wood is carried on an apron, is practicable, and may be made to perform with complete success with ordinary mechanical skill, and without the aid of invention; that this experiment was not proved in the former case, the witness not having been asked the reason for his confidence in the practicability of the Weatherley mode of feeding; that he, the witness, believes that the omission to fully prove the practicability of the Weatherley mode of feeding was a principal cause of the loss of the case by the defendants; and that since the hearing of that case several machines have been constructed and put in successful use in the city of New York, which feed the wood to the knife in precisely the manner shown in the Weatherley patent, that is, by its being pushed forward to the knife upon a table by the pressure of the wood behind it.

I have examined the testimony given by this witness and the other witnesses in the former suit, and also the Weatherley patent. The experts on both sides gave their views very fully as to the Weatherley patent. It is quite apparent that the Weatherley machine was a different machine from that of the plaintiff's. The object of it was to split kindling wood, and it was patented in 1825, but it did not appear that any machine had been practically used for the purpose until the plaintiff's machine was patented in 1855. The Weatherley machine has splitting-knives, and a bed to resist the splitting action of the knives, and a moving carriage to convey the blocks of wood, and a clearing plate. All these elements are in the plaintiff's machine. But the combination and arrangement of them in the two machines are altogether different, as is apparent from the evidence of the experts. In the plaintiff's machine the moving carriage carries the block of wood to the knives, and ceases moving during the splitting action, so as to permit that action, and then resumes its progress, and thus carries the block away after it is split. In the Weatherley machine the moving carriage merely carries the block to the edge of the fixed bed, to which it is transferred from the moving carriage, and over the surface of which it is pushed by the forward motion of the block next behind it to the place where it it to be split. As, therefore, the feeding and carrying arrangement in the Weatherley machine is so widely different from the feeding and carrying arrangement in the complainant's machine, it is of no consequence to show, by experiment or otherwise, that it is practicable to feed and carry the wood in the manner shown in the Weatherley patent; and if, as the witness now swears, machines are in successful use which feed the wood to the knife in precisely the manner shown in the Weatherley patent, they may be freely used, if they do not embody any of the claims of the plaintiff's patent.

It is urged that the defendant is perfectly responsible, and is willing to give security for the payment of any decree that may be obtained against him on final hearing, and that a provisional injunction ought to be withheld. But where, as here, the patent has been sustained on full hearing, and the infringement is clear, and especially where the very form of machine used by the defendant has been passed upon by the court on the question of infringement, the complainant is entitled to have his rights promptly protected by injunction. An injunction must issue as prayed for.

[NOTE. There was a decree for complainant and a reference to a master. On the coming in of the report, exceptions were taken thereto, and it was referred back for additional proofs. Case No. 3,122.

[The master again reported, and the report was confirmed, and a final decree entered for complainant. From this decree, defendant appealed to the supreme court, where the decree of the circuit court was affirmed.

[For grounds of affirmation by the supreme court, see note to Case No. 3,122.

[For other cases involving this patent, see note to Conover v. Roach, Case No. 3,125.]

Case No. 3,124.

CONOVER v. RAPP.

[4 Fish. Pat. Cas. 57.][1]

Circuit Court, S. D. New York. Nov., 1859.

PATENTS — EXPERT TESTIMONY — EQUIVALENTS — INFRINGEMENT—MEASURE OF DAMAGES.

1. Opinions of experts are admitted contrary to the general rule which requires witnesses to testify only as to facts.

2. It would probably be as well, if not better, that such opinions should be excluded from the consideration of the jury.

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

3. A mechanical equivalent is a device which performs substantially the same office with the thing described, in substantially the same way.

4. The grant of a patent for an improvement does not give the patentee of the improvement a right to use any original machine.

5. The actual damages are the profits which the defendant has made.

[Cited in Johnson v. Onion, Case No. 7,401.]

At law. This was an action on the case [by Jacob A. Conover against John H. Rapp], tried by Judge Ingersoll and a jury, to recover damages for the infringement of letters patent [No. 12,857] for an "improved machine for splitting wood," granted to plaintiff May 15, 1855, and more particularly referred to in the report of the case of Conover v. Roach [Case No. 3,125].

P. Van Antwerp and C. M. Keller, for plaintiff.

A. K. Hadley and L. S. Chatfield, for defendant.

INGERSOLL, District Judge, charged the jury as follows:

There is no question as to the novelty of this invention, for the patent is prima facie evidence of its novelty; and, as there has been no evidence introduced, nor could any be introduced under the pleadings, to prove the want of novelty, the patent must be deemed conclusive evidence that the thing granted, at the time of the grant, was new and useful, and that the plaintiff had the exclusive right to it. The first question, then, to be considered, is, what was the grant of right contained in the patent? That is a question of law and must be determined by the court, and whatever the court determines to be the grant of right, the jury will consider as the true grant of right.

The other question is a question of fact; namely, does the device or invention used by the defendant interfere with the grant of right given to the plaintiff? In other words, is the machine of the defendant identical with the machine of the plaintiff?

To determine what was the grant of right, we must look to the patent; and the patentee in specifying his particular machine has described how it is to operate, and how it is constructed, by what means the result which he wishes to bring about is produced. He describes that which he deems the best way to bring about this result, and having described his machine he goes on and states how and what he does not claim, and then he goes on and states what he does claim. He says, "I do not confine myself to the form of knife described and represented, as that can be changed at pleasure, although I prefer the form described; nor do I confine myself to the use of an endless bed, as a reciprocating bed or carriage will answer the purpose, but not as well. Nor do I confine myself to the making of the holding or clearing plate movable, or with an elastic pad on its under surface, as it will answer the purpose of a clearer without these features, which add to it the function of holding down the block firmly during the operation of splitting. It will be obvious to the mechanic that the several parts constituting the said machine may be varied in form or by the substitution of equivalents, and still possess the substantial mode of operation which I have invented." "What I claim as my invention and desire to secure by letters patent is the movable bed or carriage for carrying and advancing the blocks of wood in combination with the reciprocating cutters operating at right angles with the surface of the bed or carriage, substantially as and for the purpose specified. I also claim in combination with the bed or carriage and reciprocating cutter, substantially as specified, the employment of the clearing plate through which the cutters pass, substantially as and for the purpose specified." "And, finally, I claim providing the said clearing plate with an elastic pad, and imparting to it an up and down motion, substantially as specified, in combination with the bed or carriage and reciprocating cutter, as specified, by means of which the said plate, under the combination specified, performs the double office of holding the blocks and clearing the cutters as specified."

He does not claim the bed or the cutters separately. They were admitted to be old, the bed was old, the cutters were old, but the claim was for the combination of these two elements in the manner described and for the purpose specified. That was one grant of right; the other grant of right was for the combination of three elements, to wit: the bed and cutters, which composed the first grant of right, with the clearing plate combined together; so that this grant of right is the combination of the bed or carriage, or device, whatever you may call it, with the cutters and the clearing plate together; and if in this case the defendant, in his machine, has interfered with this grant of right made to the plaintiff in any one of these particulars, then it will be your duty to find a verdict for the plaintiff. It is not necessary that he should interefere with this grant of right in both particulars. It is not necessary to enable the plaintiff to recover that he should have a combination of the bed and cutters and clearing plate. If he has got his combination of the bed and cutters, it will be your duty to find a verdict for the plaintiff, although he may not have used the two combinations. Now, gentlemen, having ascertained what the grant of right is, which is a question of law, and which you must take as the court lays it down to you, the next question is one of fact, and it is: Has the defendant interfered with this grant of right, or with either of these grants of right, made to the plaintiff? In other words, has he used in the machine—used substantially, not in form—the two elements which were patented by the plaintiff in combina-

tion, to wit: the bed for carrying the wood or removing the wood, in combination with the cutters for splitting the wood, after being so carried, or has he interfered with the plaintiff's right in the second particular, to wit: the combination of the bed for carrying the wood or removing the wood, with cutters for splitting the wood, and the clearing plate to make the operation of the machine more effectual.

It is very evident, gentlemen, that the defendant has used a machine by which the wood is removed from one point to another, and, after it has been removed, for splitting the wood by these knives there is a combination in his machine of these two elements, to wit: that of removing the wood, whether it is in the carriage or not, and the splitting of it. Without the removing of the wood the machine would be ineffectual; without the knives to split it, both would be ineffectual; both of these are used; that appears from an inspection of the machine itself, and it is admitted, I believe, on all hands. Now, does this machine interfere, thus combined, with the combination which was granted to the plaintiff? It is claimed on the part of the defendant, that it is not this combination, for the reason that there is no carriage used to carry the wood, and various witnesses, as experts, have been introduced before you to give their opinion whether one machine is identical with the other.

The opinions of witnesses on a question of this kind are not to be admitted unless they are what are called experts. As a general rule, witnesses are confined in their testimony to the relation of facts, and the jury are to make up their opinions from those facts. But, gentlemen, in a case of this kind, the opinions of witnesses who are experts are admitted, contrary to the general rule which requires witnesses to testify only as to facts. And I must say, gentlemen, so far as my experience extends that it would be as well, if not better, that the opinions of such witnesses should be excluded from the consideration of the jury. But, gentlemen, such testimony is admitted, and the jury must give such weight to it as they think it deserves. It is unsafe in many particulars to rely on the opinions of witnesses as to the identity of two machines, for the reason that they may not have a clear perception in what the identity consists; and, in that case, their opinions, whether they are identical or not identical, should have no weight with the jury. This is illustrated very well in the case now before you. If I understand correctly, this question was put to a witness: whether, in his judgment, having a machine composed of certain mechanical elements, each performing appropriate functions and combined, whether in his judgment it would make a material change if you took out one of the elements thus combined, and substituted a mechanical equivalent for such element. And I understood him to say that, in his opinion, the substitution would make it a different machine. It is for you to determine whether he did say so or not. If he did, his opinion is not worth a rush, because he is mistaken in points of law as to what makes a machine identical or not. If his opinion is, that the substitution of a mechanical equivalent for one of the elements of a combination changes the machine, I say that in law he is mistaken, for the law is, gentlemen, that the substitution of a mechanical equivalent would not change it, and therefore the opinion of a witness of this kind, if he is mistaken as to the law, should have no weight with you. But you will give those opinions such weight as they deserve, and come to the question of fact. Is this device which the defendant uses for moving the wood the carriage or bed described by this plaintiff, or is it a mechanical equivalent therefor? If it is, it is the same as if he used it in form. Now, what is a mechanical equivalent, gentlemen? You hear witnesses talking about a mechanical equivalent, but they don't tell you what it is, and we are left in the dark to know what a mechanical equivalent is. A mechanical equivalent is a device which performs substantially the same office with the thing described in substantially the same way, and if this device of moving in the defendant's machine performs the same office in the plaintiff's, in substantially the same way, it is an element in the combination of the plaintiff's machine; does it then perform the same office? What is the office of the plaintiff's device of this carriage or bed? The office, as is manifested, of this bed or carriage is to move the wood from one particular point to another, where it can be acted upon by the knives, and it is very evident that the office of both devices in this machine is the same. It does remove the wood from one point to another, so that it can be operated upon by the knives.

Does it remove it in substantially the same way? It is moved in both devices by the power acting upon the bed or carriage, and then acting on the wood removes it. It is evident that they are both, in this respect, operated upon. But it is said that it is operated upon in substantially the same way. The plaintiff, as he has described it here, has this endless bed. In the defendant's there is no endless bed. In the plaintiff's the wood is not in itself moved over any bed. It remains stationary on the bed, and is carried along with the bed, not dragged along the bed. Now, gentlemen, I do not know that I can make this thing better understood by you than by stating the following case: If, gentlemen, in winter, on a pond of water, a man stands upon a sleigh, having a pair of skates upon his feet, and that sleigh (the bottom of it being two inches from the ice) should be moved across the ice by the power of horses, or any other power, it is admitted that that man would be carried, provided

this sleigh went from one end of the pond to the other, would be carried by a sleigh, that he would be removed in a carriage. In other words, carried by the force and power applied to the sleigh, and that would be a carriage. Now, supposing that there should be holes in the bottom of the sleigh, and he should drop his feet through, and let his feet slide. The question is, is he carried in the same way, in substantially the same way, that he is in the other. He is moved by the power that is applied to the carriage, whether his feet be upon the bottom of the sleigh or upon the ice; and the question for you to determine is, is the wood now carried in substantially the same way by the power of this bed, by the consequence of the force applied to it, in substantially the same way, whether it is done by the plaintiff's device or the other.

The great object you will see in both devices is to move the wood—that is the whole object—from one point to the next to enable it to be operated upon by the knives; it is moved so as to be operated upon, and you are to determine whether it is substantially in the same way, not in the same form, for forms are nothing. If forms were essential, every patent that has been granted could be successfully contested. You are to determine whether the device of the defendant—no matter what you call these several elements—is substantially like the device of the plaintiff. If it is, then it is your duty to find a verdict for the plaintiff. Allusion has been made to this patent of the defendant. The patent of the defendant is not to operate upon any rights granted to the plaintiff. On looking at the patent of the defendant, as I understand it, it is only for an improvement on wood-splitting machines; and where there has been a patent granted for a wood-splitting machine, and a subsequent grant for an improvement on that wood-splitting machine, that grant for such an improvement does not give the patentee for the improvement a right to use any original machine. He must obtain that right from the original patentee before he can use his improvement.

If you should find a verdict in favor of the plaintiff, the next question will be, what damages are you to give him? He is entitled to such actual damages as he has sustained. The actual damages are the profits the defendant has made. That would depend on the extent of the use by the defendant, and you must judge of that in the best way you can from the evidence before you. Evidence has been given that this defendant used it, and the amount of wood that was split during each day, and the amount that can be split by hand. There has been no evidence given that this defendant had any right to use any other patent or any right to use any other mode of splitting wood, except by hand, and the plaintiff has calculated from that, what the actual damages were. A plaintiff is not able, with the utmost accuracy, in cases of this kind, to give the exact amount of damages that he has sustained. It is not in his power. He does the best he can. If he is wrong in his calculation, the defendant can put him right. The defendant knows the profit he has made. Therefore, you must take this evidence as it is, and come to the best conclusion you can as to what are the actual damages. If you find in favor of the plaintiff, give a verdict for such actual damages as you think he has fairly sustained, judging from the evidence before you.

The jury found a verdict for the plaintiff.

The defendant moved for a new trial before Mr. Justice Nelson, who delivered the following opinion:

NELSON, Circuit Justice. I do not see any error in the charge of the judge on the submission of the case to the jury, and am of the opinion that the newly-discovered evidence does not warrant the granting of a new trial on that ground.

[NOTE. For other cases involving this patent, see note to Conover v. Roach, Case No. 3,125.]

Case No. 3,125.

CONOVER v. ROACH et al.

[4 Fish. Pat. Cas. 12.] [1]

Circuit Court, S. D. New York. Jan., 1857.

PATENTS — "MACHINE FOR SPLITTING WOOD" — WHAT MAY BE PATENTED — INVENTION — COMBINATION — EQUIVALENTS — CONSTRUCTION OF SPECIFICATION — EXPERT TESTIMONY.

1. When a patentee patents a machine, he can not patent either a purpose or effect, but the mechanical means, devices, and organization which his machine embodies. When the means, devices, and organization are patented, the patentee is entitled to the exclusive use of this mechanical organization, device or means, for all the uses and purposes to which they can be applied, to every function, power, and capacity of his patented machine, without regard to the purposes to which he supposed originally it was most applicable, or to which he supposed it was solely applicable, if such were his original view.

[Cited in McComb v. Brodie, Case No. 8,708.]

2. When the patentee has limited his claim to the combination of parts, those parts, except in the combinations claimed, are conceded by the patentee to be old.

3. A mere change of form in the elementary parts of a combination, or in the different parts of a machine, which is patented, does not change the character and principle of the machine, provided the spirit, substance, and principle of the machine are retained, and the substitution of one well-known mechanical equivalent for another, is not such a change as will alter the character of the machine, or shield infringers from the consequences of an infringement.

4. It is a question of law, for the court to determine, what construction shall be placed upon the language contained in the specification.

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

5. The claims of Conover's patent for "machine for splitting wood," granted May 15, 1855, are limited to the combinations specified, in which a moving bed or platform, having those peculiar and distinguishing features and characteristics of the movable bed or carriage described in the specification, is to be found; and the patent can not be avoided by the prior use, or infringed by the subsequent use of any combination in which a movable bed or carriage, having those peculiar and distinguishing features, or its equivalent, is not to be found.

[Cited in Johnson v. Onion, Case No. 7,401; Rowell v. Lindsay, 6 Fed. 296.]

6. It is not enough, in order to show that one mechanical device is the equivalent of another—that it accomplishes the same result, or that it produces the same effect, unless that effect is produced by substantially the same mode of operation.

[Cited in Gottfried v. Phillip Best Brewing Co., Case No. 5,633.]

7. It is necessary, in order to authorize the jury to find that one device, or a series of devices, all operating to the same end, is or are mechanical equivalents for other devices, that they effect the same substantial purposes, by substantially the same mode of operation.

8. It may be assumed in most patent cases, that neither party would call experts on their side, unless they had supposed that their opinions in reference to the straining point of the case, would be directly opposed to the opinions which they suppose will be expressed by the experts of the adversary. Their well-considered and deliberately-formed opinions are asked in advance, and if they are found to be adverse to the party who seeks such opinion, that expert is not called on his part.

9. An invention, in the sense of the patent law, means the finding out, the contriving, the creating of something which did not exist, and was not known before, and which can be made useful and advantageous in the pursuits of life, or which can add to the enjoyment of mankind.

10. The thing patented must be new, and it must be useful, to an appreciable extent, although the measure of usefulness is not material.

11. If a party finding a machine calculated and intended for the accomplishment of one purpose, discovers or conceives that it is able to accomplish another purpose, and that purpose can be accomplished by the organization which has before been produced, he can have no patent for the application of this old machine to a new use.

At law. This was an action on the case [by Jacob A. Conover against Peter R. Roach and others], tried before Judge Hall, and a jury, to recover damages for the infringement of letters patent [No. 12,857], for an "improved machine for splitting wood," granted to plaintiff, May 15, 1855. The mode of operation of the machine was substantially as follows: The blocks of wood were placed upright on an endless movable bed. A plate with an elastic pad held the block down to the bed during the descent and the rising of the knife. The knife had four blades forming a cross, working through a corresponding slot in the plate. As soon as the knife cut through the block and was again lifted above the block and plate, the plate was raised by the operation of a cam, and a forward motion of the bed took place to advance or feed the next block. The claims were as follows: "The movable bed or carriage for carrying and advancing the blocks of wood in combination with the reciprocating cutters, operating at right angles with the surface of the bed or carriage, substantially as and for the purpose specified. Also, in combination with the bed or carriage and reciprocating cutters, substantially as specified, the employment of the clearing-plate, through which the cutters pass, substantially as and for the purpose specified. Finally, providing the said clearing-plate with an elastic pad, and imparting to it an up and down motion, substantially as specified, in its combination with the bed or carriage and reciprocating cutter, as specified; by means of which the said plate, under the combination specified, performs the double office of holding the blocks and clearing the cutters, as specified."

P. Van Antwerp and C. M. Keller, for plaintiff.

George Gifford, for defendants.

HALL, District Judge, charged the jury as follows: The action is brought by the plaintiff for the purpose of recovering damages for an alleged infringement of a patent granted under the authority of the laws of the United States; and although, after the experience which you as jurors have had in this case, it may be considered somewhat unnecessary to refer you to the provisions of the law which authorize the granting of patents for inventions, I shall nevertheless deem it expedient to refer you to some of those provisions, with a view of guiding your action in the present case.

You are aware, gentlemen, that for the purpose of promoting the progress of the useful arts, congress had the power, under the constitution of the United States, to give for a limited time to inventors the exclusive right, or privilege, of using their inventions; and when that right is given in accordance with the law of congress, adopted for that purpose, that exclusive privilege becomes the property of the inventor, and any person who takes that property from him by an unauthorized use of the invention patented, becomes an infringer of his rights, and is liable in damages precisely as though he had been guilty of taking any other property belonging to the patentee. The exclusive right to use is the property of the patentee, and whoever interferes with it must respond in damages whenever a case is brought for trial in a court of justice. But you will perceive, gentlemen, that it would be extremely unjust that a party should be prosecuted for the infringement of a patent unless he had some means within his reach of determining precisely what he had the right to use, and precisely what he was compelled to refrain from using. And it is for this reason, among others, that the law of congress, which authorizes the issuing of letters patent for inventions, requires that the inventor, when

he applies for a patent, shall present, with his application, what is called a "specification," describing and defining the limits of his invention. The statute provides: "That before any inventor shall receive a patent for any such new invention or discovery, he shall deliver a written description of his invention or discovery, and of the manner and process of making, constructing, using or compounding the same, in such full, clear, and exact terms, avoiding unnecessary prolixity, as to enable any person skilled in the art or science to which it appertains, or with which it is most nearly connected, to make, construct, compound, and use the same; and in case of any machine, he shall fully explain the principle and the several modes in which he has contemplated the application of that principle or character by which it may be distinguished from other inventions; and shall particularly specify and point out the part, improvement, or combination which he claims as his own invention or discovery."

This specification is required for the double purpose: first, as I have before told you, of enabling the public to understand precisely what has been secured to the patentee; and, in the next place, to enable the public, after the expiration of the patent, to put in successful practice the invention from the description alone which has been furnished by the patentee.

In this case, the plaintiff, upon the application at the patent office for the issuing of the patent upon which this suit is brought, presented a specification describing and defining the limits and character of his invention, which specification, or a copy of it, is annexed to the letters patent, which are the foundation of this suit. I shall presently have occasion to state to you, gentlemen, the construction which I have felt it to be my duty to give to that specification in respect to the extent of the claims made by the patentee therein. But before proceeding to that portion of the case, it is, perhaps, proper that I should say to you, that before any patent can be issued, or, if issued, before it can be sustained in any court of justice, the party applying for that patent, or some person under whom he claims, must have invented some new and useful improvement in some machine, manufacture, or art, or composition of matter, and therefore it becomes necessary for us to understand, to some extent, what constitutes an invention in the sense of the patent law. An invention in the sense of the patent law, as I understand it, means the finding out—the contriving, the creating (and I speak now in respect to a machine, or an improvement upon a machine) of something which did not exist, and was not known before, and which can be made useful and advantageous in the pursuits of life, or which can add to the enjoyment of mankind. In other words, the thing patented must be new, and it must be useful, to an appreciable extent, although the measure of that usefulness is not material. Any degree of utility appreciable by a jury is sufficient, upon the question of utility, to sustain a patent.

In connection with this question of invention, it is proper to state to you, that the mere application of an existing machine, or organization to a new use, is not the subject matter of a patent. If a party finding a machine calculated and intended for the accomplishment of one purpose, discovers or conceives that it is able to accomplish another purpose, and that purpose can be accomplished by the organization which has before been produced, he can have no patent for the application of this old machine to a new use. In other words, the invention patented, when a patent is taken out for a machine, is the machine itself—the mechanical means and devices by which certain results in the operation of the machine can be obtained; and when the inventor has obtained a patent for his invention, he is entitled to the exclusive use of it, if that invention is a machine, for all the uses and purposes to which that machine, without the exercise of any inventive power, can be usefully applied. In other words, when he patents a machine, he can not patent either a purpose or an effect, but the mechanical means, devices, and organization which his machine embodies; and when these means, devices, and organization are patented, the patentee is entitled to the exclusive use of this mechanical organization, device, or means, for all the uses and purposes to which they can be applied, to every function, power, and capacity of his patented machine, without regard to the purposes to which he supposed originally it was most applicable, or to which he supposed it was solely applicable, if such were his original view. Nevertheless, gentlemen, a patent may be granted for an improvement upon an existing organization, that existing organization being capable of performing certain functions, or producing certain results only, if that improvement, in addition, enables the machine to accomplish additional and different purposes. For instance, in the case of the machine patented by the plaintiff: suppose that originally this machine had been patented and intended, or had been patented, and when patented had been intended for some purpose similar to that of the cracker machine of Nevens, if you please, in the accomplishment of which purpose it was not at all necessary or desirable, that these flanches or side ledges upon the movable bed or carriage should be used, and therefore in that organization the bed had been a plain surface such as is exhibited in the moving bed in the case of the cracker machine; but this plaintiff in this action desiring to use this machine for the accomplishment of the particular purpose to which he intended to apply the machine or organization, in which were contained the combinations mentioned in his patent, had

added this flanch or ledge to this machine, he could have obtained a patent for that improvement, upon the existing organization, and for that only, and the patent for that improvement, while it would have restrained the plaintiff, if he had patented the machine without these ledges, from using the ledges upon the machine which he had patented, would nevertheless have given no right to the patentee of the improvement to use the original machine, if the original machine had been patented as a distinct and entire organization. It may therefore happen very frequently in the progress of invention, that the original inventors of a machine, calculated to accomplish a particular purpose, may bring an action against a person who has patented an improvement upon that machine, for using the original machine, while the party who had patented the original machine may also be liable to an action for the use, not of what he has patented, but for the use of what has been patented to his adversary. Therefore, gentlemen, in this case, it does not follow from the fact (if the fact should be so) that the plaintiff in this action might be sued for a violation of a patent granted to Howard, that this plaintiff, if he has made a new and useful combination, can not maintain an action even against the holders of the Howard patent. Their rights are distinct and independent, and are subject to be litigated and determined in suits brought each upon a distinct patent, having, so far as the question of infringement is concerned, no necessary and absolute dependence upon each other. I have said to you before, gentlemen, that it was necessary for an inventor, and necessary for this plaintiff, in presenting his application for a patent, to annex to his application a description of his invention, and a statement of the claims which he makes, for the purpose of showing to the patent office and to the public, what he desires to restrain the public from using in connection with his invention. In this case, the plaintiff, in the specification annexed to his patent, has described, as he properly might, substantially the machine represented by the model now before me, and which has been exhibited to the jury in the progress of the trial. He has described, as he properly might, the whole of his organization, but nevertheless when he comes to that part of the specification in which it becomes necessary for him to define and limit the precise extent of his claim, he has not claimed, as he could not properly claim, the whole of this machine as his entire invention. In other words, he has not claimed the peculiar form of this knife, which he could not have done, as you will perceive, because this peculiar form of knife was found in the patent previously granted to Howard. He has not claimed other portions of the machine, but having described the whole machine he then proceeds to define precisely the character and extent of his invention. He says first: "I do not confine myself to the form of knife described and represented, as that can be changed at pleasure."

Or rather perhaps I should say, before reading any portion of this specification, that the plaintiff instead of claiming it as an entire organization—as wholly his own invention, or claiming any distinct, separate, and independent part of it as new, has limited his claim to the combination of parts, and as he has limited his claim to the combination of parts, for all the purposes of this action, these parts, except in the combinations claimed, are conceded by the patentee to be old. And he then says before describing the combination: "I do not confine myself to the form of knife described and represented, as that can be changed at pleasure, although I prefer the form described, nor do I confine myself to the use of an endless bed, as a reciprocating bed or carriage will answer the purpose, but not so well."

Now, you will perceive, that in this part of the specification, he says distinctly, that he does not confine himself to the form of this knife—that knife constituting, as you will perceive, one of the elements, or elementary parts of the combination substantially claimed; nor does he confine himself to this endless bed. He says, and properly I think, that "a reciprocating bed or carriage will answer the purpose, but not so well," for the reason, that if it is a reciprocating bed or carriage, when it has passed through the machine to the extent of its length, it must be brought back before it can be again loaded, and again passed through the machine, and therefore time would be lost in this retrograde motion. He proceeds: "Nor do I confine myself to the making of the holding or clearing plate movable, or with an elastic pad on its under surface, as it well answers the purpose of a clearer, without these features, which add to it the function of holding down the blocks firmly during the operation of splitting."

Gentlemen, in the defendant's model, as in the plaintiff's machine, this central plate, as you will perceive, is allowed to have an up and down motion. It is fitted upon the blocks with an elastic pad, and this elastic pad, with the up and down motion, enables him to perform in addition to the proper office of a clearing plate, the additional office of pressing upon the wood to be split, and holding it in place while under the operation of the machine. The plaintiff therefore clearly indicates in this point of the specification, that he does not confine himself to a plate having this up and down motion, or this elastic pad, but he claims as his invention, and as a new and useful combination, the use of the clearing plate in combination with these cutters, and with the movable bed or carriage, a plate which can be used, and is capable of being used as a clearer plate alone, and does not at any period in the op-

eration of the machine press upon the wood or material to be cut. You will see when I come to read the claim that he keeps up the same distinction that he has subsequently made. Then he adds: "It will be obvious to the mechanician that the several parts constituting the said machine may be varied in form, or by the substitution of equivalents, and still possess the substantial mode of operation which I have invented."

And this was doubtless done for the purpose of having it appear upon the face of the specification, what the rule of law is upon that subject, that a mere change of form in the elementary parts of a combination, or in the different parts of a machine which is patented, does not change the character and principle of the machine, provided the spirit, substance, and principle of the machine are retained, and that the substitution of one well-known mechanical equivalent for another is not such a change as will alter the character of the machine, or shield infringers from the consequences of an infringement. Having said thus much, he declares explicitly the extent and character of his claim: "What I claim as my invention, and desire to secure by letters patent, is the movable bed or carriage for carrying and advancing the blocks of wood in combination with the reciprocating cutters, operating at right angles with the surface of the bed or carriage, substantially as and for the purpose specified."

You will see, gentlemen, by this, that he claims a combination consisting of two elements, or two elementary parts only; this movable bed or carriage carrying and advancing the blocks of wood, in combination with the reciprocating cutters, operating at right angles with the surface of the bed or carriage, substantially as and for the purposes specified. Secondly. He says: "I also claim, in combination with the bed or carriage, and reciprocating cutters, the employment of the clearing plate through which the cutters pass, substantially as and for the purpose specified."

And here you will perceive, gentlemen, that in this claim he makes no mention of the functions or office of this clearing plate, for the purpose of holding down the wood to be split during the operation of the machine.

In the next claim he says: "And finally, I claim providing the said clearing plate with an elastic pad, and imparting to it an up and down motion, substantially as specified, in its combination with the bed or carriage, and reciprocating cutter, as specified; by means of which the said plate, under the combination specified, performs the double office of holding the blocks and clearing the cutters, as specified." This is the language of the claim. The construction of this language is for the court. It is a question of law for the court to determine what construction shall be placed upon the language contained in this specification; and it is important for you to know precisely the construction which I have put upon this claim, and the extent of the claim, as construed by the court.

The plaintiff claims in his invention, and has patented: (1) The movable bed or carriage, for carrying and advancing the blocks of wood to be cut or split exhibited in the drawings, and described in the specification annexed to his patent, in combination with the reciprocating cutters, operating at right angles with the surface of the bed or carriage, substantially as and for the purposes set forth in the specification. (2) The employment of the clearing plate through which the cutters pass, in combination with the bed or carriage and reciprocating cutter, substantially as and for the purposes set forth in such specification. (3) The providing of the clearing plate with an elastic pad, and imparting to it an up and down motion, substantially as specified in its combination with the bed or carriage and reciprocating cutters, as specified, by means of which such clearing plate is enabled, under the combination specified, to perform the double office of holding the blocks and clearing the cutters, as set forth in the specification.

All these claims, it will be observed, are of combinations simply, and neither presents a claim that either of the elements or elementary parts of the combination specified is new, when considered as a distinct and separate mechanical instrument, device, or organization. For all the purposes of this action each of those elementary parts, as a separate and distinct device, is conceded to be old, and not the invention of the plaintiff; but he claims that he has brought them into new and useful combinations by the exercise of his genius as an inventor; and if he has done so, he had a right to obtain a patent for such combinations. He has claimed the particular combinations set forth in his specifications and claims, and he has claimed and patented nothing more. His patent is, then, for the three several combinations mentioned in the three several claims at the end of his specification, and it is for these three combinations only, and not for either of the elementary parts of either of such combinations.

To these claims I will again ask your particular attention: (1) The first claim is of two elements or elementary parts, viz: the movable bed or carriage, for carrying and advancing the blocks of wood to be split, with the reciprocating cutters operating at right angles with the surface of the bed or carriage. (2) The second claim is of a combination of three elements or elementary parts, viz: The said bed or carriage, the said reciprocating cutters, and the clearing plate through which the cutters pass when such plate is arranged and used for a clearing plate only. (3) The third claim is of a combination of the same number of elementary parts as the second, but by a change in the character and operation of the clearing plate, by which

it performs the double office of a clearing plate and an elastic pad, to hold down the wood to be split, this claim may be said substantially to embrace four elements or elementary parts, viz: The said bed or carriage; the said reciprocating cutters; the said clearing plate, provided with an elastic pad, and having an up and down motion by which it is enabled to hold the wood to be split, and the clearing plate performing its simple and distinct office as a clearer. In other words: The clearing plate in this claim might be considered as having two distinct offices or functions, and in regard to these offices or functions, as being constituted of two elementary parts, one that gives it the function of a clearing plate only, and the other which gives it the additional office of holding the wood upon the bed during the operation of the machine.

We have already seen, by the statements read from the specification, that the plaintiff in these claims does not intend to confine himself to the form of knife represented and described in his drawings and specifications. And it appears by such statement as well as by the second and third claims, that he does not limit himself in his second claim to the use of a moving clearing plate, having an elastic pad, and performing the office of holding down the wood to be split, as well as the office of a clearer, for the second claim covers it as a simple clearing plate, permanently affixed, in such a manner as to perform its single function as a clearer, and the third claim embraces it when provided with an elastic pad, and having an up and down motion, by which it is enabled to perform the double office of a clearer, and of a pressure pad, to hold in place the blocks of wood to be split.

And we have also seen that the plaintiff, in his specification has avowed his determination to enforce his rights against infringers, who substitute for the elementary parts of his several combinations those mechanical equivalents which are frequently resorted to, in order to disguise the true character of a machine, and to conceal an infringement, by changing the form of a machine, while its principle, its spirit, and its substance are retained.

We have also observed that the plaintiff has stated that he does not intend to confine himself to the use of an endless bed or carriage, as he describes (and as the jury will readily perceive) will answer the purpose, but not so well. This is the only specific intimation of the particular change which may be made in the carriage or bed used, without changing the principle of the plaintiff's invention; but a substitution therefor of any mechanical equivalents, for the uses to which it is to be applied, would not change its principle, or carry it beyond the claim of the patent. To do this, the substance and mode of operation, and not the form merely, must be changed. But in determining the character of the bed or carriage claimed in order to determine the question of substantial identity, as connected with the questions of novelty and infringement, we must look to the claim and specification and the drawings annexed, and to the uses for which the patentee states he has invented it.

A movable bed or carriage being one of the essential and vital elements of each of the combinations patented, perhaps the first and most important question upon the construction of this patent is, whether this movable bed or carriage must be simply a movable bed or carriage, either endless or reciprocating, or operating substantially like an endless or reciprocating bed or carriage, or whether the plaintiff has, by the terms and true construction of his claims, confined those claims to combinations in which the endless bed or carriage described in his specification, or its equivalent, is found as one of the elementary parts. In other words, whether the peculiar construction or characteristics of the movable bed or carriage are important to the existence of the combinations claimed by the patentee. This question is an important one, because your finding upon the question of novelty may depend upon it; for if the peculiar characteristics of the movable bed or carriage are not necessary in the movable bed or carriage, which must necessarily constitute one of the essential elements of the patented combination, you may find that combination existing in prior machines, when it may not be found in such prior machines if the peculiar characteristics of the movable bed or carriage are necessary to the existence of such combination.

It is also an important question upon the subject of infringement; for, in order to infringe, the defendant must use one or more of the combinations patented, in substance, though it is not necessary that they should be identical in form. After all the reflection I have been able to bestow upon this question, and under the evidence which has been given in reference to the use of endless beds for other purposes, I am of opinion that the plaintiff's claims are limited to the combinations specified, in which a moving bed or platform, having the peculiar and distinguishing features and characteristics of the movable bed or carriage described in the specification, is to be found, and the patent can not be avoided by the prior use or infringed by the subsequent use of any combination in which a movable bed or carriage, having those peculiar and distinguishing features, or its equivalent, is not to be found.

The flanches or side ledges on this movable bed or carriage described in the plaintiff's specification, are proved by one of the very intelligent and sagacious experts produced on the part of the plaintiff, to be an essential feature, and characteristic of the form and construction of the movable bed or carriage described in the plaintiff's specification, and

the jury will see that in the practical operation of the machine it is intended to perform, and ordinarily does perform, an important office, in confining and holding to its place the blocks of wood to be split; and if there are any other peculiar features or characteristics in the bed or carriage, or trough, as it is called in one portion of the specification, those must also be taken into consideration by the jury.

A most important question of fact, and one which may possibly dispose of this whole case, is whether the defendant has used in his machine a mechanical equivalent for the movable bed or carriage described in the plaintiff's specification, with its peculiar features and characteristics, or whether the defendant had used in his machine devices substantially adopted from the movable bed or carriage of the plaintiff, and which produce the same results by substantially the same mode of operation. I have used frequently the term "equivalent," or "mechanical equivalent," in the progress of this charge, and it is perhaps necessary that I should state to you more fully than I have yet done, my views of what, in the sense of the patent law, constitutes an equivalent. It is not enough in order to show that one mechanical device is the equivalent of another, that it accomplishes the same result; that it produces the same effect, unless that effect is produced by substantially the same mode of operation. In other words, the ultimate end and object of a machine may be to produce a fabric or manufacture of a certain kind, and it may well appear, in the progress of invention, that several different inventors may have invented different machines, producing the fabric, or that manufacture, by entirely different modes of operation, and in that event each successful inventor might be entitled to his patent. They might perhaps be so entirely distinct, and different, and independent in their organization and mode of operation, that a patent for each might stand, covering the whole machine as an entirely distinct and independent organization—as a single organization; or, they might stand, one being an improvement on the other. It is not, therefore, sufficient, in order to authorize the jury to find that one device, or a series of devices, all operating to the same end, is or are mechanical equivalents for other devices, unless they effect the same substantial purpose, by substantially the same mode of operation. And in this case, as I have before said, the question is, whether the defendant uses a mechanical equivalent for the plaintiff's movable bed or carriage, because there is no pretense that a movable bed or carriage, identical in form with the one described and patented by the plaintiff, has been used by the defendant, and therefore the question is simply whether its equivalent has been used.

Upon this question the jury have had the benefit of full and able arguments by the respective counsel; of a careful examination and explanation of the models, and the operation and effects of the working machines; and of the carefully considered and deliberately expressed opinions of the experts on both sides. In reference to these opinions, it happens, as it usually does in patent cases, that the opinions of the two experts on one side are apparently, if not actually, diametrically opposed to the opinions of the two experts on the other side. Indeed, it may be assumed in this and in most other patent cases, that neither party would have called the experts on his own side, unless he had supposed that their opinions in reference to the straining point of the case, would be directly opposed to the opinions which he supposes will be expressed by the experts of his adversary. Their well-considered and deliberately-formed opinions are asked in advance, and if they are found to be adverse to the party who seeks such opinion, that expert is not called on his part. I do not say this, gentlemen, to impeach the integrity or fairness of the experts, or to convey the impression that they are wanting in intelligence or mechanical knowledge, for few experts possess any of these qualities in a higher degree than those called in this case; but to show you that upon these questions of mechanical equivalents, of substantial identity, and substantial difference of organization, and mode of operation, these opinions are to be regarded by you as opinions merely, and that you must decide which opinions are correct, after carefully considering such opinions, and the reasons upon which the experts have told you they are based, in connection with the other evidence in the case, and that furnished by your own senses in the examination of the models which have been given in evidence. In no other way can you decide between the conflicting opinions of these experts, and it is your opinions and judgments, and not the opinions of the experts, which must in the end determine the questions of substantial identity and equivalents litigated in the case. In that you are to consider the evidence, the opinions of the experts, the reasons they have given for their opinions, to look and consider the models, to deliberately exercise your own judgments, and then decide.

The duty and responsibility of determining all the questions of fact, the credibility of witnesses, and every question which in the end becomes material as a question of fact, must be determined by you, and by you alone. The court, ordinarily, has enough to do to dispose as it best may of the questions of law arising in the progress of the case. You must understand me as not intending to touch at all upon the ground which it is your duty to occupy. Upon the other hand, you have been told, and prop-

erly told, I think, by the counsel upon both sides, that the questions of law involved in the case are questions which the court must dispose of, and that its determination in reference to these questions of law is, for the purpose of the present trial, conclusive upon the parties, and also upon you. Indeed, this is necessary to the correct and proper administration of justice. If the court, in determining any question of law, should err (as they are very likely to do), a full remedy is provided by law, by an appeal to the highest judicial tribunal of the Union; but if you should take upon yourselves to determine any question of law, in opposition to the determination of the court, no exception can be made to that determination, and no mode of review has been or can be provided for the purpose of reversing any such erroneous determination. You will, therefore, take the ruling of the court upon the questions of law which I have already discussed, as conclusive upon your judgment for the purposes of the present case.

The jury found a verdict for the plaintiff.

[NOTE. Patent No. 12,857 was granted to J. A. Conover, May 15, 1855. For other cases involving this patent, see Conover v. Rapp, Case No. 3,124; Conover v. Mers, Id. 3,123; Conover v. Dohrman, Id. 3,120; Johnson v. Onion, Id. 7,401; Conover v. Mers, Id. 3,122; and Mers v. Conover, 92 U. S. 1,008.]

Case No. 3,126.

In re CONRAD.

[3 Leg. Gaz. 331; 8 Phila. 147; 1 Leg. Gaz. Rep. 284; 28 Leg. Int. 324; 4 Am. Law T. 189; 1 Leg. Op. 201; 6 Am. Law Rev. 385.]

Circuit Court, E. D. Pennsylvania. Oct. 2, 1871.

PROMISSORY NOTES—LAW OF PLACE—USURY.

1. Though the notes were drawn, dated, signed and endorsed at Philadelphia, where the drawers and endorser resided, yet, as they were delivered and discounted at New York (not being made with exclusive reference to the laws of either Pennsylvania or New York), the effect was to bring the whole transaction within the dominion of the laws of New York.

2. The transmission of the proceeds of the notes to the parties at Philadelphia, by means of checks on a New York bank, did not change the place of the transaction, as the notes were placed in New York, discounted there, and the money provided and deposited there; and the checks were only the contemplated means employed to facilitate the receipt of the money by the parties in Philadelphia.

3. As the notes were discounted in New York at usurious rates of interest, and are therefore declared void by the laws of that state, the endorser is not liable, and the claim of indebtedness founded upon said notes is disallowed.

Appeal from the district court for the eastern district of Pennsylvania, in bankruptcy.

In equity. Promissory notes were drawn by Flues & Schatte, residents of Philadelphia, for the accommodation of Peter Conrad, also a resident of that city, who endorsed said notes, and had them discounted at usurious rates of interest, by Flues & Co., of New York, receiving the money from them by checks of the latter firm upon a New York bank. Conrad becoming a bankrupt, Flues & Co., presented the notes for proof before the register in bankruptcy, and their allowance was opposed. George M. Dallas, trustee, appealed from the decree of the district court [sustaining the opposition to the proof of the debt].

Charles S. Pancoast and James E. Gowen, for appellant.

Charles H. Sidebotham, for Flues & Co.

McKENNAN, Circuit Judge. There is no ground for contention as to the facts which give rise to the question presented by this appeal. Peter Conrad, the bankrupt, desiring to raise money to meet certain pecuniary liabilities, made an arrangement with Flues & Co. of New York, to obtain it for him there, by the discounting of notes to be drawn for his accommodation by Flues & Schatte, and endorsed by him. The notes were accordingly drawn, endorsed and dated at Philadelphia, where the drawers and endorser resided, and were sent by mail to Flues & Co., who discounted them themselves, at usurious rates of interest, and remitted the proceeds to Flues & Schatte, by their checks on the Manhattan bank, New York. Thirteen of these notes remained unpaid in the hands of Flues & Co., who have presented them for proof before the register in bankruptcy, and their allowance is opposed by the trustee of the estate of the bankrupt.

The question now to be determined is, by the law of which place, New York or Pennsylvania, is the liability of Peter Conrad to be governed. If by the law of New York, his liability is altogether avoided; if by the law of Pennsylvania, it is reduced to the amount actually loaned, with legal interest thereon. As a general rule, the construction and validity of contracts are to be determined by the laws of the place where they are made, unless the parties, by the terms of the contract, had in view a different place. Thompson v. Ketcham, 8 Johns. 193; Cox v. U. S., 6 Pet. [31 U. S.] 202. Thus, where no place of execution is expressed in a note, it will be governed by the law of the place where it is made, but, if it is made payable at a different place, the rate of interest there will be allowed, and it will be governed generally by the law of that place. This was the principle on which Mullen v. Morris, 2 Barr [2 Pa. St.] 85, was determined. But this rule is applicable only to bona fide contracts, to which effect would be given by the laws of the place at which they are to be performed. In Andrews v. Pond, 13 Pet. [38 U. S.] 65, the action was against the endorsers of a bill of exchange, drawn, dated, and negotiated at New York, and payable at Mobile, which was usurious, both by the laws of New York and Alabama. Chief Justice Taney, delivering the opinion of the

court, says: "Now, if this defence is true" (that the contract was not made with reference to the laws of either state, and was usurious by the laws of New York), "and shall be so found by the jury, the question is not which law is to govern in executing the contract, but which is to decide the fate of a security taken upon usurious agreement, which neither will execute. Unquestionably, it must be the law of the state where the agreement was made, and the instrument taken to secure its performance. A contract of this kind cannot stand upon the same principles with a bona fide agreement, made in one place to be executed in another. In such cases, the legal consequences of such an agreement must be decided by the law of the place where the contract was made. If void there, it is void everywhere."

The notes in controversy were not made with exclusive reference to the laws of Pennsylvania or New York; and it is undoubted, that, as usurious contracts in both states, they would not be executed by the laws of either. The only and decisive inquiry then is, where were they made? They were drawn, dated, signed, and endorsed at Philadelphia, where the drawers and endorser resided. But had they any efficacy there? Did they there impose any obligation upon these parties to pay the sums stated on their face? Were they there evidences of indebtedness to any one? Clearly not, because, until they passed out of the hands of the persons who made them, they belonged to them, and did not bind them to pay anything to anybody, and would not sustain any action upon them. They were not contracts, because there was only one party to them. Something else was essential to impress upon them the character and qualities of a contract. That was their transfer to some one else for a valuable consideration. They then became for the first time, promises to pay. Before, they had no legal existence; by that fact, they were brought into life, and invested with the obligation and validity of promissory notes. Now, there was no transfer of these notes in Philadelphia, because, not only was it agreed that the money was to be raised upon them in New York, but they were sent there to Flues & Co., to be negotiated according to the previous arrangement. Until they were delivered to Flues & Co., they could not be negotiated. They were discounted and delivered at New York, and then only was any obligation to pay them imposed upon the drawers and endorsers, and did they become effectual as contracts. The effect, then, is to bring the whole transaction within the dominion of the laws of New York.

In its main features, Ludlow v. Bingham, 4 Dall. [4 U. S.] 47, strikingly resembles the present case. There the notes in question were dated and signed by Bingham, at Philadelphia, where they were also endorsed by the payee, but they were delivered to Duer, in New York, in payment of Bingham's indebtedness to him. Ch. J. McKean, in delivering the unanimous opinion of the court, says: "It appears, then, that although the note was signed in Philadelphia, it was not delivered in Pennsylvania; but that the delivery was made by the order or direction of Henry Knox, the payee, to William Duer, in the city of New York, in pursuance of a contract, and for a valuable consideration. It is certain that the bare signing of a note will not give it efficacy. It may be signed with a view to deliver it to the payee, on his complying with some previous stipulation; so that in case of a refusal, it would become useless, and might be cancelled by the drawer. A note is not, therefore, obligatory and valid, until it has been actually delivered to the party for whose use it is drawn; and as it received its life, existence, and negotiable character at the place where it is so delivered, the law of that place must regulate all its subsequent operations. Hence, we consider the present note, as having taken effect in New York, as being liable to the lex loci of that state (whether depending in positive statutes, or the adoption of the general commercial law), and as exempt from the provisions of our act of Assembly, by which an endorsee is liable to all the equity that the drawer could enforce against the payee." Davis v. Clemson [Case No. 3,630] was ruled by the same principle. Clemson, a resident of Ohio, there drew and endorsed a bill on Suydam, Sage & Co., of New York, and sent it to them to be negotiated for their accommodation. They accepted it, and passed it to the plaintiffs in New York, for a usurious consideration. The court held, that the "bill was blank paper when it was transmitted by Clemson to Suydam, Sage & Co., and after it was accepted by them, it was nothing more than blank paper. It was intended for the benefit of the acceptors, but thus far, there was no liability by the drawer, endorser, or acceptors. No action could be sustained on it. It was then, in contemplation of law, no contract or bill of exchange. Until negotiated, it was, in effect, blank paper." It was, therefore, adjudged that the bill was to be considered as made in New York, and to be governed by the laws of that state. To the same effect are Cook v. Litchfield, 5 Sandf. 337, and numerous other cases, to which it is unnecessary to refer. They uniformly affirm the rule that a bill or note becomes effectual only by negotiation and delivery, that it is to be treated as made at the place where it is so negotiated, and that the law of that place, except in cases of bona fide contracts by which a different place of performance is fixed will govern it.

But it is sought to avert the application of the principles recognized in these cases, by the argument that, as the proceeds of the notes were remitted through the mail to

Flues & Schatte, at Philadelphia, by Flues & Co., by checks on a New York bank, the consideration did not pass, and the usurious act was not complete until the receipt of these checks, and that thus the situs of the transaction was fixed in Philadelphia. The transmission of the checks was the final act of performance by Flues & Co., of an agreement to which Conrad had previously given his assent, and which he had executed by the delivery of the notes to them in New York. Nothing remained to be done on either side to make the transfer of the notes effectual. Whenever Flues & Co. resolved to discount the notes and put the proceeds, in the form of their bona fide checks beyond their control, in course of transmission to Flues & Schatte, through a channel sanctioned as well by commercial usage as by the obvious understanding of the parties, in contemplation of law, the negotiation was complete, and they were the holders of the paper. The notes were placed in New York; they were there discounted; the money for that purpose was provided and deposited there, and the checks were only the contemplated means employed to facilitate Conrad's receipt of it there. There is nothing then, to change New York, as the place of the transaction; and Flues & Co., cannot complain that they are to be governed by the law of their own state. As these notes were discounted in New York, at usurious rates of interest, and are, therefore, declared void by the law of that state, Conrad cannot be made liable as their endorser. The first exception made by the trustee of the bankrupt's estate to the report of the register, is sustained, and it is decreed, that the endorsement by Peter Conrad, of the notes held by Flues & Co., numbered in the record 1 to 13, inclusive, and set forth in their affidavit for proof of debt, is void, and of no effect, and the claim of indebtedness of said Flues & Co., founded upon said notes, be disallowed, and that the costs of this appeal be paid by the appellant.

Case No. 3,127.

CONRAD et al. v. DATER et al.

[2 Biss. 342;[1] 4 Am. Law T. 42.]

Circuit Court, E. D. Wisconsin. June, 1870.

PURCHASE BY SAMPLE.

1. A purchaser on a warranty by sample is not bound to receive goods which do not correspond with the sample, and can recover the money paid for the same.

2. The fact that he has received the goods and paid the freight on them does not estop him, if he had no previous opportunity to examine them and ascertain their quality. By immediately notifying the vendor that he refuses to accept the goods, he becomes entitled to a return of the money paid.

3. He can also recover the freight money on the ground that it was paid before he had an opportunity of knowing whether the article delivered was of the quality represented.

4. Such a contract of purchase is executory, and there is no legal way by which a man can be compelled to accept that which he had not agreed to buy.

5. He is not bound to receive the goods and then sue the vendor upon his warranty.

On the 18th of May, 1868, the plaintiffs, who were merchants of Janesville, Wisconsin, purchased in New York, of the defendants, who were wholesale merchants in that city, four hogsheads of prime St. Croix sugar, at fourteen cents a pound, as by sample shown. The sugar was shipped in the usual way by defendants, and arrived at Janesville, on the 3d of June, 1868, and was carted to the plaintiffs' store, and, before the sugar was inspected or examined, the freight, amounting to $47.50, was paid by them. On examination subsequently the sugar proved to be of a different kind and quality from the sample. At the time of the contract of purchase, the plaintiffs paid the value of the sugar, amounting to $740.40. As soon as the quality of the sugar was ascertained, the plaintiffs notified the defendants that they would not accept it, and that it was subject to their order. This action was brought for money had and received and money paid out and expended.

John Winans, for plaintiffs.

Conger & Sloan, for defendants, cited Payne v. Whale, 7 East, 274; Thornton v. Wynn, 12 Wheat. [25 U. S.] 189-193; Voorhees v. Earl, 2 Hill, 288.

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

DRUMMOND, Circuit Judge. The sugar being a different article from what the plaintiffs had purchased, they had the right to decide whether they would accept the same, and, in order to determine this, they must have had an opportunity to examine it. It was not competent for the defendants to send a different article from that which the plaintiffs had agreed to buy, and then compel them to take it, and sue the defendants on their warranty; but, under such circumstances, the plaintiffs had the right to decline to receive it, notifying the vendors at once of the fact, demand the money which they had paid, and, on failure of payment. to bring this action, They could also recover for the freight which had been paid, on the ground that it was paid before they had an opportunity of knowing whether the article was of the kind and quality represented. This is not like the case of a party receiving property with the knowledge that it did not correspond with the quantity represented. In this case the contract 'was executory, and not executed. The plaintiffs had performed their part of the contract, and the

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

defendants had not. This was an agreement to sell goods of a certain kind and quality, but they had not been delivered, and there is no legal way by which a man can be compelled against his will to accept an article which he had not agreed to buy. The plaintiffs are, therefore, entitled to recover the money paid for the sugar, as well as on account of freight, and the defendants are entitled to take the sugar.

The judgment will be for the plaintiffs accordingly.

NOTE [from original report]. For a full discussion of the rights and remedies of the vendee of chattels sold with warranty, consult Chandelor v. Lopus, 1 Smith, Lead. Cas. 264, 275, 281; Cutter v. Powell, 2 Smith, Lead. Cas. 32. And even where there is no warranty, if the articles be of a decidedly inferior quality, the purchaser may rescind the contract, and, on restoring the articles, recover the purchase price. Conner v. Henderson, 15 Mass. 319; Gray v. Cox, 4 Barn. & C. 108; Jones v. Bright, 3 Moore & P. 155; 4 Kent, Comm. 479, 480.

CONRAD (HAZLETT v.). See Case No. 6,288.

CONRAD v. UNITED STATES. See Case No. 3,097.

CONSEQUA (FISHER v.). See Case No. 4,816.

CONSEQUA (GILPINS v.). See Case No. 5,452.

CONSEQUA (READ v.). See Cases Nos. 11,606 and 11,607.

Case No. 3,128.

CONSEQUA v. WILLINGS et al.

WILLINGS et al. v. CONSEQUA.[1]

[Pet. C. C. 225.][2]

Circuit Court, D. Pennsylvania. April Term, 1816.

PROOF OF FOREIGN LAW — PROVINCE OF COURT AND JURY—BREACH OF CONTRACT—MEASURE OF DAMAGES—CUSTOM AND USAGE—INTEREST—NEW TRIAL.

1. The written laws of foreign countries, must be proved by the laws themselves, if they can be procured; if not, inferior evidence of them may be received. The unwritten laws or usages of such countries, may be proved by parol; and when proved, the court have the right to construe them, and decide on their effect.

2. The court may give an opinion to the jury upon the weight of evidence, or they may decline so to do; and if the evidence is doubtful, it is most proper to leave it to the jury.

[Cited in Charter Oak Life Ins. Co. v. Rodel, 95 U. S. 238.]

3. The rate of damages to be recovered for a breach of contract, is a part of the right to which the injured party is entitled, and is distinct from the remedy for enforcing his claims. In the former case, the lex loci of the place where the contract is made or broken prevails; in the latter, the lex loci of the forum where the remedy is provided, operates.

4. When a usage is so proved, as to leave no doubt of its existence, it becomes a part of the law; and the court will decide on it as such, without requiring it to be again proved.

5. Rate of interest in China.

6. The jury being impanelled to try three causes, the plaintiff in one of them gave evidence applicable to a case in which he was not a party, but which affected his own case, to his advantage: the court granted a new trial in all the cases.

These actions [by Consequa against Willings and Francis and others, and by Willings and Francis against Consequa] were tried in 1815, at the October sessions of this court, and verdicts were given in favour of the claims of Messrs. Willings and Francis and others, and against those of Consequa, a Hong merchant of Canton; although, upon adjusting the accounts between the parties, according to the verdicts, a balance of five thousand dollars was due to Consequa. A rule was obtained at the last sessions by Consequa, to show cause why a new trial should not be granted, for the following reasons: First, that the court ought not to have left it to the jury to decide, what was the usage or the law of Canton, in relation to the construction of the contracts made in these cases, or to the measure of damages to be paid for a breach of those contracts. Secondly, that the verdict upon the point so submitted to the jury, is against the weight of the evidence. Thirdly, that in relation to the usage at Canton, the verdict was founded upon incompetent evidence. Fourthly, that the jury allowed interest on the damages claimed from Consequa.

Upon the first point it was contended, that the jury are alone competent to decide upon the credit of witnesses, called to prove what is the law or usage of a foreign country; yet it belongs to the court to decide, what is the law so proved, and in what manner it is to be construed. That it is the exclusive province of the court to decide upon the weight of evidence, and the fact which is proved by it, if the witnesses called to prove it are believed by the jury; but in this case the whole was left to the jury.

Secondly, it was proved by the depositions of four witnesses, that where a purchase is made by examination of the samples, sent to the supercargo, the Hong merchant is not liable to damages; unless the purchaser can prove, that the teas furnished were inferior in quality to the samples, which was not attempted in this case. The only circumstance relied upon, to contradict this evidence, was, the settlement made by Consequa for one cargo, which had been examined by the supercargoes; without making the rule proved by the witnesses, an objection. But this settlement might have been made upon the ground of compromise, and was not sufficient to outweigh the positive evidence of four witnesses.

Thirdly, the only evidence attempted to be given to prove a rule of compensation, dif-

[1] See Pet. C. C. 172 [Case No. 17,766].

[2] [Reported by Richard Peters, Jr., Esq.]

ferent from the general one laid down in the case of Gilpin v. Consequa [Case No. 5,452], was a settlement made by Consequa, in relation to the cargo of the Ganges, and his promise as to the Asia's cargo. This settlement was proved by Mr. Kuhn, who was plaintiff in one of the causes, and consequently was swearing in his own cause; since by giving testimony to prove the usage of Canton, to avail in the causes in which he had no interest, he established it in his own cause, and in fact had all the advantage of his own evidence.

Fourthly, upon this point the following cases were cited: 3 Caines, 234; 2 Salk. 623; 2 Bay, 233; 2 Call, 358; 7 Johns. 213; 5 Johns. 45; 1 Campb. 50; 3 Caines, 48; [Phelps v. Holker] 1 Dall. [1 U. S.] 264; [Olney v. Arnold] 3 Dall. [3 U. S.] 313; Doug. 376; Walker v. Smith, 4 Dall. [4 U. S.] 389; Barnes' Notes Cas. 445; 2 Salk. 647.

Lastly, it was also contended, that as to remedies, and damages, the lex loci where the suit is brought, and not where the contract is made, is to govern. 3 Johns. 268; 2 Burrows, 1084.

As to the first point it was answered; that the usage of trade and foreign laws, are to be proved like any other fact; and, consequently, it belongs to the jury, to decide whether they are proved or not. As to the construction of foreign laws, when proved, it was admitted that the court is to decide upon them. But the only point as to this matter, was, whether the conduct of Consequa proved the usage or not, and this was properly left to the jury. No question of construction arose in the cause.

Secondly, the witnesses relied upon to prove the usage, such as is contended for, do by no means establish any thing like it. Their evidence was expressly confined to cases where no express contract was made. If in the face of a contract, to furnish teas of the first quality, inferior teas may be palmed upon the purchaser, because he has examined them, to see whether they were of that quality or not; where would be the use of making an express contract, since it appears by the evidence, that they are always examined; and that without doing so, the grossest impositions may be practiced? Kuhn's evidence was not alone relied upon, to prove the settlement made by Consequa, in relation to the cargo of the Ganges. Wharton also proved the same fact. But, even if the jury were influenced by Kuhn's evidence, still it was unexceptionable, as it applied to two of the cases; and, if it has sufficiently established the usage, the court will not set aside the verdict in those cases, because that in which he was interested, was founded upon improper evidence.

A number of cases were cited, to show that interest was allowed on damages arising from a breach of contract, though not liquidated, if there exist a rule by which they are capable of certain liquidation. Walker v. Smith, 4 Dall. [4 U. S.] 389; 3 Caines, 266; [Crawford v. Willing] 4 Dall. [4 U. S.] 289; 4 Mass. 108; 2 Mass. 433; 1 Johns. 315, 65; 2 Johns. 280; 8 Johns. 446. But if interest ought not to have been allowed on these damages, still Consequa has not been injured, since the jury have improperly given him twelve per cent. interest on the debt due to him by the defendants, and that being disallowed, the verdict would be so nearly what it now stands, that the court will not, for a trifling difference, direct a new trial. The reason why Consequa was not entitled to interest, is, that Willings and Francis, and the other plaintiffs, attached this debt in their own hands, to answer the damages to which they were entitled, and no rule of law is more clear, than that after an attachment is laid, interest in the hands of the garnishee stops. [Fitzgerald v. Caldwell] 2 Dall. [2 U. S.] 215; Serg. Attachm. 108.

Whether a creditor can lay an attachment in his own hands, is a question which has been argued in the case of Graighle and Notnagle; and if the court should decide that he may, the principle will apply to this case, the plaintiffs in the attachment having succeeded in those suits. If it be objected, that by the agreement of the parties in those suits, Consequa was permitted to enter an appearance in one of them, without bail; and that he has given bail in the others, by which the attachments were dissolved, still the plaintiffs in the attachments were justified in retaining the money, until their claims for damages should be decided; and besides this, the agreement recognises this right to retain. Upon the last point the cases noted below were cited: [Church v. Hubbart] 2 Cranch [6 U. S.] 187; 3 Johns. 105, 1 Emer. 122; 1 Johns. Cas. 140; 1 Caines, 402; 3 Johns. 268.

Binney & Ingersoll, for the rule.
Rawle & Sergeant, against it.

WASHINGTON, Circuit Justice. The written or statute laws of foreign countries, are to be proved by the laws themselves, if they can be procured; if not, inferior evidence of them may be received. The unwritten laws or usages may be proved by parol evidence, and when proved, I admit that it is for the court to construe them, and to decide upon their effect. Whether the law or usage is sufficiently proved or not, is a question, upon which the court may express an opinion or not, as may seem proper. I have always thought, that the court may give an opinion upon the weight of evidence, if it be believed by the jury; because upon a motion for a new trial, upon the ground of the verdict being against evidence, the court must decide whether it be so or not: and it would seem to follow, that the same opinion might have been expressed to the jury on the trial. But the court may decline to give an opinion to the

jury, upon the weight of evidence; and if it be doubtful, it is in general most proper to leave it to the jury. There is certainly no error in the court pursuing this latter practice, and it is even doubted, by very great authority, whether the court ought, in any case, to express an opinion, whether a particular fact is proved or not. I do not concur in that sentiment, nor have I acted in conformity with it, although I am clearly of opinion, that the court is not bound to give an opinion in such a case. The present case was precisely within the distinction above stated. The rule laid down in the case of Gilpins v. Consequa [Case No. 5,452] was conceived by the court to be the general rule of compensation, in cases of this kind. But, if according to the usage of this trade at Canton, a different rule prevails there, the court was of opinion, in the present cases, that that rule was incorporated into the contract, and ought to prevail here. This is still my opinion. The rate of damages to be recovered for a breach of contract, is a part of the right to which the injured party is entitled, and it is totally distinct from the remedy provided for enforcing it. In the former case, the lex loci, where the contract was made or broken, is to prevail; in the latter, the lex loci of the forum, where the remedy is provided.

In this case, the only evidence of a usage different from the general rule, was the settlement made by Consequa of the damages claimed on the cargo of the Ganges; and his promise to settle the claims arising from the cargo of the Asia, upon the same principle. But the court could not undertake to say, whether, under all the circumstances of the case, settlements and agreements were evidence of a usage consistent with them; or, whether they did not proceed from a spirit of concession, voluntarily made by Consequa, for which he might have had particular reasons. It was therefore left to the jury, and I think properly so, to decide the fact one way or the other. When a usage is so established as to leave no reasonable doubt of its existence, it becomes a part of the law; and the court will decide upon it as such, without requiring it to be again proved. Most of the usages of trade, have at some period been proved as matters of fact, and when sufficiently established, they have grown into laws. The rate of interest in China, for instance, is so well established to be twelve per centum per annum, that the court would not require it to be proved.

As to the usage of the trade, attempted to be proved by Consequa, in relation to the purchase by samples, it is by no means clear, that the verdict is in opposition to the evidence. The witnesses examined to prove it, seem not to have had in view the case of an express contract, like that entered into in this case; and it would be strange indeed, if the mere examination of samples, sent by the Hong merchant to the purchaser, should amount to a rescinding of an express contract by the merchant, to deliver teas of the first quality. It would be too much to construe an act so universally practised, into a waiver of an express warranty.

The third objection to the verdict must prevail. The settlement of Consequa with Mr. Kuhn, in relation to the cargo of the Ganges, and his promise to settle upon the same principles as to the cargo of the Asia, was the only evidence to prove an usage at Canton, as to the rule of compensation, opposed to that laid down in the case of Gilpins v. Consequa [supra]. Kuhn was the witness, called to prove this settlement. The establishment of such an usage swelled the damages in one of the cases, with which the jury was then charged, and in which the witness was one of the plaintiffs. He was then a witness in his own cause, against the most sacred rules of evidence. It is no answer to say, that the verdict may have been founded upon other testimony than that of Kuhn. It is a sufficient objection, that it may have rested solely on his evidence or have been influenced by it. It was contended against the rule, that although the court should grant a new trial in the case where Kuhn was one of the plaintiffs, it is no reason for setting aside the other verdicts. To this the answer is, that Kuhn's evidence was given under the influence of an interest, which affected, equally, all the cases. If the danger of offering a temptation to perjury, be the reason for excluding an interested person from giving testimony, it is equally applicable to the cases in which Mr. Kuhn has no interest, as to that in which he had. These observations will not be considered as applicable to this respectable gentleman, otherwise than as the law applies them to all men indiscriminately, who are directly interested in the cause in which they testify.

As to the question of interest, it is unnecessary to give any opinion at this time. The right of Consequa to claim it upon the debt due by the defendant, will, under the particular circumstances of the case, deserve serious consideration should the cause be tried again. I shall be better pleased, if the parties should render this unnecessary, by a compromise upon just principles.

Rule made absolute.

CONSEQUA (WILLINGS v.). See Cases Nos. 17,766 and 17,767.

Case No. 3,128a.

CONSOLIDATED COAL CO. v. The SECRET.

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

MARITIME LIEN FOR SUPPLIES.

[Coal delivered to a foreign vessel in pursuance of an agreement with, and on the credit

of, her charterers, is not furnished on the credit of the ship.]

In admiralty. Libel in rem by the Consolidated Coal Company of Maryland against the steamship Secret for supplies.

H. E. Tremaine, for libelants.

Butler, Stillman & Hubbard, for claimants.

CHOATE, District Judge. This is a libel for supplies furnished to the Secret on the credit of the ship. She belongs to a British corporation. About the 15th of December, 1878, the ship not then being in port, the firm of Murray, Ferris & Co. made an agreement with the libelants under which the libelants were to furnish two schooner loads of coal, to be sent, one to Jacksonville, Florida, and the other to Nassau, N. P.,—in all 250 tons,—and about 175 tons more were to be delivered to the Secret on her arrival in this port, where she was expected in a few days. Murray, Ferris & Co. informed libelant's agent that the Secret was to run in their line, which libelant's agent knew was a line between Jacksonville and Nassau, and the libelant's agent also understood, from the statements of Murray, Ferris & Co. at the time of the agreement, that the Secret was not an American vessel; but they did not know, and did not inquire, who her owners were, and where they resided. The price of the coal was agreed to, being $3.85 a ton for the two schooner loads to be delivered on board the schooner at the libelant's dock at Hoboken, and $4.00 a ton for that to be delivered to the Secret; this difference in price being caused simply in consequence of the difference of expense and convenience of delivery between the two places. The sale was a cash transaction. The 250 tons were delivered to the two schooners, which were chartered for the purpose by Murray, Ferris & Co., and bills of lading given by the masters of the schooners were received by the libelant's agents, and sent with the bills for the coal to Murray, Ferris & Co. These bills of lading made the coal deliverable at Nassau and Jacksonville to persons designated by Murray, Ferris & Co. The bills were made to Murray, Ferris & Co. This coal delivered to the two schooners was, as Murray, Ferris & Co. gave the libelant's agents to understand, to be there used by the Secret in her trips between those ports, and it, or part of it, was to be delivered by the schooners to the Secret, if in port on their arrival, otherwise to be discharged on her dock. Afterwards the Secret arrived in this port, and the libelants, in pursuance of the agreement, delivered to her 170 tons of coal, and sent the bill to Murray, Ferris & Co. In fact, but not within the knowledge of libelants, Murray, Ferris & Co., who were a firm of merchants in this city, then in good credit, had chartered the Secret for four months, to run in their said line, agreeing to pay for all her supplies. They had had prior dealings with the libelants, purchasing coal of them, and these three items of coal sold were carried by libelants into the account of "Murray, Ferris & Co." on their ledger, with another previous item there charged. The books kept by the libelant's agents do not show any entry indicating that the coal was sold on the credit of the steamship, nor, at the time of the purchase, was anything said about its being furnished on her credit. Libelant's agent, indeed, who made the sale, testified that the sale was on the credit of the steamship, but the circumstances clearly show the contrary, and his testimony, taken together, seems to indicate that all he meant by the statement was that he supposed that the ship was bound to pay for the coal if Murray, Ferris & Co. did not do so. The coal was all purchased under one agreement, and there can be no distinction drawn, as to the credit on which it was sold, between that shipped on the schooners and that delivered here to the steamship. The two schooner loads were absolutely and completely delivered to Murray, Ferris & Co.; put entirely in their power to do with what they liked. There was not even an agreement exacted from them that the coal should go to Nassau and Jacksonville. There was no reason to believe that, after that coal left this port, the Secret would ever be here again. Assuming that in fact this coal was actually used on the Secret, proof of which was defective on the trial, but which the libelants have reserved the right to produce evidence of, in case such evidence would entitle them to recover, all the usual indications of a credit to the vessel are wanting, if indeed it is possible for a maritime lien for supplies to be created through such an absolute intermediate delivery to another party. It also appears that Murray, Ferris & Co., and not the ship, or her owners, were expected by the libelants to pay for the coal until after their insolvency. It is, I think, very clear that the sale of this coal was made directly to Murray, Ferris & Co., and on their credit. It is therefore unnecessary to consider other points raised by the claimants.

Libel dismissed, with costs.

Case No. 3,129.

CONSOLIDATED FRUIT-JAR CO. v. DORFLINGER.

[2 Am. Law T. Rep. (N. S.) 511; Cox, Manual Trade-Mark Cas. 250; 2 Wkly. Notes Cas. 99; 2 Cent. Law J. 721; 1 Law & Eq. Rep. 393; 21 Int. Rev. Rec. 348; 1 N. Y. Wkly. Dig. 427; 32 Leg. Int. 362.]

Circuit Court, E. D. Pennsylvania. Oct., 1874.

TRADE-MARK—REPRESENTING ARTICLE TO BE PROTECTED BY PATENT WHEN PATENT HAS BEEN DECLARED VOID.

1. Complainants used, to distinguish jars, the designation "Mason's Patent, Nov. 30th, 1858,"

"Mason's Improved," "The Mason Jar of 1858." It appeared that the jars had been protected by a patent that had been adjudged to be invalid. *Held*, that the designation had a tendency to mislead the public, and could not, therefore, be protected as trade-marks.

[Followed in Fairbanks v. Jacobus, Case No. 4,608.]

[See Allegheny Fertilizer Co. v. Woodside, Case No. 206.]

2. In respect of the designation "The Mason Jar of 1872," the objection *held* not to be applicable.

CADWALADER, District Judge. The complainants deduce their asserted right under Mason, who was the patentee of certain alleged improvements in fruit jars. There has been a judicial decision against the validity of his patent; and they do not now assert its validity. But they claim a trademark in what I think is not sufficiently distinguishable from a claim of exclusive right in the patented privilege. In other words, the alleged trade-mark is either deceptively obscure, or purports to be for the subject of the patent, or to include it. These remarks apply, whether the trade-mark is claimed in the words "Mason's Patent, November 30th, 1858," or in the words "Mason's Improved," or in the words "The Mason Jar of 1858," or in any substantially similar form of words. If there had not been a patent, a different import might perhaps be attributable to the second and third of the forms of words which have been quoted. But when the question is considered with reference to the pre-existence of a patent to Mason, these expressions are to be understood as applying to it, or as including the subject of it. The patentee of an alleged invention, in consideration of the exclusive privilege granted to him for a limited period, is bound to disclose fully his secret; and is understood as dedicating the supposed invention to the public, subject to the supposed exclusive privilege. If the privilege is invalid, the dedication is immediate and absolute. It has, therefore, been contended that the rights of the public ought to be protected against any subsequent assertion by the patentee of an independent right under the name of a trade-mark.

The objection to the complainants' alleged right would prevail if it covered the whole of the question. But it does not. The answer to the objection is, that a tradesman who has an invalid patent may nevertheless rightfully use the subject of the patent himself, and then he ought, in that case, to be protected against injury by others who falsely impose their goods on the public as his own. Upon this view of the subject the case of Sykes v. Sykes, 3 Barn. & C. 541, 5 Dowl. & R. 292, was decided in the year 1824. It is a decision apparently in favor of the complainants here. It was hastily considered on a motion for a new trial, a rule to show cause being refused. But there was no defect in the reasoning on the point upon which, alone, it was decided. Another objection, however, to the complainants' bill, does not admit, in reason, of the same answer. This objection is, that no title can be successfully asserted in a trade-mark which is of a tendency to mislead or deceive the public. This objection may avail a defendant, notwithstanding what would otherwise be imputable to him as misconduct. The doctrine is, that the complainant must come into a court of equity with clean hands. 4 De Gex, J. & S. 149. This doctrine, if applicable alike at law, was overlooked in the case of Sykes v. Sykes. The direct application of the objection appears when we consider that the alleged trade-mark in question tends rationally to induce a belief that the subject of it is a securely patented invention of Mason, whereas it has been judicially decided that he never had a valid patent for it as an invention. In cases prior to 1863, before English vice chancellors, the authority of Sykes v. Sykes, supra, could not be disregarded; and there was great hesitation in holding directly that a trade-mark representing an article as patented, when in fact it was not securely protected by a patent, was invalid in equity. Thus Vice Chancellor Wood, afterwards Lord Hatherley, in 1853, intimated an opinion that the trade-mark would be invalid where no patent had ever existed (Flavel v. Harrison, 10 Hare, 467); but afterwards, in the same year, when considering the case of a patent which had expired, suggested some qualification of the general doctrine (Edelsten v. Vick, 11 Hare, 86, 87; compare with Morgan v. McAdam, 36 Law J. Ch. 229, 231). But such doubt, or hesitations, were removed in England by the case of Leather Cloth Co. v. American Leather Cloth Co. (in the house of lords in 1865) 11 H. L. Cas. 523, affirming a decree made by Lord Chancellor Westbury, in 1863. 4 De Gex, J. & S. 137. In this case Lord Kingsdown said: "If a trade-mark represents an article as protected by a patent, when in fact it is not so protected, it seems to me that such a statement prima facie amounts to a misrepresentation of an important fact, which would disentitle the owner of the trade-mark to relief in a court of equity against any one who pirated it;" and added, that he would have great difficulty in assenting to the distinction suggested by Vice Chancellor Wood, in case which had been cited. 11 H. L. Cas. 543, 544. Lord Kingsdown here succinctly restated the opinion of Lord Westbury, in the court of chancery; and Lord Westbury adhered to it in the court of appeal. Page 548.

An exception from this rule of decision had been previously, and has been since, recognized in the case of an article, such as patent leather, or patent thread, whose designation of this kind is in constant use, though no one supposes that it is thereby intended to convey the impression that the subject is protected by any patent. Marshall v. Ross, L. R. 8 Eq. 652, 653. So after a patented privilege is long since expired, such a designation

may have become a general or special word of art. Hall v. Barrows, 4 De Gex, J. & S. 155. But such exceptions only confirm the rule of decision in ordinary cases. Lord Westbury, in the court of chancery (4 De Gex, J. & S. 138, 139), seems to have had American decisions in view. His opinion appears to have been followed in the patent office of the United States. If other American opinions are conflicting, it may, perhaps, be attributable to undue defence to the supposed authority of Sykes v. Sykes. If there be such a conflict, the question is too doubtful for interlocutory adjudication.

The above observations may not be applicable to the alleged trade-mark in the words "The Mason Jar of 1872." The complainant, if so advised, may renew his application as to this mark. But a man is perhaps not at liberty to flood the market with various designations, all including more or less of a common subject, without making the differences very distinct. How this may be as to the particular subject here, I cannot at present decide.

As to the other alleged trade-marks, a preliminary injunction is refused.

Case No. 3,130.

CONSOLIDATED FRUIT-JAR CO. v. STRONG.

[2 N. J. Law J. 338.]

Circuit Court, D. New Jersey. July 18, 1879.

PRACTICE—FINAL DECREE.

[Since the amendment of equity rule 18, a final decree may be taken at any time after 30 days after the bill is taken pro confesso.]

NIXON, District Judge. The bill of complaint was filed in this case July 22, 1878, and a provisional injunction granted upon notice to the defendant, July 27, 1878. No appearance has been entered, or plea, answer or demurrer filed, by the defendant. The complainant neglected to enter the order in the rule book that the bill be taken pro con., as it was entitled to under the eighteenth equity rule. The case slept until the 24th of June, 1879, when the complainant took a rule upon the defendant to plead, answer, or demur to the bill within twenty days after service upon her or her solicitor of a copy of said order. It was served June 27th, and, no appearance having been entered, or plea, answer or demurrer filed, the complainant may now enter, as of course, a decree pro confesso. Before the recent amendment of the eighteenth rule (see 97 U. S. viii.), no final decree could be taken until the first day of the next term, but now it may be done at any time after thirty days after the bill is taken pro con., but not at once, as asked for by the decree presented.

Case No. 3,131.

CONSOLIDATED FRUIT-JAR CO. v. THOMAS.

[2 N. J. Law J. 272.]

Circuit Court, D. New Jersey. June Term, 1879.

INFRINGEMENT OF TRADE-MARK—PRELIMINARY INJUNCTION—LACHES.

1. An infringement of a trade-mark is not necessarily an exact imitation. No matter how vague the resemblance, if the imitation is so close that by the form, marks, contrasts, or their special arrangement, purchasers exercising ordinary caution are liable to be misled by it, it is a case of infringement.

2. The device used by the Hero Glassware Works held to be an infringement of the trade-mark of the complainants.

3. Delay in making the application is no bar to a preliminary injunction, although it may preclude the complainant from obtaining past profits.

Frost & Coe, of New York, and A. Q. Keasby, for complainants.

Wm. C. Witter and Causten Browne, of New York, and Samuel Dickson and John C. Bullitt, of Philadelphia, for defendant.

NIXON, District Judge. There is no difficulty about this case in regard to the infringement. The only embarrassment arises in determining to what extent the injunction should go, or what it should include. The complainant corporation and the Hero Glass Works, which are the producers of the articles complained of, are the principal makers of fruit-jar caps in the country. Any interference with the business of the one, would particularly give a monopoly to the other. But such a consideration should not and will not hinder the court from protecting the complainant in all its rights.

The question of infringement is ordinarily more easily determinable in trade-mark cases than in patent cases, because they are less dependent upon the testimony of witnesses. Whether one thing is a colorable imitation of another, is answered most satisfactorily by judicial inspection and comparison of the two, and if the court is convinced by such inspection and comparison that the two things are near enough alike to deceive or mislead the ordinary purchaser, in the exercise of ordinary care and caution, no amount of expert evidence of substantial difference would justify the court in withholding the injunction.

The infringement by the defendant is clear. The monograms differ because the letters are not the same; but it is not necessary for the complainants to show an exact imitation or similarity before they are entitled to the protection of the court. No matter how vague may be the resemblance, if it be sufficient to mislead the public, it is unlawful, and when unexplained, it is the duty of the court to infer intent, and to hold that the resem-

blance was adopted for the purpose of deception. Taylor v. Taylor, 23 Eng. Law & Eq. 282; Curtis v. Bryan, 2 Daly, 312. It is difficult to lay down a general rule, which will be applicable to all cases, of what constitutes the infringement of a trade-mark. It may be said, however, as was substantially held by the supreme court in McLean v. Fleming, 96 U. S. 245, that an injunction should be granted where the imitation is so close that by the form, marks, contrasts, or their special arrangement, or by the general appearance of the infringing device, purchasers exercising ordinary caution are liable to be misled into buying the article bearing it for the genuine one. Both parties in the present case have the right to manufacture and sell fruit-jar caps. The complainants have adopted and registered as their trade-mark a monogram composed of the initial letters of the corporation name. They began its use early in the year 1878, to distinguish their manufactures from the product of other houses, and particularly of their great rival, the Hero Glassware Works. They placed the monogram on the circular depression on the top of the cap. The caps were put up for the market in wooden boxes, in each end of which the trade-mark was printed in red ink. Each box was also furnished with printed circulars, on which the monogram appears on the bottom, between the words "like" and "this." The jar caps in the deponent's possession have also a monogram put in the circular depression on the head of each cap. The same was also printed in red ink on the end of the wooden boxes containing the caps, and the boxes are supplied with circulars in a style of printing to give them the general appearance of the complainant's circulars, and also showing in the same relative position a printed monogram between the words "like" and "this." It is proved that all these resemblances have been adopted and used by the manufacturers of the defendant's caps since the registry and use of the complainant's trade-mark. They are not accidental, but intentional and misleading, and therefore unlawful.

The court suggested to counsel, in the argument, that the delay of the complainants in applying to the court for the injunction until the season for furnishing fruit-jar caps had fully arrived, had a suspicious aspect, and that we should be reluctant to interfere with the defendant, whatever might be the legal rights of the complainants, if there had been laches in bringing the suit. The suggestion was perhaps uncalled for by the facts of the case; but it was prompted by the extreme sensitiveness which always springs up when any disposition is suspected of using the process of the court to obtain a temporary business advantage. There has been large discussion of the question how far laches in stopping the infringement of a trade-mark will deprive a complainant of the benefits of a preliminary injunction. But that discussion has been put to rest, so far as this court is concerned, by the recent decision of the supreme court in the case of McLean v. Fleming, 96 U. S. 245, when it was held that acquiescence of long standing was no bar to an injunction, although it precluded the party acquiescing from any right to an account for past profits. This was only anticipating the latter decision of the high court of justice in England, in the case of Fullwood v. Fullwood, 9 Ch. Div. 176, when the single question involved was the effect of delay in prosecuting for an infringement of a trade-mark, and when the defendant set up, as a defence to an application for an injunction, that the plaintiff had known all the material facts stated in the pleadings for a period of at least two or three years before the action was brought. The court said this was no defence, and that, where an injunction is sought in aid of a legal right, mere lapse of time was no bar to granting it. The injunction was treated as always a matter of course, if it appeared that the legal rights existed.

The court is of the opinion that the complainants are entitled to an injunction restraining the defendant pendente lite from the use of the monogram on the fruit-jar caps, and on the ends of the boxes, and from circulating the printed circulars so closely resembling the circulars of the complainants; and it is ordered accordingly.

Case No. 3,132.

CONSOLIDATED FRUIT-JAR CO. v. WHITNEY et al.

[1 Ban. & A. 356;[1] 10 Phila. 268; 31 Leg. Int. 229.]

Circuit Court, D. New Jersey. June, 1874.

APPORTIONMENT BY LICENSEE OF PATENT—INJUNCTION—MODIFICATION.

1. A mere license is not apportionable, so as to permit the licensee to grant to others separate rights to use or work the patent, by subdividing the rights that may have been granted to himself. Brooks v. Byam [Case No. 1,948], commented on and followed.

[Distinguished in Adams v. Howard, 22 Fed. 658.]

2. The patentee gave to A, and his assigns, a license to manufacture and sell the Mason fruit jar, patented September 24, 1872, within a specified territory. Afterwards, the patentee assigned the patent, and all his rights thereunder, to the complainant. *Held*, that a transfer by A, of a portion of the rights and privileges secured to him by the license, was void, as against the complainant, even if the complainant's assignment was held subject to the prior license.

[Cited in Racine Seeder Co. v. Joliet Wire-Check Rower Co., 27 Fed. 376.]

3. Where, upon the filing of a bill for the infringement of a patent, an injunction order has been granted, restraining the defendant, pendente lite, from manufacturing and selling

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

the patented article; and an application, on behalf of the defendant, is made to the court, to modify the injunction, by permitting the defendant to manufacture a limited number of the patented articles, with which to complete contracts between the defendant and third parties; and, as a condition to the modification, the defendant offers to file a bond, to secure complainant against loss occasioned thereby; and it appears, from the papers used upon the application, that the defendant is the assignee of a part only of the rights, secured to his assignors by license from the patentee, and that, at the time of the assignment to the defendant, a suit was pending in New York, between the present complainant and the assignors of the defendant, wherein the relief sought was to have the license from the patentee to the defendant's assignors held fraudulent and void, of which suit the defendant admitted having, at some time, received actual notice: *Held*, that the absence, in the moving papers, of sufficient proof, that the notice to the defendant of the pendency of the former suit was subsequent, and not prior, to the making of the contracts which the defendant now desires to carry out, is fatal to the defendant's motion, and, that the papers did not present a proper case for the exercise of the equitable powers of the court.

[Cited in Tobey Furniture Co. v. Colby, 35 Fed. 594.]

4. The rule that where the complainant has established a right to an injunction, the defendant cannot defeat it by tendering security for damages, is applicable to patent cases.

[In equity. On bill filed [by the Consolidated Fruit-Jar Company] for an account, and to restrain defendants [Thomas W. Whitney and others] from the use of letters patent No. 131,695, granted to John L. Mason Sept. 24, 1872, under a license alleged to have been fraudulently granted, an injunction order was made by virtue of the 7th section of the act to further the administration of justice, approved June 1st, 1872 (17 Stat. 197), enjoining the defendants from making or vending any fruit jars containing the improvements secured by said letters patent, until the decree of the court upon the motion for an injunction. Application made to the court to modify the injunction order, so as to allow defendants to complete certain contracts for jars, upon the tender of security to the complainants for all damages, and on the affidavit of one of the defendants, that they had purchased the right to manufacture and sell under the license in good faith, and without notice of the alleged fraud.] [2]

A. Q. Keasbey, for complainant.
Abram Browning, for defendant.

NIXON, District Judge. Application is made to the court, to modify the injunction order, granted on filing the bill in the above stated case.

The application is based on the ground, that the defendants, in good faith, purchased the right to manufacture and sell the jars or bottles, described in the Mason patent; that, in like good faith, they have entered into contracts with sundry person to furnish such jars or bottles, upon specified terms, and within or at certain times, which contracts are only partially executed; and, that if they are now restrained from fulfilling them, they will be subjected to serious losses, damages, etc. The modification asked for is, that the defendants may be allowed six weeks to carry out all unexecuted contracts, not exceeding the manufacture and delivery of fifteen hundred gross of said jars or bottles, on their indemnifying the complainant, against any loss or damage which it may sustain, by reason of their completing the same.

As the case now stands, there are two reasons why the court is precluded from granting this request: 1. It does not appear upon the face of the papers, that the defendants have acquired any rights to manufacture and sell under these patents. All the authority they have, is derived from the agreement entered into, during the month of December, 1873, between the Standard Union Manufacturing Company and the defendants, while the suit was still pending against the individuals who principally formed and constituted the said company. If I have not mistaken the purport of that agreement, its design was, to convey to the defendants, for a valuable consideration, the exclusive right to make and sell the Mason patent fruit jar, patented September 24, 1872, and known in the market as the Mason jar of '72, in the city of Philadelphia, and at all places within fifty miles of said city, and also in the city of Baltimore. Conceding, for the purposes of this motion, that the paper executed by John L. Mason to John K. Chase, November 13, 1872, is a valid instrument, so far as the rights of these defendants are concerned, who are bona fide purchasers under it, without notice of any fraud, yet, it must be borne in mind, that such paper does not purport to be an assignment of the invention, but a mere license to exercise the privileges secured by the patent. It is not claimed that the Standard Union Manufacturing Company had more than the rights of a licensee, and, while it is an open question, whether a license to a party and his assigns is a personal privilege, or whether it confers the power of assignment, in its entirety, to third persons, it seems to be understood, that a mere license is not apportionable, so as to permit the licensee, as is attempted in the present case, to grant to others, separate rights to use or work the patent, by subdividing the rights that may have been granted to himself. Curt. Pat. § 213; Brooks v. Byam [Case No. 1,948].

The case of Brooks v. Byam, supra, was this: A patentee of friction matches, by deed under seal, granted, sold, assigned, and transferred to B, his executors, administrators, and assigns, the right and privilege of making, using, and selling the friction matches patented; and to have and hold the right and privilege of manufacturing the said

[2] [From 31 Leg. Int. 229.]

matches, and to employ in and about the same six persons, and no more, to vend them in any part of the United States. Judge Story was in doubt, whether the license was not such a personal privilege, that the entirety could not be assigned, notwithstanding it was given to B and his assigns, and left the question open, because it was not necessary, in that case, to decide it. He held, however, that the right granted by the above deed, was a license or authority, coupled with an interest in the execution, to the grantee and six persons to be employed by him in making matches; that the right was an entirety, incapable of being apportioned or divided among different persons; and that, therefore, an assignment by B, of a right to make as many matches as one person could roll up, was void.

The learned judge, in his opinion (page 545), pertinently remarks: "The language ought, in my judgment, to be exceedingly clear that should lead a court to construe an instrument of this sort, granting a single right or privilege to a particular person or his assigns, as also granting a right or license to split up the same right into fragments among many persons in severalty, and thus to make it apportionable as well as transmissible. The patentee might well agree to convey a single right as an entirety, to one person, to manufacture the matches, and employ a fixed number of persons under him, when he might be wholly opposed to apportioning the same rights in severalty among many persons."

On the other hand, it appears by the bill of complainant, that on the 6th of January, 1873, Mason executed assignments to the complainant, of the legal title to the patents —the right to the monopoly embraced in the inventions. Admitting that this is held subject to the license granted to Chase, the attempted apportionment of the authority to the exercise of the license between the grantees of Chase and the defendants, must be treated as void, against the complainant.

2. The other ground, on which the court should refuse to modify the injunction order, appears, by considering the defective character of the affidavits, on which the motion is founded.

The bill charges, that the complainant brought a suit, in the courts of New York, to declare the license from Mason to Chase fraudulent and void, that the rights of the defendants were acquired pendente lite; and, that the defendants had actual notice of the pendency and character of said suit.

The only defendant that filed an affidavit is Samuel A. Whitney, who states, that neither he, nor his brother, the other defendant, had anything, or very little, to do with entering into said agreement; and, had no acquaintance with John L. Mason, the president of the Standard Union Manufacturing Company, by whom, on the part of that company, the said agreement was wholly made; that, on the part of the defendants, one Thomas W. Synnott, who was, at the time, and long before and ever since has been, their agent and clerk, conducted all the negotiations with the said Mason that led to the agreement, which, when concluded upon, was drawn up by said Synnott, and by him delivered to defendants for approval and execution; and that; on its approval and execution, it was assumed, without inquiry or doubt on their part, that the said company were the true, legal, and bona fide owners of the said letters patent and the extensions thereof, and had full power and authority to grant a license to said defendants, to manufacture and sell said bottles or jars, to the extent agreed upon in the said articles of agreement; and that, so far as he knows and believes, the said Synnott, as the agent of the defendants, acted upon the like assumption of ownership and right of said company, and, in like good faith, in negotiating and effecting the said agreement. He further admits, that, since the agreement was entered into, and contracts for manufacturing quantities of jars or bottles were made by the defendants in good faith, he received notice of the suit in the city of New York, involving the right of the Standard Union Manufacturing Company to said letters patent, or some of them, and the extensions thereof, but he fails to make any statement in regard to the essential fact, whether the large contracts for the sales of bottles or jars to third parties, which they now ask the privilege to carry out, were entered into prior or subsequent to the notice and knowledge of said suit. This is an appeal to the court for the exercise of its equitable powers, to relieve parties from the harshness of the rigid application of legal rules and principles, and before the court can interfere, some equitable reason should be clearly revealed. Whatever relief, under this head, the defendants might be entitled to, in regard to contracts made by them before they had notice of the alleged fraudulent title of their grantors, they have no claim to be relieved from the consequences of their engagements and contracts, after such notice. The absence of all information, as to the respective dates of the notice of the pending suit, and of the contracts sought to be exempted from the restraints of the injunction order, is significant, and, in default of explanation, is fatal to the motion.

It was suggested, by the affidavit of the defendant, Mr. Whitney, and by the counsel of the defendants, at the hearing, that the defendants were able and willing to give their bond, with security if required, to indemnify the complainant against any loss or damage it may sustain, by reason of their being allowed to complete the said contracts.

But, it seems to me, that this case comes clearly within the spirit of the rule, now so well established, that where a case reveals the right in the complainant to the protection afforded by an injunction, the

defendant cannot defeat it by tendering security for damages. Sickles v. Mitchell [Case No. 12,835]; Hodge v. Hudson R. R. Co. [Id. 6,560]. In patent cases, especially where the owner depends upon the use of the invention, and the monopoly which the ownership affords, for his gains and profits, and not upon the sale of licenses to others, it is impossible to afford adequate protection by a bond of indemnity, because, there are no sufficient data existing, on which the damages or profits can be estimated.

The injunction order in this case was granted by virtue of the provisions of the seventh section of the "act to further the administration of justice," approved June 1, 1872 (17 Stat. 197). Whether it will result in granting a provisional injunction, depends upon the answer or the affidavits of the defendants, on the hearing. In the mean time, the law vests the court with discretion, as to compelling the complainant to give security to the defendants for the losses which they may sustain by reason of the injunction order, if it should afterward appear that they had the right to use the patents in question.

As there are no charges of actual fraud against the defendants, I am disposed to entertain a motion, in their behalf, to require the complainant to give such security to the defendants, and will hear their counsel, at any time, in regard to the amount of the penalty of the bond to be executed, on proof of notice to the complainant of such application.

Case No. 3,133.

CONSOLIDATED FRUIT-JAR CO. v. WHITNEY et al.

[2 Ban. & A. 30.][1]

Circuit Court, D. New Jersey. March, 1875.

CONTRACTS UNDER PATENTS—JURISDICTION — RES JUDICATA — JUDGMENT OF STATE COURT — LIS PENDENS.

1. Where the controversy does not involve the validity of letters patent, but turns upon the force and effect of some contract under them, the state courts are the proper tribunals for the adjudication, and the federal courts cannot properly assert jurisdiction, unless the residence or citizenship of the parties confers it.

2. The application of the doctrine of res adjudicata to parties to former actions and their privies, considered.

3. A suit against three of the defendants in the court of common pleas of the city and county of New York resulted in a decree that two licenses under letters patent were fraudulent and void. *Held*, that these defendants were estopped from denying in a suit by the same complainant in a federal court brought for the infringement of the letters patent, that the licenses were fraudulent and void. *Held*, also, that the decree of the state court was res adjudicata against all the privies of the said defendants, whose rights were acquired from them after the making of said decree.

4. In cases where the law of lis pendens can be applied, it is limited in its application to parties whose rights were acquired after the suit was instituted against the grantors or vendors under whom they claim.

[Cited in Bate Refrigerating Co. v. Gillett, 30 Fed. 687.]

[In equity. Bill by the Consolidated Fruit-Jar Company against Thomas H. Whitney, Samuel A. Whitney, John L. Mason, and the Standard Union Manufacturing Company, to restrain the infringement of certain patents.]

A. Q. Keasbey and J. H. B. Latrobe, for complainant.

Abram Browning and George Harding, for defendants.

NIXON, District Judge. This is a motion for a preliminary injunction. The answer of the defendants to all the material allegations of the bill is full and complete. Assuming, as I am bound to do at this stage of the proceedings, that it is true, the application must be refused, unless the judgment in the court of common pleas of the city and county of New York, in the suit brought by the complainant against John L. Mason, John K. Chase, and Henry F. Johnson, declaring fraudulent and void the two licenses granted by Mason to Chase for the letters patent No. 22, 129, and No. 22,-186, is held to be binding upon the other defendants here sought to be enjoined.

That action was begun against Mason and Chase, on the 11th of April, 1873. Henry F. Johnson was made a party defendant by order of the court, on the 14th of July following, and an amended summons was issued July 18, requiring him and the other defendants to answer a supplemental bill filed in the cause. The final decree was entered on the 10th of February, 1874, declaring that the license executed by Mason to Chase, bearing date November 13, 1872, and recorded in the patent office of the United States February 18, 1873, was made collusively, in fraud of the rights of the complainant, and was void against said rights in the hands of Chase; and that the two several transfers or assignments of the license from Chase to Johnson—one by an instrument in writing, dated February 27, 1873, and recorded in the patent office on the 13th of June following, and the other, dated April 9, 1873, and recorded as aforesaid on the 16th—were not made in good faith and for a valuable consideration; that they vested no right or interest in Johnson, but that the same were wholly void and of no effect against the complainant, in the hands of said Johnson; and, further, perpetually enjoined the three defendants and each of them from transferring, assigning, or in any manner using, or disposing of the said grants, licenses, or assignments.[2]

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

[2] [See this case on appeal. Consolidated Fruit Jar Co. v. Mason (Com. Pl. N. Y.) 7 Daly, 64.]

It must be remarked, as a preliminary consideration, that the suit in New York only referred to the patents No. 22,129, for "Improvement in moulds in making bottles," and No. 22,186, for "Improvement in screw-necked bottles," and did not involve any inquiry into the right to use the license for patent No. 19,786, for "Improvements in screw chucks" by or through the defendant Chase. The license to make and use the lathe chuck under this patent, with certain limitations and restrictions, was granted to Chase by the Sheet Metal Screw Company, in June, 1869, which limitations and restrictions were removed by a subsequent grant in August, 1871. There is nothing, therefore, in the case, which authorizes the court to enjoin any one in regard to the use of that patent, and its further consideration will be dismissed.

The ground was taken by the counsel of the defendants, that no one was estopped by the judgment of the state court of New York, because the court had in fact no jurisdiction over the subject matter of the controversy. The argument was, that the right of property in inventions was wholly the creature of the constitution of the United States, and of the acts of congress in pursuance thereof, and that all suits touching such rights are confined to the federal courts.

It is, undoubtedly, true, that the state courts have no cognizance of actions in which the validity of letters patent is involved. The jurisdiction of the courts of the United States is exclusive over such questions. Where, however, the controversy does not turn upon the letters patent, but upon the force and effect of some contract under them or in reference to them, in which the question of their validity is not raised, it has long been held that the state courts are the appropriate tribunals for the adjudication, and that the federal courts cannot properly assert jurisdiction, unless the residence or citizenship of the parties confers it. Thus, in the case of Wilson v. Sandford, 10 How. [51 U. S.] 99, where a bill had been filed in the circuit court of the United States for the district of Louisiana, to set aside a contract between the appellant and the appellees, by which the former had granted to the latter permission to use, or vend to others to be used, one of Woodworth's planing machines, and to obtain an injunction against the further use of the machine, on the ground that it was an infringement of his patent rights—the jurisdiction of the supreme court, on the appeal, depended upon the question whether the action arose "under any law of the United States granting or confirming to inventors the exclusive right to their inventions or discoveries."

The opinion of the court, dismissing the appeal, was delivered by Chief Justice Taney, in which he says: "The dispute in this case does not arise under any act of congress; nor does the decision depend upon the construction of any law in relation to patents. It arises out of the contract stated in the bill; and there is no act of congress providing for or regulating contracts of this kind. The rights of the parties depend altogether upon common law and equity principles. The object of the bill is to have this contract set aside and declared to be forfeited; and the prayer is 'that the appellant's reinvestiture of title to the license granted to the appellees, by reason of the forfeiture of the contract, may be sanctioned by the court,' and for an injunction. But the injunction he asks for is to be the consequence of the decree of the court sanctioning the forfeiture. He alleges no ground for an injunction unless the contract is set aside. And if the case made in the bill was a fit one for relief in equity, it is very clear that whether the contract ought to be declared forfeited or not, in a court of chancery, depended altogether upon the rules and principles of equity, and in no degree whatever upon any act of congress concerning patent rights." And to the same effect, also, was the opinion of Mr. Justice Nelson, in Goodyear v. Day [Case No. 5,568].

The pleadings in the suit in the court of common pleas of the city and county of New York, presented no issue in regard to the validity of the patents. The only question was as to the validity and bona fides of certain transfers and assignments of interests in and under them of which—the above cases being authority—the court had jurisdiction.

The court having jurisdiction over the subject matter, the next inquiry is, who is concluded by the judgment or decree? The general rule is, that all matters which have been once determined by judicial authority cannot be again drawn into controversy as between the parties and privies to the decision. The parties, with some exceptions not necessary here to be stated, are named in the record. They have their day in court; are interested in the property or matters involved in the litigation, and have the right to give direction and control to the proceedings. There must be an end to strife, and where a person has been summoned to appear, or voluntarily appears, and has the opportunity to maintain or deny the issues presented by the pleadings in a cause, he is ever afterward estopped from controverting the truth of the facts directly decided.

It may be said, generally, that privies are those who are partakers, or have an interest in any action or thing. The term privity denoting mutual and successive relationship to the same rights of property, privies to a suit are those who are represented by the parties and claim under them. The principle on which they are bound by the proceedings is, that they are identified with the parties in interest, and where such identity exists they are concluded by the result. The

grantee, on the transfer of land, or the vendee, on the sale of chattels, is estopped by the acts and admissions of his vendor or grantor, and by a judgment or decree against him, because he holds by a derivative title from such grantor or vendor, and cannot be in any better position than the party from whom he obtained his rights.

But here an important qualification must be stated in regard to the estoppel of privies by a judgment or decree against those with whom they are in privity. In order to bind them as privies to the judgment, their succession to the rights of property affected by it should occur after the judgment; or, if the law of lis pendens is invoked, after the service of the summons or subpoena. Freem. Judgm. §§ 162, 195. One that has acquired his title previously, must be made a party to the proceedings if he is to be bound by the result. Some confusion has arisen in the books, because this proper qualification of the rule has not always been kept in mind or stated with precision. Thus in Com. Dig. tit. "Evidence," we have the broad statement that "A verdict in another action for the same cause shall be allowed in evidence between the same parties. So it shall be evidence where the verdict was for one under whom any of the present parties claim." In Foster v. Derby, 1 Adol. & E. 790, Lord Littledale, in commenting on this paragraph, says: "But that must mean a claim acquired through such party, subsequently to the verdict; if, as it has been now argued, the rule could be extended to parties claiming other lands under the same title previously to the verdict, the effect of such verdict might be carried back for a hundred years." And, hence, the court of appeals in New York, in Campbell v. Hall, 16 N. Y. 575, held, that a mortgagee is not estopped by judgment in an action between his mortgagor and a prior mortgagee, rendered after the execution of the second mortgage, but may litigate the amount due upon the prior mortgage, notwithstanding the judgment. Selden, J., delivered the opinion of the court, and after discussing the nature of the privity between the grantor and grantee, and the reasons why the latter is estopped by the acts of the former or by judgment or decree against him, he continues: "This being the reason of the rule, it follows that it can have no application except where the conveyance is made after the event out of which the estoppel arises. The principle in such cases is, that the estoppel attaches itself to and runs with the land. The grantor can transfer no greater right than he himself has, and hence the title which he conveys must necessarily be subject, in the hands of the grantee, to all the burdens which rested upon it at the time of the transfer. On the other hand, nothing which the grantor can do, or suffer to be done, after such transfer, can affect the rights previously in the grantee. It is obvious, therefore * * * that the rule that estoppels are binding upon privies as well as parties, should be stated with qualifications." And it is because of this qualification that a tenant in possession before the commencement of an action of ejectment cannot be dispossessed by the judgment, unless he was made party to the suit, and that the assignee of a note is not affected by any litigation in reference to it beginning after the assignment, and that the foreclosure of a mortgage, or of any other lien, does not operate upon the rights of any person who is not a party to the suit, whether such person is a grantee, judgment creditor, attachment creditor, or other lien holder. Freem. Judgm. § 162.

In the case under consideration, Mason, Chase, and Johnson were the defendants in the New York suit, and hence, are bound by the decree, as to all matters determined by it. So far as they are concerned, it estops them from denying hereafter that the license from Mason to Chase, dated November 13, 1872, and the one from Chase to Johnson, by instruments in writing dated February 27, 1873, and April 9, 1873, are fraudulent transfers, and wholly void against the rights of the complainant. The Standard Union Manufacturing Company, Thomas H. Whitney, and Samuel A. Whitney, were not parties. And they are not in privity in interest and estate, with those who were parties, so as to be concluded by the final decree, because all their rights were acquired before such decree.

The suit was begun against Mason and Chase, April 11, 1873, Johnson was made a party on the 14th of the following July, and the decree against the three defendants was entered on the 10th of February, 1874. It has already been shown that an order to estop persons by a judgment or decree, because they were in privity with the parties to the suit, in relation to the same rights of property, the title which the privy derived from his grantor must be made after the event out of which the estoppel arises, to wit, the judgment or decree, and no interest or estate acquired by the privy before that date is concluded by the judgment or decree.

It only requires a statement of dates to show that the license from Mason to Chase, November 13, 1872, and from Chase to Johnson, February 27, 1873, and from Johnson to the Standard Union Manufacturing Company, April 25, 1873, and from the Standard Union Manufacturing Company to the Whitneys in December, 1873, were all executed some time before any result was reached in the suit, and hence that the said corporation defendants and the Messrs. Whitney are not here concluded by the final decree in that case.

But the counsel of the complainants have invoked against these defendants the law of lis pendens, which does not wait until judgment or decree, but begins with the service of summons or subpoena, and operates from

that date. But upon whom does it operate? It is constructive notice of the pendency of the suit only to those who have acquired some title to or interest in the property involved in the litigation from and under the parties to the suit, or some of them, since the suit was commenced. It is not applied, as may be inferred from the phrase itself, to parties whose rights were acquired before the suit was instituted against the grantors or vendors, under whom they claim. Stuyvesant v. Hall, 2 Barb. Ch. 151; Haughwout v. Murphy, 7 C. E. Green [22 N. J. Eq.] 545; Hopkins v. McLaren, 4 Cow. 678; Hunt v. Haven, 52 N. H. 170.

The last case, from the New Hampshire reports, is a recent one, where the subject was fully considered in the light of all the authorities; and the court held that one cannot be a privy in estate to a judgment or decree unless he derives his title to the property in question subsequent to and from some party who is bound by such judgment or decree.

In the present case, the suit was commenced against Chase, April 11, 1873. Johnson's title was acquired from him the previous February. Johnson was brought in as a party to the suit July 14, but he had previously, in the month of April, conveyed all his rights under the license to the Standard Union Manufacturing Company. The Whitneys claim under this corporation; but there was no legal obligation upon them to take notice of a suit pending against other parties, and they are not to be estopped by the decree from maintaining here the validity of their title.

Other questions arising from the answer, or suggested by the very elaborate arguments of counsel, have been carefully considered, but only in reference to their influence on the matter now before me, to wit, the propriety of issuing a preliminary injunction.

It was strongly urged by the counsel of the defendants, that this is a court of equity; that the case of the complainant, upon its own showing, was an attempt to get the aid of the court to recover property which it had transferred to Mason to enable him to perpetuate a fraud upon the law and the patent office, and that courts of equity never lend their help to wrong-doers.

It was also suggested that the assignment of the patents in controversy from the complainant to Mason was absolute on its face and was duly recorded, and hence was evidence to the world that Mason was the lawful owner; that neither of the Whitneys had any notice of any implied trust in favor of the complainant, but they were bona fide purchasers for a valuable consideration; and that under these circumstances the recognized equity rule was applicable, that where one of two innocent parties must suffer the law imposes the loss on the party whose conduct gives rise to the loss.

It was as earnestly urged on the other hand, that "The Standard Union Manufacturing Company" was a mere agency, device, or combination, on the part of Mason, Chase, and Johnson, who with their counsel were its controlling spirits, to enable them to do, in the name and under the cover of this artificial person, what they were precluded from doing by the decree of the court of common pleas of the city and county of New York: to wit, continue the use of the licenses which had been declared fraudulent and void in their hands. It is only necessary to observe that, if this should prove to be so, the court will have no difficulty in dealing with the case. That corporation, doubtless, would be bound by all the equities existing between the complainant and these parties who organized it, and would be treated as a purchaser of the licenses with full knowledge of their fraudulent and defective title. But all this is denied in the answer, and the suspicions engendered by the conduct of the parties in regard to the organization of that corporation are not to be allowed to overcome the weight of the answer, at this stage of the proceedings. Due consideration can be given to that and several other questions, more or less discussed, only after proofs and on final hearing.

Nor have I adverted to the claim of the counsel of the complainant that the transfers or assignments of the licenses were void for lack of record within three months after their execution, because I am not satisfied that the 36th section of the act of July 8, 1870 (16 Stat. 203), requires a mere license to be recorded. It was held, that licenses were not the subjects of regulation, in the 11th section of the act of July 4, 1836 [5 Stat. 121] (Brooks v. Byam [Case No. 1,948]; Curt. Pat. §§ 179, 181), and, although there is a change of phraseology in the act of 1870, I am not willing to say. in this interlocutory hearing, that congress meant to extend its provisions so as to include assignments of a license, as well as transfers of the legal estate in the patent, within its scope and meaning.

The application for an injunction in regard to patents No. 22,129 and No. 22,186, is granted as to the defendant, John L. Mason, and is refused as to the Standard Union Manufacturing Company and Thomas H. and Samuel A. Whitney.

[NOTE. On the final hearing the court directed a decree in favor of complainant for a perpetual injunction against all the defendants, and a reference for an account against the defendants Whitney, and for damages. Case No. 3,134.]

Case No. 3,134.

CONSOLIDATED FRUIT-JAR CO. v. WHITNEY et al.

[2 Ban. & A. 375.] [1]

Circuit Court, D. New Jersey. Aug., 1876.

PATENTS—FRAUDULENT GRANT BY TRUSTEE — NOTICE—RES JUDICATA—CONSOLIDATION OF CORPORATIONS — ACTION TO ENFORCE AGREEMENT — DEFENSES.

1. Three letters patent were granted to Mason, who afterwards parted with the title thereto. Mason entered in an agreement with the legal owners of the patent and others, for the purpose of effecting the incorporation of the complainant; and agreed to use his best efforts in securing extensions of the patents for the use and at the expense of the complainant, in consideration of which he was to be paid $5000, it being agreed that all extensions or renewals of the patents should be transferred to and form a part of the assets of the complainant corporation. Mason being one of the incorporators, and the principal officer of the complainant, and an application in his name as inventor being deemed necessary in order to procure extensions of the patents, the complainant assigned them to him with the distinct agreement that the extensions when obtained should be assigned to the complainant. Mason obtained the extensions, and the complainant paid him the $5000 and his expenses, in pursuance of the agreement. But while he was the legal owner of the patents and held the title thereto in trust for the complainant, he granted a license to one Chase, under two of the patents, giving the right to make and use the invention described in the patents, together with all extensions and renewals thereof. Chase assigned this license to one Johnson, who afterwards transferred it to the Standard Union Manufacturing Company. That company entered into an agreement with the defendants Whitney, by which it granted to them the right of manufacturing under the patents. *Held*, that it would be inequitable, upon any mere technical grounds, to relieve Mason or those claiming under him from the full surrender of the property which he had agreed to give up, and from the strict performance of the duties and services which he undertook to render in consideration of the pecuniary benefits which he received.

2. It is doubtful whether the complainant ought to be permitted to hold the defendants Whitney responsible for the use of the patents before they received actual notice of its claim, and of the lack of title in Mason, but after such notice, the defendants proceeded at their peril, and assumed the legal responsibility of their acts.

3. Where a court has decreed the title to a patent to be in the complainant, in an action brought for the purpose of determining the rights of the parties, such decree makes that question res adjudicata, and the defendants to the suit will be estopped from controverting it in another suit, so long as such decree stands unreversed.

4. Where certain parties representing the interests of different rival companies, enter into an agreement, to incorporate a new company, to which shall be transferred the property of the old companies, and that thereupon the old companies shall be dissolved: *Held*, that it was no defence to an action brought by the new company, to show that the old companies did not join in the certificate of incorporation of the new company.

5. Where an agreement provides for the transfer of property to a company not in existence, the objection that the company after it is organized cannot maintain an action to enforce its rights against the parties to the agreement, because such agreement is not binding upon the parties to it, nor on the company when it is afterwards organized, can have no force, the office of the agreement in these proceedings being principally, if not only, to indicate the intention of the parties in the formation of the new company and to show that certain of the defendants are estopped from claiming certain property which it had been agreed for a valuable consideration should be conveyed to the complainant. The agreement will not be treated as the ground of the right of the company to maintain its action, but as evidence of its right.

[In equity. Bill by the Consolidated Fruit-Jar Company against Thomas H. Whitney, Samuel A. Whitney, John L. Mason, and the Standard Union Manufacturing Company.]

A. Q. Keasbey, for complainant.
Abram Browning, for defendants.

NIXON, District Judge. The bill of complaint was filed in this case, originally, against Thomas H. Whitney and Samuel A. Whitney. It sets forth, in substance, that on the 30th of March, 1858, one John L. Mason, obtained from the United States, letters patent, No. 19,786 for "an improved lathe chuck;" that on the 23d of November, of the same year, letters patent No. 22,129 for "improvement in moulds for making bottles" were granted to him, and on the following 30th of November, letters patent, No. 22,186, for "improvement in screw neck bottles," the right and title to which several patents, by divers mesne assignments, became vested in the complainant; that by a certain agreement in writing, bearing date December 12th, 1871, executed by the said Mason and others, and duly delivered to the complainant, for the purpose of effecting the organization and incorporation of the complainant, the said Mason agreed to use his best efforts and services and influence to procure a renewal of all of said patents, for the use, and at the expense, of the complainant, in consideration of which the complainant covenanted to give to him its promissory note for five thousand dollars, payable in sixty days after date, the said Mason further agreeing, that all such renewals of the said patents should be transferred to, and form a part of the assets of the complainant corporation.

It further alleges, that in pursuance of the terms of the said agreement, the complainant gave to Mason its promissory note for five thousand dollars, which was afterwards paid at maturity, and also paid to him the sum of four thousand dollars for his expenses in obtaining the renewals and extensions of the said patents; that the said Mason, being one of the incorporators, and the principal officer of the complainant corporation, and an application in his name, as inventor, being deemed necessary in order

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

to procure the said extensions, the complainant made an assignment of the said patents to him, as follows: No. 19,786 on the 27th of January, 1872; and Nos. 22,129 and 22,186 on the 19th of November, 1872, said assignments being made for the sole purpose of facilitating the procuring of the renewals or extensions thereof, and with the distinct agreement, that the extensions, when obtained, should be assigned to the complainant; that in the month of March, 1872, Mason obtained from the commissioner of patents, an extension for seven years, from March 30th of that year, for the letters patent, No. 19,786, which extended term was duly assigned to the complainant, May 2d, 1872; that in the month of November of the same year, he also procured the extension of the letters patent, No. 22,129, for seven years, from November 23d, and of letters patent, No. 22,186, for seven years, from November 30th, 1872; and, that on the sixth day of January following, he assigned and transferred both of these to the complainant, and received the full consideration for his services in procuring and assigning the same, as provided in the agreement of December 12th, 1871.

The bill then charges, that Mason, notwithstanding his trust relative to, and his obligation to hold said patents for the exclusive benefit of the complainant, did, on the 13th of November, 1872, secretly and fraudulently execute a paper, by which he pretended to grant a general right and license to one John K. Chase, to make and use the inventions described in letters patent, Nos. 22,129 and 22,186, together with all extensions and reissues thereof, for the whole of the terms then granted, and thereafter to be granted; that said grant or license was executed to Chase without consideration, and with a full knowledge on his part, that Mason was under obligations to assign the said extensions to complainant, and was received by him in trust, to hold the same for complainant, in the event of Mason's failing to make said assignment, and to deliver up and surrender the same, in case the said Mason in good faith executed his agreement; that Chase, in violation of his trust, refused to deliver the said extended grant or license, to complainant, or to cancel the same, but on the contrary, fraudulently assigned the same to one Henry F. Johnson, by two instruments of transfer, one dated February 27th, 1873, and recorded in the U. S. patent office, June 13th, 1873, and the other dated April 9th, 1873, and recorded as aforesaid, April 16th, 1873; that Johnson afterward made a transfer or assignment of the said license to the Standard Union Manufacturing Company—the said company, having full knowledge and notice of the rights and claims of the complainant therein, and of the fraudulent character of the pretended grant or license; that the said company or some of its officers. have entered into an agreement with the defendants, Thomas H. and Samuel A. Whitney, trading as Whitney Brothers, in which they pretend to grant or bestow upon them the right of manufacturing fruit jars containing the improvements secured by the said letters patent, and using the trade marks relating thereto, and by virtue of which, the said Thomas H. and Samuel A. Whitney are extensively engaged in manufacturing and selling fruit jars, embracing the said patented improvements.

The prayer of the bill is, that they be perpetually restrained by injunction, from making and selling fruit jars, containing any of the elements secured by the said letters patent, and from transferring or disposing of any pretended right, privilege or license granted to them by the said Standard Union Manufacturing Company or by the said John L. Mason, or any other persons, and for an account.

Subsequently to the filing of the original bill, an amendment was allowed, setting forth that John L. Mason, acting for himself and for the Standard Union Manufacturing Company, which was entirely under his control, was engaged in the city of Camden, New Jersey, in manufacturing trimmings for fruit jars, and disposing of the same to various fruit jar manufacturers, which trimmings contained the improvements secured by the aforementioned letters patent; that the said Standard Union Manufacturing Company, not only agreed with the Whitney Brothers to bestow upon them the rights under the said pretended grant or license to manufacture fruit jars embracing the said pretended improvements, but claimed and exercises the right to authorize other parties to use the same in New Jersey and elsewhere; and asking that the said Mason and the Standard Union Manufacturing Company, be added as parties defendant in said bill, and in the prayer for injunction and subpoena.

Upon further allegation in the bill, that an action had been instituted in the court of common pleas of the city and county of New York, by the complainant, against John L. Mason, John K. Chase, and Henry F. Johnson, to avoid and set aside the aforesaid grant or license from Mason to Chase, and from Chase to Johnson, and to prevent the said parties from using the rights and privileges thereby pretended to be transferred; and that after appearance, answer and proofs, a final decree had been entered against the said defendants in favor of the complainant, adjudging that the said grant or license from Mason to Chase was made collusively, and was a fraud on the rights of the complainant, and was fraudulent and void; and perpetually enjoining the said Mason, Chase and Johnson, or either of them, from transferring, assigning or in any manner disposing of, or interfering with the said grant or license or using the same; and, that the said Standard Union Manu-

facturing Company, and Thomas H. Whitney and Samuel A. Whitney, had knowledge and notice of said suit, and of the rights and claims of the complainant; an injunction order was issued and served, restraining all the defendants from using the said patented improvements of the complainant, until the further order of the court.

After the defendants had filed their joint and several answer to the bill of complaint, the court heard the motion for a preliminary injunction, and after advisement, granted it against the defendant, John L. Mason, as to letters patent, Nos. 22,129 and 22,186, but refused it as to the other defendants. See 2 Ban. & A. 30 [Case No. 3,133].

A large amount of conflicting testimony has been taken, and the case has been ably and exhaustively argued, by the counsel of the respective parties. No evidence is found impeaching the title of John K. Chase to a license to make and use the lathe chuck, under letters patent No 19,786, and hence no further consideration need be given to the claim of the complainant for the same. With regard to the title of the two other patents, Nos. 22,129 and 22,186, the matter is res adjudicata, as to the defendant, John L. Mason, and John K. Chase and Henry F. Johnson, the parties defendant to the suit in the court of common pleas of the city and county of New York. That was the question determined there, and they are estopped from again controverting it in this court, so long as the decree therein rendered, stands unreversed.

No such estoppel can be pleaded or maintained against the Standard Union Manufacturing Company, Thomas H. Whitney and Samuel A. Whitney, and it remains to consider how the proofs, in the present case, affect these parties. Although careful attention has been given to the various positions maintained by the able counsel on the argument, it is not deemed necessary to dwell upon them in detail, but to briefly state the results and conclusions to which the court has arrived.

It must be borne in mind that, when the agreement of December 12th, 1871, was entered into, Mason was not the owner of the two patents, Nos. 22,129 and 22,186. They then belonged to the Sheet Metal Screw Company, from which corporation the complainant derived its title, by deed of transfer bearing date January 27th, 1872. The parties to that agreement were, in fact, four. (1) Lewis R. Boyd, in his own right and also representing the Sheet Metal Screw Company, in behalf of which he was duly authorized to act; (2) Henry E. Shaffer; (3) Stephen R. Pinckney, William S. Carr and John L. Mason, "each for himself, and jointly, in behalf of the Mason Manufacturing Company;" and (4) Henry C. Wisner. Its object was "to combine their respective interests and business for their mutual benefit," to bring together all the property used by them in destructive business rivalry, and to consolidate the same into one organization. The capital stock of the new company was to be five hundred thousand dollars. Of this, Boyd was to receive $197,500, upon his transferring all of his own property used in the business and also all the property of the Sheet Metal Screw Company. Upon a like transfer, Schaffer was to have $65,500; and when Pinckney, Carr and Mason, had assigned to the proposed organization "all tools, machinery, fixtures, moulds and all letters patent and rights or interests therein belonging to them or either of them, or to the Mason Manufacturing Company," Pinckney was to receive $23,800 in capital stock: Carr, $23,700, and Mason $89,500. The remaining one hundred thousand dollars of the capital stock, was to be made up by a cash subscription.

But although the Sheet Metal Screw Company then owned these patents, its title did not include their renewal or extension. They had less than a year to live, and if they were renewed or extended, in the absence of any contract, the new term would belong to Mason. It was, hence, stipulated in the agreement, that John L. Mason should "use his influence and efforts and services to procure a renewal of all patents heretofore granted to him, expired or unexpired, for the benefit, and at the expense of, the said new company, and that the said company should give to Mason, upon the organization thereof, their promissory note in writing for the sum of $5,000, payable in sixty days after date, for his influence and efforts and services in this behalf; and that all renewals of the letters patent, referred to in the agreement, should be transferred to and form a part of the assets of the said new company," etc.

On the same day that the agreement was entered into, the certificate of incorporation of "The Consolidated Fruit-Jar Company" was drawn up, signed and acknowledged by Boyd, Shaffer, Pinckney, Wisner, Mason and Carr. It was filed in the office of the secretary of state of New York, on the 16th day of the same month and year, and was obviously intended to be in pursuance of the provisions of the said agreement. It is clear from the proofs, that upon the organization of the new company, Mason, who was one of the trustees as well as incorporators, accepted his proportion of the stock, took the consideration to be paid for the renewals of patents expired or unexpired, to wit, $5,000, and also the expenses alleged to have been incurred in obtaining the renewals, to wit, $4,000, and, in short, received all the profits and advantages which could possibly enure to him from the new company by the terms of the agreement. Under these circumstances, it would seem alike inequitable and unconscionable, for a court of

equity, upon any mere technical grounds, to relieve Mason or those claiming under him, from the full surrender of the property which he had agreed to give up, and from the strict performance of the duties and services which he undertook to render in consideration of these pecuniary benefits.

It was set up in the answer, and strongly urged on the argument by one of the counsel of the defendants, that the complainant was not entitled to recover. (1) Because the corporation was not organized by all the parties to the agreement—the Sheet Metal Screw Company and the Mason Manufacturing Company not joining in the certificate; and (2) Because the agreement, in providing for the transfer of property to a corporation not then in existence, was neither binding upon the parties to it, nor on the company when it was afterwards formed.

In regard to the first objection, it is, perhaps, sufficient to say there was no need that these expiring corporations should become parties to the certificate of incorporation, inasmuch as, by the express terms of the agreement, they had authorized their legal agents to turn over all their assets to the new company, and they were to become dissolved as soon as the organization was completed.

And in regard to the second, it may be observed, that the principle, if not the only office of the agreement in these proceedings, is to indicate the intention of the parties in the formation of the new company, and to show that the defendant Mason, and those holding under him, are estopped from claiming certain property, which he had agreed, for a valuable consideration, to convey to the complainant. In other words, the agreement is not treated as the ground of the right of the complainant to maintain its suit, but as evidence of its right.

The action being maintainable by the complainant, and the matter in controversy, being res adjudicata as to the defendant Mason —is there anything in the evidence as to the origin, or methods and purposes of life of the Standard Union Manufacturing Company, which authorizes the court to conclude, that that company took the title to these patents without notice or knowledge of the complainant's ownership?

A corporation is an artificial person. It thinks and speaks and acts only in the thoughts, words and actions of the individuals who organize it and direct its proceedings. The sum of its knowledge or intelligence is found in the aggregate knowledge and intelligence of those who give it being and life. The corporators of this organization were David Hannigan, George W. Palmer and Gulian V. Quillard, who acknowledged the certificate of incorporation on the 19th of April, 1873. The seven trustees to manage its concerns for the first year were these corporators, and Henry F. Johnson, William H. De Camp, George Ross and Isaac G Speekers. All of these persons, except Johnson and Speekers, who are reported dead, were placed upon the witness stand by the complainant, to testify in regard to the organization and life of this company, and their testimony is quite remarkable.

Hannigan says, that he is not able to state whether he was one of the incorporators or not; that he was a particular friend of Mason's, and if he was one, it was at Mason's solicitation; that he never owned any stock or knew anything about the business of the concern; that at the request of some of the trustees, he purchased the machinery of the factory at Camden, and gave his notes and a mortgage upon the property for $10,000, the amount of the purchase money; that he never paid anything on the purchase, but presumes that Mason has paid; that he resigned his position as trustee about a month after the organization and knows nothing about the company since.

George W. Palmer was the attorney for Mason, in the New York suit, and drew the answer for him—the suit having been commenced and a temporary injunction granted against Mason on the 11th of April—more than a week before Palmer signed the certificate of incorporation of this company. He never owned any of the stock, although he was the first president of the board of trustees, and held the position for several months —Mason being the general superintendent of the concern and succeeding him as president. So far as the company had any office or place of business in New York, it was at the law office of Palmer & De Camp, at 318 Broadway. He does not know who the treasurer of the company was, nor where its funds were kept, while he was president, and thinks that "pretty much all of the $500,000 of stock was issued for patent rights."

Quillard, the remaining corporator, testifies, that he was the only real and regular secretary the company ever had, and was also a trustee; that he held $5,000 of the stock at one time, which was given to him by Mason, "without any consideration or bargain whatever," and, that he afterwards returned the same to him. He further states, that there has been no meeting of the company since June, 1874; that Mason has been the president and manager, and conducted the business without the supervision of the board of trusteees, or any one else.

Johnson was not put upon the stand by either party; but Chase says, that he assigned the license to use the patented improvements in dispute to Johnson at the request of Mason; that he (Chase) first suggested the idea of a corporation to hold the title, and that Mason agreed to it, that he received $20,000 in the stock of the new company, for the transfer, which, however, he afterward sold for $100, and that he backed out from being one of the corporators,

when "he thought things were not going right."

George Ross, another of the trustees, was never a stockholder, and does not recollect that he was present at the organization of the company. He has never had any knowledge about its affairs, transactions and business. He loaned some money to it, and took a mortgage from Mason, on property owned by him, as security for payment of the loan, and has tried to find out something about the company, as he wants his money back.

The foregoing is a synopsis of a large amount of testimony of the same general sort, from trustees and other officers of the corporation, and, after its fair consideration, the conclusion is quite irresistible that the formation of the Standard Union Manufacturing Company was a scheme of Mason, with his aiders and abettors, to evade the injunction of the court of common pleas of the city county of New York, which restrained him from the open use of these patents; and that it is the duty of this court to protect the real owners against all such fraudulent devices.

3. Whatever rights the defendants Thomas H. Whitney and Samuel A. Whitney had in these patents, were obtained from the Standard Union Manufacturing Company. They were authorized to use the patented improvements by virtue of the agreement executed in December, 1873, by Mr. Synott, representing the Whitneys of the one part, and Mason, representing the company, of the other. In such a transfer of personal property, the maxim caveat emptor applies, and although the good faith of the Whitneys has not been impeached, they could not, under the circumstances, acquire any rights which their vendor did not have. Assuming that the Whitney Brothers were innocent purchasers, and remembering that the complainant, by its ostensibly unconditional assignment of the patents to Mason, put him in a position to enter into the agreement with the Whitneys, it is doubtful whether the complainant ought to be permitted to hold these defendants responsible for the use of the patents, before they received actual notice of its claim, and of the lack of title in Mason; but after such notice they proceeded at their peril, and assumed the legal consequences of their acts. This notice was given by the president of the complainant corporation, January 27th, 1874, and subsequently by a copy of the injunction ordered against Mason by the court in New York, in the pending suit, forwarded to them in a letter dated February 28th, 1874.

There must be a decree in favor of the complainant, for a perpetual injunction against all the defendants, and also a reference for an account against Thomas H. Whitney and Samuel A. Whitney, and for damages, according to the prayer of the bill.

Case No. 3,135.

CONSOLIDATED FRUIT-JAR CO. v. WRIGHT.

[12 Blatchf. 149;[1] 6 O. G. 327; 1 Ban. & A. 320.]

Circuit Court, S. D. New York. June 11, 1874.

PATENTS—"FRUIT JARS"—VALIDITY—PATENTABILITY—ABANDONMENT.

1. The letters patent granted to John L. Mason, May 10th, 1870, for an "improvement in fruit jars," are invalid.

2. The claim of such patent is to a combination of three elements: first, a shoulder to receive a gasket outside, and a little below the top, of the jar; second, a cover, with a rim extending down outside of the top, to press upon the gasket; third, a screw-ring or screw-cap, with its screw-threads operating upon those of the jar below the gasket shoulder.

3. Mason invented, in 1859, a fruit jar containing such combination, and put several such jars into use, and sold others. He did nothing towards applying for a patent until 1868. Meantime, in 1865, a patent was issued for a fruit jar containing the same combination, except that the gasket was on the top of the jar, to receive the pressure of the cover, instead of upon the exterior shoulder beneath the overlapping flange of such cover. Another patent was issued, in 1865, for a combination of shoulder, cover and screw-ring, wherein the shoulder and cover were inside, and a gasket was used. Patents were issued in 1861 and 1862 for jars with shoulders, covers and gaskets outside, and a clamp instead of a screw-ring. These inventions are disclaimed by Mason, in his specification. Whether, under such disclaimer, anything patentable remained which Mason could secure to himself, quere.

[Cited in Kittle v. Hall, 29 Fed. 514.]

4. Jars constructed like Mason's were put into use by others in 1865, and were extensively made and sold in 1866 and 1867. Mason applied for his patent in 1868. No reason was shown for the delay: *Held*, that Mason had abandoned his invention.

[Applied in U. S. Rifle & Cartridge Co. v. Whitney Arms Co., Case No. 16,793.]

[See note at end of case.]

[In equity. Bill by the Consolidated Fruit-Jar Company against James T. Wright.]

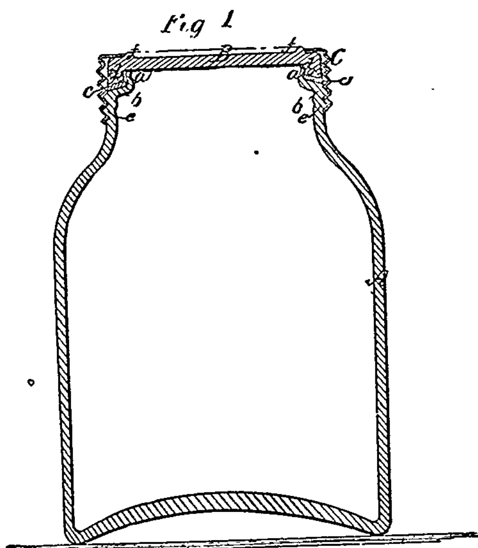
John H. B. Latrobe and Andrew J. Todd, for plaintiff.

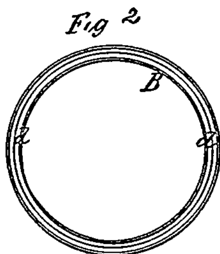
W. C. Witter and George Gifford, for defendant.

WOODRUFF, Circuit Judge. The bill is filed herein to restrain the alleged infringement of a patent [No. 102,913] granted May 10th, 1870, to John L. Mason, for an "improvement in fruit jars," and by assignment now held by the complainant. The application of Mason for the patent was made on the 15th of January, 1868. In the specification, the invention is said to relate "to a new and improved construction of jars and other vessels, designed for the preservation of fruit and other substances which are seriously affected by exposure to air, whereby India rubber packing rings or gaskets can be em-

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

ployed, in making tight joints, without exposing the rubber to the contents of the jars; and whereby flat horizontal shoulders formed outside of the jars are adapted to afford bases upon which to receive said rubber packing rings, upon the exterior of the jars, above the continuous glass screw; and whereby flanged caps or covers can be used, the flanges of which are adapted to fit over annular ribs or flanges surrounding the mouths of the jars; and whereby flexible flanged screw-rings, made of thin metal, are adapted to confine the caps or covers down firmly in place, over the mouths of the jars and upon the said rubber packing rings





placed upon the said shoulders formed outside of the jars." After a more minute description and reference to the drawings annexed to his specification, the patentee states that he claims "the combination, first, of the shoulder b, to receive a gasket outside, and a little below the top, of the jar; second, of the cover B, with the rim d extending down outside of the top, to press upon the gasket; and, third, of the screw-ring or screw-cap C, with its screw-threads operating upon those of the jar below the gasket shoulder; all substantially as above set forth and described."

It is to be noticed, that the patentee does not claim either of the elements or parts of this combination, nor does the patent purport to secure to him the exclusive right to use either, nor does it secure to him the special form of either, but only the combination of the three. The patent, therefore, in no wise hindered the use by any one of a cover having a rim or flange extending down outside of the top of the jar, to press upon a gasket, nor of a shoulder upon the outside of the jar a little below the top, to receive such gasket, nor of both of these combined, provided the pressure was not produced by a screw-ring whose threads operated upon threads in the glass jar below the gasket; and so of any other jar not combining the three parts. The patent is strictly a combination patent, in which the parts are not claimed to be new. Possibly, this criticism may have some bearing upon the effect of certain patents granted after the patentee is alleged to have made his invention and before he applied for a patent; which patents are for inventions which, in his specification, Mason expressly disclaims. If the effect of his disclaimer, in the very patent on which the suit is brought, left nothing of patentable invention to be secured by the patent, then it may be wholly in vain, as to any right to be established under the patent, that the complainant proves that Mason invented the fruit jar described, or all, any, or either of the parts thereof, before such patents were granted. For the purposes of this suit the disclaimers of the patentee must be taken to concede, as to the inventions disclaimed, the right to use the devices therein shown, and all the legal consequences of the recognition of that right.

It is not my intention to discuss at much length the proofs herein, or the legal questions which may be involved. I must content myself with stating briefly my conclusions.

1. The proofs show, that Mason, the patentee, did first invent a fruit jar containing the combination described in the patent; that he made such invention in the summer of the year 1859; and that he then completed such invention and reduced it to practical form, adapted to use and sale, as fully as has at any time since been done.

2. The proofs show, that, at the time last mentioned, he caused at least two dozens of such completed jars to be manufactured; that some of them were put into actual domestic use for the keeping of preserved fruits, and others thereof were put by the patentee on public sale, and were sold, and the proceeds of sale were received by him; and that such sale was made by the patentee for the double purpose of "getting the money" therefor and of "trying them, to see if they would sell well."

3. At the time last aforesaid, the said patentee contemplated procuring a patent for his said invention; and there is no affirmative evidence that he ever relinquished that purpose, except that, for the period of more than nine years thereafter, he did nothing towards the execution of such a purpose.

He suffered the moulds which he procured for the original making of such jars to remain unused at the glass factory, (where his jars had been blown and formed,) without claiming them, and the proprietors, (in 1867,) after eight years, not knowing where to find the patentee, sold them, because not able to pay storage upon them; and nothing more was done in the matter of manufacturing such jars, by the patentee, down to the time of his said application for a patent on the 15th of January, 1868.

4. In the mean time, Gillender and Bennett invented, and, in 1865, patented, a fruit jar having a shoulder on the outside, a little below the top of the jar; a cover, flanged, overlapping the top of the jar, and extending downward outside of the top; and a screw-ring with screw threads operating upon those of the jar below the shoulder—thus combining the devices before described, in the very terms of the claim of the patent of Mason, with the single difference, that the gasket was to be placed on the top of the jar, to receive the pressure of the cover, instead of upon the exterior shoulder beneath the overlapping flange of such cover.

Charles Imlay also invented, and, in 1865, patented, a jar wherein the shoulder or seat of the gasket was inside the mouth of the jar, a little below the top, with a cover dropping within the mouth, with an annular notch or groove to contain or embrace the gasket resting on the shoulder, and having the like screw-ring to press the cover down upon the gasket, to make the jar air tight. These the patentee recognizes in his specification, and disclaims as not within his claim.

Not only so, Gilbert, in 1861, and Otterson, in 1862, had invented, and they had respectively patented, jars having the shoulder to receive the gasket outside and a little below the top of the jar, and a cover with a flange or rim overlapping the top of the jar, and extending down outside of the top, to press upon the gasket. Their mode of giving pressure to the top, to hold it firmly down upon the gasket, was a species of clamp, and not the screw-ring used by Gillender and Bennett and by Imlay. These also the patentee recognizes in his specification, and disclaims as not within his invention. What, then, was there remaining to be the subject of a patent? Certainly, not the placing of the rubber gasket on a shoulder outside of the jar; not the flanged cover to embrace the top of the jar and extend down upon the gasket; not both of these combined. These were devices which, either separately or combined, he disclaimed. But there was another device equally adapted to be used with these, and without any additional device or change in its construction—the screw-ring of Imlay and of Gillender and Bennett. And the screw-ring and screw-thread of the last named two patentees, and all that Mason's patent claims is effected. Is not this simply and only the putting of the screw device to a new use, without alteration and without any new result,—a mere exercise of judgment in the choice between two or more known devices for pressing the cover down upon the packing or gasket? There is grave doubt whether, under circumstances such as I have stated, the patent describes and claims anything which, under the disclaimers in the specification, was of patentable invention; and, if not, then, in this suit, and under this patent, it would avail nothing if the complainant had proved that Mason was, in fact, the first inventor of the several devices named in it, and had neither done nor omitted anything affecting his right to have had a patent therefor instead of the patent which he received.

5. But this is not all. Besides the jars of Gillender and Bennett, and of Imlay, made and patented before the application of Mason for this patent, there were, in the year 1865, in the possession of Imlay, in actual domestic use, several jars of the construction described in Mason's patent, and of the construction now claimed to infringe that patent. Imlay was in the business of devising and constructing fruit jars, and in that year had taken out one patent for a fruit jar, above referred to. It is not distinctly and in terms proved that he made those jars like the patented invention, which were in in use in his family. Nor is it proved how otherwise they were made. Whoever made them, the fact is another circumstance, added to the manufacture and sale by the said Mason in 1859, bearing on the allegation that the patented invention was on public sale and in use more than two years before the application for the patent now sued upon.

6. And, still further, it is shown that, in the spring of 1866, negotiations were entered into between Imlay and S. B. Rowley, for the manufacture of just such jars, (Rowley being the assignee of one or more of the said previous patents,) combining the devices as now claimed in the Mason patent; that on the 7th of March, 1866, Imlay licensed Rowley to use the devices mentioned in his patent and the Otterson patent, then held by Imlay, and, by agreement of the same date, the terms upon which the business was to be carried on were fixed between them; and that thence onward, in concert with Imlay, (who produced to him such a jar as a sample,) Rowley procured moulds to be made, and manufactured extensively, and put upon public sale, among other jars, the jars containing the combination in question, (being the jars now alleged to infringe the patent thereafter granted to Mason,) such jars being the Otterson jar, with the screw-ring theretofore used by Imlay transferred thereto, as above already stated, the same being called and known as the Hero jar. These jars were extensively advertised, and it is proved that, in the year 1866, Rowley sold of such jars about "150 to 200 gross,"

having covers of glass, and a large number having covers of metal applied in the same manner; and it is testified, by his agent or clerk, without contradiction, that, prior to 1868, he had sold several thousand gross of such jars. The jars sold by the present defendant, and claimed to infringe the patent applied for by Mason in 1868, were purchased by him from Rowley, and this suit is defended by Rowley, in vindication of his right to make and sell such jars.

7. Upon these facts, my conclusion is, that the alleged invention, if otherwise patentable, had been in "public use" and "on sale, with the knowledge of the inventor," so as to deprive him of the right to a patent therefor.

8. The acts and neglect of Mason, the patentee, amounted to an abandonment of the supposed invention, and of all claim to a patent therefor. It was not until after the several patents above specified had been obtained by others, and after Rowley, in concert with Imlay, had engaged largely in the manufacture, and they had been for very nearly two years extensively sold, that Mason, nine years after his alleged invention, comes forward to claim the exclusive right to make such jars. If he originally might have claimed it, he had slept too long. He had abandoned the manufacture. His instruments of manufacture were lost, or had passed from his possession and control, without an effort to reclaim them. Others having no connection with him had produced and given to the public the benefit of the device he now seeks to claim, and had devoted their time and capital to its production and its sale. There was no reason for this delay, if Mason entertained any purpose to pursue the invention or patent it. He had abundant means for the purpose. He actually applied for and received another patent. He apparently applied himself to a totally different subject, so as to indicate, that, for some reason, he did not regard the device worthy of further attention, until either the ingenuity or skill, judgment and capital of others, applied to the manufacture and sale, suggested to him that the alleged invention had value. The remarks of Judge Fisher, of the supreme court of the District of Columbia, in his opinion in the matter of the interference between the applications of Rowley and Mason, (put in evidence by the complainant,) are forcible and apt to this view of Mason's rights, especially as against Rowley, who, it seems, defends this suit. The authorities which he cites are to the like purport. Adams v. Jones [Case No. 57]; White v. Allen [Id. 17,535]; Sayles v. Chicago & N. W. R. Co. [Id. 12,414]; Ransom v. Mayor [Id. 11,573]; [Reed v. Cutler, Id. 11,645]. As well on the ground of abandonment as on the ground of unnecessary delay and neglect, until Rowley, or Rowley and Imlay, had produced and put the alleged invention into extensive use and on sale, for nearly two years, expending their time, industry, skill and capital, the patent to Mason must be regarded as invalid.

Nor, in my opinion, is it material to inquire whether Mason or Rowley did or could have obtained a patent for the combination in question. If an inventor, without substantial reason or excuse, abandons the use of his invention, and for nine years sleeps on his rights, and in the mean time others, in good faith, employ their industry, skill and money in producing the same thing, and give the public the benefit thereof, putting it into extensive use, and on sale, such a state of facts not only warrants the inference of abandonment by the first inventor, but it also creates, as between him and the others, the same equity as would arise if such others had gone further and taken out a patent. Whether the device be patented, or has "gone into use without a patent," should make no difference. Kendall v. Winsor, 21 How. [62 U. S.] 322. This is not because lapse of time, per se, deprives an inventor of his right, but because the circumstances giving character to the delay indicate abandonment; and also because the intervening rights of others make it inequitable that he should thereafter be permitted to assert any such exclusive title to the invention.

The bill must be dismissed, with costs.

[NOTE. Complainant appealed to the supreme court, and the decree of the circuit court was there affirmed, Mr. Justice Swayne delivering the opinion.

[The sale of the portion of the two dozen jars in the summer of 1859, for the purpose of "getting the money" therefor, and of "trying them, to see if they would sell well," was fatal to the patent.

[Suffering the model to remain at the glass factory until the sale by the proprietors was very significant and important, and, taken in connection with the other circumstances appearing in the case, clearly established an abandonment of the invention. Consolidated Fruit-Jar Co. v. Wright, 94 U. S. 92.]

CONSOLIDATED VA. MIN. CO. (KINNEY v.). See Case No. 7,827.

Case No. 3,136.

CONSTANT v. ALLEGHENY INS. CO.

[3 Wall. Jr. 313;[1] 1 Am. Law Reg. (N. S.) 116.]

Circuit Court, W. D. Pennsylvania. Nov., 1861

INSURANCE — PAROL AGREEMENT—AUTHORITY OF CORPORATE OFFICERS.

1. Though by the charter of an insurance company it is provided that "every contract bargain, and other agreement," in execution of the powers of the company, "shall be in writing or print, under the corporate seal, and signed by the president, or, in his absence or inability to serve, by the vice president or other officer, &c., and duly attested by the secre

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

tary or other officer," &c., a parol agreement as to the terms on which a policy shall be issued, made by the president secretary, or other general agent of the company may, nevertheless, be enforced specifically in a court of equity, which, in case of a previous loss, will be by a decree for the amount which would be due upon a policy duly executed.

[Applied in Franklin Fire Ins. Co. v. Colt, 20 Wall. (87 U. S.) 566.]

2. But a mere collateral agreement, which does not involve the execution of a policy of insurance, is not within the scope of the general authority of an officer or agent of such a corporation, and cannot be enforced.

3. The plaintiff, through a broker, applied to the defendants for an insurance on a boat for a definite amount, and was informed that "it would be taken." The defendants subsequently sent to the broker their own policy for a part, and the policies of three other companies for the residue, executed by an agent for the latter companies. The broker, on receiving the policies, wrote, in the absence of his principals, to the defendants, to say that he doubted whether the agency policies would be accepted, alleging as a reason, that the particular agent had not a good reputation for "settling losses," and added, "I don't know whether it is your custom to guarantee the offices you insure in, or not; if you do, I may prevail on" the plaintiff "to hold the policies." The secretary of the defendants in reply, wrote: "In handing the policies" to the plaintiff, "you can say that if the boat is not insured in offices satisfactory to him, we will have them cancelled; but, though they are not re-insurances, yet in case of loss we feel ourselves bound for a satisfactory adjustment. We deem the companies good, and if any parties can settle with them, we can." On the faith of this letter the plaintiff closed the transaction. One of the substituted companies afterwards became insolvent, and, a loss having occurred, a special action on the case was brought against the defendant: *Held*, (1.) That the secretary of the defendants had no general authority to bind them by a guarantee of the solvency of the substituted companies; and, (2,) if he had, his letter did not amount to this, but only to an undertaking for a satisfactory determination of the amount of the loss, and its apportionment between the insurers.

Constant and others, including the captain of it, Bowman, were owners of a steamboat, upon which they were about to make an insurance. One Springer was a correspondent of the Allegheny Insurance Company of Pittsburg, the defendant in the case, and in the habit of getting customers for it, which he had authority to do, but he had no authority to make contracts for the company. Captain Bowman, for himself and in behalf of the other owners, applied to Springer, as agent of the Allegheny Company, to get an insurance of $20,000 on the boat. Springer communicated with the company by telegraph, to know if they would take the risk, and received for answer "that it would be taken;" and Springer so informed Bowman, who requested Springer to write to defendants to take the risk. Springer did so, informing them of the names of the owners, and their respective interests. The defendants agreed to take the risk, and sent to Springer five policies of insurance, covering the risk of $20,000: two of them of $2,500 each, in favor of Captain Bowman, executed by themselves; one for $5,000, in favor of Bowman, executed by the "Pennsylvania Insurance Company;" one for $5,000, in favor of plaintiff, executed by the "Quaker City Insurance Company;" and the other for $5,000, executed by the "Commonwealth Insurance Company" in favor of the remaining owner, one McGhee.

When these five policies were received the owners and the boat were absent on their voyage, and Springer wrote to the secretary of the Allegheny Insurance Company as follows: "Your favor, together with the policies on the steamer, came to hand. I was very much disappointed in receiving the three policies from agencies. Altogether I am very much afraid, when the boat comes back, that the owners will not have them. They expected them to be taken in Pittsburg offices, and they were issued by Mr. Carrier, whose reputation for settling losses is not very good in this city. As far as my own knowledge goes, he never settles without a law suit. I don't know whether it is your custom to guarantee the offices you insure in, or not; if you do, I may prevail on them to hold the policies. I will keep the policies until they return, and do the best I can to get them to keep them; but I know the owners are very much prejudiced against the 'Commonwealth' and 'Quaker City' (they have agencies here), and if they will not keep them, I can only return them. I can say no more until the boat returns."

To this letter the secretary of the company defendant replied, as follows: "In handing the policies to the owners of the boat, you can say, that if she is not insured in offices satisfactory to them, we will have them cancelled; but though they are not reinsurances, yet in case of loss we will feel ourselves bound for a satisfactory adjustment. We deem the companies good, and if any parties can settle with them we can."

When Springer presented the policy of insurance executed by the Quaker City Insurance Company, to the plaintiff, he objected to it. Springer then informed him of the contents of the letter aforesaid, upon which the plaintiff "gave his premium note for $750, and the matter was closed."

It may be pertinent to observe, that by legislative enactment, insurance companies in Pennsylvania, except in cases of special charters, are "empowered to make, execute, and perfect such contracts, bargains, agreements, policies, and other instruments as shall or may be necessary, and as the nature of the case may require, and every such contract, bargain, policy, and other agreement shall be in writing or print, under the corporate seal, and signed by the president, or in his inability, by the vice president," &c., and that subject to this act the Allegheny Insurance Company, the present defendant,

held its charter. Act April 2, 1856, § 10; Act Jan. 29, 1859, (P. L. p. 10.)

Soon after the insurance effected by the correspondence and acts already mentioned, the steamboat was lost; and the Quaker City Company having become wholly insolvent, this suit, a special action on the case was instituted at law, to recover the amount from the defendant, the Allegheny Company.

The facts as above stated, were found on a special verdict; judgment being to be entered for $5,265.83, if the court thought that they made out a case for the plaintiff, otherwise for the defendant.

GRIER, Circuit Justice. To entitle the plaintiff to judgment on this verdict, he must show:

1st. That on the facts as found the secretary of the insurance company could legally bind the company to guarantee an insurance made by another insurance company.

2d. That such a promise or agreement was made, in such form as to support an action at law against the corporation.

By its act of incorporation this company could make insurance which would be legally valid only by a policy attested by the president, secretary, and the seal of the corporation. Yet, before such instruments are attested in due form, the president or secretary, or whoever else may act as a general agent of the company, may make agreements, and even parol promises, as to the terms on which a policy shall be issued, so that a court of equity will compel the company to execute the contract specifically (see Commercial Mut. Ins. Co. v. Union Mut. Ins. Co., 19 How. [60 U. S.] 318); and where the loss has happened, to avoid circuity of action the chancellor will enter a decree directly for the amount of the insurance for which the company ought to have delivered their policy, properly attested.

The secretary of the company, in this case, replied by telegram to one sent by Springer, who acted as a broker or mutual agent of the parties, not that the defendants would themselves take the whole risk of $20,000, but "that it should be taken." The company showed their construction of their undertaking by transmitting policies to the amount requested, equally divided among four insurance companies, as negotiated by defendants, and divided among the three several owners of the boat, according to their respective interests. The objection made by the insured was not to the manner in which the risk was divided, but that the agent of one of the companies (the Quaker City), had the character of being a very troublesome person to deal with in case of a loss which would require adjustment.

Assuming the representation of the secretary, that in case of loss "we will feel ourselves bound for a satisfactory adjustment," is an agreement to guarantee the solvency of the Quaker City Insurance Company, had the secretary authority to make a simple or parol contract to bind his principal to guarantee the solvency of another company? We think he had not. Every promise to make a policy of insurance under the seal of the company, and the terms on which it will be done, falls necessarily within the scope of the authority confided to such agent; but any other merely collateral promise or representation, which does not involve the execution of a policy of insurance, is not within the scope of his authority, as agent, because it is not strictly within the scope of the powers granted to the corporation.

Whether the officers of the corporation could, by covenant, duly executed, but not in the form of a policy of insurance, bind the company to perform such a contract, we need not inquire. This is a suit at law, and the plaintiff must show a legal obligation, executed according to the forms required by the law, which confers the corporate powers on the defendant. And if it were a bill in equity, the chancellor would decree only a specific execution, to wit, the delivery of an instrument of writing, executed and attested according to law, and such as was within the powers of the corporation as provided by their charter.

But assuming that this parol promise, as stated in the secretary's letter, would support a suit at law against the company, is there a promise to guarantee the solvency of the Quaker City, or any of the three other companies who joined in taking this risk of $20,000? The parties did not complain that the defendants would not take the whole risk on themselves, but had it negotiated and divided among other companies. The objection was not made to the solvency of any of the companies, but on the anticipated difficulties of adjustment in case of a loss occurring. The undertaking of the secretary is not that the defendant shall pay the amount of the loss, but to take the trouble of adjusting the loss with this captain's agent. This might be an easy matter for the defendants' officers to perform, as the very same adjustment would have to be made with and for themselves, and other companies who were not infested by such an agent.

The adjustment of a loss is defined to be the "settling and ascertaining of the indemnity which the assured, after all allowances and deductions made, is entitled to receive under the policy, and fixing the portion which each underwriter is liable to pay."

Now, the direction of the secretary to Springer is to tender the policies, and if they are not satisfactory to the owners to cancel them; stating that they are not reinsurances, and that "we feel ourselves bound" not to pay the losses if the other insurers should be insolvent, but "for a satisfactory adjustment," and adding, "we deem the companies good, and if any parties can settle with them we can." Here is no

guarantee. The whole length and breadth of this undertaking is a satisfactory adjustment of the loss, and no more. [The facts as found by the jury, do not, therefore, support the claim alleged in the declaration. The defendants are consequently entitled to judgment for the defendant.][3]

Judgment for the defendant.

CONSTANT (GLADDING v.). See Case No. 5,468.

CONSTITUTION, The (REEVES v.). See Case No. 11,659.

Case No. 3,137.

CONSUL OF SPAIN v. The CONCEPTION.

[2 Wheeler, Cr. Cas. 597;[1] Brunner, Col. Cas. 497.]

Circuit Court, D. South Carolina. 1819.[2]

INTERNATIONAL LAW—RIGHTS OF SOVEREIGNTY.

The fact of national independence may be deduced from history by courts exercising jurisdiction of international law; no explicit official recognition is necessary.

[Appeal from the district court of the United States for the district of South Carolina.]

In admiralty.

JOHNSON, Circuit Justice. This vessel and cargo are clearly Spanish property, and the corvette La Union, by which she was captured, was a commissioned cruiser of the republican or revolted province (for names prove nothing) of Buenos Ayres. The prize put into this port in distress, was libelled by the Spanish consul in behalf of the Spanish owners, and by the decree of the district court ordered to be restored on two grounds: First. That the courts of this government cannot recognize the commission under Buenos Ayres. Second. That the capturing vessel had recruited men while lying in the mouth of the Mississippi in the month of April last, which men were on board at the time of this capture. As to the second ground, I cannot think that the evidence was such as sanctioned the decree of the district court; for, besides that the fact is but feebly established by the witnesses who swear to it, when their testimony is compared with each other, and with that of the officers, the only witness who testifies to the national character of the four men said to have been enlisted, proves them to have been foreigners, not Americans, and to have come on board the capturing vessels to enter. The case has never been included in any of the penal laws passed by congress on this subject, nor have foreign governments any ground for claiming from the United States that such a case should have been included. The fact of illegal equipment, therefore, I consider as unsubstantiated. With regard to the first and principal ground on which the decree is founded, I am of opinion that it is one of more delicacy than real difficulty. To have dismissed the libel it was not necessary to recognize the independence of Buenos Ayres as one of the family of nations. The indisputable fact known, to all the world, and recognized by our own executive in many official communications, of the existence of open, solemn war between Spain and an extensive and powerful colony, is enough to impose on us, as a nation, the duties of neutrality. The colony asserts, the social compact is violated by the parent state, and the state of dependence or allegiance no longer existing. On this question an appeal is made to the god of armies, and no inferior tribunal ought to interfere. The colony claims from us no acknowledgment of her independence; she only demands of us to leave her in possession of what she can win by arms. Spain, unable to rescue by force, solicits our aid to seize, in violation of the rights of hospitality, the property that has been forced into our harbors; our duty is to lend our aid to neither, but to leave them as we find them, rigidly adhering to the duties of neutrality. This is not a piratical capture, and therefore not a case within the provisions of our treaty with Spain. It is a seizure in the exercise of the rights of war, not by one who wages war against the human race, but one who has singled out Spain for the sole antagonist. All seizures of property within our limits we are bound by that treaty to prevent, but the duty to restore is confined solely to the case of rescue from those whom we can recognize as pirates. In the Case of Palmer and others, in the supreme court, the principles laid down by the chief justice excluded all idea that this was a piratical capture. It was then a seizure jure belli, and the rights of war are necessarily commensurate with the power of maintaining it openly and solemnly, more especially upon the high seas, the jurisdiction of which is not susceptible of that demarkation and appropriation which takes place on the land. This conflict has long been carried on between the colony and parent state. The event is at least doubtful. It is on both sides an assertion of a supposed existing right, and neither can claim, of a nation to whom their disputes are immaterial, any act of interference which may involve it in a contest with the victor. Much has been said, and some cases and opinions cited to show that this court cannot recognize the independence of a revolted colony, until that recognition shall have proceeded from our own government or the parent state. There was a time when this country negotiated and fought to maintain a different doctrine; and it will be recollected that in the opinion before expressed I have not thought it necessary, in this case,

[3] [From 1 Am. Law Reg. (N. S.) 116.]

[1] [Reported by Jacob D. Wheeler, Esq.]

[2] [Reversed in La Conception, 6 Wheat. (19 U. S.) 235.]

to assert a different doctrine. But as the doctrine on this point is nowhere laid down fully to my satisfaction, I will embrace this opportunity to state briefly my views of the subject. The recognition of our own government, whatever be the state of fact, removes all question of doubt, and our courts must consider the governments thus recognized as independent; and so the recognition of the parent state actually produces a state of independence. But courts exercising jurisdiction of international law may often be called upon to deduce the fact of national independence from history, evidence, or public notoriety, where there has been no formal public recognition. The actual possession and long exercise of all the attributes of a state of independence may be legally resorted to, without giving just cause of umbrage to a nation that does not possess the power to subjugate a revolted colony. There exist many nations at this day which may claim of courts of international law all the rights of independent nations, and may be judicially recognized as such, notwithstanding no act of government has acknowledged them in that capacity; and some which hold it altogether by the sword, which acquires it when the parent state relinquishes the conflict, or plainly evinces an inability to pursue it with success. I should say her recognition in words is unnecessary; and should our own government ever exercise towards a revolted colony those acts of comity or communication which are known and practiced in the intercourse of nations, I should consider all positive explicit recognition as unnecessary to support the claims of such states to a judicial recognition. The establishment of many such facts would in my estimation supersede the necessity of explicit official recognition. Our own courts have in several instances been called on to express opinions on this subject; and although the opinions which they have expressed may, in their language, appear very general, yet that language has always been used in reference to cases in which the conflict was actually kept up. In the Case of Palmer, the chief justice had expressly limited his observations to such a case flagrante bello, it is a question of policy; there is an actual absence of such evidence as a court of justice can act upon, and the question is altogether one on which the executive or legislative power is called to act. Decree reversed, property restored, and libel dismissed with costs.

The decree of Judge Johnson, in the case of the Spanish schooner Conception, was appealed to the supreme court, at Washington.

[NOTE. Upon the new proofs taken since the hearing in the circuit court, it is apparent that the capturing vessel was originally equipped, manned, and armed in the United States for a cruise against Spain, and sailed with that intent, being owned by citizens of the United States. There is no satisfactory evidence that the American ownership ever ceased, or that there was a real bona fide sale of the vessel at Buenos Ayres, consequently the capturing vessel must still be considered as owned in the United States, and the capture therefore was illegal. Mr. Justice Story, delivered the opinion of the court reversing the decree of the circuit court, on an appeal by the Spanish consul. La Conception, 6 Wheat. (19 U. S.) 235.]

Case No. 3,138.

CONSUL OF SPAIN v. CONSUL OF GREAT BRITAIN.

[Bee, 263.][1]

Circuit Court, D. South Carolina. 1808.

SALE OF PRIZES IN NEUTRAL PORT.

Belligerents have no right, unless secured by treaty, to sell their prizes in a neutral port. The neutral government may grant permission, but ought not to do so, unless all the powers at war can be put upon an equal footing.

[Cited in Hopner v. Appleby, Case No. 6,699.]

The bill states that the Spanish felucca La Nostra Signora, the property of the subjects of his most catholic majesty, was discovered, chased, attacked, fired upon and brought in here by his Britannic majesty's ship of war Meleager, on the open seas, and was sent into this port on the tenth day of May instant as a prize to his Britannic majesty's said ship of war Meleager, and advertised for sale in the Gazette of this city. That Don Diego Morphy, consul of his most catholic majesty, conceives that the sale of the said prize, in any of the ports of the United States, is contrary to the present state of amity subsisting between his most catholic majesty and the United States, is unauthorized by the government of the United States, would be a breach of and violation from their neutrality, and in contravention of the laws of nations, and therefore prays an injunction to stop the sale. On the part of the defendant, it was objected, that the intended sale is neither contrary to any existing treaty, or regulation of the executive of the United States, or law of congress, or of nations: and that the sale of prizes made by the British from their enemies, the Spaniards, may lawfully take place in the United States, till our government does (as it may) by treaty or otherwise, prevent the same. The judiciary power cannot interpose its authority to enjoin a sale, unless the executive shall positively interdict the same. On the part of the complainant, it was answered, that where no right to sell is granted by treaty, nor express permission to sell is shewn, that the court of equity is the proper court to restrain the party. That a right to sell cannot be supposed to pass by implication, as it goes to a cession of sovereignty. That to permit a sale would be a breach of neutrality; inasmuch as both the belligerent powers ought to be placed on an equal footing in all respects.

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

The CHIEF JUSTICE delivered the opinion of the court to the following purport:

The right to sell cannot be claimed by treaty. If it exists at all, it rests on permission. Without doubt, a neutral nation may permit a belligerent to sell, without violating its neutrality: treaties apart, it is wholly discretional. The sovereignty of a neutral power authorizes the exercise of such discretion. Between aiding commerce and permitting the sale of prizes, there is a great difference. Silence, in the ordinary cases of commerce, may be considered as a consent to it; but the sale of prizes must be by positive permission. If permitted to sell, without a previous decision by the court of the capturing power as to the legality of the prize, there is danger of fraud, and even of piracy. I do not say that a condemnation is necessary, but all nations are interested that it should take place before a sale is made. The sale of prizes ensnares, and insensibly leads to a departure from strict neutrality; for this reason, a neutral nation should first give its consent, by treaty, or otherwise. Here there is no treaty that authorizes the sale, nor is any permission of the government shewn. An attempt, therefore, to sell is inconsistent with the sovereignty of the United States. What we are at liberty to grant as a favour must be granted equally; but, by treaty with Great Britain we cannot grant this favour to the Spaniards; therefore, we ought not to grant it to the British. As the court does not undertake to decide what the executive ought to do, I wish to frame the decree so as to permit an application to that branch of the government. Let there be an injunction to stop the sale, till further order of this court, unless permission be sooner obtained from the president of the United States.

Case No. 3,139.

CONTEE v. GARNER.

[2 Cranch, C. C. 162.][1]

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

PLEADING—VERIFICATION—CONTRACT BY SLAVE.

1. A special plea of non est factum must conclude with a verification.

2. A slave cannot bind himself, at law, to pay money to his master, even for his freedom.

The defendant pleaded, that at the time of signing the bond he was a slave, and so non est factum, and concluded to the country. Special demurrer, because he did not conclude with a verification.

Mr. Law, in support of the demurrer, cited Whelpdale's Case, 5 Coke, 119; 1 Chit. Pl. 537; Bushell v. Pasmore, 6 Mod. 218; and Story, Pl. 189.

Mr. Jones, for defendant, submitted the question without argument.

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

THE COURT (THRUSTON, Circuit Judge, absent) was inclined to think that it ought to have concluded with a verification.

THE COURT also decided that a slave cannot bind himself, at law, to pay money to his master, even for his freedom.

By consent, the plea was amended, the demurrer withdrawn, and issue joined upon the replication to the plea. Upon the trial, the plaintiff was non prossed.

Case No. 3,140.

CONTEE et al. v. GODFREY.

[1 Cranch, C. C. 479.][1]

Circuit Court, District of Columbia. June Term, 1808.

EVIDENCE OF DEED—DESCENT—INHERITANCE BY ALIEN—DECREE OF PARTITION—EFFECT—ESTOPPEL.

1. The rent-rolls and books of the lord proprietors of Maryland may be given in evidence to supply the want of a deed, and may be explained by parol.

2. If one of four parceners be an alien the whole descends to the remaining three.

3. A British subject could not, in 1793, inherit lands in the United States from a citizen of the United States.

4. The statute of 7 Anne, c. 5, § 3, does not apply to children born under the same allegiance with that of their father.

5. A decree of partition between heirs, some of whom are aliens, does not estop those who were not aliens from claiming the whole in ejectment.

6. A decree of partition does not pass any thing from one coparcener to another.

[See note at end of case.]

Ejectment for a tract of land called "Argyle, Cowell, and Lawn."

The plaintiff, to support his title, produced a patent from Lord Baltimore, dated December 8, 1722, to Randal Black, and a deed from John Bradford to Richard Lee, for the same land, dated August 3, 1737, but did not produce any deed from Black to Bradford. As evidence from which the jury might presume such a deed, he offered to read the entries in the lord proprietors' books, charging Richard Lee with the quitrents of a tract called "Augle," and offered parol evidence to prove that "Augle" meant "Argyle, Cowell, and Lawn."

P. B. Key, for defendant, objected that parol evidence could not be admitted to explain the record.

But THE COURT (CRANCH, Chief Judge, contra) permitted the evidence to be given.

Evidence was also given of the possession of Richard Lee and his heirs down to Russell Lee, who was a citizen of the United States, and died intestate in 1793,

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

leaving four sisters his heirs at law, one of whom (Mrs. Dawson) was a British subject at the time of his death. See Dawson v. Godfrey (Sup. Ct. U. S.) 4 Cranch [8 U. S.] 321. The other three were citizens of the United States, and are the lessors of the plaintiff in this action.

THE COURT (nem. con.) instructed the jury that if they found the facts to be as stated, they ought to presume a valid deed of conveyance from Black to Bradford.

Mr. Key, for defendant, contended that the plaintiff could not recover the share which would have descended to Mrs. Dawson if she had not been an alien; and that the four sisters constituted but one heir. 2 Bl. Comm. 187; Bac. Abr. tit. "Parcener;" Co. Litt. 163b; Id. Sa.

C. Lee and Mr. Jones, for plaintiff, relied upon the opinion of the supreme court of the United States in the case of Dawson v. Godfrey, 4 Cranch [8 U. S.] 321.

THE COURT (nem. con.) was of opinion, upon the authority of that case, that Mrs. Dawson was to be considered as an alien born, and as never having had a right to inherit lands in the United States; and consequently, that the whole land descended to the three other sisters, the lessors of the plaintiff.

Mr. Key then contended, that as the father of the four sisters was born in Maryland, and was there at the time of the Revolution, he was a natural-born subject of the state of Maryland, and that his child (Mrs. Dawson) born out of the allegiance of that state, was a subject of that state, and entitled to inherit under the English statute of 7 Anne, c. 5, § 3, which he contended was in force in Maryland, by virtue of the bill of rights of that state.

THE COURT (nem. con., but not without some doubt) was of opinion that the statute of 7 Anne, c. 5, § 3, did not protect the right of Mrs. Dawson. She and her parents were under the same allegiance at the time of her birth; and if the statute is adopted by the bill of rights of 1777, yet it cannot look back and make her born under a different allegiance, contrary to the fact.

Mr. Key then contended that the lessors of the plaintiff were estopped by the decree of partition made by the chancellor of Maryland, from denying Mrs. Dawson's right.

But THE COURT decided that they were not estopped.

Mr. Key then contended that Mrs. Dawson took by purchase under the decree, and not by descent; and can therefore take and hold until office found, especially as the chancellor had decreed that she should pay money to the other heirs, in consequence of having had the largest portion allotted to her in the partition.

But, PER CURIAM, the partition passed nothing from the three sisters to Mrs. Dawson. The decree cannot be enforced, as it was founded upon a mistake of the rights of the parties; and there is no evidence of the money having been paid.

Verdict for the plaintiffs. Bills of exceptions were taken, but no writ of error was prosecuted.

[NOTE. In the decision of the supreme court, relied upon by plaintiff, it was held that as the common law, which was the law of Maryland, deprived an alien of the right of inheriting, there was no exception giving the right to inherit distinctly from the obligation of allegiance existing either in fact or in supposition of law. Mr. Justice Johnson delivered the opinion. Dawson v. Godfrey, 4 Cranch, (8 U. S.) 321.]

CONTENT (RISTON v.). See Case No. 11,-862.

Case No. 3,141.

The CONTINENTAL.

[8 Blatchf. 3.][1]

Circuit Court, D. Connecticut. Sept. 20, 1870.[2]

COLLISION BETWEEN STEAMERS—LIGHTS—PRECAUTIONS—BURDEN OF PROOF.

1. A steamer navigating Long Island Sound *held* in fault, in a collision with another steamer, for exhibiting no stern light, but showing only her colored lights and a white light forward on her stem, whereby the other steamer was misled into the belief that she was a sailing vessel.

2. The other steamer *held* to have been justified in such belief.

3. A vessel which is in fault in not complying with the statute regulation as to lights, takes the hazard of such mistakes as may, in the exercise of ordinary diligence and care, be made by other vessels as to her true character.

4. Although the fault of one vessel will not justify the want of ordinary care and skill in the other, when a vessel clearly in fault invokes the application of that principle, the burthen is upon her of showing very clearly that the party misled by that fault might, nevertheless, by ordinary care and skill, have discovered the mistake and avoided the collision. The faulty party cannot demand of the other extraordinary diligence or skill, but only ordinary care, under the actual circumstances of mistake caused by his own fault.

[Cited in The Barque Kallisto, Case No. 7,-600.]

5. Two steamers were at a distance approaching each other, and the green light of one of them was seen decidedly off the starboard bow of the other, so as to make it certain that, if each steamer kept her course, there could be no collision, as their courses did not cross ahead of either. This each was bound to know; and, if their proximity was such as to suggest possible danger of collision, it was the duty of the former to keep her course and of the latter to keep out of the way: *Held*, therefore, on the proofs in this case, that, if the latter vessel might, by ordinary vigilance and skill, have corrected a mistake of supposing the former to be a sailing vessel and should have known that she was a steamer, still the former had no right to port her helm and attempt to pass by

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

[2] [Reversed in New Haven Transp. Co. v. The Continental, 14 Wall. (81 U. S.) 345.]

the port side of the latter, and that a collision caused by her doing so was her sole fault.

[Cited in The Sunnyside, Case No. 13,620.]

[See note at end of case.]

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

In admiralty. The libel in this case was filed by [the New Haven Steam Transportation Company], the owners of the steam propeller Northampton, against the steamboat Continental [the New Haven Steamboat Company, claimant], to recover for the damages sustained by the libellants, by a collision between the two vessels in the night, off the harbor of New Haven. The Northampton was about entering the harbor and was on a course, east northeast, heading directly for New Haven light. The Continental came out of the harbor, and the proofs were claimed by her to establish that she had passed from a half to three-quarters of a mile beyond and to the southward of that light, when she took her course southwest half south, bound for New York, although this was denied by the libellants. The wind was north-northeast. The libellants alleged, that the Continental had not reached the course of the Northampton when she came to her course for New York, that she was seen over the port bow of the Northampton, and that the latter ported her helm to pass to the right, but her endeavor was defeated by the starboarding of the helm of the Continental, which brought the two vessels together. The claimants insisted, first, that, by the want of range lights on the Northampton, they were misled into the belief that she was a sailing vessel, and that the collision was caused by the fault of the Northampton in this respect, and by the want of a proper lookout on the latter; and, also, that, when the Continental had passed beyond the light-house, and had the Northampton on her starboard bow, each being on a course which did not cross the course of the other, the Northampton suddenly put her helm to port and attempted to cross the bows of the Continental, and a collision ensued. The libel was dismissed by the district court, on the ground that the Northampton was in fault in not having her range lights, and that for that reason the Continental was misled into the belief that she was a sailing vessel. The libellants appealed to this court.

Charles Donohue, John S. Beach, and Charles R. Ingersoll, for libellants.

Erastus C. Benedict, Edward H. Owen, and Tilton E. Doolittle, for claimants.

WOODRUFF, Circuit Judge. 1. I concur fully in the conclusion of the judge of the district court in respect to the fault of the libellants' vessel, the propeller Northampton, and her responsibility for the collision which gave rise to this action. The proof clearly shows that she was, before and at the time of the collision, without the proper stern light. At what precise time it became dim is not proved, and, notwithstanding it was the duty of those in charge thereof to see that it was up and burning brightly, it may, for aught that appears in their testimony, have been, for some time before it was taken down, in such condition that it wholly failed to answer the requirements of the act of congress [13 Stat. 60]. When they came within sight of the steamboat Continental, and were thereby aroused to diligence, they discovered the condition of the stern light, but too late to supply the defect in season to inform the Continental of the true character of their vessel. In consequence of this, followed as it was by the taking down of the light for the purpose of having it trimmed, those on board of the Continental saw only the colored light and the white light forward on the stem of the propeller, and were thereby, as a matter of fact, misled into the belief that the propeller was a sailing vessel. Waiving for the present the inquiry whether careful and critical observation of the relative bearings of the two, as they approached each other, would have enabled the officers of the Continental to discover their mistake sooner than they did, the fact is fully established, that this condition of the lights did mislead them. Their testimony is explicit on the point, and it is not incredible. On the contrary, such an exhibition of lights was well calculated to mislead them. Although a sailing vessel is not permitted by law to carry a white light, yet it is proved, without contradiction, to be not unusual for a vessel, when she is near her destination in the night, and is making preparations for landing, to have use for a light on her forward deck, in getting her lines or anchors ready, &c. The propeller on this occasion was just entering the harbor of New Haven.

To the suggestion, that ocean-bound steamers are required to carry two colored lights and one white light, that, therefore, the presumption was that the propeller was a steamer, that the officers of the Continental should have so assumed, and that, on this ground, the taking the propeller for a sailing vessel was, of itself, a proof of negligence or want of skill, the answer is, (1.) There is no proof that, in fact, ocean-bound steamers were ever seen navigating Long Island Sound at all, still less in that neighborhood; (2.) If it be, nevertheless, true, and so notorious that the court can take notice thereof, the white light which ocean-bound steamers carry is at the foremast-head, far above and not below the colored lights, and not near the deck, on the stem. The argument for the libellants assumes that the officers of the Continental might reasonably have expected to see ocean-bound steamers in the Sound; but the act requiring range lights applies to all coastwise steamers, although they may navigate the ocean on their coastwise voyages. I am not able to say

that steamers crossing the ocean are in the habit of passing the neighborhood of the place of this collision. In any view of that question, their light at the foremast-head could not readily be mistaken for the bow light of a coasting vessel.

The propeller was, therefore, in fault. She was violating the act of congress. That neglect of compliance with the law in fact misled the officers of the Continental. The lookout on the latter took her for a sailing vessel, and so reported her. The captain and the man at the wheel both swear that they took her for a sailing vessel, and acted upon that belief. A Hell Gate pilot, a passenger on board, having no responsibility touching the management of the Continental, and apparently an indifferent witness, confirms them. He, also, took the propeller to be a sailing vessel.

It is suggested, that, in a case in the southern district of New York—The Scotia [Case No. 12,513]—the officers of the steamship Scotia were held justified in mistaking a sailing vessel, the Berkshire, for a steamer, because she had a white light, and that, if a white light on a sailing vessel can be deemed to indicate that the vessel bearing it is a steamer, a white light on a steamer cannot also be held to indicate that the steamer is a sailing vessel. In the first place, the only light seen on the Berkshire was a white light, and it was not deemed a fault that the officers of the Scotia believed that such white light was the mast-head light of a steamer at a distance, just rising above the horizon, whose colored lights had not yet become visible above the surface of the distant waters. The cases are very unlike in this respect. In the next place, the vessel which is in fault in not complying with the statute regulations, takes the hazard of such mistakes as may, in the exercise of due diligence, care and skill, be made by those who observe her. Approaching vessels have a right to expect compliance with the law, and exercise their judgment accordingly; and, even if the same circumstances should operate to lead, in one instance, to the erroneous belief that the faulty vessel is a steamer, and, in another instance, to an erroneous belief that the faulty vessel is a sailing vessel, it by no means follows that either of the deceived parties is in fault. If they actually exercise proper vigilance and skill, and yet are in fact misled, they are not responsible that, under circumstances apt to create doubt, their judgment was in fact deceived. It is against precisely such errors that the law was designed to guard, and precisely such errors the neglect of its observance is likely to produce. Therefore, while I think that the Continental is, upon other grounds, exonerated from fault, I concur in the conclusion below, that the propeller was in gross fault, that such fault in fact misled the other vessel, and that, so far as that mistake was the cause of the collision, the responsibility rests on the propeller.

2. There is a further view of the subject, urgently pressed upon my attention by the counsel for the libellants, and founded, in part, upon the testimony of the witnesses from the Continental. It is to the effect following, namely, that the position and course of the propeller, seen to be approaching the Continental, considered in connection with the course of the latter and the observations in fact made from the latter, are so inconsistent with the idea that the propeller was a sailing vessel, that such idea could not be true, and the officers of the Continental could not, without negligence or want of skill, believe it to be true; that if, at the first observation, they were deceived, the changes presented to their eyes almost immediately should have undeceived them; and that even the fault of the propeller did not excuse them from the exercise of ordinary care and skill. The legal principle involved in this argument is correct; but, when a vessel clearly in fault invokes its application, the burthen is upon her of showing very clearly that the party misled thereby might, nevertheless, by ordinary care and skill, have avoided the collision or corrected the misapprehension. The faulty party cannot, for his own protection, demand of the other extraordinary diligence and skill. All he can require is ordinary care, under the actual circumstances of mistake caused by his own fault.

The claim of the libellants on this point is, that, when the officers of the Continental took the propeller to be a sailing vessel, they were bound to know, and must be assumed to know, all the conditions involved in that supposition. Thus, the wind was, as is expressly admitted, north-northeast. This they knew, or were negligent in not knowing it. If the vessel seen was a sailing vessel, they knew that, if she was on her port tack, she could not be sailing nearer to the wind than due east, that is, within six points; and, if on her starboard tack, not nearer to the wind than northwest. But they testify that her green light was visible. If that be true, then they certainly knew that she was not on her port tack, for, on that tack, they could not see her green light from the position in which they then were, since only the red light, on her port side, could be visible. They, therefore, knew, assuming that their testimony is true, that, if a sailing vessel, she was not sailing in a direction approaching them, but was going from them. Not only so, but, assigning to the Continental, according to the testimony of her officers, a position four-fifths of a mile southwestwardly of New Haven light, the green light of a sailing vessel seen, as they say, two points on her starboard bow would, even if such vessel were sailing close-hauled on the wind, that is, on a northwest course, be barely visible; and, if she was three points on the starboard

bow, as they say she was a very few minutes later, her green light could not be seen at all. Her back-board would have entirely cut it off. So that, if, in this position, they saw the green light at all, and were running twelve miles an hour, it must have almost immediately disappeared, opening, until disappearance, on the Continental's starboard bow. All this, as nautical men of ordinary skill, they knew, and, upon the premises assumed, all this is obvious to any experienced mariner. This being so, it was demonstrated to them by what, according to their own testimony they saw, that she was not a sailing vessel, because she continued to bear in nearly the same direction, her green light being continuously visible, which could not be if she was a sailing vessel; and this they were bound to know. When they first saw her, the captain of the Continental says she might have been three or four miles off—he should judge four miles—and bore three points on his starboard bow. Elsewhere, he says two and a half points, and makes the time when she was reported five minutes before the collision, which would make her then distance about one mile and a half. Other witnesses place the propeller from two to two and a half points on the starboard bow, and distant from one and a half to two miles. Taking either of these estimates, and considering the speed of the Continental, one minute could not elapse before the green light must be hidden from view, if she was a sailing vessel, and there was an abundance of time, if they had shown ordinary care and attention to the steady nearing of the green light, to see that the vessel was a steamer and not a sailing vessel. And, further, if a sailing vessel, showing her green light two and a half or three points on the Continental's starboard bow, the latter moving twelve miles an hour on her then course, southwest half south, her bearing would have changed with great rapidity more and more to starboard, and the fact that she did not at any time bear more than three points on that bow, was conclusive that they were mistaken. They should have known this, and they might and ought to have seen it while there was yet time enough to act accordingly.

This reasoning has much force if the positions of the vessels and the opinions of the officers of the Continental are assumed to be mathematically accurate. But, in relation to estimates of distance, and observations of the precise angle made by another vessel measured on a ship's bow, as well as of slight fluctuations in course, made in the night, it is of common experience, that witnesses with the same opportunity for judgment differ, and some must, of course, be inaccurate. Close geometrical calculations are not reliable, unless the premises are in harmony with other facts which are deemed established. And, in regard to the claim that the Continental had opportunity to discover her mistake in supposing the propeller to be a sailing vessel, while it is true, upon the premises, that such discovery might possibly be made, if those premises are varied, no such result ensues; and, in any event, it calls upon the officers, after being deceived and misled without fault, to enter upon a careful scrutiny when wholly unaware of its necessity, and make their correction, and act upon it, within a very short time. Nevertheless, the considerations thus urged have led me to scrutinize the evidence of facts not lying in mere estimates, by which to test the management of both vessels; and, in my judgment, there are facts, established by a clear preponderance of evidence, which convict the propeller of fault, and acquit the officers of the Continental, even if it were conceded that the latter ought to have known that the former was a steamer. They are these: 1. When the officers of the Continental saw the propeller, they saw her off their own starboard bow. 2. They also saw her green light, and not her red light, until she ported and turned across their course. From these two facts, it is a necessary and inevitable result, that the officers of the Continental had no reason to apprehend a collision, and their sheer to the southward, out of abundant caution, or, as a witness expresses it, "to give the propeller a wide berth," was taking more than ordinary care to be wholly out of reach of danger. These two facts being established, there could be no collision if both vessels kept their course; and the result is, that the accident was wholly caused by the sudden and unwarranted porting of the propeller, which brought her across the bows of the Continental.

I am aware that there is some conflict in regard to the facts above stated. The captain and pilot of the propeller testify that they were heading east-northeast, for New Haven light; that the Continental, when she sheered to the westward, to take her course toward New York, was seen on the propeller's port bow; and, in substance, that she so continued down to the moment when the propeller ported to pass her further to the right, or port side to port side. It is not necessary to question their sincerity. They had seen the Continental coming down the harbor very decidedly on their port bow. But they had a duty to perform in the management of their vessel, and they had no lookout forward—in itself a neglect of duty and a fault. Had such lookout been forward, in the discharge of his duty, he would have observed the Continental closely, and could have spoken effectively on the subject; and, most probably, as I think, the collision would have been avoided. The situation of the Continental, as she took her course, is so important, and the captain and pilot of the propeller, who are under heavy responsibility in this matter, must have seen it to be so important, that they were under a strong motive to believe that what they saw

a few minutes before had continued, though they did not themselves certainly see it. Their testimony is wholly over-borne. 1. The lookout on the Continental. The wheelsman and the captain of the Continental are each positive that, before they came to their course, southwest half south, they had passed beyond New Haven light, from a half to three quarters of a mile. This would bring the propeller, running for that light, on the Continental's starboard bow. The instructions of the captain to the wheelsman to go beyond the light confirm this. 2. The captain, wheelsman, and lookout of the Continental each testify that the propeller was in fact seen on the starboard bow of the Continental, and so continued until the propeller ported and brought the vessels together. Assuming that they have the same interest and are under the same responsibility as the captain and pilot of the propeller, it becomes important, that they are expressly corroborated by two persons who have no such motive. Two passengers, one of them an experienced mariner and a Hell Gate pilot, both expressly sustain them, and their testimony in detail carries with it conviction of its truth. 3. The important fact, that, after the Continental took her course, south west half south, according to the captain, the green light of the propeller, and not the red, was visible, and so continued until the propeller changed her course across that of the Continental, is, in like manner, testified to and corroborated. If the propeller was heading, as her witnesses state, for the New Haven light, her green light, and not her red, must have been visible to the Continental, she then being below that light-house. On these points, then, there are five witnesses, two of them disinterested and intelligent observers, and one of the latter testifying to his observations on two distinct, specified occasions, at one of which his observation was made at the after starboard gangway of the Continental, where he could not see the propeller at all unless she was to the starboard of the Continental, and there he saw her green and not her red light.

I cannot hesitate to say, that the evidence preponderates largely, that, during all the time after the Continental took her course, the propeller was to her starboard, and on a course which presented her green light to view. In that relative situation, the vessels could not collide if each kept her course. The act of the officers of the Continental in falling off, as the witnesses from both vessels agree that she did, was a measure of greater caution, which removed all doubt. The vessels were not crossing each other's track, but were on lines of perfect safety, and there was no just ground to apprehend collision until the propeller ported. If they had been crossing, still, as the Continental had the propeller on her own starboard side, it was the duty of the propeller to keep her course, and leave the Continental to keep out of the way. Act April 29, 1864, arts. 14, 18 (13 Stat. 60, 61). By suddenly porting, the propeller defeated the effect of the sheer of the Continental to the southward. Upon no view of the subject which I can harmonize with the weight of the evidence, can I impute any fault to the Continental, whether she was bound to regard the vessel she had under observation as a steamer, or was justified in the mistake into which she was led by the want of proper lights.

The decree should be affirmed.

[NOTE. Reversed by the supreme court, on the ground that the evidence was sufficient to fully satisfy the court that those in charge of the Continental did not exercise due care and vigilance to ascertain the character of the Northampton, and that, if they had done so, they would have been enabled to have adopted reasonable precautions to have prevented the collision. The court then found that both vessels were in fault, and directed the damages to be equally apportioned between the offending vessels.

[The appeal was taken by the libellant, and the opinion was delivered by Mr. Justice Clifford. The Continental, 14 Wall. (81 U. S.) 345.]

CONTINENTAL, The (CULBERG v.). See Case No. 3,460.

CONTINENTAL, The (GILL v.). See Case No. 5,425.

CONTINENTAL INS. CO. (SEVERANCE v.). See Case No. 12,680.

Case No. 3,142.

CONTINENTAL WINDMILL CO. v. EMPIRE WINDMILL CO. et al.

[8 Blatchf. 295; 4 Fish. Pat. Cas. 428.][1]

Circuit Court, N. D. New York. March 21, 1871.

PATENT BY EMPLOYE—TRANSFER OF PATENT—NOTICE.

1. B. entered the employment of E., a corporation manufacturing windmills, under an agreement for a salary, and that, in regard to any patentable improvements he might make, he should receive $500 for such improvements. While in such employment, B. made certain improvements in windmills, using the time and tools, &c., of E., and made and sold for E. windmills embodying such improvements. He applied for a patent for such improvements, but, before it was granted, he left the employment of E. After the patent was granted, he assigned it to C., another corporation manufacturing windmills, in which he was a director and the manager of the business. C. then sued E., in equity, for infringing the patent: *Held*, that the suit could not be maintained.

[Cited in Whiting v. Graves, Case No. 17,577; Hapgood v. Hewitt, 119 U. S. 226, 7 Sup. Ct. 197.]

2. An agreement which operates as a transfer of a patent, is good as against the patentee and those who purchase with notice, though not recorded.

[In equity. This was a bill in equity filed to restrain the defendants from infringing

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

letters patent (No. 87,628) for "improvement in windwheel," granted to Addison P. Brown, March 9, 1869, and alleged to have been assigned to complainants. The defendants claimed to be the owners of the patented invention, under a state of facts fully set forth in the opinion.] [2]

A. Monell and Keller & Blake, for plaintiffs.

C. W. Smith and N. B. Smith, for defendants.

WOODRUFF, Circuit Judge. It appears, by the proofs on the part of the complainant herein, that Addison D. Brown, the patentee in the patent upon which the bill is filed, entered the employment of the defendant, the Empire Windmill Company, on the 1st of February, 1866, and continued in such employment until October 19th, 1868. The terms of his employment were, that he should "receive one thousand dollars per annum on a trial of three months, and, if satisfactory, twelve hundred dollars thereafter; and, in regard to any patentable improvements which he might make, he was to receive five hundred dollars for such improvements." The said defendant was engaged in the manufacture of windmills, and the said Brown was employed, in the early portion of the time, as machinist, and afterwards as superintendent. During such employment, Brown made what are alleged to be improvements in windmills, using therein the time, tools, &c., of the defendant, and constructed and sold for them mills embodying such improvements, and it was deemed desirable that a patent therefor should be taken. Accordingly, as early as February, 1868, he made application for a patent therefor. Delays occurred in the conduct or prosecution of the proceeding, so that the patent was not in fact granted until March 9th, 1869, which was after Brown had left the employment of the said defendant. After that, he assigned three-fourths of the patent to certain parties, who then united with him in an assignment to the plaintiff, a corporation in which the said Brown is a director and the manager of the business of making and selling windmills.

The present action is brought in this court, as a court of equity, alleging that the said defendant infringes the patent by using the improvements in the manufacture and sale of windmills, claiming to recover the gains and profits of such use, and praying that the defendant be enjoined from such use, &c.

[Various issues of fact were raised by the pleadings, upon which, I presume, it was not expected that I should make any decision or express any opinion. The proofs submitted for my consideration do not enable me to do so. No model showing the alleged improvements is submitted. No lettered drawings are furnished me. Without these the specification and much of the testimony of the witnesses can not be fully understood. In the view I have taken of the case, this imperfection in the proofs was quite immaterial, and no doubt it was so considered by the counsel on both sides.] [2]

A question prior to any inquiry into details touching the utility of the alleged invention, its specification and claims, the title of Brown as first inventor, or the extent of the infringement, if any, grows out of the circumstances and the agreement under which the improvements were made or devised. Assuming that the patent is, in all respects, valid, and that the defendant is using the improvements described therein, can this bill be sustained by the plaintiff? I think not.

By the agreement with Brown, any patentable improvements made by him were for the defendant, and he was to be paid therefor five hundred dollars. He made such improvements, introduced them into the defendant's machines, and, no doubt, became thereby entitled to receive the five hundred dollars. Taking the patent in his own name, it might have been necessary that he should tender an assignment, before he could maintain an action at law for the five hundred dollars; but he must, at least, put the defendant in some default, before he could assert exclusive ownership of the improvements. So far from doing this, the proof shows, that, notwithstanding he put the improvements into actual use in the mills made by the defendant, and for its benefit, as it was right and proper for him to do, he, before a patent was procured, in December, 1866, attempted a clandestine, and, as to the defendant, a fraudulent, transfer of the improvements and the right to a patent therefor, to one of the officers of the defendant, on the understanding that it should be for the private benefit of such officer, and should be kept secret from the company. This was no less a fraud on the part of Brown and such officer, because, by the aid of a court of chancery, the defendant might have obtained a decree declaring that such officer held as trustee for the defendant's use. That was not the intent or purpose of the parties to the transaction. About a year afterwards, that transaction, it appears, was rescinded, and no such suit was necessary. But, after such rescission, Brown, still in the employment of the company, prosecuted his application for the patent. That, under these circumstances, the defendant acquired, and had, an equitable, if not a legal, right to use the improvements so made for it, and by its employee, is not, I think, doubtful. What would be the effect of a refusal by the defendant to accept an assignment of the patent and pay

[2] [From 4 Fish. Pat. Cas. 428.]

[2] [From 4 Fish. Pat. Cas. 428.]

therefor the price before mentioned, it is not necessary here to inquire. The proofs do not raise that question. No such refusal is alleged or proved.

It is claimed, that, whatever may be the equitable title of the defendant, the legal title is not in the defendant, and, therefore, this defence cannot prevail; and that the defendant should file a bill setting up such equitable title, and compel a transfer of the patent. This suggestion overlooks the fact, that this suit is brought in a court of equity, where, in matters within its jurisdiction, an equitable title is as good as a legal title, as to all parties affected by such equity. It would be quite absurd to say, in a court of equity, that a party holding an equitable title could be ousted of his equitable rights by the holder of the legal title, who, in such case, stands, in a court of equity, as trustee for the use and benefit of the party beneficially interested.

I do not think the plaintiff stands in any better position than Brown himself, in respect to a claim to restrain the defendant, or recover for its use of the improvements. Brown is himself the plaintiff's director and manager, and, in its dealing with this patent, it has notice, through him, as such. Therefore, the absence of any record of the defendant's agreement with Brown, gives the plaintiff no advantage. It has been repeatedly held, that an agreement which operates as a transfer of a patent is good as against the patentee and those who purchase with notice, though not recorded.

But there is another view of this branch of the case, which, though less favorable to the defendant, is equally fatal to this action, namely, that the transaction between Brown and the defendant operated as a license to it to use these improvements in the manufacture and sale of machines. If I had doubted the views first suggested, I should think this last named proposition quite clear.

The bill should be dismissed, with costs.

CONTRA COSTA WATER CO. (HAWES v.). See Case No. 6,235.

CONTRACTS FOR UNION WHARF v. The J. H. STARIN. See Case No. 7,320.

Case No. 3,143.

CONVER v. PHOENIX MUT. LIFE INS. CO.

[3 Dill. 224, note;[1] 6 Chi. Leg. News, 144.]

Circuit Court, D. Minnesota. Jan., 1874.

ACTION ON A LIFE INSURANCE POLICY — APPLICATION FOR POLICY — FALSE REPRESENTATIONS IN OBTAINING — AS TO HEALTH AND DISEASES—EFFECT OF—BURDEN OF PROOF—WHEN REPRESENTATIONS ARE NOT MATERIAL OR INTENTIONALLY UNTRUE—SUPPRESSION OF FACTS.

[1. Declarations by an applicant for life insurance, in response to questions as to his health, are representations, and the burden of proving their falsity is on the insurer.]

[2. A statement by the applicant that he is in good health means that he is free from any apparent sensible disease or the symptoms thereof, and that he is unconscious of any derangement of functions by which health could be tested.]

[Cited in Goucher v. Northwestern T. M. Ass'n, 20 Fed. 598.]

[3. Failure of the applicant to make known slight temporary disturbances, unless presenting characteristics of a dangerous disease, will not avoid the policy; but information of frequent and repeated physical disturbances should be given to the insurer at the time of application, and the suppression of such information is a withholding of facts material to the risk.]

[At law. Action by W. W. Conver, administrator of John Hope, deceased, against the Phoenix Mutual Life Insurance Company on a policy of life insurance.]

There was evidence given to show that Hope, whose life was insured, was stricken down on the night of December 27, 1871, and remained in an apparently unconscious state for some time. Physicians were called to attend him. He recovered, and was up and about his business the next day. Evidence also disclosed the fact that two or three of these attacks, less severe, occurred some weeks previous; and that after the insurance was effected, attacks of a nervous character were more frequent, when the deceased would call for some one to hold his wrists, and would lie down upon his back, partially unconscious. These attacks were about five minutes each in duration. Hope, on January 2, 1872, made application for life insurance, and a policy for the sum of $5,000 was issued. He did not disclose these attacks to the defendant, but made answers to the questions propounded to him, as stated in the charge of the court to the jury. There was also evidence to show that these attacks were vertigo, slight dizziness or fainting fits of a nervous character and not severe. Hope died May 29, 1872, of "chronic cerebritis." It appeared also that, in the opinion of one of the physicians who attended him December 27, 1871, this attack was owing to some disease of the brain.

Gordon E. Cole and Harvey Officer, for plaintiff.

Bigelow, Flandrau & Clark, for defendant.

NELSON, District Judge (charging jury). Contracts of life insurance are made upon the application of the party whose life is insured, or upon the application of the assured named in the policy. The application is usually accompanied by answers to certain interrogatories propounded in writing by the company, and when not actually or constructively embodied in the policy of insurance, but in a collateral paper, are called representations. These representations are in this case, by the agreement of the parties, made a part of the contract, and it is stipulated in the contract that "if any of the declarations or statements made in the application for

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

this policy, upon the faith of which this policy is issued, shall be found in any respect untrue * * * this policy shall be null and void." When the assured consented that the contract should be based upon the truth of the statements or answers made to the questions in the application, there can no question arise for the consideration of the jury as to their materiality. The company may show that they are simply untrue, and if that is done the right of plaintiff to recover is defeated.

The defense in this case is directed to proof that the answers to the following questions in the application were false and untrue: 8th. "What is the present state of the party's health?" Answer. "Good." 14th. "Has the party ever had any of the following diseases: Apoplexy, paralysis, fits, etc.?" Answer. "Scarlet fever when a lad; no other so far as I know." 19th. "Has the party had during the last seven years any severe sickness or disease; if so, state the particulars, and the name of the attending physician or who was consulted and prescribed?" Answer. "No." 20th. "Is the party now afflicted with any disease or disorder of any kind, and if so, what?" Answer. "No."

Mutual good faith is required in contracts of insurance, and in life insurance particularly it is requisite that a frank and truthful statement should be made by the applicant. The company must rely upon the information obtained from him, and the correctness of the information given is the basis of the contract. I agree with those authorities which hold that these declarations are representations; but when they are made a part of the contract, and the untruth of any of them is set up as a defense, the burden of proving it is upon the company; and if the answers are shown to be simply untrue, the plaintiff can not recover. The 14th question obtained an answer, that the applicant was in "good health." This I think means that in the ordinary sense of the term, the applicant was free from any "apparent, sensible disease, or the symptoms of them, and that he was unconscious of any derangement of the functions by which health could be tested;" in fact, that he was in a good state of health.

Should you believe from the testimony that the applicant, at the time he made this statement, was not in good health, as above stated, or if Hope knew of any symptom of disease which he did not disclose, then the plaintiff can not recover. By the 14th question, the attention of the assured was called to certain diseases therein mentioned, and was asked if he had any of those diseases. He answered, "Scarlet fever when a lad, and none other that I know of." The 19th question was put to him: "Have you had any severe sickness during the last seven years? If so, give the particulars, name of attending physician, and who was consulted, and what was prescribed." The answer was, "No." To the 20th question the answer was also, "No."

It is urged that these answers were untrue; for the assured concealed the fact that only seven days previous he had been prostrated, and remained for some time in an unconscious state, and the attack was so severe that two physicians were called by his friends to attend him, and also that similar attacks, less severe, had been frequent. Now it is for you to determine from the testimony whether the attacks about which the physicians have enlightened you was a disease specifically mentioned in the 14th question, or such a sickness as is contemplated by the 19th question, and in reference to which the company is entitled to know all the particulars, the names of the attending physicians, and any information which would afford it an opportunity of accepting or rejecting the application. It is not for you to decide whether the statements made to these questions in the application were material or not to the risk. The company, in making these inquiries, implies that it considered the representations material, and it will be relieved from the contract if the answers are untrue. The assured agreed that the representations should form part of the contract, and if untrue in any respect the policy should be void, and he must be bound by it. Whether they were intentionally untrue is also immaterial, if, in fact, they were untrue; for the contract of the parties is based upon the correctness of the answers, and to avoid the policy it is not essential that the applicant knew they were untrue. So far as the specific questions are concerned, the company was entitled to true and correct answers to them, and if untrue the policy is void; but in regard to information upon matters to which the attention of the applicant was not specifically called, the suppression must be of such facts as might render the insurance of the applicant's life unusually hazardous. It is for you to say, therefore, whether the condition of the applicant's health is shown by the evidence to have been such as indicated disease of some kind. A mere slight temporary disturbance, unless presenting characteristics of a dangerous disease, would not ordinarily avoid the policy; but information of repeated and frequent physical disturbances should be given to the company at the time of the application—good faith requires this—and the suppression of the information would be withholding facts material to the risk, and would avoid the policy. You are to say whether there has been such suppression on the part of the applicant in this case. You are to determine also, from the whole evidence, whether the defendant has established the untruth of the statements; and in considering this question you will, I know, freely and impartially decide the issue without any prejudice. The defendant, although an insurance corporation, is entitled to the same rights as a natural person—no less, and no more.

The jury rendered a verdict for the plaintiff.

CONVERSE (BRADLEY v.). See Cases Nos. 1,775 and 1,776.

CONVERSE (BURGESS v.). See Case No. 2,154.

Case No. 3,144.

CONVERSE et al. v. CANNON et al.

[2 Woods, 7;[1] 9 O. G. 105.]

Circuit Court, D. Louisiana. Nov. Term, 1873.

PATENTS—COMBINATION—INFRINGEMENT—DEFENSES.

1. It is no defense to an action for an infringement of a patent for a combination of several well known devices, for defendant to allege that he has improved upon one of the independent devices used in the combination.

2. Where a patent covers a combination of devices for handling steamboat staging, consisting of a rope attached to a derrick, and the application of force by means of a power windlass, the use of the combination without authority will be an infringement, notwithstanding variations in the method of attaching the rope, or in the form of the derrick, or in the position in which the stage is placed on the deck of the boat.

[Bill by E. K. Converse and others against John W. Cannon and others to restrain infringement of a patent.]

This was a cause in equity, heard for final decree upon the pleadings and evidence.

J. R. Beckwith, for complainants.

R. H. Marr, for defendants.

WOODS, Circuit Judge. The complainants allege that they are the assignees of a patent [No. 31,147] issued to one A. John Bell, dated January 22, 1861, for an "improvement in steamboat staging;" that they are also the assignees of two patents issued to one Hannibal S. Blood, the first [No. 103,834] dated June 7, 1870, being for "a new and useful improvement in derrick or hoisting cranes, and relating particularly to a means for avoiding the labor and delay incident to handling and manipulating heavy landing stages used on steamboats and water craft by manual labor," and the second [No. 124,878] being a patent dated March 26, 1872, for an "improvement in derricks;" that all of the inventions named in said three letters patent relate to the manner and mode of manipulating and handling stages used on steamboats and water craft, for landing freight and passengers, whereby manual labor is in a great measure dispensed with, and great economy in the navigation of such vessels effected; that the defendants John W. Cannon and William Campbell, the first largely interested in the steamer Robert E. Lee, as owner, and the latter being her master, are using upon said boat two several machines which are substantially in their mode of construction the same as the machine described in said three letters patent. The bill prays for a perpetual injunction against the defendants, to restrain them from infringing upon the patents owned by the complainants, by the use of said machine now employed by them upon the steamer Robert E. Lee.

The answer of defendants denies any infringement of the patents held by complainants, and claims that they use an apparatus invented by one John Perkins, and patented to him by letters dated May 7, 1872, which differs substantially and materially from the apparatus covered by the patents owned by complainants, and is not an infringement thereon. The answer further alleges that the results attained by the contrivance patented to Blood were accomplished by cranes described upon pages 349, 350, vol. 1, of Appleton's Dictionary of Mechanics, published in 1865, one of which it is therein stated had been used at the United States dry dock, at Brooklyn, New York, and one in the construction of the Erie canal, by which heavy weights were moved toward or from the mast, and hoisted or lowered to the required position by means of ropes and pulleys. That the results accomplished by the contrivance patented to Blood were accomplished during the late war by the marine brigade; by the application of steam power, heavy stages were raised, launched out and lowered into position on the bank, and again raised, launched inward and lowered into position in the boat, so that the results contemplated and claimed to be accomplished by the contrivance of Blood, of raising or lowering stages by applying steam power to a suitable apparatus were well known, as well as the contrivance by which such results were accomplished, and were in public use long before Blood's patent. The answer claims that the apparatus covered by the Blood patents is not useful, and its use has been abandoned.

An amended answer was filed, which, besides describing more particularly the contrivance used by the marine brigade, alleged that in December, 1868, one J. Frank Hicks used a derrick or crane provided with ropes and pulleys, and operated by steam power, for the purposes of a freight hoister on board the steamer Magenta, and for hoisting and managing the staging on said steamer.

The schedule attached to the letters patent of A. John Bell, states that the object of his invention is "a more rapid, easy and effective means of shipping and unshipping the stage planks from steam water craft, and consists in a mode of operating said planks by connection with one of the steam engines employed to work or load the vessel." His claim is thus stated: "I claim as new and of my invention and desire to secure by letters patent the arrangement of the staging C., power windlass, E. F. G. H. I., and supporting apparatus, J. K. L., the whole being constructed and operating substantially as and for the object set forth." The staging shown in the drawing is the ordinary one used on

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

steamboats upon the outer end of which is a bail, to which is attached a rope, which leads to the upper end of a gaff, the foot of which rests on the deck while the upper end is supported by a rope attached to an upright mast or spar. This gaff and mast and the rope connecting them constitute to all intents and purposes a derrick differing mainly from the derrick in common use, by the fact that the foot of the gaff or boom rests on the deck instead of resting against the mast or spar; so that we have a staging suspended by the bail at one end to a derrick. The staging so attached to the derrick is connected with a power windlass by which the stage is shoved out or drawn in, and the end of the staging as it is pushed out may be adjusted to the height of the bank upon which its outer end is to rest by the slipping of the rope attached to the bail. On the edge of the gunwale of the boat is a roller to enable the stage to move with greater facility. The two patents issued to Hannibal S. Blood, which have been assigned to the complainants and the patent to William J. Perkins under which the defendants seek to protect themselves are simply improvements upon the derrick in common use, and nothing more. The most cursory reading of Bell's patent shows that it is not intended to cover a derrick, nor a steamboat stage, nor a power windlass operated by steam, or other power. The invention claimed by Bell is for the combination of these three well known contrivances, to accomplish the handling of the stage with ease and rapidity. The roller on the gunwale of the boat is not an essential part of the combination, and is not mentioned in the patentee's claim. It is no defense to a suit for the infringement of this patent, to set up that the defendant has improved upon the derrick or upon the windlass, or upon the stage. If the combination is used, although some of its separate parts may be improved, it is an infringement. The answer of the defendants does not deny that they handle and manipulate a steamboat stage by attaching it to a derrick by a rope and raise or lower it by means of a power windlass. They set up merely that they use an improved derrick different from the derrick shown in the specification of A. John Bell's patent, and different from the derrick covered by the patents of Hannibal S. Blood.

In passing upon the issue of infringement, the question to be determined is whether under a variation of form or by the use of a thing which bears a different name, the defendant accomplished by his machine the same purpose or effect as that accomplished by the patentee, or whether there is a real change of structure or purpose. If the change introduced by the defendant constitutes a mechanical equivalent in reference to the means used by the patentee, and if besides being an equivalent, it accomplishes something useful beyond the effect or purpose accomplished by the patentee, it will still be an infringement as respects what is covered by the patent, although the further advantage may be a patentable subject as an improvement on the former invention. Foss v. Herbert [Case No. 4,957]. The material question is not whether the same elements of motion or the same component parts are used, but whether the given effect is produced, substantially, by the same mode of operation and the same combination of powers in both machines. Odiorne v. Winkley [Id. 10,432]. In determining the question of infringement, we are not to determine about similarities or differences, merely by the names of things, but are to look to the machines or their several devices or elements in the light of what they do or what office or function they perform and how they perform it, and to find that a thing is substantially the same as another, if it performs substantially the same function in substantially the same way to obtain the same result. Union Refinery v. Matthiessen [Id. 14,399]. The rule is, and so it has been settled, that if two machines be substantially the same and operate in the same manner, though they may differ in form, proportions and utility, they are the same in principle. Evans v. Eaton [Id. 4,560]. As between a device conceded to be new and a device claimed to infringe because an equivalent, the alleged infringer could not protect himself by showing that although his device was the equivalent of the patented device in all its functions, and in its construction and mode of operation, yet by other additional features it possessed other and further useful functions. Such a device, though an improvement upon the patented one, would be an appropriation of it. Woodruff, J., in Sarven v. Hall [Id. 12,369]. To constitute an infringement, the contrivances for the purposes in view must be substantially identical, and that is substantial identity which comprehends the application of the principle of the invention. Page v. Ferry [Id. 10,662]. It makes no matter what additions to or modifications of a patentee's invention a defendant may have made; if he has taken what belonged to the patentee he has infringed, although with his improvement the original machine or device may be much more useful. Howe v. Morton [Id. 6,769].

Applying these principles to the case in hand, there can be no doubt that the defendants have appropriated the invention covered by the patent of A. John Bell. That they have improved upon parts of the combination may be true; but they are using the idea first suggested by Bell, and covered by his patent, namely: the handling of a steamboat stage by means of a rope attached to a derrick, through force applied by a power windlass. The variations which have been made in the method of attaching the rope, in the form of the derrick, in the position in which the stage is placed on the deck, are immaterial variations, which do not affect the

question of infringement. As the patent to Bell bears date prior to the use of stages by the marine brigade, or the publication in Appleton's Dictionary of Mechanics, the defense of want of novelty cannot be maintained.

The averment that the device of Bell is not useful cannot be sustained. All the law requires as to utility is that the invention should not be frivolous or dangerous. It does not require any given degree of utility. If the invention is useful at all, that suffices. Cox v. Griggs [Id. 3,302]; Hoffheius v. Brandt [Id. 6,575].

The result of these views is that there must be a decree for complainants, directing a perpetual injunction to go against defendants, as prayed in the bill, and a reference to a master for an account of profits.

Case No. 3,145.

CONVERSE v. COIT.

[This case does not appear to have been reported, but in a note to Tutt v. Ide, Case No. 14,275b, Mr. Justice Nelson, then of the United States supreme court, is stated as having said, on denying a motion by defendant for a new trial, that Converse v. Coit was decided by him in a case in the state court,—referring to the New York supreme court.]

CONVERSE (MALTBY v.). See Case No. 8,-999.

CONVERSE (UNITED STATES v.). See Case No. 14,848.

Case No. 3,146.

CONWAY v. ALEXANDER.

[2 Cranch, C. C. 57.][1]

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

COSTS UPON REVERSAL BY SUPREME COURT.

Costs are not given upon reversal in the supreme court of the United States.

Upon a mandate from the supreme court of the United States, reversing the decree of this court, and ordering the bill to be dismissed. [Conway v. Alexander, 7 Cranch (11 U. S.) 218.]

C. Lee, moved this court to award costs of the supreme court, as well as of this court against the complainant.

But THE COURT (FITZHUGH, Circuit Judge, absent) refused as to the costs of the supreme court.

CONWAY (COOK v.). See Case No. 3,154.

CONWAY (HOWLAND v.). See Case No. 6,793.

CONWAY (NATIONAL BANK OF FREDERICKSBURG v.). See Case No. 10,-037.

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

Case No. 3,147.

CONWAY v. SHERRON.

[2 Cranch, C. C. 80.][1]

Circuit Court, District of Columbia. Nov. Term, 1813.

PART PERFORMANCE OF LAND CONTRACT.

The taking possession, and cultivating of the land by the vendee, takes the sale out of the statute of frauds.

Bill in equity by the executors of the vendor for a specific execution of a sale of land at auction; averring part performance. Plea, statute of frauds.

E. J. Lee, for plaintiffs, contended—

1st. That the statute does not apply to goods sold at auction; and that there is no reason for a difference between lands and goods in that respect. It is not necessary that the auctioneer's authority should be in writing. 1 Sugd. Vend. 57; Simon v. Motivos, 3 Burrows, 1921, 1 W. Bl. 599; Payne v. Cave, 3 Term R. 148; Coles v. Trecothick, 9 Ves. 234, 249; Pow. Cont. 272; Waller v. Hendon, 5 Vin. Abr. 524. The auctioneer is a public officer, like a sheriff or a master in chancery, &c. Law Va. Dec. 22, 1796; Duval v. Bibb, 3 Call, 362.

2d. That the agreement was executed in part by the plaintiffs' suffering the defendant to take possession and enjoin the rents and profits, &c., which takes the case out of the statute. Bell v. Andrews, 4 Dall. [4 U. S.] 152; 1 Sugd. Vend. 72; 1 Vern. 363; 1 Ves. 220, 297; 4 Ves. 720; and Argenbright v. Campbell, 3 Hen. & M. 161.

THE COURT (FITZHUGH, Circuit Judge, not sitting) overruled the plea, on the ground of part execution of the agreement; and at November term, 1814, upon final hearing, decree a specific performance.

CONWAY (TRIGG v.). See Cases Nos. 14,-172 and 14,173.

CONWAY (UNITED STATES v.). See Case No. 14,849.

Case No. 3,148.

CONWELL v. WHITE WATER VALLEY CANAL CO. et al.

[4 Biss. 195.][2]

Circuit Court, D. Indiana. May, 1868.

JURISDICTION—CITIZENSHIP—THIRD PERSONS.

1. It is a general rule that, to give the United States courts jurisdiction of a cause, the plaintiffs and defendants must be citizens of different states. But to this rule there are several exceptions.

2. In a cause over which a national court has acquired jurisdiction solely by reason of the

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

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

citizenship of the parties, if the rights and interests of third persons should become complicated with the litigation, either as to the original judgment, or any property in the custody of the court, or any abuse or misapplication of its process; and if no state court has power to guard and determine those rights and interests without a conflict of authority with the national court, the latter court will, from the necessity of the case and to prevent a failure of justice, give such third persons a hearing without regard to their citizenship, so far as to protect their rights and interests relating to such judgment or property, and so far as to correct any abuse or misapplication of its process, and no farther. The court will not entertain jurisdiction on behalf of a citizen of the state to litigate new or original matters, or any which might be settled in a state court without interfering with the jurisdiction already attached.

[Approved in Re Sabin, Case No. 12,195. Cited in McBee v. Marietta & N. G. Ry. Co., 48 Fed. 246; Central Trust Co. v. Bridges, 57 Fed. 762, 6 C. C. A. 539.]

[In equity. Bill filed by Abraham Conwell against the White Water Canal Company and others to dissolve the defendant company.]

G. H. Pendleton and J. W. Gordon, for complainant.

Hendricks, Hord & Hendricks, for defendants.

McDONALD, District Judge. This is a suit in equity. The defendants have demurred to the bill. And the question to be decided is whether the demurrer ought to be sustained. In support of the demurrer, several objections to the bill are urged. The principal point insisted on, however, is that this court has no jurisdiction to hear and determine the cause. Our attention will be chiefly directed to this objection. The bill states that the complainant is a citizen of Indiana; and that the defendants, the White Water Valley Canal Company, and the Connersville Hydraulic Company, and the White Water Valley Railroad Company, are all Indiana corporations. There are twelve other defendants to the bill; and as to their citizenship, the bill is silent. Under these circumstances, it is obvious that our jurisdiction of this case as arising from the jurisdiction of the parties to the bill, cannot be sustained. Counsel for the complainant, indeed, admit this; but they contend that there are other facts in the case which support our jurisdiction. Whether this is so, must be determined by the allegations in the bill. It will, therefore, be necessary here to state the substance of the bill.

The bill charges that, for many years past, the complainant has been, and still is, the owner of large tracts of land lying along White Water river, in Indiana, and is thereby entitled to the use of the water of that stream, in its natural flow past and through said lands; that this right has existed in him, and in those under whom he holds, for sixty years past; that before the year 1842, the state of Indiana constructed a canal along the valley of said river past and through said lands, and, by means of feeder dams in the river, diverted the water from its natural flow through said lands and to and by certain mills thereon, of which the complainant is, and long has been, the owner; that the state constructed said canal for the purpose of navigation only, and water power to propel machinery was only an incident thereto; that the landed and riparian proprietors, among whom was the complainant, who transferred to the state the right to locate the canal on their lands respectively and to divert the water of the river as aforesaid into said canal, did so on condition that the canal should be forever used for navigation; that by the terms of those transfers, a nonuser of the canal for purposes of navigation, would revest all the rights so transferred in the donors; that in the year 1842, the state transferred all its interest in said canal to the defendant, the White Water Valley Canal Company; that this company has long since ceased to use the canal for purposes of navigation, and now appropriates its waters solely to the purposes of propelling machinery; that all the defendants in combination have increased the height of a certain feeder dam on the river, whereby the flow of water through the complainant's lands and to his mills has been much decreased as compared with its flow when the canal was used for navigation; that the defendants have entered into divers fraudulent combinations and contracts relating to the canal and its water power in order to perpetuate the wrongs complained of; and that, by reason of the premises, the defendants have lost all right to the canal, its water power, and privileges, and the same have reverted to the complainant and the other riparian proprietors on said river.

The bill further charges that after said transfer by the state, on the 2nd of February, 1855, one Henry Vallette, to whom the White Water Valley Canal Company was then largely indebted, filed his bill in equity in this court against that company, charging said indebtedness, praying that other creditors of the company might be allowed to join him in that proceeding, and asking that an account should be taken and a receiver appointed to control the concern for his benefit. The bill avers that a receiver was appointed accordingly, and an account ordered to be taken; that a final decree was rendered against the company in favor of Vallette and others including the present complainant, Abraham Conwell; that the said suit is still pending in this court;[2] that the defendant, Hamlin, is the receiver, and has the possession of the property of the company; and that, as such receiver, he has made a fraudulent lease for the term of ninety-nine years renewable forever to the defendant, the Con-

[2] [See Vallette v. White Water Valley Canal Co., Case No. 16,820; also, White Water Valley Canal Co. v. Vallette, 21 How. (62 U. S.) 414.]

nersville Hydraulic Company. The bill fails to state in what respect said lease is fraudulent, or whether it was made under an order of this court.

The bill prays that said feeder dam be abated; that the defendants be enjoined from keeping it up or increasing its height; and that they be required to permit the water to pursue its natural channel in the river. Thus have we attempted to state as much of the bill, as will throw any light on the question of jurisdiction. To attempt more would be a serious labor; as the bill fills thirty-six printed pages.

Under this state of facts, the question is, can this court take jurisdiction of the case without regard to the citizenship of the parties? In most cases in this court, the jurisdiction depends on the citizenship of the parties. The reason of this is, that the second section of the third article of the national constitution, and the eleventh section of the judiciary act [1 Stat. 78], give to this court jurisdiction of suits between citizens of different states. And it follows that, in all cases falling within these provisions, the pleadings must show that the plaintiff and defendant are citizens of different states. And, though most of the suits in this court must be subject to this general rule, yet there are many exceptions to it. Thus in revenue cases, and copy-right and patent-right cases, and in many others the jurisdiction depends on the subject matter of the suit, and not on the citizenship of the parties.

So, too, in many instances where the jurisdiction originally depends on the citizenship of the parties, if the proceedings happen to affect the interests of other persons not original parties, the latter may often be brought before the court and made parties irrespective of their citizenship. Thus for example, if a judgment be rendered in this court between parties whose citizenship gave the jurisdiction, and if any circumstances afterwards arise entitling some third party to have such judgment modified or enjoined, he may, in many instances, maintain a bill for that purpose in this court without reference to his citizenship. This rule arises from the necessity of the case, and to prevent a failure of justice. For, since when a court has once obtained jurisdiction of a cause, it cannot suffer any other court to disturb its proceedings or interfere with property in its custody, a party aggrieved, if he could not be heard in the court where the judgment was rendered or in which the property is held, would be without redress.

This rule is illustrated by the case of Ohio & M. R. Co. v. Fitch, 20 Ind. 499. In that case the railroad was in the hands of a receiver appointed by this court. Fitch had obtained a judgment in a state court against the company; and he attempted to procure its satisfaction by a process of garnishment against the receiver in the court which rendered his judgment. And it was held that this could not be done; and that his only remedy was to apply to this court either for leave to sue the receiver, or for an order on the receiver to pay the judgment. Thus, as he had no remedy in a state court, he could apply for redress in this court, irrespective of his citizenship. So, in the case of Freeman v. Howe, 24 How. [65 U. S.] 450, it was held that where, by virtue of mesne process of attachment issued out of a national court, the marshal levied on property not subject to the attachment, but belonging to a stranger, the stranger could not maintain replevin for the property in a state court, but must seek redress in the court which issued the process, without regard to the citizenship of the parties.

In the recent case of Minnesota R. Co. v. St. Paul R. Co., 2 Wall. [69 U. S.] 609, it was held that when a bill in equity is necessary to have a construction of the orders, decrees, and acts of a United States court, the bill is properly filed in such court, as distinguished from any state court; and that it may be entertained in such national court, even though the parties filing it would not, for want of proper citizenship, be entitled to proceed by original bill of any kind in a court of the United States. That was a case in which, like the present, the property in question was in the hands of a receiver appointed by a national court. And Mr. Justice Miller, in delivering the opinion, said, "that, in contemplation of law, this property is still in the hands of the receiver of the court. If in the hands of a receiver of the circuit court, nothing can be plainer than that any litigation for its possession must take place in that court, without regard to the citizenship of the parties. * * * The question is not whether the proceeding is supplemental and ancillary or is independent and original, in the sense of the rules of equity pleading; but whether it is supplemental and ancillary or is to be considered entirely new and original, in the sense which this court has sanctioned, with reference to the line which divides the jurisdiction of the federal courts from that of the state courts. No one, for instance, would hesitate to say that, according to the English chancery practice, a bill to enjoin a judgment at law is an original bill in the chancery sense of the word. Yet this court has decided many times that when a bill is filed in the circuit court to enjoin a judgment of that court, it is not to be considered as an original bill, but as a continuation of the proceeding at law; so much so, that the court will proceed in the injunction suit without actual service of the subpoena on the defendant, and though he be a citizen of another state, if he was a party to the judgment at law."

From the decisions above referred to and

several others made by the courts of the United States, we venture to deduce the following general rule: In a cause over which a national court has acquired jurisdiction solely by reason of the citizenship of the parties, if the rights and interests of third persons should become complicated with the litigation, either as to the original judgment, or any property in the custody of the court, or any abuse or misapplication of its process; and if no state court has power to guard and determine those rights and interests without a conflict of authority with the national court; the latter court will, from the necessity of the case, and to prevent a failure of justice, give such third persons a hearing irrespective of their citizenship, so far as to protect their rights and interests relating to such judgment or property, and as to correct any abuse or misapplication of its process, and no farther.

Now the question is, does the case at bar fall within this rule? If so, we have jurisdiction of it; otherwise, not. So far as the question of jurisdiction is concerned, the substance of the case made by the bill is, that this court undoubtedly had jurisdiction of the original case of Vallette against the White Water Valley Canal Company, by reason of the citizenship of the parties; that this court now has the legal custody of said canal and its appurtenances, including the feeder dam in question; that the right to maintain the canal and the feeder dam, and to divert the water from the complainant's lands and mills, has been forfeited; that the complainant has now the right to the natural flow of the water in the stream past his lands and mills; and that this court ought, therefore, to abate said dam, and to restrain all the defendants (including the receiver) from any longer diverting the water from its natural flow in the river.

On the case thus made on paper, several points are suggested: First. It is certain that no state court can interfere with the possession of the property in the custody of this court. Second. It is equally certain that any attempt, on the part of the comp'ainant, Conwell, to exercise the acknowledged common law right of peaceably abating a nuisance, would, if exerted on the feeder dam in question while the same is in the custody of this court, be a contempt of its authority which might be followed by severe punishment. Third. It is also clear that the bill proposes not only to enforce the protection of rights and interests relating to the property in the custody of the court, but it proposes, as an indispensable prerequisite to the enforcement of those rights and interests, to litigate a new and important question—one not involved in the original suit between Vallette and the White Water Valley Canal Company—namely, whether the right to divert water from its natural flow in the stream for use of the canal, has not been forfeited by the perversion of the canal from the purposes of navigation to those of machinery. Fourth. It is furthermore certain that the bill proposes to confine the litigation of this new and important question, not to the original parties to the bill filed by Vallette, but chiefly, if not wholly, to the new parties introduced by Conwell's bill, all of whom—complainant and defendants—are citizens of Indiana; or, at least, none of whom appear to be "citizens of different states." Fifth. It is evident that without litigation of this new and important question of forfeiture, and without a decision of it in favor of the complainant, there is nothing stated in the bill on which any relief could be decreed.

And upon all these points, it seems to us that there is no difficulty touching the question of jurisdiction, except upon that relating to the forfeiture. None of the cases to which we have referred—none which we have found in the adjudication of the United States courts—go the length of holding jurisdiction of a question like this. On the contrary, the case of Dunn v. Clarke, 8 Pet. [33 U. S.] 1, is strongly against the jurisdiction in the case at bar. In that case, Graham, a citizen of Virginia, had recovered against Clarke and others, a judgment in ejectment, in the United States circuit court for the district of Ohio. The defendants to the ejectment suit were citizens of Ohio. Graham afterwards died, and Dunn, a citizen of Ohio, became his executor. Subsequently, Clarke and his co-defendants filed a bill in equity in the same court against Dunn, to obtain a decree for the conveyance of the land in controversy, and praying an injunction of the judgment in ejectment. All the parties to this bill were citizens of Ohio, and it became a question whether the court had jurisdiction of the case. In the opinion delivered on the question it is said: "No doubt is entertained by the court, that jurisdiction of the case may be sustained, so far as to stay execution on the judgment at law. * * * Of the action at law, the circuit court had jurisdiction; and no change in the residence or condition of the parties can take away a jurisdiction which has once attached. If Graham had lived, the circuit court might have issued an injunction to his judgment at law, without a personal service of process, except on his counsel; and as Dunn is his representative, the court may do the same thing as against him. The injunction bill is not considered an original bill between the same parties as at law. But if other parties are made in the bill, and different interests involved, it must be considered, to that extent at least, an original bill; and the jurisdiction of the court must depend upon the citizenship of the parties. In the present case, several persons are made defendants who were not parties to the suit at law, and no jurisdiction, as to them, can be exercised by this or the circuit court. But as there appear to be matters of equity in the case which may be investigated by a

state court, this court think it would be reasonable and just to stay all proceedings on the judgment, until the complainants have time to seek relief in a state court."

We are not aware that the authority of this case of Dunn v. Clarke has ever been questioned. In several respects it is very analogous to the case at bar; and it is identical with it in regard to the bringing forward of new and important matter, not involved in the original cause, to be litigated between new parties, all citizens of the same state. It decides that, so far as such new matters and new parties are concerned, the bill must be deemed "entirely new and original in the sense" which the supreme court of the United States "has sanctioned with reference to the line which divides the jurisdiction of the federal courts from that of the state courts;" and that, so far as it is to be deemed a new and original bill, there can be no jurisdiction unless the parties are citizens of different states. In the case in 8 Pet. [33 U. S.] 1, the new matter was a claim for a specific performance of an unexecuted contract for the conveyance of the land; in the present case the new matter is a claim that the right to divert the water into the canal was forfeited, and that the right to the natural flow of the water in the river has reverted to the complainant. In that case, several new parties were brought before the court; in the present case there are fifteen defendants to the new bill, only two of whom were parties to the original suit. In the former case it was proposed to obtain an injunction of a judgment at law, which, having been the very matter and result of the original litigation, was in no sense new matter, and was therefore temporarily enjoined; but in the present case it is proposed to enjoin the maintenance of a feeder dam, a thing, which, so far as appears, was neither directly nor indirectly involved in the original litigation. In that case, the court denied all jurisdiction over the question of a conveyance of the land in controversy; and if, in the question before us, we feel bound by the authority of that case, we must decline all jurisdiction to hear and determine whether the forfeiture mentioned in the bill has been incurred, and what consequences would legally follow.

Indeed, the present is a stronger case against the jurisdiction of the court than was that of Dunn v. Clarke [supra]. It may, however, be urged that, in the last-named case, the parties had a complete remedy for a specific performance by way of a conveyance of the land in controversy, in a suit in a state court; and that here, according to the case above cited from 20 Ind. 499, the complainant can have no remedy in any of the Indiana courts. To the truth of this latter assertion we cannot assent. In the case in 20th Indiana, the court suggest that the party aggrieved might obtain, from the national court in which the original suit was pending, leave to sue the receiver in a state court, and might then sue in a state court accordingly. In the present case, if the complainant had leave to sue the receiver in a state court, it is pretty clear that he could join all the other defendants in such suit without any leave from us.

But as there may be some doubt concerning the wisdom of said suggestion of the supreme court of Indiana, we are disposed to put the reason of our decision on another ground, namely, that we see no difficulty in the way of testing in a state court, the principal questions raised in this bill. It is true that no state court, would be justified in disturbing the receiver's possession of the canal property while the original suit of Vallette against the White Water Canal Company is pending. But that possession, as a matter of litigation, is merely incidental to the main matters presented by this bill for adjudication. Those main matters, we repeat, are the questions whether there has been a transfer by the complainant of the right to use water in the canal, on condition that it be used for navigable purposes; whether that condition has been broken; and whether the right to the natural flow of the water past the lands and mills of the complainant has consequently vested in him. Let these questions be settled and the question of the possession by the receiver will be one of little moment. And can there be any doubt that these questions may all be settled by a state court, without interfering with the jurisdiction of this court over the original case of Vallette v. White Water Valley Co. [Case No. 16,820]? A complaint under the Indiana Code of Procedure to establish the complainant's rights under the alleged forfeiture, filed against the principal defendants to the present bill, would fully present all these questions; and a decree settling the question of those rights, and operating in personam, would not, so far as we can see, interfere at all with our jurisdiction, and would, it is presumed, be respected by this court, so far as it should become our business to take any notice of them. Even should a state court in such a proceeding finally deem that the water in question ought no longer to be drawn into the canal, but, on the contrary, be permitted to take its natural course along the river, past Mr. Conwell's farms and mills, this court, on that fact being duly brought to its attention, would no doubt pursue such a course as to avoid all collision with the state courts, and would lend its aid to the promotion of justice between all the parties interested. Thus, while we deny that, so long as the original litigation is pending, any state court could operate on the possession of the property in the hands of the receiver or even make an order to abate the feeder dam or restrain repairs on it, we do not hesitate to say that a state court might, without interfering with this court, try the question of forfeiture and settle all the rights of the complainant set forth in this bill. Mr. Justice Davis, of the

supreme court, concurs with me in this opinion. The bill is dismissed for want of jurisdiction.

Case No. 3,149.

CONYERS v. ENNIS et al.

[2 Mason, 236.][1]

Circuit Court, D. Rhode Island. June Term, 1821.

STOPPAGE IN TRANSITU—INSOLVENT VENDEE—FRAUD.

1. The right of a vendor in cases of insolvency, to stop goods for non payment of the purchase money, is confined to cases, where the goods are still in transitu to the vendee.

2. If goods are ordered by the vendee who is then insolvent, but uses no device or fraud to deceive the vendor, and afterwards and before the consignment of the goods, the vendee dies, and his estate is represented insolvent, and the goods are afterwards sent by the vendor without knowledge of the facts, and arrive and are taken possession of by the administrators of the vendee, the vendor cannot reclaim the property or its proceeds, upon the ground of the insolvency.

3. Quere, how it would be, if there was a fraudulent representation of solvency, or a fraudulent suppression of insolvency?

A bill in equity [by Conyers and another against William Ennis and others, administrators of Lewis Rousmaniere, for the payment of the cost of a quantity of rice purchased by the intestate, out of the proceeds of the rice in the hands of defendants] which was set down by consent for a hearing upon the bill and answer.

Mr. Hunter, for plaintiff.
Mr. Randolph, for respondents.

STORY, Circuit Justice. This is a case of extreme hardship, and such as might well induce a court to strain after some mode of redress. The cause has come on upon the bill and answer, and the material facts are these: The intestate, Lewis Rousmaniere, a merchant of Newport, being deeply and fraudulently insolvent, on the 4th of May, 1820, wrote a letter to the plaintiffs, who are merchants in Charleston, S. C., and with whom he had previously done business, containing an order for the purchase and shipment of 30 casks of rice on his own account, from Charleston to Newport. On the 6th of May, the intestate, in consequence of the discovery of his frauds, committed suicide. The letter of the 4th of May, duly reached the plaintiffs, who, on the 16th of May, shipped the 30 casks of rice consigned to the intestate on his own account and risk, and drew a bill on the intestate for the amount, in $500 73, payable at 30 days sight. The rice duly arrived at Newport, on the 24th of May, and was received and freight and charges paid by the defendants, who had previously taken administration on the estate of Rousmaniere, and represented it insolvent, according to the laws of Rhode Island. On the evening of the day in which the rice was received by the defendants, a letter arrived by the mail, from the plaintiffs, containing an invoice of the rice, and advising of the draft drawn for payment. Upon the presentment of the draft, the defendants refused payment, and it was duly protested. The rice was sold by the defendants, and the present bill is brought to obtain payment of the cost of the rice, out of the proceeds in the hands of the defendants. The defendants' answer admits, that at the time of the order, the intestate must have been insolvent, but that whether that fact was then known to him, they are unable to say; and it states, that the defendants are ignorant of any representations made by the intestate to the plaintiffs of his ability to comply with his engagements, and if he made any, whether he made them being himself deceived as to his pecuniary circumstances, or with a view to deceive the plaintiffs. It farther states, that the intestate to the day of his death, was actually engaged in business, and was in the daily receipt and payment of considerable sums of money.

The principal point, which under these circumstances, has been pressed at the bar, is, that the right of a consignor to stop property in cases of insolvency, ought not to be confined to stoppage in transitu, but in equity should extend to all cases where the property is not paid for, and remains in the hands of the consignee. It is admitted, that the decisions in England have confined the right of stoppage to cases where the property is in its transit. But it is suggested, that the point has not been solemnly adjudged in the United States, and that it is open for the court to adopt the more enlarged rule, hinted at by Lord Hardwicke, in Snee v. Prescott, 1 Atk. 245. His lordship there says, "Though goods are even delivered to the principal, I could never see any substantial reason, why the original proprietor, who never received a farthing, should be obliged to quit all claim to them, and come in as a creditor only, for a shilling perhaps in the pound, unless the law goes upon the general credit the bankrupt has gained, by having them in his custody." The reasoning, too, of Lord Loughborough, in Mason v. Lickbarrow, 1 H. Bl. 357, is brought in aid of the same doctrine. All argument of this sort is addressed in vain to this court. I do not sit here to revise the general judgments of the common law, or to establish new doctrines, merely because they seem to me more convenient or equitable. My duty is to administer the law as I find it; and I have not the rashness to attempt more than this humble discharge of duty. Nothing is better settled, if an uninterrupted series of authorities can settle the law, than the doctrine, that the vendor in cases of insolvency, can stop the property only while it is in its transit. If it has once reached the consignee, there is an end

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

of all right to reclaim it as a pledge for the payment of the purchase money. If the doctrine were to go the length now contended for, it is far from certain that it would promote public convenience or policy. Where could we stop? Could it be applied with safety to purchases made at any distance of time, if it should turn out in the event, that the buyer was then insolvent? It is very true, as has been stated at the bar, that our law respecting the distribution of the estates of persons dying insolvent, differs from that of England, where the assets are marshalled, and payment goes according to the dignity of the debt. Here, all debts are paid pari passu. This, however, affords no ground to change the general rights and duties of vendor or vendee, or to create relations between debtor and creditor hitherto unknown to the law. The cases arising under the bankrupt laws, are not in principle unlike those which arise here under insolvencies. And the bankrupt laws furnish no instance of an attempt to establish any doctrine like that now sought from the court. It is sufficient for me to stand upon the law, as it is now universally received. If there are public mischiefs growing out of its principles, let them be remedied by the legislature.

The only point of view, in which it seemed possible to sustain the plaintiffs' bill, struck me at the argument to be, that there was a meditated fraud and concealment practised on them by Rousmaniere. If the latter had by false affirmations and contrivances, imposed upon the plaintiffs, and induced them to send him the property, there might be reason to say, that the contract was ab origine void for fraud. And the question then would be, whether the suppressio veri, under the strong circumstances of the present case, was not equivalent to the allegatio falsi, since the imposition as to the intestate's insolvency was complete. If a man, knowing his own insolvency and utter incapacity to make payment, purchases goods of another, who is ignorant of any change of his circumstances, and sells them under the most implicit belief of the good faith and solvency of the buyer, in what respect does the transaction differ from a direct affirmation by the buyer of his own good faith and solvency? If the buyer conceals a fact that is vital to the contract, knowing that the other party acts upon the presumption that no such fact exists, is it not as much a fraud, as if the existence of such fact were expressly denied, or the reverse of it expressly stated?

Upon looking more attentively to the facts of this case, strong as at first blush they seem to be, I do not think they establish a case of meditated fraud. The intestate was in full business as a merchant, and there is no reason to suppose, that he did not expect still to keep on in business. It is admitted at the bar, that the accidental discovery of his fraudulent conduct led to the unhappy catastrophe which terminated his life, and he might have been able and have intended fairly to pay for the rice in question at the time when payment should become due. The sum was not so large as not to be completely within the ordinary means of a merchant. At all events, the bill does not pointedly put the case as one of meditated fraud and imposition; and so far as any conclusion to this effect might be drawn from the facts, it is repelled by the answer.

I do not say, that the suppressio veri, if made out in this case, would have sustained the plaintiffs' bill, even if it were a concealment of positive and deep insolvency, no device or contrivance having been made use of to deceive the plaintiffs. That is a question with which we need not at present intermeddle; and sufficient unto the day is the evil thereof. In the case now before the court, there is no pointed averment of such fraudulent concealment to cheat the plaintiffs; and if it had been averred, no attempt has been made to sustain it by proof; and without proof no court of justice ought to presume it, unless the presumption from the other facts, be direct and irresistible. Let the bill be dismissed with costs.

CONYNGHAM (RUCHER v.). See Case No. 12,106.

CONYNGHAM (WORTMAN v.). See Case No. 18,056.

CONYNHAM (UNITED STATES v.). See Case No. 14,850.

Case No. 3,150.

In re COOK et al.

[3 Biss. 122; 4 Chi. Leg. News, 1; 20 Pittsb. Leg. J. 32.][1]

District Court, W. D. Wisconsin. Sept. Term, 1871.

INSOLVENT PARTNERS—TRUSTEES FOR FIRM CREDITORS—TRANSFER TO CO-PARTNER—WHEN VOID.

1. When partners are in fact insolvent, they should be considered in equity as holding the partnership effects in trust for the benefit of the firm creditors, and cannot by a transfer of the interest of one to the other defeat this trust.

2. A sale by one partner to his co-partner, when the firm is insolvent and on the eve of bankruptcy, is presumptively fraudulent as to the firm creditors, and the court should set it aside and distribute the property as firm property.

[Cited in Mattocks v. Rogers, Case No. 9,-300.]

3. The legal effect of such transfer being to change the order of payment and prefer certain creditors, the private creditors over the firm creditors, it would be void as creating a preference contrary to the provisions of section 35 of the bankrupt law [of 1867 (14 Stat. 534)].

[Cited in Re Tomes, Case No. 14,084.]

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[1] [Reported by Josiah H. Bissell, Esq., and here reprinted by permission. 20 Pittsb. Leg. J. 32, contains only a partial report.]

This was a petition by Clara M. Davis, to obtain satisfaction, out or funds in the hands of the assignee, of a judgment recovered by her against Charles R. Gleason, one of the bankrupts. The facts appear fully in the opinion.

W. P. Bartlett, for petitioner.

Tenney, McClellan & Tenney, for assignee, and firm creditors.

HOPKINS, District Judge. The questions raised in this case are of far more than ordinary importance to the whole mercantile community. The bankrupts entered into a mercantile and lumbering partnership in the year 1868, Cook agreeing to put in one-third of the capital, and Gleason two-thirds. Cook, it is claimed, did not put in his share, and what he did put in he drew out, principally before the 1st of January, 1871. The firm, in December, 1870, were threatened with bankruptcy proceedings, and were largely insolvent. About the first of January, 1871, the firm dissolved, and Cook agreed to transfer all his interest in the firm to Gleason for five hundred dollars, which he was to receive in claims, $300 being against himself, and Gleason agreeing to pay the partnership debts; but this transfer was not in fact made until the 18th day of January, 1871, when the papers were executed and notice of the dissolution published. During the year 1870, the parties, with the joint funds, built a store for their partnership business on a lot they owned in Eau Claire.

That store and lot, at the time of the dissolution, was a part of the assets of the firm, and was transferred to Gleason by Cook as a part of the firm property. The firm was then insolvent, and so were the partners individually; but as to whether they, or either of them knew it, the evidence is insufficient to determine, although the probabilities are that they did, for Cook had withdrawn and used up all his capital, and they were being strongly pressed by their creditors, and even threatened with bankruptcy proceedings.

The debts were principally firm debts, and there is no evidence before me that either owed any individual debts, except the debt of the petitioner against Gleason. One of the firm creditors filed a petition in bankruptcy on the 19th day of January, 1871, the day after the execution of the transfer papers from Cook to Gleason, and upon this petition they were adjudged bankrupts.

This store was taken possession of by the assignee in bankruptcy, and was sold by order of the court, free and clear of all incumbrances, except a certain mortgage, and the money ordered brought into court, and the claims of all creditors which were a legal lien upon the property to stand as against the fund arising from the sale.

Clara M. Davis now petitions the court for the payment of a judgment which she obtained against the bankrupt, Charles R. Gleason, on the 22d day of January, 1870, for $1,562.97, and interest since its recovery, out of the fund derived from such sale. In her behalf it is argued that by the transfer of Cook to Gleason the property that before was partnership property and subject first to the payment of the partnership debts, became the private property of Gleason, and that thereupon her judgment became a lien upon that real estate, and should be paid before the partnership debts; that at the time of filing the petition in bankruptcy there was no partnership property, but it had, by the dissolution of the firm and the transfer by Cook to Gleason, become the individual property of Gleason. It was further argued that, by the transfer, what was before partnership property had become private property, and was, under the provision of section 36 of the bankrupt act, to be applied first to the payment of the private debts of Gleason, and only the surplus remaining after the payment in full of all Gleason's private debts was applicable to the payment of the partnership debts of Cook & Gleason.

If it did become private property by that transfer, such is undoubtedly the rule of law. The bankrupt act, under which the assignee took and sold it, provides that the net proceeds of all the joint stock shall be appropriated to pay the creditors of the copartnership, and the net proceeds of the separate estate of each partner shall be appropriated to pay his separate creditors, and the balance only of the separate estate, after payment of the separate debts, is to be applied to the payment of the joint debts; and the balance only of the partnership property, after the payment of all partnership debts, to be applied to the payment of the separate debts. In Howe v. Lawrence, 9 Cush. 553, it is said the effect of such transfer, as between the partners, is to vest the legal title to the property in the individual partner with a right to use and dispose of it as his separate property. The court say further that it would seem to follow as a necessary consequence that the creditors of the firm, after such conveyance, would have no right to look to the property transferred as joint property upon which they had any special claim or lien.

This, they say, is the effect when the property is sold in good faith and without any intent to defraud the creditors of the firm. In that case they hold, however, that, although the partnership was insolvent, the sale was good to place the legal title in the individual partner, and to give the individual creditors of the buying partner a preference over the partnership creditors. They say, however, that there was no proof to show that the partners knew they were insolvent. It was claimed, on the argument, that the case went so far as to hold that knowledge, even of their insolvency, would not change the rule; but I don't think the decision goes so far. That case lays down the rule correctly as applicable to solvent part-

nership, I have no doubt (Ladd v. Griswold, 4 Gilman, 25); but, in cases where the firm is insolvent, I am not satisfied with the reasoning or conclusions, and I think I am sustained in my view by the case of Ketchum v. Durkee, 1 Barb. Ch. 480, and Story, Partn. § 358 et seq.

I think where a firm is insolvent the partners should be considered rather in the light of trustees of the firm property for the benefit of the firm creditors, and should not be allowed to sell to each other, and thus defeat the equitable priority of the firm creditors.

But if such transfer operates to make what was previously company property, private property and applicable, first to the payment of the private debts of the partner purchasing, as would be the necessary result in cases of insolvency and bankruptcy such transfer would be a fraud upon the joint creditors, it would be sanctioning the right of one partner to allow his share of the firm property to be applied to the payment of a debt for which neither he nor his property was liable at law or in equity. Kirby v. Schoonmaker, 3 Barb. Ch. 46. In other words, it would be authorizing the partner selling to assign his property to pay the debts of another, for which he was in no way liable, instead of paying his own debts. He would receive no legal consideration in such case, and such conveyance would be in fraud of the law, and equity would at once set it aside. It is only when parties act fairly for the purpose of dissolution and winding up the affairs of the firm that creditors will be bound by a change of the partnership property to the separate estate of one of the partners. Howe v. Lawrence, supra, 558; Story, Partn. § 97, note 2. Take this case as an illustration. Before the sale this was partnership property and liable, in case of bankruptcy, first to the payment of all firm debts. Cook sells his share to Gleason in consideration of a nominal sum and the agreement that Gleason would pay the firm debts. Gleason does not pay, and the next day after the transfer and notice proceedings in bankruptcy are commenced, and the property, instead of being applied to the payment of Cook's debts, or the firm's debts for which he was liable, is applied first to the payment of debts for which he is in no way liable. Can it be possible that such a transaction, causing such injustice towards the firm creditors, can be sustained? If he had assigned his interest in the firm assets to pay Gleason's private debts, instead of his own or the firm debts, would not the court have set it aside as being without consideration, and a fraud upon his own creditors? And such being the legal consequences of the transfer as claimed by the counsel of Davis, can there be any other or different decision in this case than there would be in that? It seems to me not. The transaction in its legal effect, is the same, and courts must pronounce the same judgment upon it as if the transfer had expressed that purpose upon its face. To sustain this transaction, and give to it the effect claimed by Davis's counsel, would be to sanction, in the most direct manner, the right of insolvent partners to create preferences contrary to the express terms of the bankrupt act. In re Byrne [Case No. 2,270]; In re Crockett [Id. 3,402]. I find this question has indirectly been before some of the district courts in bankruptcy, and although not directly passed upon, I think the reasoning in those cases in harmony with the views herein expressed by me.

I think there are three good answers to the claim of Davis, the private creditor of Gleason:

First—When partners, as in this case, are in fact insolvent, they should be considered in equity as holding the partnership effects in trust for the benefit of the firm creditors; and they cannot, by a transfer of the interest of one to the other, defeat this trust; as stated in Bird v. Morrison, 12 Wis. 153: "The partnership property is subject to an implied trust in favor of the partnership debts."

Second—That a sale by one partner to his co-partner, when the firm is insolvent and upon the eve of bankruptcy, as in this case, which, if upheld, would operate to apply the property of the retiring partner to the payment of the individual debts of the partner purchasing, is presumptively fraudulent as to the firm creditors, and the courts should set aside such sale, and distribute the property as firm property to the payment of the firm debts.

Third—If the legal effect of such transfer would be to change the order of payment and prefer certain creditors, the private creditors over the firm creditors, it would be void as creating a preference contrary to the provisions of section 35, of the bankrupt act.

I therefore order and adjudge that the sale of Cook to Gleason was fraudulent and void as to firm creditors, and direct that the partnership property and assets of the firm of Cook & Gleason be distributed as partnership effects and to the payment of the firm debts as provided by law.

I further order and adjudge that the store and lot, for the purpose of distribution, are to be treated as a part of the firm assets, and that the judgment of the petitioner was not and did not become a lien thereon by the sale of Cook to Gleason, and that the petitioner Davis has no lien or claim upon said fund by virtue thereof, and that her judgment is not payable out of the firm effects of Cook & Gleason until after the payment of all the debts of said firm.

And the petition and motion of said Davis is denied.

Consult In re Munn [Case No. 9,925]; In re Knight [Id. 7,880].

Case No. 3,151.

In re COOK et al.

[3 Biss. 116;[1] 3 Chi. Leg. News, 410.]

District Court, W. D. Wisconsin. Sept., 1871.

MECHANIC'S LIEN UNDER STATE LAW—WHEN ATTACHES—PETITION FILED BY LEAVE—BANKRUPT LAW RECOGNIZES LIENS—HOW FAR GOOD—NOT FOR WORK DUE AFTER PETITION FILED.

1. The lien created by the statute of Wisconsin attaches from the time the building was commenced, or the materials furnished.

[Cited in Re Hoyt, Case No. 6,805.]

2. A person claiming a lien should not proceed in the state courts after petition in bankruptcy filed, without leave of this court. The doing so is a contempt, and until discontinuance of such suits the claimants will not be protected by this court.

[Cited in Davis v. Anderson, Case No. 3,623; Phelps v. Sellick, Id. 11,079; Re Brunquest, Id. 2,055.]

3. The bankrupt act [of 1867 (14 Stat. 523)], provides for the protection of legal liens against the bankrupt's estate, instead of destroying them, and where a party has a lien when the petition in bankruptcy is filed, the court in bankruptcy will adjudicate upon and protect it.

[Cited in Re Hufnagel, Case No. 6,837; Re Gorham, Id. 5,624.]

4. The lien is only good for the articles actually used in the building, or sold for such use.

5. On a contract not completed when petition was filed a pro rata allowance only should be made.

6. Parties having commenced suits in the state courts without such consent must discontinue them before they can be paid by the bankruptcy court.

7. For work done afterwards nothing should be allowed. Parties cannot thus create a lien upon property in the possession of the court.

This was an application by divers mechanics and others who claimed liens for their work upon and materials used in a certain store lately erected by the bankrupts, for which they had not been paid at the commencement of proceedings in bankruptcy. They went on and finished, or claimed to finish the building after the proceedings in bankruptcy were commenced. They then filed their petitions, in conformity with the state law, to perfect their liens, and commenced suits against the bankrupts and the assignee in bankruptcy, to enforce them in the state courts. This court, upon the application of the assignee, stayed such suits, and directed the property to be sold free of all liens of that character, and that the proceeds be paid into court, and ordered that all such liens be transferred to that fund in the registry of the court. The mechanics and others, after such sale, filed proof of their claims in this court, and now ask to be paid the amount thereof, with their costs in the suits prosecuted in the state courts to enforce the same. The material sections of the Wisconsin mechanics' lien laws are as follows:

Tayl. St. p. 1761, § 1 (Rev. St. c. 153): "Every dwelling house or other building hereafter constructed, repaired or removed, * * * together with the right, title and interest of the person or persons owning such dwelling house, etc., in and to the lands upon which the same shall be situated * * * shall be subject to the payment of all debts contracted for, or by reason of any work done or any material found or provided by any bricklayer, stonecutter, mason, etc., or any other person employed in erecting or furnishing materials in the erection, construction, protection or repairing or removing of such dwelling house, etc., before any other lien which originated subsequent to the commencement of such house, building, or repairs or removal."

Tayl. St. p. 1764, § 6 (Laws 1858, c. 59, § 1): "No such debt for work and materials shall remain a lien upon such lands, etc., longer than one year from the time of furnishing of materials, or the performance of the labor, unless a petition or claim for the same be filed, and an action for the recovery thereof be instituted, within the same year. Such petition or claim shall be filed in the office of the circuit court of the proper county, within six months from the date of the last charge for work and labor performed, or materials furnished."

Tayl. St. § 9 (Laws 1859, c. 113, § 4): "In all cases of lien granted by the provisions of chapter 153 of the Revised Statutes, where right of action has at the time of the passage of this act, accrued, and action has not been commenced, the person or persons claiming the benefit of such lien, shall, before being entitled to maintain an action for the same, and within sixty days after this act shall take effect, file the petition or claim as provided by section 1 of this act."

W. P. Bartlett and A. Meggett, for lien claimants.

Tenney, McClellan & Tenney, for assignees.

HOPKINS, District Judge. I think the lien created by chapter 153 of the Revised Statutes of the state of Wisconsin, entitled, "Of the Lien of Mechanics" (Tayl. St. p. 1761), attaches from the time the building was commenced, upon which the work was done or material used. Sections 1 and 4 taken together are so clear upon that point that there seems little room for difference of opinion. The case (Dobbs v. Enearl, 4 Wis., 451) cited by counsel for assignee as establishing a contrary doctrine has, I think, been substantially overruled by the cases of Witte v. Meyer, 11 Wis., 295, and of Jessup v. Stone, 13 Wis., 466; at all events as it has not been followed by the court which pronounced it, and as it is so widely different from my understanding of the statute, I do not feel disposed to follow it unless I am bound to, as the construction given to a state statute by the highest tribunal of the state. And as later decisions of the same court

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

are at variance with it, I cannot regard it as the law of the state, but shall adopt the views expressed in the later decisions above referred to, which sustain the interpretation given by me to the statute as to the time the lien attaches. I therefore think that any mechanic who had a lien at the filing of the petition in bankruptcy would have a right, by leave of this court, to file a petition according to the provisions of section 4 of the act of 1859, so as to continue it, notwithstanding the commencement or pendency of bankruptcy proceedings.

The bankrupt act provides for the protection of legal liens against the bankrupt's property, instead of destroying them; I hold, therefore, that where a party has a lien when the petition in bankruptcy is filed, but according to the requirements of the statute, in order to continue it beyond a certain period, it is necessary to file a petition in the clerk's office, such party having first obtained the leave of this court, has the right to file such petition, and thereby continue the lien thereon, or if he does not file his petition in the clerk's office, but asks to have his rights established in this court, that the court should hold that as against property in the hands of an assignee in bankruptcy it should not be necessary to file a petition in the state court to continue it. In re Coulter [Case No. 3,276]. See opinion of supreme court of Massachusetts in Re Clifton v. Foster [103 Mass. 233].

Since the commencement of proceedings in bankruptcy and the appointment of the assignees, several parties have commenced suits against bankrupts and assignees to enforce their liens in the state circuit court. These suits were improperly brought. The liens of mechanics and all others should be presented to and be ascertained by this court, and the parties claiming those liens have no right to bring such suits in the state court without first obtaining leave of this court to do so. Angel v. Smith, 9 Ves. 335; In re Heller, 3 Paige, 199; In re Hopper, 5 Paige, 489; Wiswall v. Sampson, 14 How. [55 U. S.] 52. I therefore disallow the costs of all those cases, and direct the assignee or clerk to pay only the amount of the lien in such case.

If a party has a claim, lien or interest in the property in the hands of an assignee in bankruptcy, he should apply to this court for relief, and this court may grant the relief or allow a suit to be brought either in this or the state courts to determine the same; but without such consent I think parties have no right to sue, and are guilty of a contempt of the authority of the court in so doing. This principle is applicable to every interference with the possession of a receiver, sequestrator, committee or custodian who holds property as the officer of the court, as his possession is in law the possession of the court itself. Edw. Rec. 129; In re Heller, 3 Paige, 199; Kaye v. Cunningham, 5 Madd. 406; In re Hopper, 5 Paige, 489; Taylor v. Carryl, 20 How. [61 U. S.] 583.

Those parties who have commenced such suits must discontinue them before they can be paid by this court the amount of their claims. This court acquired jurisdiction over the property and the bankrupts and had taken possession of the property. It will, therefore, insist upon its right to administer and distribute the property. Parties should understand that they have no right to commence suits against assignees in bankruptcy to affect the property, for as they are accountable to this court for the property, it is the duty of the court to protect them in the possession. The federal courts sedulously avoid all interference with property held by the state courts or their officers, and they with equal solicitude and firmness maintain their right to hold property which is in their possession, or in the custody of their officers, against the process of any state court, and will not permit persons through process issuing from state courts to interfere with impunity with property so in possession of the federal courts, or their officers; and this principle has in the United States supreme court, as stated in Taylor v. Carryl, 20 How. [61 U. S.] 595, received its clearest illustrations, and it has been employed most frequently in that court, and with most benign results. And as stated in that opinion, "It forms a recognized portion of the duty of this court to give preference to such principles and methods of procedure as shall seem to conciliate the distinct and independent tribunals of the states and of the Union, so that they may co-operate as harmonious members of a judicial system, co-extensive with the United States and submitting to the paramount authority of the same constitution, laws and federal obligations."

Upon filing discontinuance of the suits pending in the state courts for the enforcement of such liens, the clerk will pay out of the funds in court due from such sale, the amount of liens hereby allowed. In Bosworth & Son's Case, the issue is as to whether the materials were furnished and used for this store. The only proof is that of Mr. Gleason, who says only $396.90 of those charged were actually used in the building; the balance was used by another firm, who were building adjoining to them. I shall only, therefore, allow that sum. When the material is not in fact used by the party in the building sought to be charged, the seller must show that they were sold to be so used (Esslinger v. Huebner, 22 Wis. 633), which he failed to do in this case. In the case of Sanborn & Butterfield, for work, they claim $91.81, but Mr. Gleason testified that they had not finished their contract and that it would be worth $25 to finish it; so I deduct from the claim $25, and allow it at $66.81 and interest. It appears from the bill of particulars annexed to Bangs & Fish's proof that $147.51 of the amount of the claim was

for work done after filing the petition in bankruptcy. This part of the claim is not allowable. Mechanics should have stopped then, and if they went on they certainly cannot create a lien upon the property when in the possession of the court. Their claim is allowed at $393.64, and interest at seven per cent. since January 1, 1871.

NOTE [from original report]. That a creditor claiming a lien must proceed in the bankrupt court, or obtain leave from that court, consult Smith v. Kehr [Case No. 13,071]; In re Ulrich [Id. 14,328]. For construction of the mechanic's lien law in other states, on similar questions, consult In re Dey [Id. 3,870]; In re Gregg [Id. 5,796.]

Case No. 3,152.

In re COOK.

[2 Story, 376;[1] 5 Law Rep. 443.]

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

BANKRUPTCY—LIEN OF ATTACHMENT.

1. The doctrine in the case of Ex parte Foster [Case No. 4,960] re-stated and affirmed.

2. A judgment upon property, attached on the writ, in Massachusetts, is a lien within the proviso of the second section of the bankrupt act of 1841 [5 Stat. 442], and is saved thereby, and is wholly unaffected by the proceedings in bankruptcy, when it has been regularly obtained, before any petition, or decree, or discharge in bankruptcy.

[Cited in Fiske v. Hunt, Case No. 4,831; Re Bellows, Id. 1,278; Re Reed, Id. 11,640; Hudson v. Adams, Id. 6,832.]

3. Where property was attached upon mesne process, and after judgment was obtained, the defendant filed his petition to be decreed a bankrupt, it was *held*, that the right of the attaching creditor had attached absolutely to the property, and by the law of Massachusetts, remained a fixed and permanent lien, for thirty days after the judgment, by means of which, the creditor, at his election, might obtain a preference of satisfaction out of the property attached over all other creditors.

[Cited in Hudson v. Adams, Case No. 6,832.]

This case was adjourned in the circuit court upon the following statement of facts: The president, directors, and company of the Charlestown Bank, a corporation, created by a law of the commonwealth of Massachusetts, and having its place of business in Charlestown, in the said commonwealth, heretofore sued out three several writs of attachment against the said Enoch Cook, upon which personal property was attached, and which was returnable to the court of common pleas for the county of Middlesex, and commonwealth aforesaid, at the September term thereof, A. D. 1842. The actions were entered, and judgment was recovered against the said Cook by default, on the twelfth day of September aforesaid. On the thirteenth day of the said September, the said Cook filed his petition, in common form, for relief under the bankrupt act, and in the schedule annexed to his petition, was enumerated the property heretofore attached by the said corporation. Order of notice upon the said petition was issued returnable on the first Tuesday of November. Executions duly issued upon the said judgments recovered by the said corporation against the said Cook, and they were duly levied upon the property attached on the sixth day of October, A. D. 1842. A portion of the said property was advertised for sale on the twelfth day of the said October, and another portion for a subsequent day. The said Cook, on the eleventh day of the said October, presented a petition to the honorable, the district judge of the United States, for the district of Massachusetts, for an injunction against the sale of the said property and the satisfaction of the said judgments out of the same, on which order of notice to show cause issued, returnable on the twelfth day of the said October. The question was briefly spoken to before the district judge, but was not decided by him, and, at his suggestion, the parties entered into an agreement, by which, the property and the proceeds of the property were to be retained in the hands of officers, by whom it had been attached, subject to the decision of the circuit court. Under these circumstances, the question is now presented to the consideration of the circuit court, whether the said injunction shall be dissolved. The said Enoch Cook has been declared a bankrupt, according to his said petition. Upon this statement, the question whether the injunction there referred to shall be dissolved, was adjourned by the district court into this court.

The case was shortly spoken to by B. R. Curtis, for the respondents, and by George S. Hillard, for the petitioner.

The following cases were cited: Martin v. Martin, 1 Ves. Sr. 211, 213; Drewry v. Thacker, 3 Swanst. 529; Lee v. Park, 1 Keen, 714; Ex parte Foster [Case No. 4,960]; Drew. Inj. 111; Clarke v. Earl of Ormonde, Jac. 108, 124.

STORY, Circuit Justice. It has been a matter of surprise to me, to see how greatly the case of Ex parte Foster [Case No. 4,960], has been misunderstood and misinterpreted. A great deal of the preliminary reasoning in that case was employed in the discussion, of points raised by the elaborate arguments of counsel, which seemed necessary to clear the way for the decision of the point, actually presented to the court by the adjourned question. That decision was, that an attachment commenced under the Massachusetts laws by a creditor against his debtor in a suit for his debt, and which suit had not as yet arrived at the stage, in which the pleadings closed, or are even put in, is not such an absolute lien as is entitled to protection and priority under the act of congress, but

[1] [Reported by William W. Story, Esq.]

is a contingent lien dependent upon the creditor's obtaining a judgment in the suit. That if the debtor proceeding in bankruptcy should be decreed a bankrupt, and should receive a discharge under the act, that discharge could be pleaded as a good bar to the suit in the nature of a plea puis darrien continuance; and that consequently under such circumstances, the district court, acting in bankruptcy, ought not to permit the creditor, pending the proceedings in bankruptcy, and before it was possible for the debtor to obtain a discharge in a race of diligence, to obtain a judgment, which should give him a priority of satisfaction over the general creditors, out of the property attached in his suit. Consequently, the creditor ought to be enjoined against further proceedings in his suit, except so far as the district court should allow, until it should be ascertained, whether the debtor obtained his discharge or not. If he did not obtain his discharge, then the creditor might be at liberty to proceed and get judgment, and thus to perfect his lien under his attachment, by following it up by a seizure of the property in execution, which might, under such circumstances, (for the court gave no opinion on the point,) give him an unconditional priority of satisfaction out of the same. So that the effect of the injunction was not, to annul the attachment, but only to suspend proceedings in the suit, until it could be ascertained, whether the bankrupt had a good bar, or defence upon the merits, to the suit, or the creditor had an absolute right to judgment therein. No question arose, in that case, as to what would be the effect, if the creditor had proceeded to judgment in his suit, before the petition in bankruptcy was filed by the party, praying to be declared a bankrupt (which is the very point now presented for consideration), and, therefore, the effect of a judgment was only incidentally discussed; and yet, as far as it was discussed, the court pointed out the obvious distinction between the case of a supposed lien by an attachment of property before judgment, and the case of such a lien by attachment after judgment. In the former case, the lien was contingent and conditional, waiting upon the judgment; in the latter, it was absolute and binding at the election of the creditor as a means of satisfying the judgment. Then came the case of Parker v. Muggridge [Case No. 10,743], where the very distinction was taken, and strongly insisted upon by the court. That case having been founded upon contracts between the parties, as to the attachment and management of the suit, and the judgment having been in pursuance of those contracts, did not directly involve the present question, as the court decided it upon the mere footing of those contracts. The present case is, therefore, distinguishable, it being a mere proceeding by attachment by the creditor against the debtor, in invitum, without the interposition of any such contracts.

I have no doubt whatsoever, that no injunction ought to be awarded by the district court, in the case now before the court, upon the facts stated. The proceedings in bankruptcy after the judgment can have no effect whatsoever upon that judgment or upon the property attached in the suit. The creditors, by their judgment, have made their right (call it if you please, their lien) perfect under the attachment. It is no longer a conditional, or contingent right, but it has attached absolutely to the property, and by the laws of Massachusetts, it remains a fixed and positive lien for thirty days after the judgment, by means of which, the creditor, at his election, may obtain a preference of satisfaction out of the property attached, over all other creditors. The court has no authority to deprive him of that election, nor, by an injunction, to obstruct or stop his proceedings on his execution. If the bankrupt should obtain his discharge, it would be no bar or defence to the due execution and satisfaction of that judgment in the regular course of proceedings thereon; for the debtor, after the judgment, has no day in court to plead any bar or defence. In short, after judgment, the case is precisely the same, in legal intendment, under the laws of Massachusetts, as the lien of a judgment at the common law on the real estate of the debtor. I never have doubted, that the lien of a judgment at the common law upon real estate, since the statute of Westminster (13 Edw. I. Stat. 1, c. 18), which has been adopted in many states in the Union, is within the proviso of the second section of the bankrupt act of 1841, and saved thereby, and is wholly unaffected by the proceedings in bankruptcy, when it has been obtained in the regular course, before any petition or decree or discharge in bankruptcy.

My attention has been drawn to several cases in the courts of equity in England, bearing upon the merits of the present case. If those cases are adverse to the doctrine, which I have already stated, it is not, that they stand upon any wrong principle; but that they were decided upon general reasoning and equitable considerations, applicable to cases of administrations in England; whereas the present question must be decided upon the true meaning of the proviso in our own statute of bankruptcy, which must of course control and govern all such general reasoning and equitable considerations. But upon a careful examination of the authorities, there does not appear to me any ground to doubt, that the present doctrine in England is coincident with that, which this court maintains. The case of Martin v. Martin, 1 Ves. Sr. 211, 213, was one, where a creditor's bill was filed, and after the decree to account, the particular creditor was

restrained from proceeding at law, and very properly restrained; for the decree was equivalent to a judgment for all the creditors, and yet could not be pleaded at law to the suit of the creditor, for courts of law do not take cognizance of decrees in equity. But Lord Hardwicke there said, that a decree in equity is equal to a judgment at law, and then a preference will be given in priority of time only, as in judgments in the courts of law. This plainly admits, that if the judgment is before the decree, it overrides the decree. And, indeed, so his lordship expressly admitted, saying, that if the creditor suing at law, obtains judgment first, he must be first satisfied, as he will then gain a preference in course of administration, both in law and equity. See the general doctrine stated in Morrice v. The Bank of England, Cas. t. Talb. 217, 3 Swanst. 573. Drewry v. Thacker, 3 Swanst. 529, does not interfere with this doctrine. There, the creditor, before the decree for an administration of the assets, had obtained a judgment at law against the administrator de bonis intestatoris, et si non, de bonis propriis; and the question was, whether the court would, by injunction, stop the creditor from proceeding to execute his judgment in both respects, de bonis intestatoris, and de bonis propriis. The vice chancellor (Sir John Leach), granted the injunction; but Lord Eldon refused upon appeal to confirm it. But the point was not absolutely decided. There is a dictum of Lord Eldon in Clarke v. Earl of Ormonde, Jac. 108, 124, where he said; "Even if a creditor has got a judgment before the decree, though he may come in and prove as such, he must not take out execution." Possibly this may be true sub modo in some cases, and under some circumstances; but as Lord Langdale justly observed in Lee v. Parke, 1 Keen, 724, this is not the ordinary rule. And in the case before him, turning upon very special circumstances, he decreed an injunction. In Price v. Evans, 4 Sim. 514, the judgment was before the decree; and in Kent v. Pickering, 5 Sim. 569, although it does not appear, whether the judgment or decree was first, the court granted an injunction only to restrain the creditor from proceeding at law against the assets; but not from proceeding against the executor de bonis propriis. I should rather gather from the report, that the decree was first; and so it seems to have been understood by the learned author on injunctions. See Drew. Inj. pt. 1, pp. 115, 122, c. 4.

Upon the whole, my opinion is, that the injunction granted in this case ought to be dissolved, and I shall direct a certificate accordingly, to the district court.

COOK (BANK OF COLUMBIA v.). See Case No. 864.

Case No. 3,153.

COOK v. BEALL.

[2 Cranch, C. C. 264.] [1]

Circuit Court, District of Columbia. Oct. Term, 1821.

REINSTATEMENT OF CAUSE.

The court will, on affidavit, reinstate a cause non prossed on a rule for security for costs laid on the plaintiff, who had no attorney in court, his attorney having died, and no rule served on the plaintiff to employ new counsel.

The plaintiff's attorney died. The defendant laid a rule on the plaintiff to give security for costs, and non prossed him upon that rule, without having served a rule on the plaintiff to employ new counsel.

THE COURT, upon affidavit, reinstated the cause.

COOK (BELT v.). See Case No. 1,282.

Case No. 3,154.

COOK v. CONWAY.

[2 Cranch, C. C. 99.] [1]

Circuit Court, District of Columbia. April Term, 1814.

ASSIGNMENT OF EXPECTANCY.

An assignment of "all the assignor's estate, and effects in possession, or which may accrue or become due and owing to him," will not transfer a mere possibility of a legacy.

Daniel Muse assigned his wife's legacy, after the death of R. Conway, the testator, to Cook; but before the testator's death he had assigned to R. Edwards and S. Downing, "all his estate and effects in possession, or which may accrue or, become due and owing to him."

THE COURT (FITZHUGH, Circuit Judge, absent) was of opinion that Cook was entitled to the legacy.

COOK (EAMES v.). See Case No. 4,239.

Case No. 3,155.

COOK et al. v. ERNEST et al.

[5 Fish. Pat. Cas. 396; [2] 1 Woods, 195; 2 O. G. 89.]

Circuit Court, D. Louisiana. March, 1872.

PATENTS—"TIES FOR COTTON BALES"—UTILITY—PRESUMPTION—EXTENSION—DECISION OF COMMISSIONER—ANTICIPATION—INFRINGEMENT—INJUNCTION.

1. It is competent for a party to sue for an infringement of any one of the separate and distinct inventions that may be covered by his patent.

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

[2] [Reported by Samuel S. Fisher, Esq., and here reprinted by permission.]

2. The fact that other devices, superior to that covered by complainants' patent, taken as a whole, have been invented, and have driven the latter out of use, does not prove or tend to prove that such invention lacks utility, as the law uses that word.

3. The presumption, created by the issue of letters patent, that the patentee was the first and original inventor, is greatly strengthened by the extension of the patent, especially when the extension is resisted on the ground of want of novelty.

4. While the decision of the commissioner of patents is not entitled, upon this question to the force of res adjudicata, yet it is a determination entitled to the highest respect of the courts, and should not be reversed except upon the most satisfactory proof.

[Cited in Odell v. Stout, 22 Fed. 161.]

5. The open slot in the metallic cotton-bale tie patented to Frederic Cook, March 2, 1858, was not anticipated by an elongated open ring, such as is used for fastening parts of chains together. No use to which the latter could naturally be applied would suggest the open slot in a rectangular flat buckle for the introduction of a flat band sidewise. Said invention was not anticipated by the English patent to George Hall, No. 2561, A. D. 1801.

6. The buckle described in the English provisional specification of Pilliner, A. D. 1856, was not described in such terms that the public could construct and put it to the use designed by Cook without further invention.

7. The fact that defendant has taken out patents for other improvements relating to the same subject is no reason why he should not be enjoined from infringing upon the improvement covered by complainants' patent.

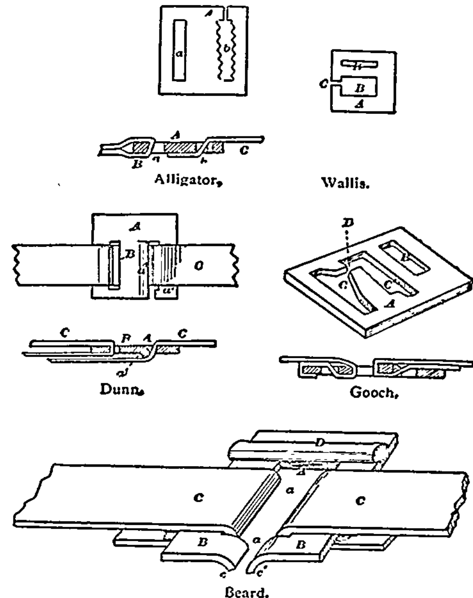
8. The writ of injunction issues on the principle of a clear and certain right to the enjoyment of the subject in question, and an injurious interruption of that right, which, on just and equitable grounds, ought to be prevented.

9. Where complainants produced their patent; proved an uninterrupted use of the invention, without infringement, for eleven years; had established their patent by an action at law, in which every defense known to the law might have been set up; and had obtained an extension of the patent in the face of vigilant and interested opposition, a preliminary injunction was granted.

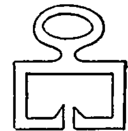
10. Property in a patent is just as much under the protection of the law as property in land. When the owner has made good his claim to his patent, and shown an infringement of it, it is the duty of the courts to give him the same relief meted out to suitors in other cases.

In equity. Motion for provisional injunction. Suit brought [by Frederic Cook and James J. McComb], upon letters patent [No. 19,490], for "improvement in metallic ties for cotton-bales," granted Frederic Cook, March 2, 1858. and extended for seven years from March 2, 1872, an equitable interest in which was conveyed to James Jennings McComb. There were six suits: One against Frederic B. Ernest and Frederic Ernest, agents for the sale of the "Gooch" tie; one against John S. Wallis, manufacturer of the "Wallis" tie; one against William Chambers, manufacturer of the "Alligator" tie; one against George Norton, M. O. H. Norton, and Arthur L. Stuart, agents for the sale of the "Dunn" tie; one against Andrew Stewart, William Stewart, Hugh Stewart, and A. D. Gwynne, agents for the sale of the "Beard" tie; and one against George Brodie, manufacturer of the "Brodie" tie, and defendant in the suit of McComb v. Brodie [Case No. 8,708]. The nature of the invention and the claims, together with engravings of the Cook and Brodie ties. will be found in the report of the latter case.

The accompanying engravings will illustrate the various ties sold by the defendants.



In the "Alligator," "Wallis," and "Dunn" ties, one end of the band was passed through the closed slot, and turned under, while the other end was first bent and then passed through the slit into the open slot. In the "Gooch" tie, the end which formed the fastening was bent and passed through the opening, D, into the slot, C′, around the bar, A, and back and over the outer bar. In the "Beard" tie, both ends were bent and passed through the opening into the slot.



The accompanying engraving represents No. 16 of the drawings of Hall's English buckle, patented in 1801; and which, it was insisted by the defendants, anticipated the invention set forth in the third claim of the Cook patent.

Randolph, Singleton & Browne, J. A. Campbell, and S. S. Fisher, for complainants.

Clark & Bayne and Lea, Finney & Miller, for defendants.

WOODS, Circuit Judge. The bill states, in substance, that complainant, Cook, prior to March 2, 1858, was the original and first inventor of a certain new and useful improvement in metallic ties for cotton-bales, and which had not been known or used before his invention, nor been in public use before his application for a patent therefor.

That on the day and year aforesaid, letters patent were issued to him for said invention by the proper department of the government of the United States, granting to him and his assigns, etc., the exclusive right of making, using, and vending to others his said invention. That on January 22, 1872, before the expiration of the original term of said letters patent, the said Cook contracted and agreed, in writing, to convey to his co-complainant, McComb, for a valuable consideration, all his right and title in said letters patent for the extended term thereof, if the same should be extended by the commissioner of patents, which agreement was duly recorded in the patent office. That on January 31, 1872, said Cook filed in the patent office a disclaimer to so much of said invention set forth in the letters patent as were embraced in the first claim of invention therein, which disclaimer was recorded according to law. That on February 17, 1872, the commissioner of patents renewed and extended said letters patent for the term of seven years from and after the expiration of the original term of fourteen years—to wit, from March 2, 1872.

That during the original term of said patent a suit was brought, on the law side of this court, by Mary Frances McComb and James Jennings McComb, the then owners of said patent, against one George Brodie, for an infringement thereof, which was tried before a jury at the November term, 1871, of this court—to wit, in March, 1872; that much testimony was introduced on both sides of said cause; the defendant denied the patentability of said invention described in the third claim, and the scope thereof, and denied infringement, and set up a claim in reconvention against the plaintiffs for the infringement of a patent issued to him on March 22, 1859, for an improved metallic band for baling cotton, and claimed that the buckle which he had made and sold was covered by his own letters patent; that the jury found the issues joined for the plaintiffs, and rejected the claim in reconvention of the defendant. That since the date of said extension the legal title to said letters patent has been vested in Cook, subject to the equitable rights of McComb, under the contract aforesaid; that the improvement specified in the third claim is of great value; that said claim has been applied by complainants to use, and introduced into the market, to the great advantage of the public.

That defendants, without consent of complainants, and in violation of their rights in said letters patent, have made, used, and vended to others to be used, and are now making, using, and vending to others, and are preparing to continue to do so, metallic ties for baling cotton, containing the invention set forth in said letters patent and claimed in the third claim of invention—that is to say, the slot described in the specification of said letters patent, cut through one bar of the clasp, which enables the end of the tie or hoop to be slipped sidewise underneath the bar in the clasp, so as to effect the fastening with greater rapidity than by passing the end of the tie through endwise, and that defendants have a large quantity of said ties, so constructed, in their possession, which they are preparing to sell, without consent of complainants, and in violation of their rights. That defendants have been requested to desist from making and vending said ties, and have been notified of complainants' exclusive rights as aforesaid; but, disregarding complainants' rights, have combined with others to make, use, and vend said ties. The bill prays for an account of profits and damages, and for injunctions, both provisional and perpetual, against defendants.

The case is now submitted to the court on the motion of complainants for a provisional injunction, after reasonable notice to defendants, who appear by counsel, and resist the motion. To sustain their motion, the complainants introduce the letters patent to Cook; the extension by the commissioner of patents; the contract of Cook with McComb, assigning to him the right of Cook in the extension; a certified copy of the examiner's report on the application of the extension of the Cook patent, and of the reasons of opposition to the extension filed by William Chambers; the testimony on said application; the affidavits of M. B. Muncy, Frederic Cook, F. B. Parkinson, James J. McComb, and William Clough; and the record in the case of McComb v. Brodie [Case No. 8,708], on the law side of this court. From this evidence, it appears that McComb has the equitable title and Cook the legal title to the extension of the letters patent originally issued to Cook.

The schedule accompanying Cook's original patent discloses that the patent was intended to cover three separate and distinct inventions: (1) A friction buckle or clasp, represented by figures 1, 2, and 3, showing the different views of it, for attaching the ends of iron ties or hoops for fastening cotton-bales and other packages. (2) The manner of looping the ends of the iron ties or hoops into a buckle, by the form of which they are prevented from slipping, by friction, when the strain of the expansion of the bale comes on the ties. (3) The slot cut through one bar of the clasp or buckle, as shown in the diagram, which enables the end of the tie or hoop to be slipped sidewise underneath the bar in the clasp or buckle, so as to effect the fastening with greater rapidity than by passing the end of the tie through endwise.

As already said, the bill complains of the infringement of the third claim only. The device covered by this claim is so clearly stated as to need no explanation. The affidavit of Cook shows that in 1857 he commenced the manufacture of ties according to his invention, which was patented to him

in March, 1858, and that up to 1861, when he sold his patent to one A. C. Sturdevant, he had made and sold a number sufficient to bale twenty thousand bales of cotton; and he exhibits with his affidavit one of the ties made, according to his invention, in 1857. The affidavit of McComb shows that, since 1856, he has been engaged in the enterprise of introducing metallic ties for baling cotton; that in 1859 his attention was called to a device said to be the invention of one Taylor, which was simply a square buckle with an open side, through which the loop-end of the band could be passed edgewise; but, on inquiry at the patent office, he learned that the open buckle was the invention of Cook, who had taken out a patent for it March 2, 1858; that he afterward invented a modification of the form of the mortise in the buckle, now generally known as the "arrow tie," and in 1861, through an intermediate assignment, his wife, Mary Frances McComb, became the owner of the device patented by Cook; and, by uniting his own with Cook's invention, produced what is known as the "arrow tie."

That in 1861 he went to England and made arrangements for shipping large quantities of bands and ties as soon as the blockade, then existing, was raised, which did not occur until 1865, when he at once commenced shipping his ties to each of the southern ports, and has continued to do so until the present time, and is prepared to supply fully the demand for iron ties in this country. That the first open infringements of the open-slot tie were in 1869, and they have increased, so that in 1870 one-third of the ties in competition with the arrow tie were open-sided, and in 1871 the entire importation was open-sided. That he has frequently and constantly notified infringers that they would be prosecuted, and has only refrained from so doing by the fear of impairing his credit in England, where litigation in reference to patent rights is much dreaded. Nevertheless, he did bring the suit of McComb v. Brodie [supra], which resulted as stated in the bill of complaint.

The affidavit of Muncy shows that the defendants are selling, in the city of New Orleans, ties with a buckle containing an open slot, one of which buckles is attached to the affidavit; and the affidavit of William Clough, an expert, is to the effect that the buckle sold by defendants employs the device described by Cook in the third claim of his letters patent. The documents filed, showing the extension of Cook's letters patent, show that, in applying for said extension, he disclaimed the first claim of invention in his original patent, and took out his extension for only his second and third claims. The certified records from the patent office also show that the extension of Cook's patent was opposed, among other grounds, because other parties, and not Cook, were the first to invent devices that rendered the use of iron bands practicable for baling cotton, and because Cook was not the first to use the slotted link for fastening metallic bands around cotton-bales.

The report of the examiner, in the application of Cook for an extension, states that, among the numerous American inventions of that class, none is found previous to that date (the date of Cook's patent) with an element of construction answering to his open slot. Attention was, however, called by him to the English patent No. 2,561, A. D. 1801, granted to George Hall, for elastic fastenings for shoes, and also bands, garters, and ornaments for the knees, etc., showing buckles provided with open slots in numerous modifications of form and construction. On consideration of this report, the commissioner of patents, as shown in the proof, extended the patent of Cook for the term of seven years, as alleged in the bill.

This is the case as presented by the complainants, and it appears to mé that it establishes the right of the complainants to the writ of injunction, unless the case is overthrown by the showing made by defendants. To resist the motion for injunction, defendants have offered a large number of affidavits. Many of these affidavits are to the effect that affiants have for a long time been engaged in the sale of metallic cotton-ties, and have never sold or seen in use a tie constructed according to the original patent of Cook. The affidavit of John S. Wallis, among other things, states that long before Cook's invention the use of open buckles, for the fastening of belts, bands, and chains, was common and public; and he illustrates his affidavit by attaching thereto what is popularly known as an open link, commonly used in trace-chains. Samuel H. Boyd testifies to the same effect; and Francis B. Fassman testifies that in April, 1871, he saw the open link, like the one described by Wallis, actually used to fasten the bands around a bale of cotton. Caleb S. Hunt also testifies that he is familiar with the use of links or buckles having slots for introducing rapidly an end-loop into the mortise, and has known of such use for forty years. The English patent to George Hall, referred to in the report of the examiner on the application of Cook for an extension, is also introduced to show want of novelty in Cook's invention. Numerous affidavits are introduced showing models and drawings of Frederick James Pilliner's provisional specification, No. 1,584 of English patents of 1856, showing a device which is claimed to be substantially the device of Cook's third claim. This device of Pilliner was intended for fastening military belts.

From this statement of the contents of the affidavits presented by defendants, it will be seen that Cook's invention is attacked on two grounds: want of utility and want of novelty. It is obvious to notice that all the affidavits intended to show want of utility

referred to the three claims of invention, covered by Cook's patent, taken together. The affiants say that they have never seen the tie, as described in these three claims, used. But, as already stated, Cook's patent covers three separate and distinct inventions. It is competent for the complainants to sue for an infringement of any one of them, and in this case they complain only of the infringement of the third claim under the patent.

These affidavits do not show or propose to show that this claim is not a useful contrivance. The testimony clearly shows that the open slot for passing the end of the iron tie through the bar of the buckle sidewise is used on nearly all the ties now sold, which is conclusive proof of the utility of that part of Cook's claim. But, taking the three devices of Cook's patent as one combined contrivance, there can be no doubt of its utility. The testimony shows that ties made according to all three claims of his letters patent, sufficient to bale twenty thousand bales of cotton, were made and sold by Cook.

All the law requires as to utility is that the invention shall not be frivolous or dangerous. It does not require any degree of utility. It does not exact that the subject of the patent shall be better than anything invented before or that shall come after. If the invention is useful at all, that suffices. Hoffheins v. Brandt [Case No. 6,575]. To warrant a patent, the invention must be useful—that is, capable of some beneficial use, in contradistinction to what is pernicious, frivolous, or worthless. "Useful," in the patent law, is in contradiction to mischievous; the invention should be of some benefit. Cox v. Griggs [Id. 3,302]. The degree of utility is not pertinent to the question of the validity of a patent. Tilghman v. Werk [Id. 14,046].

The word "useful," in section 6 of the act of 1836 [5 Stat. 119], and in section 1 of the act of 1793 [1 Stat. 318], does not prescribe general utility as the test of the sufficiency of an invention to support a patent. It is used merely in contradistinction to what is frivolous or mischievous to the public; it is sufficient if the invention have any utility. Wintermute v. Redington [Case No. 17,896]. If the defendant has used the patented improvement, or something substantially like it, he is estopped from denying its utility. Vance v. Campbell [Id. 16,837].

Tested by these rules, the defense of want of utility is clearly untenable. The entire invention covered by Cook's patent was intended for a useful purpose. It can be and has been used for that purpose. It is not frivolous or mischievous. The fact that other devices superior to Cook's original device, taken as a whole, have been invented and have driven it out of use, does not prove, nor tend to prove, that his invention lacks utility, as the law uses that word.

The next defense presented by the affidavits is the want of novelty. This is confined to the third claim of invention—namely, the open slot for passing the end of the iron tie sidewise under the bar of the buckle. The issue of letters patent is prima-facie evidence that the patentee was the first and original inventor. This prima-facie case is greatly strengthened by the extension of the letters patent, especially when, as shown in this case, the extension is resisted on the ground of want of novelty. While the decision of the commissioner of patents is not entitled upon this question to the force of res adjudicata, yet it is a determination entitled to the highest respect of the courts, and should not be reversed except upon the most satisfactory proof. The original presumptions of novelty and utility arising from the grant of a patent are strengthened by its extension. Whitney v. Mowry [Id. 17,592]. Upon an application for an extension of a patent, the law requires a very rigid scrutiny into the original claim of the patentee, as to the novelty and utility of the invention; and the extension strengthens the novelty and utility of the patent. Swift v. Whisen [Id. 13,700].

To overthrow the case made by complainants, as to the novelty of the invention described in Cook's third claim, we have, first, the affidavits of Wallis, Hunt, and Fassman, showing the long anterior use of open links, like those attached to their affidavits, for connecting chains and bands. Upon the issue of novelty, testimony will not be received to show what might have been done with previous machines. Howe v. Underwood [Case No. 6,775]. It is not enough to defeat the novelty of an invention, that prior contrivances are produced, which might, with a little change, have been made into the patented contrivance, though not so intended by the maker. Livingston v. Jones [Id. 8,413]. When a useful machine is sought to be invalidated by an old one, made years ago, the testimony should be examined with care and caution to ascertain whether the prior machine was actually and substantially the same. Hayden v. Suffolk Manuf'g Co. [Id. 6,261].

Changes in the construction and operation of an old machine, so as to adapt it to a new and valuable use, which the old machine had not, are patentable, and may consist either in a material modification of old devices, or in a new and useful combination of the several parts of the old machine. Seymour v. Osborne, 11 Wall. [78 U. S.] 516. The link presented by the affidavits of Wallis and others is an elongated open ring. It is similar to a device long used for attaching the clevis of a plow to the double-tree, and it is exactly like the open links used by farmers for lengthening trace or other chains, by fastening two parts of chains together. The pretense that the prior use of this open link shows want of novelty, in Cook's third claim, is utterly untenable. It is a device designed to accomplish no such purpose as Cook's device, and is not adapted to that end. As used for uniting chains, a closed link is in-

serted in the slot of the open link. It was not designed to be used for the insertion of a hook or loop; for that could be done in a closed as well as open link, and with more facility in the former by putting the end of the hook or loop into the link than by passing it sidewise through the opening. It can, with more plausibility, be claimed that all closed buckles for fastening the ends of the metallic cotton-ties lack novelty, because iron links have been in use ever since the invention of chains. The fact that the link shown by Wallis' affidavit is in the form of a ring, shows that it was not designed for the introduction of flat bands, like cotton-ties, and no use to which it could naturally be applied would suggest the open slot in a rectangular flat buckle for the introduction of a flat band sidewise.

The next item of evidence to establish the want of novelty is the English patent to George Hall for elastic fastenings for shoes, bands, garters, etc., No. 2,561, A. D. 1801. This patent was used before the commissioner of patents to show want of novelty in Cook's third claim, in order to defeat the extension of his patent; but the effort was not successful. An examination of a model of Hall's buckle shows that it was not intended as a fastening for metallic ties or bands, and that it is so constructed that a metallic band can not be introduced sidewise through the open slot into the buckle, the stationary tongues in the buckle preventing the passage of any metallic bar or band. This, therefore, can not be claimed as an invention embodying the same principle as Cook's. The provisional specification of Frederick James Pilliner, No. 1,584 of English patents of 1856, shows a buckle which, as represented in the drawings of the experts who have attempted to give form to the device described in the specification, approaches much nearer the invention of Cook than the open link described by Wallis, or the device patented by Hall. It is a contrivance for fastening military waist-belts. It is not shown that any patent was issued for that device, and the proof does not show that it was described in any printed publication prior to Cook's invention, which the evidence shows was as early as 1857. But I am by no means satisfied that the device of Pilliner is identical with that of Cook. The provisional specification does not describe the device covered by Cook's third claim of invention. Remotely suggestive of it, it may be; but the illustrations given by experts do not agree, nor is the buckle described in such terms that the public could construct and put it to the use designed by Cook without further invention. Opinion of McKennan, J., in McMillin v. Barclay [Case No. 8,902].

We are, therefore, brought to the conclusion that defendants have not only failed to show the want either of utility or novelty in the Cook invention, but that they have not overcome the case made by the complainants as to the validity of the patent. The question of infringement of the third claim of the Cook patent, by a device the same in principle as that of defendants, has been recently tried by a jury on the law side of this court, resulting in a verdict for the plaintiffs. An inspection of the tie of defendants shows that it is substantially identical with the device of Cook, embodying the principle of his invention.

The defendants claim that to entitle complainants to an injunction they should have an undisturbed possession, and that an injunction will not be granted if it disturbs the existing condition of things. If by undisturbed possession it is meant that the patent has never been infringed, then an injunction could never be granted in any case; for, when there is no infringement, there is no necessity for, no propriety in the allowance of an injunction. The claim of Cook under his patent has never been attacked in the courts. He and those claiming under him have had undisputed possession of their property in their patent. They have continually asserted their rights under it, and have warned and threatened infringers. Notwithstanding their warning and threats, the latter have, as the evidence shows, continued to invade the rights of the patentee and his assignees. It is now claimed that an injunction should not issue, because it would disturb the existing order of things—that is, it would put a stop to infringements, and give a protection to the property of complainants, which the defendants will not voluntarily accord. In other words, the claim is, that because the defendants have been invading the rights of claimants for one, two, or three years, they should not be enjoined, lest the existing order of things should be disturbed.

The very purpose of the bill of complaint is to disturb the existing order and to induce a new order, by which the complainants may be protected in their property and rights. If the existing order of things is a good reason for refusing a preliminary injunction, it would be a still stronger reason for refusing a perpetual injunction on the final hearing; for the order of things would then have existed for a greater period of time. The rule laid down by Mr. Justice Woodbury in Perry v. Parker [Id. 11,010], is, that if respondent denies the complainant's title, and casts a shadow over it by evidence, the grant of the injunction must be delayed till the validity of the title can be tried under a proper issue in the case, unless the complainant can strengthen his claim beyond the mere patent by showing former recoveries in favor of it, quiet possession of it for some time, or frequent sales and use of it under him. In this case, the complainants have strengthened their claim by showing that their original patent has been extended in spite of strong opposition; that they havo

recovered upon their patent at law, when all defenses to its validity might have been made if defendants had so elected; and quiet possession and frequent sales and use, and a general acquiescence in their rights from 1858 to 1869, when open infringements first appeared.

Several patents issued to the different defendants for various improvements in cotton-ties have been introduced in evidence, and the rule of law is invoked that an injunction will not issue where the defendant holds under a patent. Admitting this to be the correct rule, it has no application to this and similar cases; for none of the patents issued to the defendants cover the third claim of the Cook patent, for the infringement of which this suit is brought. The fact that these defendants have taken out patents for other improvements in cotton-ties, is no reason why they should not be enjoined from infringing upon the improvement covered by complainants' patent. As well might a defendant to a bill for the infringement of a sewing-machine patent set up against a prayer for injunction the fact that he held a patent for a reaping-machine. The writ of injunction issues on the principle of a clear and certain right to the enjoyment of the subject in question, and an injurious interruption of that right, which, on just and equitable grounds, ought to be prevented. Hil. Inj. 818.

In this case the complainants have clearly established their rights under their patent; first, by the production of the patent itself; second, by the use of the patented article for three years immediately after the date of the patent, followed by the uninterrupted use of the assignee, without infringement, for eight years more; then, by an action at law, in which the patent was sustained, in which every defense known to the law might have been set up; and, finally, on the expiration of the original term of fourteen years, by proof of the extension of the patent in the face of vigilant and interested opposition. The defendants have been warned to desist from their invasion of the plaintiffs' rights. They disregard the warning, and continue to use complainants' property without their leave and without any compensation to them. If the rights of property so invaded were rights to land or other tangible estate, no court would hesitate for a moment to restrain the wrong-doer by injunction. The property in a patent is just as much under the protection of the law as property in land. The owner has the same right to invoke the protection of the courts, and when he has made good his claim to his patent, and shown an infringement of it, it is the duty of the courts to give him the same relief meted out to suitors in other cases. The defendants have had ample notice of this motion; they have been fully heard upon it. I am convinced that the complainants have shown themselves entitled to the relief they ask, and that defendants have shown no good reason to the contrary. Injunctions will issue against all of the defendants.

[NOTE. For other cases involving this patent, see note to McComb v. Brodie, Case No. 8,708.]

Case No. 3,156.

COOK v. FENTON.

[4 Cranch, C. C. 200.][1]

Circuit Court, District of Columbia. May Term, 1832.

INSOLVENCY.

The act of congress of May 6, 1822, entitled "An act for the relief of certain insolvent debtors," is not confined to non-resident debtors.

Judgment was rendered in this case against Fenton at the last term.

Mr. Redin, for the bail, now moved to exonerate the bail of Fenton, on the ground of his discharge under the insolvent act of this district, in January, 1832.

Mr. Wallach, contra. The plaintiff was a non-resident creditor of Fenton at the time of his discharge, and the debtor was not then confined at his instance.

Mr. Redin, contended that the act of congress of the 6th of May, 1822 (Davis' Laws D. C. p. 362), applied only to non-resident debtors (3 Stat. 682).

But THE COURT said that that point had been many times discussed, and overruled by the court. The words were peremptory, "that no discharge under this act, or the act to which it is amendatory, shall operate," &c., thereby referring to every discharge which should thereafter be granted under the original act of 3d of March, 1803 (2 Stat. 237).

COOK (FORBUSH v.). See Case No. 4,931.
COOK (FRY v.). See Case No. 5,138.
COOK (GARDNER v.). See Case No. 5,226.
COOK (GIBSON v.). See Case No. 5,393.

Case No. 3,156a.

COOK v. GRAY.

[Hempst. 84.][2]

Superior Court, D. Arkansas. Nov., 1829.

RECORD ON APPEAL — PROMISSORY NOTES — DAYS OF GRACE—CONSIDERATION.

1. A note sued on is not part of the record, unless produced on oyer.

2. Days of grace are not allowed on promissory notes.

3. The case of Fisher v. Reider [Case No. 4,822a] cited and approved.

4. A note imports a consideration.

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

[2] [Reported by Samuel H. Hempstead, Esq.]

Appeal from Pulaski circuit court.

[At law. Action by Sampson Gray against John Cook on a promissory note. There was a judgment for plaintiff, and defendant appeals.]

Before JOHNSON, TRIMBLE, ESKRIDGE, and BATES, Judges.

OPINION OF THE COURT. The first assignment of error is that "the action of debt will not lie in this case." In answer to this, it will be sufficient to say that the statute gives to the assignee the same remedy that the original holder had. The second objection is, "the declaration is not sufficient." The declaration is sufficient. (3) "The whole sum is not due for which judgment was rendered." The averments in the declaration are sufficient to charge the defendant, and warrant a judgment for the debt and interest. (4) "The instrument declared on is not a promissory note, as described in the declaration; and the court erred in rendering judgment on a different instrument than the one declared on." It does not appear that the court rendered judgment on any instrument in writing other than the one set forth in the declaration. The production of it did not make it a part of the record, unless it was produced on oyer. (5) "The computation of interest was from a wrong time; three days of grace ought to be allowed." This court has before decided that the days of grace allowed on mercantile paper do not attach to promissory notes. (6) "The judgment is not sufficient, or such as the law requires in such cases." This objection is answered by the opinion in the case of Fisher v. Reider [Case No. 4,822a]. (7) "The whole proceedings are erroneous, prout patet per recordum." The whole proceedings, except the defendant's plea, are regular, prout patet per recordum." (8) "The contract is a nudum pactum, and shown to be so in the declaration, and therefore no judgment could be entered." The promissory note, as set out in the declaration, is not a nudum pactum. It is averred to be for "value received;" but even if it did not, our statute makes it unnecessary to show that a note is made on a good consideration. On its face it imports a consideration. Judgment affirmed.

Case No. 3,157.

COOK et al. v. HAMILTON COUNTY COM'RS.

[6 McLean, 112.][1]

Circuit Court, D. Ohio. Oct. Term, 1854.

CONTRACT OF COUNTY COMMISSIONERS — LEGISLATIVE SANCTION — ABROGATION — INSUFFICIENT APPROPRIATION.

1. By the act of 1851 [49 Laws Ohio, 130] the commissioners of Hamilton county were authorized to construct all such suitable buildings for the said county, upon the old court house lot, in Cincinnati, upon such plan and of such materials as to them shall seem proper, under which they made a contract to build a court house which covered the entire lot referred to. In the same contract the contractors agreed to build a jail, on such lot, within certain limits, as the legislature might authorize. Although the law contemplated all the buildings for the county should be placed on the court house lot, yet the contract for building the jail on another lot is not illegal, on the condition expressed.

[Cited in McLean v. Commissioners Hamilton Co., Case No. 8,881.]

2. It is made valid and binding by the sanction of the legislature. The contracts to build the court house and the jail, were separate and distinct, although included in the same instrument. The provision that both buildings should be erected on the same lot, is explained by a subsequent provision, that another lot should be procured for the jail.

3. To justify the party in putting an end to a contract, the contractor must in effect abandon it, or refuse to carry out the plan or act in bad faith, so as to show that he does not or cannot complete it within the time limited.

4. Where there is not in the law an express limitation to the power given to do a certain thing, an inference cannot be made or sustained, which will defeat the object of the law.

5. Where two hundred thousand dollars were appropriated to construct county buildings, which must cost three times that sum, the appropriation imposes no limitation as to expenditures.

Fox & Pugh, for plaintiffs.

Gholson & Groesbeck, for defendants.

OPINION OF THE COURT. This action was upon articles of agreement, dated 15th July, 1851, in which the plaintiffs agree with the defendants to build a court house and jail for Hamilton county, in Cincinnati, on the court house lot, according to the requisition of plans and sections thereof drawn, and specifications thereof made out, from number one to seventeen, by Josiah Rogers, architect, and which are referred to and made a part of the contract. And the plaintiffs agreed to build, in a good and workmanlike manner, agreeably to the said plan, &c. And it was agreed that the said court house building and jail, are to be erected on the old court house lot at the corner of Main and Court streets, now in use, as at present understood; but should the commissioners of Hamilton county, at the next session of the legislature, obtain permission to build the said jail in the rear of, or adjoining the said court house lot, or on any other lot in Cincinnati, east of Main street, west of Broadway, and south of Fourteenth street; then and in that case, the said party of the second part agrees to erect and build said jail in the rear of or adjoining to the said court house, or on any other lot in the above limits, at the same price and without any additional charge. The plans of the buildings are not furnished, but it is admitted that both of them cannot be put on the court house lot. The stipulated price for the court house was the sum $468,732.55, for the jail $226,520.74. Ten thousand dollars

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

were to be advanced on the contract, and the building was to be commenced immediately.

The defendants craved oyer and pleaded: 1. Non est factum. 2. That the plaintiffs did not begin the work and progress; with all reasonable speed, towards the erecting, building and finishing said court house, &c. 3. This plea merely negatives the averment of the declaration, as to the commencement and prosecution of the work; not alleging specially in what particulars the plaintiffs failed. 4. The fourth plea states, that by an act of the general assembly, January 28, 1851 [supra], it was enacted as follows: That Richard H. Cox, John Patton and David A. Black, commissioners of Hamilton county, are hereby authorized to erect all such suitable and necessary public buildings for the said county, upon the place or lot of ground now known as the old court house property, in the city of Cincinnati, upon such plan, and of such materials as to them shall seem proper. The entire act is set out in the plea, and it is averred that the court house lot is 190 feet square, and no more; and that the size of the lot was known to the plaintiffs and defendants to be not of sufficient capacity to admit of the construction of the court house and jail thereon. That at and before the contract was entered into, it was fraudulently agreed between the commissioners and plaintiffs, that only the court house should be constructed on the said lot, without reference to the location of the jail, and that plaintiffs should be secured in the profits in said agreement, for the construction of a jail in another place. when authority should be obtained. And that the agreement, &c., was contrary to the statute aforesaid and in fraud thereof. To the fourth plea a special demurrer was filed, and to the others, except the first one, demurrers were also filed.

The buildings were to be constructed under the direction of Rogers, the architect, who had power to vary the plan and dismiss the plaintiffs. The second plea is defective. It merely negatives the averment in the declaration, without stating facts which show the failure of the plaintiffs. The declaration avers that the work was commenced on the day the agreement bears date. Could an issue be made upon that fact, which would bar the action? Suppose the work was commenced on the second, third or tenth day after the date of the agreement, would such a failure constitute a bar? To bar the action on such ground, it would be essential that notice should be given to the plaintiffs before they were dismissed from the work. This notice was not given, but they went on with the work for three months or more without complaint. This is a sufficient answer to the allegation as to the commencement of the work.

But it is alleged the plaintiffs did not prosecute the work as they were bound by the contract to do. The work was to be done "with all reasonable speed, to be completed by the first of May, 1855." And the plaintiffs were dismissed for not so prosecuting the work.

To constitute a bar to the action on the ground stated, facts must be alleged in the plea which amount to an abandonment of the contract, or, at least, which show the plaintiffs were acting in bad faith, and this too, after notice given, unless the work had been in fact abandoned. It does not appear from the plea, that the superintendent of the work complained of its progress, nor that the defendants did so, until they dismissed the plaintiffs. The progress, as well as the manner of the work, was under the care of the superintendent. He was the agent of the defendants, expressly made so by the contract, and they had no power to vary the contract, in this respect, without the consent of the plaintiffs. At the time of their dismissal, the plaintiffs had more than three years within which to comply with their contract; and who could undertake to determine that the buildings might not be completed within this time? There is no complaint that the plaintiffs did not conform to the directions of the architect; and unless in this respect they had failed, or had abandoned the contract, or had by their misconduct shown bad faith, and a determination not to perform it, the defendants had no power to put an end to it. And if either of these causes existed, it was essential to state the fact in the plea. But the plea contains no such averment, and in the absence of it there can be no justification or excuse for the acts of the defendants, in the dismissal of the plaintiffs from their work. The acts of the defendants, therefore, must be considered as arbitrary and inexcusable. The demurrer to this plea is sustained.

The fourth plea was the one chiefly relied on in the argument. It was contended, first, that the contract was an impracticable one, as the court house and jail could not be placed upon the court house lot, as the court house covered the entire lot; and, second, that the commissioners had no power to build the jail on any other lot. It is admitted that the new buildings, as planned, covered the entire court house lot. The act of 1851, does not specify the court house and jail as the buildings to be erected on the court house lot, but "all such suitable and necessary public buildings for the county." The plan of the buildings was left to the discretion of the commissioners; and the one they adopted would accommodate all the officers of the county, clerks of the different courts, commissioners, etc., and the different courts. This was certainly a judicious plan, as it carried out the intent of the law, as far as practicable on the space of ground allotted for the county buildings. It was found that it was impracticable to construct, on the same ground, the jail. The contiguity of the courts and the county officers, promoted the public convenience, and facilitated the dispatch of the public business. And in this respect, it was immaterial whether the jail was

on the court house lot or adjacent to it. It is, therefore, clear that the commissioners acted wisely, in adopting the plan for the court house. There is admitted to be some inconsistency in contracting to build the court house and jail on the same ground which was covered by the court house; but the agreement in relation to the structure of the jail is consistent in the latter part of the article, which refers to the procurement of a lot for it, within certain prescribed limits. This gives consistency to the entire agreement. The plans for the court house and jail were distinct, and the price for each was specified in the contract. There was no confusion or uncertainty in the contract. It is, therefore, not an impracticable contract. Whether it be a legal one will be considered. The ground in the argument assumed is, that the contract is void, on the ground that it is impossible. Now, it may be admitted, that in cases where an individual engaged to do an impracticable or impossible thing, the contract is void and cannot be enforced. But to make out this position, the counsel consider the act of 1851 as a part of the agreement; and that both buildings must occupy the same space. As before remarked, the law does not say what kind of buildings, as court house and jail, but "suitable buildings for the county." That every part of the court house contains suitable and necessary buildings for the county, will not be controverted. And as all the suitable buildings for the county could not be constructed on the lot designated, it is not conceived why the jail should not have been constructed on some other lot. It is more conveniently separated from the court house than any other of the county buildings could be. That the jail was intended to be included in the law of 1851, as a suitable and necessary county building, is admitted; still, as all such buildings could not be built on the lot, the commissioners exercised a proper discretion in building the court house on it. It does not come within the class of contracts referred to. The contract may be executed, if it be legal, and, therefore, is not an impossible contract. But is it a legal contract? I think it is. The part which relates to the jail is not an absolute agreement. The jail is to be built according to the plans referred to, and for the price stipulated, if the legislature shall sanction it. This proposes to do nothing against the law or its policy. It is valid, on condition that the legislature shall legalize it. So far, then, from this agreement being against law, it expressly provides that the law-making power shall sanction it. And when this is done, the proceeding is as legal as if the law had authorized the contract.

A case similar in principle to this came before the circuit court in Columbus, P. & I. R. Co. v. Indianapolis & B. R. Co. [Case No. 3,047]. The Ohio Company entered into a contract to have the gauge of their road the same as that of the Indiana road, which would be in violation of the act of Ohio, that required the gauge of all railroads to be of a different width. The court say, "An objection is made to the legality of the contract to build the Ohio part of the road, as the gauge is in violation of the Ohio statute." "To this it is answered, in argument, that the defendants cannot take advantage of the objection, as it is a matter which rests between the state and the complainants, and that the state only can raise this objection." I am not prepared to say that any party who is called upon specifically to execute a contract, may not set up the illegality of that contract as being against an express statute. But the answer to the objection is, "that although the contract was made, it was made with reference to a future execution of its conditions, when the modification of the law of Ohio should be obtained, which removed the objection. And, in fact, it appears that the construction of the rōad, by laying down the rails, was not commenced until long after the passage of the amended act by the legislature of Ohio. The law, therefore, was not violated under the contract, nor was it intended to be violated."

The plea in bar is defective, and consequently the demurrer to it is sustained.

But there is a fifth plea, on which one of the counsel in defense principally relies. It is as follows: "That at the time of making the contract it was agreed that the commissioners should, under the provisions of the above act, sell and negotiate bonds to a large amount, to wit, the sum of two hundred thousand dollars, to make the payments under the agreements. That no other means existed or could be legally used in payment. And defendants aver the agreement was entered into without any reference to said bonds, with intent and purpose as a shift and device to violate and defeat the said act, and evade the restrictions thereof, whereby the agreement is void in law." To this plea a special demurrer was filed, assigning causes of demurrer: 1. That the plea is double and argumentative. 2. That in effect it is the general issue. 3. That it is not capable of being traversed or tried. The statements in the plea are not very explicit, but its object seems to be, to allege that the agreement is void, because the limitation of the act of 1851 was disregarded. There is no express limitation in this regard, nor can one be implied, unless it be that two hundred thousand dollars only were appropriated.

In all public works, either by the federal or state governments, it is not usual to appropriate, when the work will require several years for its completion, more than a small part of the necessary expenditure. Any other course, especially where the money must be borrowed, would be a wasteful expenditure. By the act, the commissioners were authorized to "erect all such suitable and necessary public buildings for the said county, etc., of such materials and upon such

plan, as to them shall seem proper." From this provision it is clear that the buildings were to be constructed under the discretion of the commissioners, which is inconsistent with the supposition that they were to be limited in their expenditure to two hundred thousand dollars. Every practical man must see that the buildings required to be constructed would cost more than three times that sum. In the absence of any express limitation, so unreasonable an inference as would defeat the object of the law, cannot be made nor sustained. It is insisted that a limitation necessarily arises from the limited powers of the commissioners, to impose a tax on the people of the county to meet the expenditure incurred by them. These limitations operate on ordinary expenditures, and a tax must be imposed by the commissioners to meet the expenditures. But the question of the legality of the contract raised in this case, is to be considered under the act of 1851, which authorized the contract; and it would seem from its provisions, the commissioners, in making this contract, did not exceed their powers. The act is under the special law, and not under any general provisions in the statutes, regulating the general duties of the commissioners. The demurrer to this plea is, therefore, sustained.

After the judgment of the court was given, it was agreed by the counsel on both sides, that they would go to a trial of this case on the general issue, and that this last point should be considered as open for examination under the general issue.

[NOTE. On the trial the plaintiffs secured a judgment for $45,000. Case No. 3,158.]

Case No. 3,158.

COOK et al. v. HAMILTON COUNTY COM'RS.

[6 McLean, 612.][1]

Circuit Court, D. Ohio. Oct. Term, 1855.

CONTRACT OF COUNTY COMMISSIONERS—REMEDIES FOR BREACH.

1. Where the commissioners of Hamilton county were authorized by an act of the legislature, to construct the necessary county buildings on the old court house lot, and such lot was large enough for a court house only; the commissioners made a contract to build the court house on such lot, and the jail on some other lot, with the sanction of the legislature. These contracts were valid, as to the court house and also as to the jail, on the happening of the condition expressed.

[Cited in McLean v. Commissioners Hamilton Co., Case No. 8,881.]

2. By constructing the court house on the old court house lot, they acted wisely, as accommodation was thereby afforded to more of the officers of the county, than any other plan could have given.

3. The commissioners dismissed the contractors in about four months, after they commenced the work, without cause. This subjected the commissioners to an action for damages, for the work done and the materials furnished, also for the profits of the work had it been completed under the contract.

4. In such case, the cost of materials and of labor will be estimated as of the time the contract was broken up. The wrong doers cannot complain of this rule, as they put an end to the contract wrongfully and voluntarily.

5. The act of 1851 [49 Laws Ohio, 130] authorized the commissioners to make the contract which was made.

6. The expense of the buildings was left to the discretion of the commissioners, as they were to construct all the necessary county buildings, on such plans and of such materials as they might determine.

7. As the buildings were necessarily to be large and substantial, it may be presumed that they should be also ornamental. A fair contract being made, the decision of the people by a popular vote, affords no justification for an abrogation of the contract by the commissioners. The result shows, that under the pretence of reform, the people are subjected to imposition and increased expense.

[The plaintiffs demurred to pleas interposed by defendants, and the demurrers were sustained, except that the question of the validity of the contract under the act of 1851 was left undecided, and by agreement the parties went to trial on the general issue, leaving the undecided point open for consideration thereon. Case No. 3,157.]

Fox, Stanbery & Pugh, for plaintiffs.

Caldwell, Groesbeck & Tilden, for defendants.

OPINION OF THE COURT. This action is brought on a contract between the parties, for the building of a court house and jail by the plaintiffs, for Hamilton county. The contract was dated the 15th of July, 1851, by which the plaintiffs agreed to build the court house and jail on the old court house lot, in Cincinnati. The jail to be built on another lot, should the consent of the legislature be obtained. The building was to be constructed according to the requisitions of plans and sections thereon, drawn by J. Rogers, architect, which plans, sections and specifications, are referred to and made a part of the contract. These plans were numbered from one to seventeen. The work to be done under the direction and superintendence of the architect. For the construction of the court house, the defendants agreed to pay the sum of four hundred sixty-eight thousand, seven hundred thirty-two dollars and fifty-five cents. And for the building of the jail, the sum of two hundred twenty-six thousand, five hundred twenty dollars and seventy-four cents. It was stipulated that the buildings should be commenced immediately, and prosecuted with all reasonable speed, and that they should be completed and ready for use, by the 1st of May, 1855. On the 4th of November, 1851, less than four months after the work was commenced, the contractors

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

were dismissed by the defendants, no special cause for the dismissal being assigned, and this action is brought to recover damages against the defendants for breaking up the contract. The defendants pleaded several special pleas, to which the plaintiffs demurred, and which demurrers were sustained by the court. 6 McLean, 112 [Cook v. Hamilton Co., Case No. 3,157]. It was, however, agreed by the parties, that the case should be tried on its merits, on the general issue, each party having the right to give in evidence any matter which might be pleaded.

On the evidence being offered to the jury, a question was raised at what time the price of the materials should be proved, necessary to complete the work, and also the price of labor. The court held that the proof must be limited to the time the plaintiffs were discharged from the work. Whether the materials and labor were higher or lower after this period could not be shown, as affecting the merits of the case. The rights of the parties became fixed, on the wrongful dismissal of the plaintiffs, by the defendants. No other rule is practicable or certain; and the defendants cannot be heard to complain of hardship, as their own voluntary action fixed the rule of their liability. By the contract, the architect, Rogers, not only superintended the work, but he had power to dismiss the contractors. So far from being dissatisfied with the progress of the work, he states that there was no ground of complaint against them. In laying the foundation, for some defect in a part of the work, he directed it to be taken up and the defects remedied. He says, the work, so far as the plaintiffs were permitted to progress with it, was well and substantially done, and that they would have completed it, as he thinks, within the contract. Whatever pretences were set up by the defendants, in regard to the progress of the work, there was no ground connected with its progress, or the manner in which it was executed, which authorized the defendants to dismiss the contractors. Nor was there any reason for such a step, connected with the interest of the public. It is argued that the people decided against the contract, as extravagant and injurious to the public. That contracts should be submitted to a popular vote, after they have been solemnly entered into, or notice given, as the law required, is a new principle of constitutional law. It certainly affords no justification for breaking up the contract. The people, when left to their own unbiased judgment, will generally, if not always, decide matters submitted to them judiciously, but, under an excited canvass, the result depends upon the means used. A fit illustration of this is found in the case before us. The contract, it is said, was annulled, in obedience to the decision of the people of Hamilton county; and the consequence is, that the extravagant compensation complained of, will, probably, be increased about one hundred per cent., and the buildings, when completed, will be inferior in every respect, to the first plan.

When the sacredness of contracts, fairly entered into, shall be disregarded, under any pretence, there will be an end of all confidence and protection of persons or property. And where a contract is broken up without cause, it places the injured party on the same ground, in regard to an action for damages, as if he had performed the contract. The responsibility is thrown upon the wrongdoer, and if he be a public agent, the public must suffer. Our government is founded upon the theory, that the people will protect their own interests, by electing to places of trusts, honest and capable men. The plaintiffs are entitled to compensation for the work done and the materials procured, at the time they were discharged from the contract. And they are entitled to damages which shall cover the profits on the work had it been completed. These are ascertained by estimating the cost of the materials under the contract, and the expense of construction. It appears the plaintiffs purchased a steam engine and derrick, which were necessary in placing the heavy materials in the building; but as these were retained by the plaintiffs, they cannot be charged against the defendants. For the work done by the plaintiffs and the materials procured, the amount can be ascertained from the evidence. In regard to the materials to complete the building, a question is made and argued, whether they shall be estimated, as the best that can be procured. The court house is designed to be a structure of large dimensions, and it was intended to be substantial and ornamental. The plans of the architect were to govern the contractors, and the jury, in assessing damages, will also be governed by them. And the materials to be used should be estimated as the best for the purpose intended. The price of the work will not be estimated by the old plan, of carrying the brick and mortar in the hod, but by the use of machinery to elevate, not only the brick and mortar, but the heavy materials required, by the contract to be put into the building. By this mode the labor of many hands, formerly required is dispensed with, which lessens the cost of construction.

The contract is alleged to be void, because it is impossible to perform it. The impossibility is supposed to arise from the requirement that the court house and jail shall be constructed on the same ground. The contract in regard to the jail is as follows: "It is further agreed that said court house and jail are to be erected on the old court house lot, corner of Main and Court streets, now in use, as at present understood; but should the commissioners of Hamilton county, at the next session of the legislature, obtain permission to build the said jail in the rear or adjoining the said court house lot, or on any

other lot in Cincinnati, east of Main street and west of Broadway, and south of Fourteenth street, then and in that case the said party of the second part agrees to erect and build said jail in the rear of or adjoining to said court house, or on any other lot in the above limits, without any additional charge." An act was passed the 20th April, 1852 [50 Local Laws Ohio, 4], which declared, "that the county commissioners of Hamilton county are hereby authorised and empowered, in the erection of public buildings, as heretofore by any law provided for, to proceed with the erection of the same, either by contract or otherwise, as in their opinion the public interest may require." This does not meet the above condition, nor was it intended for that purpose. It is supposed to have been intended to carry out the reform required by the vote of the people, by enabling the agents of their choice to construct the buildings under their own superintendence, without inviting bids, by public notice, for the performance of the work. Another act was passed the 14th of March, 1853 [51 Laws Ohio, 541], which is entitled an act to provide for the purchase of property and the erection of a work house in Hamilton county. And the act carries out the intention expressed in the title. Not a word is said in it about the building of a jail. Neither this act nor the one above cited, authorized the construction of a jail, within the contract, on which this action is founded. The action is not brought to recover damages, on the special ground, that the commissioners made no effort to procure the passage of a law authorizing the jail to be constructed on any other lot within the limits specified. The contract was not for the construction of a court house and jail on the same ground. Seeing that the court house covered the entire lot, provision was made to build the jail on some other lot, should the legislature authorize the same. This is not a contract against law, as upon its face it is to be binding only, on the condition that the law-making power shall sanction it. Such a contract is legal and binding on the parties, on the condition stated. Without the legislative sanction, the contract, in regard to the jail is not binding, and as no action of the legislature has been had as contemplated by the contract, the plaintiffs cannot recover damages, under the contract to build the jail.

But it is insisted that the commissioners had no authority to make the contract. The principle is admitted, that the powers of the commissioners are limited by the laws. The act of 1851 [supra], is entitled, "An act to authorize the commissioners of Hamilton county, to erect public buildings." The 4th section provides, "That Richard K. Cox, John Patten, and David A. Black, commissioners of Hamilton county, and their successors in office, be and they are hereby authorized and empowered, to erect all such suitable and necessary buildings for the said county, upon the same place or lot of ground which is now known as the old court house property, in the city of Cincinnati, upon such plan and of such materials as to them shall be deemed proper." This power is ample. The plan and materials are to be determined by the commissioners. The 4th section declares, "That the commissioners and their successors shall have power to appoint a superintendent of such buildings, &c., and shall make such necessary arrangements and contracts for the work and materials to be furnished for said public buildings, and require the faithful performance of all contracts in relation to the same." Proposals for the work were required to be invited and notice given. The powers conferred on the commissioners were full and complete, and required no prior law to be consulted. The 9th section declared, "if there be any thing, in any prior act, inconsistent with these provisions, it is repealed." A subsequent section authorizes the commissioners to borrow two hundred thousand dollars, and to provide the means of paying it, by a tax on property within the county. This power to tax is in addition to the power of taxation in any general act. The second section in the act of 1848 [46 Laws Ohio, 266] declares the commissioners shall not incur any expenditure exceeding fifty dollars, without public notice, &c. And the third section provides, "That the commissioners shall not enter into any contract to build any poor house, or any other public building, which requires an expenditure of more than five thousand dollars, without first submitting, as to the policy of such outlay, to the qualified voters of the county at the annual spring or fall election, by giving public notice, &c. And all contracts in violation of this section shall be void, as against the county." The 4th section authorizes the commissioners to lay a tax on the county levies, sufficient to pay the outstanding debts of the county, existing at the time such tax is laid. And the 5th section authorizes the commissioners to lay a tax, &c., and in the close of this section the following provision is made: "And said commissioners are by law authorized to levy taxes to pay all and every item within each current year, for which said commissioners are by law authorized to levy taxes, provided that such law is not to apply to loans made."

It is argued that the above contract is void, because it is contrary to public policy. It is not contrary to, but promotive of, the provisions of the act of 1851, except as to the place where the jail is to be built; and before the contract was to take effect a modification of the law, in this respect, was to be procured. The contract rests upon the act of 1851, and upon no prior statute. For the ordinary business of the county the general statutes, regulating the powers and duties of the commissioners, were sufficient. But county buildings being contemplated, new powers were necessarily conferred on the commissioners, not only to make contracts

and borrow money, but also to impose a tax annually which should meet current expenditures. This was done by the above act. The act did not specify a court house and jail, but authorized the commissioners to erect "all such suitable and necessary buildings for the said county, upon the old court house lot, &c. Finding that the lot afforded space enough for a court house only, the commissioners wisely determined to build the court house on the lot specified; and to ask the authority of the legislature to construct the jail on another lot. By doing this they made a larger and better provision for the county officers, and the courts, than any other plan could have given. Almost all the county offices, numerous as they are, will be accommodated in this building, to the great convenience of the officers and of those who have business with them.

The contract is alleged to be void because the expenditure incurred by it, greatly exceeded the sum which the commissioners were authorized to borrow. The commissioners must have known, and every intelligent man in the county, that the county buildings for this great city and densely populated county, could not be built for two hundred thousand dollars. And looking at the act, it is clear that a large expenditure was anticipated, as new powers were given to the commissioners to tax so as to meet the annual expenditures. Where a public contract is of such magnitude as to require five years for its completion, no wise government will appropriate at once an amount of money, which shall meet the entire expenditure.

Having noticed the principal objections made to the validity of the contract, I will make a few remarks on the testimony. A great number of witnesses, gentlemen of the jury, have been sworn, as measurers of the work and as experts; and as usual in such cases, many of them differ widely in their estimates. It is proper that I should say, that the engineer, Mr. Rogers, was employed by the commissioners to make an estimate of the work and superintend the construction of the building. He made a plan of the entire building, called the "working plan," and from which his estimates were made for the commissioners, before a contract was made with the plaintiffs. When this work was done he could have had no motive, but to sustain his professional character for accuracy and taste. Mr. Rogers also drew a general plan of the building, showing its outlines and general appearance. From the proportions thus delineated, the experts called by the defendants made their estimates. The first item of limestone in the walls of the building, McLaughlin & Baily estimate the cost at thirteen thousand dollars, while Rogers estimates it at seventeen thousand, eight hundred and twenty dollars. The latter sum being stated by the plaintiff's witness, and being higher in amount than defendants' witnesses, it would seem to be entitled to greater weight, as Rogers had the best opportunity of making an accurate estimate. The same remark applies to the brick work, which is estimated by Rogers at th rty-four thousand, nine hundred and seventy-five dollars, while the sum stated by Johnson and Morris was about twenty thousand dollars. The sheet iron roofing, Mr. Rogers sets down at eleven thousand, nine hundred and eighty-three dollars, which is not objected to by defendants. The same may be said of the plastering, which Rogers states at seven thousand and twenty-four dollars. The carpenter's work is estimated by Byefield at twenty-three thousand, three hundred and seventy-six dollars, whilst Rogers puts the cost at eighteen thousand, six hundred and twenty-nine dollars. You must decide between these estimates, by taking the one or the other, or by making an average, as you may think the evidence requires. The bill for plumbing is set down by Rogers, at three thousand dollars, whilst Gibson and Borrowly estimate it at more than three times that amount. Mr. Rogers does not profess to be acquainted with that work, and admits that his opinion respecting it is not to be relied on. Rogers estimates the painting and glazing at eight thousand four hundred and forty-seven dollars, whilst Hasbaugh, a professed painter and glazier, estimates the cost at ten thousand six hundred and eighteen dollars. The heating apparatus is estimated by Byefield, at thirteen thousand nine hundred and forty-seven dollars; whilst Rogers puts down the sum of six thousand dollars. Rogers estimates the cut stone at two hundred and eight thousand three hundred and sixteen dollars, and this is taken by both parties. The iron is estimated by the same witness, at one hundred and twenty-three thousand dollars. Mr. Rogers says that the prices at which he made the estimate would have given to the plaintiffs, on both buildings, a profit of fifty thousand dollars. No estimates have been proved in regard to the jail, as the contract for that building was not sanctioned by the legislature, consequently it cannot be considered as a valid contract. You will compare, gentlemen, the estimated cost of the building, with the contract price, and taking into view the profit on the court house, as may appear to be just, and from the sum thus made up, you will deduct the amount received by plaintiffs, after deducting from such amount the value of the materials furnished by the plaintiffs, and the work done by them on the foundation.

The jury found for the plaintiffs and assessed damages in their favor, amounting to the sum of forty-five thousand dollars. Judgment.

Case No. 3,159.

COOK v. HAMMOND.

[4 Mason, 467.][1]

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

DESCENT OF REVERSIONS AND REMAINDERS.

1. By the Massachusetts statutes of descent, reversions and remainders after life estates vested by descent in the intestate, pass to his heirs, without any regard to the ancestor from whom he inherited, in the same manner as estates in possession.

[Cited in Stoddard v. Gibbs, Case No. 13,-468.]

2. The common law in such case is different, and gives the estate in reversion to the heir of the first purchaser or reversioner, who is heir at the time when the life estate expires.

3. Under the act of 1783, c. 36 [1 Laws Mass. 105], the eldest son took a double portion in remainders and reversions as well as in estates in possession.

This was a writ of entry. The parties agreed upon a statement of facts as follows: "The above action is brought by the plaintiff [Horatio G. Cook] to recover possession of certain undivided portions of the lands and tenements described in the writs against the defendant [Samuel Hammond], who claims to hold possession under Eli Leavitt and Jane his wife in her right, who dispute the plaintiff's title; and the following are the facts agreed upon between the parties: In the year 1770 Royal Tyler died seised in fee of the demanded premises, leaving three children, viz. John S. Tyler, Royal Tyler, and Jane Tyler. The eldest son relinquished his right to a double share according to the existing law; and the three became seised in fee as tenants in common, each of one undivided third part. Jane afterwards intermarried with David Cook, by whom she had two children, viz. the plaintiff, and Mary Tyler Cook, his sister. Jane Cook died in 1786, so seised of such third part, leaving those two children and her husband, whereby he became seised as tenant by the curtesy. Mary, the daughter, died during his life, in 1809. David Cook, after 1786, married a second wife, by whom he had three children, viz. Charles, Jane, wife of the said Leavitt, and Royal. David Cook died in 1823, he or his assigns continuing until that time in possession under his title, as tenant by the curtesy. It is considered immaterial, for the purpose of the present inquiry, whether Mary Cook, the sister of the plaintiff, left issue capable of inheriting. It being agreed, that she shall be considered as having died without any; leaving any question, that could arise, if there be such, to be settled between them and the plaintiff or defendant, as there may be occasion. Upon this statement two questions are presented to the court: (1) Whether the demanded premises, of which Jane Tyler died seised, belong exclusively to the plaintiff, or to him and the defendant, according to their respective proportions, as tenants in common. (2) And if to them, as tenants in common, then, whether the plaintiff is entitled to a double share of his mother's estate; or whether he is only entitled to one moiety by inheritance from her, and saving any further right to the inheritance of his sister or father."

C. G. Loring for plaintiff.

The plaintiff is the sole owner of the demanded premises, being at the time of descent cast, viz. at the death of the tenant by the curtesy, the only surviving legal heir of Jane Tyler Cook, the last owner actually seised; Mary Cook having died before the tenant by the curtesy, and therefore never having been so seised of an estate in the premises, as to become a new stock of inheritance, whereby any portion passed to her father at her decease, and through him to the defendant.

It is an unyielding maxim of the common law, that a demandant of real estate must prove himself heir of the owner last actually seised; a mere legal seisin not being sufficient to constitute a stock of inheritance. 1 Inst. 14, 15, 241b, § 394; Watk. Desc. 65–67, 110, 112; 3 Cruise, Dig. 461–465. And this maxim operates so effectually as, in some cases, to counteract another favorite principle of the common law, viz. That the half blood cannot inherit. 1 Inst. 146; Watk. Desc. 67, 112, notes; 3 Cruise, Dig. 465. The doctrine that a tenancy for life suspends the descent during its continuance is recognized in New York. Jackson v. Hendricks, 3 Johns. Cas. 214; Bates v. Shraeder, 13 Johns. 260. This, then, was the common law, originally brought by our ancestors to this country (see Whitney v. Whitney, 14 Mass. 88); and the plaintiff is thereby entitled to the whole estate, unless it has been altered by statutory enactment, or universal consent or usage, coeval with the existence of our civil community, so as to constitute a part of the common law peculiar to ourselves, "that a reversion is descendible through an intermediate ancestor, during the continuance of the particular estate." If such a change had taken place, by usage or universal consent, it is inconceivable that it should not have been expressly recognized in our books of reports, and been generally known to the profession; yet no case can be found, in which it is acknowledged; and that the profession are not generally aware of it, is apparent from the circumstance, that this maxim, "seisina facit stipitem," is recognized in the earliest publication in this state upon land titles, and is laid down unqualifiedly in a recent treatise, by one of the most learned lawyers in the commonwealth, as a leading principle of the law of descents. Sull. Land Tit. 153; Stearns, Real Actions, 29, 30, 32–34. The same doctrine is necessarily to be inferred from the case of Whit-

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

ney v. Whitney, above cited. And although it was there adjudged that the common law has been so far altered by statute, that a reversion is liable for the debts of a mesne reversioner, who dies during the continuance of the particular estate, that decision is in perfect accordance with the common law of England, reference being had to the distinctions there prevailing between debts by specialty and those by simple contract. For in England, if the mesne reversioner had bound himself by a bond, or suffered a judgment, for satisfaction of which his real estate could be taken, such a reversion would be assets in the hands of the heir; the giving such bond, or suffering such judgment, being considered equivalent to an entry and actual seisin; and here, therefore, where all debts, whether by specialty or simple contract, are of equal worth, and the real estate is equally liable to be taken for all, it is but reasonable to infer, that the legislature, in declaring that "all the real estate of the deceased should be liable for his debts," meant to include all that by the common law was considered as his, for that purpose.

The common law doctrine of descents, therefore, remains the same here as in England, unless it has been altered by statute. Has it then been so altered? The colony law of 1641 provided, that "the county court should divide and assign to the children or other heirs their several portions out of the estate." Mass. Anc. Chart. & Laws, 205. The act of 4 W. & M. 1692, provided, "that every person lawfully seised of any lands, tenements, or hereditaments in his own proper right, in fee simple, shall have power to devise the same;" and if he died intestate, the judge of probate was to distribute the real and personal estates. Mass. Anc. Chart. & Laws, 230. The first enactment of this commonwealth upon the subject was by the act of 1783, c. 36 [supra], which reads thus: "When any person shall die seised of lands, tenements, or hereditaments, not by him devised, the same shall descend, &c.; and when there are no children of the intestate, the inheritance shall descend to the next of kin." It cannot reasonably be assumed, that any of the terms used in these statutes can be considered as intended to subvert a previously well settled rule of the common law. Lands, tenements, and hereditaments were all descendible before they were enacted; and the only purposes of these statutes were to regulate the course of their descent, and not to make estates inheritable, which previously were not so. Had such been the intention of the lawgivers, specific mention would have been made of the estates which were thus to be invested with a quality so new and important, or terms necessarily comprehending them would have been used. A reversion does not, strictly speaking, fall within either denomination of estates mentioned. It is not lands nor tenements, but a prospective right to them; nor is it a hereditament, for that is a right to something issuing out of them, as rent, &c. It is worthy of remark, too, that the word inheritance, does not include a reversion, according to its common law signification; the descent being suspended during the continuance of the particular estate, so that if the mesne reversioner die before its termination, his heir does not take it by inheritance from him, and it is not therefore an inheritance to descend to his next of kin. If, therefore, so great a change in this important branch of the law had been intended, it certainly would not have been thus left to doubtful construction.

The language of the New York statute of descents is precisely similar to that of our own above cited; but in the cases above referred to, it was held, that their statute had not altered the common law in this particular. If these views are correct, the only remaining inquiry on this point is, whether the statute of 1805, c. 90 [2 Laws Mass. 146], has made the alteration contended for. It enacts, that "when any person shall die seised of any lands, tenements, or hereditaments, or of any right thereto, or entitled to any interest therein, in fee simple or for the life of another, not having lawfully devised the same, the same shall descend in equal shares to his children, and to the lawful issue of any deceased child by right of representation; and when the intestate shall leave no issue, the same shall descend to his father." If these terms had been used in the first statute of descents, framed by a community in which no previously established rules had existed, there could be, perhaps, but very little doubt, that they were intended to comprise all the various estates known in the law, and to give to all a descendible nature. But when it is remembered, that certain well known fixed rules of law, deciding what were, and what were not, descendible estates, had existed from the creation of the community up to the time of that statute, unchanged and undisputed; and that the statute was enacted, not for the purpose of determining the descendible characters of various estates, but merely to designate with greater certainty to whom they should go (see Sheffield v. Lovering, 12 Mass. 490), it may fairly be presumed, that if any radical change were intended, like that contended for by the defendants, the precise estates, whose natures were to be thus altered, would have been named, and the words "reversions" and "remainders" would have been specifically used. Nor is it credible, that if such a change were then for the first time made, that there should not have been a perfect understanding to that effect, on the part of those concerned in the administration and exposition of the laws; whereas, since the enactment of that statute, Professor Stearns, as above cited, lays down the old common law principle as being still in full force as

the law of the land; and the supreme court of the state, in the case of Whitney v. Whitney, above cited, both in language and by the nature of the decision, recognise it as such.

The whole question in that case was, whether a reversion was assets in the hands of the administrator of the mesne reversioner, who had died during the continuance of the particular estate. Now, if the statute, last mentioned, had made a reversion descendible to his heir, what question could there be of its being assets in the hands of his administrator. It would, in such case, have been his real estate, to all intents and purposes, as much as any other; and must, of course, have been administered upon as such. The only ground of contention must have been, that the inheritance was suspended, so that at his decease nothing passed to his legal representatives upon which they could administer, or for which they could be accountable as assets. If, then, it had been considered as the common law of the state, or if the statutes above quoted had been construed as establishing it as the law, that a reversion descended from the mesne reversioner, no such question could have arisen; it would have been a minor proposition so evidently contained in the major one of the descent, as to be entirely unworthy of discussion. The elaborate opinion, therefore, given in that case, to prove that a reversion is assets in the hands of an administrator of the mesne reversioner, shows that the supreme court of the commonwealth disavows the construction of the statutes contended for by the defendants. Or at least it can hardly be imagined that the court, in giving an opinion embracing the general history of the common law upon this subject, should have simply stated the alteration inferred from the clauses in the statutes providing for the payment of debts, and not have alluded to the still greater change of the rule of descents, when such change, if it had been made, would have been a conclusive argument in favor of the decision there given.

Upon these views, the plaintiff relies for judgment in his favor, as being entitled to the whole of the demanded premises. Should it, however, be otherwise adjudged, it will become necessary to consider the second question proposed, viz. whether the plaintiff is entitled to a double portion, or takes equally with the defendant. If the first question be decided in favor of the defendant, I am at a loss to conceive of any doubt upon this point. For by the statute of 1783, above cited, it was enacted, that the eldest son should inherit a double portion of the real estate of his intestate parent, which provision was not repealed until the year 1789; consequently, as Jane Tyler Cook died in 1786, leaving the plaintiff and Mary Cook her only issue, the reversion of her real estates, if descendible during the continuance of the particular estate, vested immediately according to the rule in the statute of 1783, and two third parts became instantly and permanently vested in the plaintiff, and the remaining third part in his sister; the rule of descents, existing at the time of descent cast, determining the right of inheritance. Jackson v. Hendricks, 3 Johns. Cas. 214. The only ground, therefore, upon which the defendant could claim to be entitled equally with the plaintiff, must be by maintaining the common law rule as unaltered, and assuming to be, at the time of the descent cast (viz. at the death of the tenant by the curtesy), the legal heir, jointly with the plaintiff, of Jane Tyler Cook, claiming through their father and his daughter, Mary Cook, by virtue of the provision in the statute making him heir of her real estate, and thus giving to that provision the effect of constituting him a representative of his child in such manner, as to make him a legal heir of the mother; a construction which, it is presumed, neither the language nor policy of the statute will, in any degree, authorize.

C. S. Daveis, for defendant, conceded the main point contended for by the counsel for the demandant, viz. that curtesy suspends descent, to be well settled as law in the time of Lord Coke, who says, that the whole common law was so clear, that he knew but two points doubted in all his time. A contrary position, however, had prevailed under preceding reigns; and was holden by the whole court in the time of Henry VII., as appears by the context to Littleton (section 394). In New York the English doctrine has obtained, in consequence of the adoption of the common law of descent prior to the Revolution; and the subsequent statute of descents establishing the rules of the common law in all cases not expressly provided. But it has not been recognized in Massachusetts; and the principle does not belong to her jurisprudence. A better doctrine has dawned in the decisions that have taken place, more consonant to the character of the early law of England, and supported by several of the principles and analogies of the common law itself.

By the operation of the common law as a general rule, the descent of the reversion is suspended, in some measure, during the continuance of the particular estate. Yet the reversioner may enter in his own title to secure his own rights, and may gain a sufficient seisin by the entry, or other exercise of right, to give efficacy to his grant, and prevent any departure of the inheritance. A reversion is not esteemed assets, at common law, for the reversioner's debts; still he may charge it with them, by binding his heirs in the form of the obligation. Also, judgment against him will bind the estate, although no execution be taken out until the estate have actually descended. Again, debt will lie against the heir of an obligor from whom nothing has descended in fee simple except

a reversion, and a special judgment and extent framed thereupon. These cases are collected by Cruise, who justly classes reversions under the general denomination of vested interests. There must be a power to protect the inheritance, and that right resides in the reversioner. An action of waste will lie for the heir against the tenant in dower, or the tenant by curtesy; and the estate is vested by forfeiture. 4 Burrows, 2141; 3 Rep. [Coke] 23. In dower, also, descent is suspended as to the part set off, so that only two thirds are deemed to descend in fee, as curtesy is said to suspend the descent of the whole; yet the heir is punishable for not setting out dower. Such is the genius of the common law in respect to the descent of reversionary rights. But the demandant grounds his case upon the strict maxim of the common law, "non jus sed seisina facit stipitem." The foundation of this maxim lies in the feudal constitution, which required, that whoever claimed by descent should make out a strict pedigree, as heir from the first purchaser. But as in the course of time it might be rendered difficult to trace a genealogy, probably obscured and perplexed, it became an established understanding of this rule, that the seisin of the last possessor should prevail as presumption of his being of the blood of the first purchaser. Still, as it required the union of both bloods of the first marriage to constitute a legitimate representative of the original feoffee, so, under this relaxed construction of the rule, it was made a rigorous condition, that the claimant should be of the whole blood of the one last actually seised. Hence the maxim, "quod possessio fratris de feodo simplici facit sororem esse haeredem," to the exclusion of the brother of the half blood. 1 Inst. 14; 2 Reeve, Hist. Eng. Law, 317; 2 Wood. Lect. § 253; 2 Gu. Bac. Descent, A. C. 29, 30. This principle was preserved in England to secure the escheat against the half blood. It was useful also, under the same system, to protect the right of a disseisee against a descent cast, during the continuance of the estate by curtesy in the surviving husband of the disseisee. This is the express case put in Littleton. And it is pursued as a general proposition, by Chief Justice Kent, (4 Johns. 401), that a descent cast will not affect the right of a remainder-man or reversioner, if a particular estate exist. The principle is likewise maintained in New York in favour of the whole blood; the common law of descent not being entirely abolished, but the spaces left by the statute supplied from the former source. The system of descent, in that state, is composed of the five canons of the statute, and the five rules of the common law, applicable to all cases not especially provided; and the distinction of blood among collaterals is not done away. The decision of Jackson v. Hendricks, 3 Johns. Cas. 214, was grounded entirely on the common law, as the case arose prior to the statute. In Batês v. Shraeder, 13 Johns. 260, it may be doubtful, whether the present point was necessary to be determined. In delivering the opinion in Jackson v. Hilton, 16 Johns. 97, Mr. Justice Spencer reposed on a maxim of law, said by Chief Justice De Gray (3 Wils. 526) to have subsisted for ages, upon the authority of Bracton, Britton, and Fleta, namely, "that lands in fee simple must descend to the heir of the whole blood of the person last actually seised thereof." It cannot be denied, that this is the exact doctrine of the English law, "seisina facit stipitem." This whole doctrine is acknowledged by Sir William Blackstone to be a very fine spun and subtle nicety. At the same time he defends it against the strictures of Locke, in his Essay on Government, and Craig, in his Treatise on Feudal Law, as absurd and derogating from the maxims of equity and natural justice; and vindicates it on the fundamental principles of the law of England, averring the succession of the whole blood itself to be merely a feudal favor. He leaves it, therefore, entirely for the legislature to determine how far it may be expedient to afford relief by amending the law in particular instances, or some private inconvenience should be submitted to, rather than a long established rule should be shaken. Thus it is with the whole system of descent in England. It is supported altogether on the principle of positive establishment; and therefore it is insisted by its apologists, that the numerous and arbitrary rules, by which its course is directed or intercepted, are not open to objection as violations of natural justice. 2 Wood. Lect. 252. The universal answer to all exceptions on this score is given in the brief expression of Lord Kenyon, "lex ita scripta est." Several of its rules, at the same time, the lord chief justice admitted, were rigid, and some might press hard; such, for example, as the exclusion of the half blood, and the exposure of a person, on whom a collateral warranty should descend without assets, to be stripped of all his property. Wisdom or fancy might erect a bolder, more pleasing, perhaps more perfect system; but these rules were nevertheless the acknowledged law of the land; and it was the happiness of his lordship, no less than his duty, to follow and give effect to them. 7 Durn. & E. [Term R.] 415.

Upon these principles of the law of England, in the first place, the fee was not allowed to be inheritable at all. The whole was holden of a superior, who was at once the founder and ultimus haeres of the estate; and when, by the greatest favor granted under the feudal law, when, says Sir William Blackstone, "in the most solemn acts of law, we express the strongest and highest estate that any subject can have, it is seised in his demesne as of fee; that is, not simply and purely his own, since it is held of a superior lord, in whom the ultimate fee resides." 2 Bl. Comm. 105. All rights of real estate were thus reduced to mesne and base inter-

ests, carved out of the lordship of the land. Regard was had to a certain entire representation of the fee, in reference to the condition of a strict personal service or fealty. Hence the selection of the oldest male descendant, or nearest collateral relative, in whom the whole inheritance centered; the favour shown to the eldest son because he was to sit in his father's seat; the authority over his marriage, &c. On these grounds the several persons, among whom these inferior estates were parcelled, were attendant on the lord paramount, the heir for his inheritance, the husband for his curtesy, the reversioner for his reversion, &c. And hence the aversion of this system, through following time, to all those inventions for throwing lands into commerce, or appropriating them to uses, by which these feudal consequences, and especially escheat, might be avoided. But this maxim, "non jus sed seisina," is not recognised as a feature in the jurisprudence of Massachusetts. The obligations of feudal tenure, as expressed by Professor Stearns (page 61), formed no part of the laws of the colony or province. The tenure of free and common socage, established in the colony by the first charter, copied from the royal manor of East Greenwich, was cotemporaneously interpreted by the prescriptive customs of gavelkind, within the county of Kent, where that manor was situated. The tenure, if so it can be termed, subsisting under this construction, can hardly be distinguished from that which once prevailed under the description of allodial. By the ancient laws of England, existing down to the Conquest, lands descended equally among all the children without discrimination. These were the Saxon rules of inheritance, which were confined to the county of Kent, after the Norman Conquest, and reduced to the custom of gavelkind, as appears by Selden, Sir Matthew Hale, and Lord Holt. Hale, C. L. 220; 1 P. Wms. 49.

The doctrine of descent, adopted in the colony under the charter, was quite different from the feudal. It was considered, not a political, but a natural right. Sull. Land Tit. 148. "Haeredes, successoresque sui cuique liberi," is a maxim, not merely confined to the woods of Germany, where it existed with the addition of "Tacitus, et nullum testamentum;" but it is pronounced by Dr. Christian, in his learned and candid notes on Blackstone, to be one of the first laws of nature. The Roman law was, "Ratio naturalis, quasi lex quaedam tacita, liberis parentium, haereditatem addiceret, velut ad debitam successionem, eos vocando." In relation even to the kindred custom of Kent, it is said, by Lord Coke, "that it standeth with some reason, for every son there is as great a gentleman as the eldest son, and perchance will grow to greater honor and valor." Dr. Arthur Browne (1 Civ. Law, 27) represents gavelling as the policy of republics, preventing the prodigious growth of estates, forbidding "the towering castle to rise, and the immense demesne to spread, and swell the arrogance of primogeniture." Gov. Hutchinson, in his original volume, contemplated the future revolution as the natural result of the existing laws of inheritance, and predicted, that a similar change in the English law would be equally fatal to the British constitution. "Nobis veluti unum cunctis patrimonium." The title secured to the government under the feudal denomination of escheat, on the failure of the line of inheritance, is only a provisional principle of universal municipal law, and only amounts to a kind of caducary succession on the part of the state or sovereign. The Massachusetts law of descent is moulded on the Roman law of succession, which invested the heir with absolute dominion over the inheritance. This is the strong peculiarity pointed out by the accomplished Mr. Butler, in his learned notes on the Institutes, between the feudal and Roman systems of polity, in respect to landed property. The direct dominion of the Roman heir over the inheritance was undiminished by the existence, either of the usus-fructus, or of the fidei-commissary substitution; neither of which suspended the absolute vesting of the estate. Indeed, the civil law considers the parent and son as much the same person, so that the inheritance is not so strictly deemed to descend on the death of the progenitor, as to continue in the possession of the survivor. Dig. 28, 2, 11. The provincial act of 4 W. & M. c. 8 (1692), was copied from the English statute of distributions, 22 & 23 Car. II., extending its provisions to real as well as personal estate, and distributing the residue of the intestate's estate among his children or next of kin. Although this act did not, in express terms, establish a proper system of inheritance, yet the construction given to it by the provincial lawyers always was, that a right of inheritance was determined in the proportions, and among the relations, that the act required the residue to be distributed. The common law doctrine of inheritance was never countenanced in fee simple estates. The fee was constantly considered as vesting in the heirs of the intestate immediately on his death. A question was afterwards raised, however, which, for a time, is related to have been one of considerable expectation; whether brothers and sisters of the half blood were within the same degree of consanguinity under the act of 1692. For a season, it seems, that the common law principle, which excluded the half blood, was stoutly upheld; and the escheat, in preference to the right of the half blood, prevailed in regard to land, notwithstanding the act made no distinction between real and personal estate. This was the last relic of the feudal doctrine of inheritance; and the exclusion of the half blood from the collateral descent is understood to have continued, in the course of practice, until toward the middle of the last century, when the right of the half blood was

established, upon a special verdict, in the case of Hall v. Sprague, in 1748, supposed to be prior to that of Ames and Gay, decided in the superior court at Boston; and this decision has been considered as extending back, and constituting the law of the province. A similar question had arisen in England, upon the statute of distributions, as early as 1690, in the case of Crooke v. Watt [2 Vern. 123], which was ruled in favor of the half blood, affirmed in the house of lords, and never again moved; and with the phraseology of that statute this cotemporaneous construction is supposed to have worked itself into the law of Massachusetts. Sull. Land Tit. 153, 156; 12 Mass. 490.

The rules of descent and distribution of real and personal estate have generally been alike in Massachusetts. The statute of 1805, c. 90, describing descendible estates, expresses "any lands, tenements, or hereditaments, any right thereto, or interest therein, whether in fee simple or for the life of another, of which any person shall die seised." These terms are sufficiently copious and exact to embrace all the various estates existing in law, to which a quality of inheritance could be communicated; and in the well considered case of Sheffield v. Lovering, 12 Mass. 490, it was holden, that the statute was not intended to establish new rules, but to adopt and confirm, in clear and explicit language, the legal construction that had been given to preceding statutes, which had been holden to be the law of the country more than a century. Reversions and remainders are comprehended in the constructions of these provisions. 14 Mass. 92. The question of the inheritable quality of the half blood, against the rule of the common law, was put to rest in this commonwealth, in the case of Sheffield v. Lovering. The original stock, or propositus, was no longer regarded, in that decision, as directing the course of descent. The whole of the father's estate was deemed to descend to his daughter and sole heir, who died in the lifetime of her mother, his dowable widow, leaving half brothers and sisters, children of her mother by another husband; so that the whole became the estate of the daughter, and herself the new stock of inheritance, which passed entirely out of the blood of her father. The distinction of blood is allowed by statute only in respect to the portion of a child, derived from a deceased parent, dying under age, unmarried, and which is disposed of, by virtue of the provision, in the same manner as if such child had died before the parent; but this provision does not operate on the estate of any such child, acquired from any other source. The suggestion of Professor Stearns, therefore, that the rule of the common law, "quod seisina facit stipitem," is received in Massachusetts, is to be received with some considerable limitation. It is admitted, in his excellent treatise, not to apply, in its full force, where the ancestor acquires the estate by purchase, that is, by his own act; and several cases are mentioned, in which an ancestor may, at common law, transmit to his heirs an estate, of which he was never actually seised. The English rule of law, requiring actual seisin, is so far relaxed in New York, as to permit the formation of an entire new stock of descent in one case, arising out of the different situation of this country, in relation to property of wild and unimproved lands. 14 Johns. 406. In New Hampshire the stock is not regarded as the rule of descent. 2 N. H. 460. In Connecticut, where the distinction of blood is still not quite so stale as it is in Massachusetts, this doctrine has been digested in a series of provisions and decisions, by which the estate descends to the heirs of the legal owner, whether he were seised or not, and without being confined to the blood of the first purchaser; the maxim of "seisina facit stipitem" does not prevail, and curtesy produces no suspension of descent. [Hillhouse v. Chester] 3 Day, 166; [Bush v. Bradley] 4 Day, 306. The statute of 1805, c. 90, § 5, describes the real estate, of which a debtor dies seised, made liable for his debts, in the same terms in which it prescribes the descent of real estate. The former statutes of 1783 and 1784 are considered as containing equivalent expressions, and the same policy is construed to pervade the mass of early colonial and provincial, as well as state legislation on this subject; to wit, to charge the whole of a man's estate with the payment of his debts. Vested remainders and reversions are strictly included in the terms of the former statute, as liable for the debts of the proprietors. The case of Whitney v. Whitney, argued upon by the demandant's counsel, proceeds upon a doctrine altogether different from the common law. It does not go on the supposed ground of charging the reversion with the debts of the heir; but it contemplates an immediate descent of the fee, the statute assuming it to be the estate of the debtor. This doctrine is illustrated by various decisions in Massachusetts. Williams v. Amory, 14 Mass. 20; Penniman v. Hollis, 13 Mass. 429; Dingley v. Dingley, 5 Mass. 535; Bates v. Webb, 8 Mass. 458; Denny v. Allen, 1 Pick. 147. And see 2 Johns. 450; 4 Johns. 60. The spirit of the Massachusetts system is opposed to all suspension or postponement on the casting of descent, or vesting of the inheritance. The doctrine of abeyance is hardly recognized as existing any longer in England, the fee being considered as lodging in the heir until the contingency occurs to take it away. Heirs are seised in law before entry. By our statute they are at once entitled to partition, as tenants in common, this being an incident to the estate. Partition may be had of lands holden in dower; and there seems to be no sufficient reason to distinguish the situation of an estate under curtesy. On the death of the ancestor, the heirs became seised of the estate of inheritance, independent of any subsisting freehold or tenancy for

life. The seisin of the tenant of the particular estate is the seisin of the reversioner, who may enter at common law in his own name to secure his own right, and may, in this commonwealth, enter during the life of the former, if he refuses. Cruise, Dig. tit. 35, c. 14, § 54; 9 Mass. 508; Wallingford v. Hearl, 15 Mass. 471. No public policy remains to be supported by the preservation of the ancient rule of the feudal law; and it is not sustained by any moral principle. For what is there in the nature of the tenancy by curtesy (an estate which the law carves out of the inheritance of the child for the life-time of the father, by reason of his having inheritable issue, of the mother, from whom the descent is derived), that should go to the destruction of the inheritance itself?

STORY, Circuit Justice. Upon the very elaborate and learned arguments at the bar, every matter has been brought before the court, that can assist in forming its judgment. I should have been glad, as this is a point of local law, to have found the principal question adjudicated in our own state tribunals, so that my duty might have been merely to follow their decision. Unfortunately, no such case is known to exist, and it must therefore here receive an original determination. The rules of the common law have been fully stated at the bar, and indeed admit, upon the authorities, of no serious controversy. Where the estate descended is a present estate in fee, no person can inherit it, who cannot, at the time of the descent cast, make himself heir of the person last in the actual seisin thereof; that is, as the old law states it, "seisina facit stipitem." But of estates in expectancy, as reversions and remainders, there can be no actual seisin during the existence of the particular estate of freehold; and consequently there cannot be any mesne actual seisin, which, of itself, shall turn the descent, so as to make any mesne reversioner or remainder-man a new stock of descent, whereby his heir, who is not the heir of the person last actually seised of the estate, may inherit. The rule, therefore, as to reversions and remainders, expectant upon estates in freehold, is, that unless some thing is done to intercept the descent, they pass, when the particular estate falls in, to the person who can then make himself heir of the original donor, who was seised in fee and created the particular estate, or if it be an estate by purchase, the heir of him who was the first purchaser of such reversion or remainder. It is no matter in how many persons the reversion or remainder may, in the intermediate period, have vested by descent; they do not, of course, form a new stock of inheritance. The law looks only to the heir of the donor or first purchaser. But while the estate is thus in expectancy, the mesne heir, in whom the reversion or remainder vests, may do acts, which the law deems equivalent to an actual seisin, and which will change the course of the descent, and make a new stock. Thus, he may by a grant, or devise of it, or charge upon it, appropriate it to himself, and change the course of the descent. In like manner, it may be taken in execution for the debt of such mesne remainder-man or reversioner during his life, and this, in the same manner, intercepts the descents. But if no such acts be done, and the reversion or remainder continues in a course of devolution by descent, the heir of the first donor or purchaser will be entitled to the whole as his inheritance, although he may be a stranger to all the mesne reversioners and remainder-men, through whom it has devolved. These doctrines are fully and learnedly explained by Mr. Watkins in his Essay on Descents, and are so well known, that it seems unnecessary to give to them any illustrative commentary. Watk. Desc. 137 (110), 148 (116), 153 (120). Now the operation of this doctrine in respect to estates in fee in possession, which are subject to dower and tenancy by the curtesy, is very important. In the former case, though the heir at law may obtain an actual seisin by entry into the whole estate, yet, by the assignment of dower, that seisin, as to the third part assigned as dower, is defeated ab initio; for the dowress is in of the seisin of her husband, and her estate is but a continuance of this seisin. The same principle is true of tenant by the curtesy. It is even stronger, for the law vests the estate by curtesy in the husband without any assignment, and even without any entry, if the wife were already in possession, his estate being initiate immediately on issue had, and consummate by the death of his wife. So that there is no chasm between the death of the wife and his possession, as there is in case of the death of the husband and the assignment of dower to the wife, in which there can be a mesne seisin. Watk. Desc. (82) 104. Nothing, therefore, but a reversion passes in such case to the heir. But it is a misnomer to call it a case of suspended descent. In such case of curtesy, the reversion descends and vests absolutely in the heir. He may sell it, incumber it, devise it; and it is subject to execution as part of his property during his life. The descent to the heir is not suspended, but the actual seisin of the fee is not in him, since by law the actual seisin is in the tenant by the curtesy.

Applying these principles to the case now in judgment, it is obvious, that when Jane Tyler, the wife of David Cook, died in 1786, seised of the premises, her husband became tenant thereof by the curtesy, and consequently the reversion thereof alone descended to her children, viz. to Horatio G. Cook (the plaintiff) and Mary T. Cook. By the act of descents of 1783, c. 36 [supra], the eldest son was entitled to two shares, and this right, if at all, took effect at the time of the descent cast; and it is just as applicable to

the case of a reversion or remainder as to a present estate in fee. Nothing has since taken place to devest the title of the plaintiff by descent from his mother, and as the estate has fallen into possession by the death of his father, his reversion has become a present estate to two thirds of the premises in controversy. The great question turns upon the third of the reversion belonging to Mary T. Cook. She died in 1809, and if without issue, and it had been a present estate in fee, her father would have inherited it as her heir. It was but a reversion, and if the rule of the common law be in force here, the plaintiff, being at the time of the death of the tenant by the curtesy the sole heir of his mother, is entitled to take the whole estate. Have our laws abrogated the rule of the common law? By the colonial acts of 1641 and 1649 it was ordered, that "when the husband or parents die intestate, the county court &c. shall have power &c. to divide and assign to the children, or other heirs, their several parts and portions out of the said estate; provided the eldest son shall have a double portion; and where there are no sons, the daughters shall inherit as copartners, unless the court, upon just cause alleged, shall otherwise determine." There is nothing in this language, which points to any particular kind of estates, and the language is sufficiently broad to cover all kinds. By the provincial act of 1692 (4 W. & M. c. 8) it was enacted, "that every person lawfully seised of any lands, tenements, or hereditaments within this province, in his own proper right in fee simple, shall have power to give, dispose, and devise the same," &c. &c.; and if not so disposed of, then "the same shall be subject to a division with his personal estate, and be alike distributed according to the rules hereinafter expressed for intestate estates." Here, again, there is no language discriminating between the various kinds of estates, whether present or in expectancy, unless some stress can be laid on the words "lawfully seised of any lands," &c. the force and effect of which will come under consideration in construing the act of descents, under which the present question arises. The act of 1783 (chapter 36) enacts, that "when any person shall die seised of any lands, tenements, or hereditaments, not by him devised, the same shall descend in equal shares to and among his children, &c., except the eldest son," &c. &c. Another clause declares, that "the real estate shall stand chargeable with all the debts of the deceased over and above what the personal estate shall be sufficient to pay," &c. And throughout the act, there is a studious silence as to any differences in the course of descent of any estates capable of descending. Then came the act of descents of 1805 (chapter 90), which was drawn by Chief Justice Parsons, and after a full explanation of his views, with his permission perused by me, then being a member of the legislature, and with what little aid and co-operation I could give it, passed into a law. That act provides, that "when any person shall die seised of any lands, tenements, or hereditaments, or of any right thereto, or entitled to any interest therein, in fee simple, or for the life of another, not having lawfully devised the same, the same shall descend in equal shares to his children, &c. &c.; and when the intestate shall leave no issue, the same shall descend to his father," &c. &c. Mary T. Cook died in 1809, and consequently this act regulates the descent of her estate.

The present case is obviously within the words of the act. No reasonable doubt can be entertained, that a reversion is a "right" or "interest" in lands. In truth, it is included under the denomination even of "land," and a grant of land will convey a reversion. Com. Dig. "Estates," B, 12. A fortiori, it is included under the description of "tenement" and "hereditament," for these are words of more extensive import, nomina generalissima. Com. Dig. "Grant," E; Shep. Touch. 88; 1 Inst. 6a. The language of the act is, "when any person shall die seised." But it is not a just construction of the act, to interpret this as intending an actual seisin. Lord Coke says (1 Inst. 153a), "seisin is common, as well to the English as French, and signifies, in the common law, possession." Com. Dig. "Seisin," A, 1. It may be either a seisin in law, or a seisin in fact. Now, without adverting to what constituted, in the ancient law, a seisin in law, as contradistinguished from a seisin in deed, it is sufficient to say, that for centuries the language of the law has been, that a reversioner is "seised" of the reversion, although dependent upon an estate for life. Thus, in Plowden, 191, it was held by the court, that, where a reversion is dependent upon an estate for life, the reversioner, in pleading, may state, that he is seised of the reversion. Watk. Desc. c. 1, §§ 1 (27), 39–44; 2 Bl. Comm. 127. By this no more is meant, than that he has a fixed vested right of future enjoyment in it. If a sense, at least as large as this, were not given to the term "seised," it would follow, that the descent of reversions and remainders vested by purchase in the ancestor, and even of reversions vested in the original donor of the particular estate, would be wholly unprovided for, both by the provincial acts of descents of 1692, and the state act of 1783. Cases of this sort must have been innumerable, and yet no doubt ever was entertained, that the descent of such remainders and reversions was provided for by these acts. My opinion is, however, that the word "seised," used in all these acts, has a broader signification, and such as belongs to it in common parlance. It is equivalent to "owning;" and "seisin" is equivalent to "ownership." My reason is, that otherwise none of these acts would regulate the descents of estates, whereof the ancestor, at the time of his death, was disseised; and

yet, from the first existence of these acts, up to the present day, it has always been understood, that the descent of estates from the disseisee, was to the same heirs as would inherit, if he died in the actual seisin. The language of the provincial act of 1692 is, "any person lawfully seised;" but that of the acts of 1783 and 1805 is, any person who "shall die seised." Upon a descent, therefore, cast from an ancestor, who was disseised in his life-time, and died disseised, no title would pass to his heirs under these acts (but pass to the heir at common law), if we did not interpret the word "seised" as equivalent to "owning" or "entitled to;" and this, as far as my knowledge extends, has been the uniform interpretation. If, however, any doubt whatsoever could remain on this point, it is put completely at rest by the supplementary clause in the act of 1805; "or of any right thereto, or entitled to any interest therein." And as one object of that act was to clear away latent ambiguities, and to affirm the settled construction upon the former acts, these words seem appropriate for the very purpose under consideration. I confess I should not have entertained any doubt as to the true construction, without them. There are other parts of these acts, which satisfy my mind, that the legislature intended, by them, to provide effectually for the descent of all the real estate of the intestate. The phrase, "real estate," occurs frequently in the acts, as of the same import with the words, "lands, tenements, and hereditaments;" and the provision, making the "real estate" of the intestate liable to his debts, was evidently meant to be co-extensive with the property, which would pass by descent. If the legislature, by these acts, meant to provide a system of descents for all the real estate, which is vested in the intestate at the time of his death, and refer to him alone as the stock of inheritance as to such real estate, upon what ground can resort be had to the common law for a rule of descent in the present case. The legislature has nowhere named reversions or remainders, as entitled to a distinct course of descent. It has nowhere stated, that the heir must make himself heir, when the estate falls into possession of the original reversioner, or of the purchaser of such remainder. It has been perfectly silent on this subject; and has uniformly looked to the last intestate, as the stock of descent of the real estate vested in him; and in one or two excepted cases only (as of a child dying under age, &c.) has made a special provision, interfering with the general policy of the acts. These very exceptions are strong to show, that no others were intended. If the argument at the bar can be maintained, then this is a case wholly unprovided for by any statute, and the descent is to be regulated by the canons of the common law. But if reversions and remainders are out of the statute, so far as respects the stock of inheritance, what ground is there to stop here, and not apply the same rule to the heirship? If the statute meant to leave the rule of the common law in force, as to reversions and remainders, then the heir at common law, that is, in case of several children, the eldest son, is entitled to take the whole. Upon what principle can we apply our canons of descent to reversions and remainders to ascertain who are the heirs, and, at the same time, refuse the like application as to who is the ancestor, or stock of inheritance? If our statutes do not contemplate cases of reversions and remainders, then such cases are to be governed wholly and exclusively by the common law. Such a doctrine has not, as I recollect, been asserted.

The present question must have often occurred, in many cases of dower, and in still more numerous cases of tenancy by the curtesy. Yet hitherto there has been a total silence among the profession on the subject. There has not been any case within the memory or tradition of any man, in which such a right has been asserted or acquiesced in, as the plaintiff now claims. Judge Trowbridge, in his reading on the statute of distributions (Precedents, Declar., Ed. 1802, p. 290) of 1692, makes no allusion to any such doctrine; and yet if it had been stirred, it could scarcely have escaped his learned mind, and must have constituted a very important part of his reading. I have a note of a very memorable case (Ames v. Gay), in which the question must have arisen, and must have been decided, if there had been any such doctrine then afloat. My note states, that the case was an ejectment decided on a special verdict in 1749, and that the facts were as follows: One Fisher was seised of the estate in question, and devised the same to his wife, during her widowhood, remainder in fee to his daughter Mary, who was the wife of the demandant. The testator died, and afterwards, during the life of Fisher's widow, Mary, the devisee, died, leaving an only child, Fisher Ames, who afterwards died without issue, and intestate. Afterwards the widow of Fisher died, and thereupon the demandant brought the suit, as heir of his son, Fisher Ames. The defendant (Gay) claimed the estate as husband of the niece of Mary, the wife of the demandant. The court, after argument, gave judgment for the demandant. I have understood, that this was the first cause in which the point was decided, that the father could inherit from the son, under the provincial act of 1692. But it presents the identical question now before the court, and the father could not have recovered, if the plaintiff's argument is now well founded.[2] The case of Williams v. Amory, 14

[2] The following is a copy of the record in the case of Ames v. Gay: "Suffolk—ss. At his majesty's superior court of judicature, court of assize and general gaol delivery, begun and held at Boston, within and for the county of Suf-

Mass. 20, seems to have proceeded upon the ground, that a remainder-man, who died before the expiration of the tenancy for life, was a proper stock of descent. In that case the intestate took by purchase, and therefore was at common law a proper stock of inheritance, and as he left only one child, the descent was the same as at the common law. The court, however, took no notice of the case in this particular view. But the court there decided that remainders and reversions were, under our laws, liable to be taken in

folk, on the third Tuesday of August, being the 15th day of said month, Anno Domini 1749, Nathaniel Ames, of Dedham, in the county of Suffolk, physician, plaintiff, against Benjamin Gay, of Dedham aforesaid, yeoman, defendant, in a plea of review of a plea of ejectment, commenced and prosecuted by the plaintiff against the defendant at an inferior court of common pleas, held at Boston aforesaid, for the said county of Suffolk, on the first Tuesday of October, A. D. 1746, in the words following: viz. 'In a plea of ejectment, wherein he demands against the said Benjamin a messuage and about half an acre of land, with the appurtenances thereof, in Dedham aforesaid, bounded southerly by the county road, westerly by Mr. Samuel Dexter's land, northerly and easterly by the said Nathaniel Ames's land, or however otherwise bounded; and saith, that on the twenty-fifth day of March, A. D. 1729, one Joshua Fisher was seised of the tenements aforesaid with the appurtenances in his demesne as of fee, and being so seised thereof by his last will in writing of that date, devised the same to Hannah Fisher, his wife, to hold and improve during her widowhood; and by the same will further devised the same tenements, with the appurtenances, to his daughter Mary, to hold to her and her heirs from, or immediately after, the death or marriage of the said Hannah, whichever should first happen; and afterwards, viz. on the eleventh of March, A. D. 1730, the said Joshua died so seised thereof, after whose death the said Hannah entered into the tenements aforesaid, and by force of the devise aforesaid became seised of the same, with the appurtenances, in her demesne as of freehold for the term of her life, determinable upon her marriage, and the said Mary was thereupon seised of fee and right of and in the remainder of the same tenements, with the appurtenances, expectant upon the death or marriage of the said Hannah; and the said Mary, being so seised of the remainder aforesaid, afterwards took to her husband the said Nathaniel Ames, by force whereof the said Nathaniel and Mary were seised of the aforesaid remainder of said tenements, with the appurtenances, as of fee and right, in right of the said Mary; and afterwards, viz. on the twenty-fourth day of October, A D. 1737, had issue betweeen them lawfully begotten, viz. a son, named Fisher Ames; and afterwards, viz. on the eleventh of November, A. D. 1737, the said Nathaniel and Mary, being so seised of the remainder of the said tenements, with the appurtenances, in form aforesaid, in her right, she, the said Mary, at Dedham aforesaid, died so seised, after whose death the remainder in fee of the tenements aforesaid, with the appurtenances expectant, as aforesaid, descended to the said Fisher Ames, as only child and heir of the said Mary, whereby he, the said Fisher Ames, was seised of the remainder of the same tenements with the appurtenances, as of fee and right, expectant upon the death or marriage of the said Hannah; and afterwards, viz. on the seventeenth of September, A. D. 1738, the said Fisher Ames, at Dedham aforesaid, died thereof so seised and intestate, leaving neither wife nor child; after whose death, the remainder in fee of and in the said tenements, with the appurtenances, expectant upon the death or marriage of the said Hannah, by force of the province law, made in the fourth year of the reign of King William and Queen Mary, for the settlement of, and distribution of the estates of intestates, came, and fell to the said Nathaniel, the father of the said Fisher Ames, as next akin to him the said Fisher Ames, the intestate; whereby the said Nathaniel became seised of the remainder of the same tenements, with the appurtenances, as of fee and right, expectant upon the death or marriage of the said Hannah; and afterwards, viz. on the twenty-first day of December, A. D. 1744, the said Hannah continuing in her widowhood, and being seised of the said tenements and appurtenances in her demesne as of freehold, for the term of her life, determinable as aforesaid; and the said Nathaniel also being seised of the remainder thereof as of fee and right, expectant as aforesaid, she, the said Hannah, at Dedham aforesaid, died of such her estate so seised; whereupon the tenements aforesaid, with the appurtenances, by force of the province law aforesaid, came, and belonged to the said Nathaniel, to hold to him and his heirs, and he ought to hold the same, and be in the possession thereof accordingly. Yet the said Benjamin Gay hath illegally entered into the said tenements and appurtenances, and unjustly holds him out of the same; to the damage of the said Nathaniel Ames (as he saith) the sum of a thousand pounds.' And at the superior court of judicature, held at Boston aforesaid, for the said county of Suffolk, on the third Tuesday of February, A. D. 1746, the aforesaid Benjamin Gay recovered judgment in said action against the said Nathaniel Ames for costs of court, which were taxed at thirty-five shillings and six-pence, which judgment the said Nathaniel Ames saith is wrong and erroneous, and that he is thereby damnified the sum of a thousand and five pounds; wherefore, for reversing the said judgment, and for recovering judgment against the said Benjamin Gay for restitution of the costs aforesaid, and for possession of the premises, demanded in the original writ, and for costs of court, he, the said Nathaniel Ames, brings this suit, as also for his costs occasioned thereby.

"This suit was commenced at August term last, when both parties appeared, and the case, after a full hearing, was committed to the jury, who were sworn, according to law, to try the same, and returned their verdict therein upon oath, that is to say, they find specially, viz. that the said Fisher Ames was seised of the remainder of the tenements aforesaid, expectant upon the death or marriage of the said Hannah Fisher, as set forth in the writ, and afterwards died so seised thereof and intestate, leaving neither wife nor child; and afterwards the said Hannah, the tenant for life, died seised of the said tenements, as set forth in the writ, that the said Nathaniel Ames was father of the said Fisher Ames, and the defendant's wife was his aunt; and if, upon the whole matter, the plaintiff, by force of the province law, is intituled to the premises, the jury find for the plaintiff reversion of the former judgment, possession of the premises demanded, and costs of court; but if not, they find for the defendant costs; and from thence the action was continued from term to term to this time, for the court's advisement on the special verdict; and now, after mature advisement thereon, and a full hearing of the parties by their counsel, it is considered by the court, that the former judgment be and hereby is reversed, and that the said Nathaniel Ames recover against the said Benjamin Gay the possession of the premises sued for, and costs of court, taxed at sixteen pounds, fifteen shillings and seven-pence, in bills of credit on this province of the new tenor. Fac. hab. possess. issued Nov. 24, 1749."

execution for the debts of the reversioner and remainder-man, and comprehended as "real estate" of the debtor under our statute of executions of 1783, c. 57. The cause of Whitney v. Whitney, 14 Mass. 88, is more in point. There the court held, that a reversion in the hands of a mesne reversioner was, on his death, to be considered as assets in the hands of his administrator for the payment of his debts, notwithstanding the tenancy for life did not expire until after his death. The reasoning of the court proceeds upon the admission of the doctrine of the common law; and that it had been changed by our statutes. If the reversion, notwithstanding the death of the party, before the life estate falls in, be assets, because it constitutes a part of the "real estate" of the mesne reversioner, it seems to me, that for the same reason, it must be liable to distribution among his heirs.

Upon the whole, my opinion on this question is, that the common law rule, as to descents of reversions and remainders, has been altered by our statutes, and is not in force here; and that, by our statutes, reversions and remainders, of which the intestate is the owner at the time of his death, are to be distributed among his heirs in the same manner as estates in possession. In Connecticut the same question has arisen under the statute of descents of that state, which contains provisions, in substance, like ours; and after very elaborate arguments, the court came to the same results, to which my own judgment has been led.

There is a point, which has been suggested at the argument, upon which it may be well to dwell for a moment, as it fortifies the conclusion already expressed by the court, and leads adverse to the right of the demandant to recover the third of the reversion, which devolved on his sister Mary. It is this, that as upon her death, her right in the reversion, by our statutes, descended to her father, and vested in him as a mesne reversioner, and as he was then tenant for life, by the curtesy, of the whole premises, he became by operation of law, to this third part, seised in fee by the union of both estates. In other words, his estate for life, as to this third part, became merged in the reversion in fee, which devolved upon him. Lord Coke puts (1 Inst. 182b) several analogous cases. "If (says he) a man maketh a lease to two for their lives, and after granteth the reversion to one of them, the jointure is severed, and the reversion is executed for the one moiety, and for the other moiety there is tenant for life, the reversion in the grantee." So, "if lessee for life granteth his estate to him in the reversion, and to a stranger, the jointure is severed, and the reversion executed for the one moiety by the act of law." If I may be allowed to state a fact within my personal knowledge, I would add, that at an early period of my professional life, I put this very inquiry to Mr. Chief Justice Dana, in order to ascertain if the common law rule had ever been recognised here. His answer was, that he knew no distinction admitted in descents here, between estates in possession and in reversion. I refer to this merely to show that his extensive learning and practice had not led him to notice the existence of any distinction in this state.

Judgment for plaintiff, two thirds of the premises.

COOK (HAWES v.). See Case No. 6,236.

Case No. 3,160.

COOK v. HOWARD et al.

[4 Fish. Pat. Cas. 269.][1]

Circuit Court, D. Massachusetts. Oct., 1870.

PATENTS—"ROTARY DEFLECTOR OR VENTILATOR"—INFRINGEMENT—CONSTRUCTION—PLEADING AND PROOF.

1. No notice will be taken of defenses set up in an answer where the burden is upon the respondent, unless some proof is introduced in their support.

2. Improvements by subsequent inventors are entitled to protection if duly secured by letters patent, but the letters patent must not be so construed as to absorb what is secured to prior patentees.

3. A claim for "a rotary deflector or ventilator" in which the deflector is reversed by rotating it half round the axis of the orifice, is infringed by a reflector having a partial rotation about a vertical axis, the other characteristics being common to both.

This was a bill in equity filed [by James M. Cook] to restrain the defendants [George E. Howard and others] from infringing letters patent [No. 13,676] for an "improved dust deflector for the windows of railroad cars," granted to complainant October 16, 1855, and extended for seven years from October 16, 1869.

The invention consisted in a semicircular deflector fastened to an annulus by a rod passing through the deflector and annulus, and serving to turn both at option. The annulus rested upon a ring provided with projections for holding and guiding the deflector, which ring was fastened above or aside of the car window, over an opening leading through the side of and into the car. The deflector could thus always be turned so that the current of air coming from either direction would impinge against its outer surface, and create a current through the opening outward from the car, thus ventilating the latter while excluding dust or cinders from entering the opening.

The disclaimer and claim were as follows: "I do not claim the application of a curved deflector on the outside of the window-opening of a railway carriage, nor making the same to extend under the window and up one side thereof. But I claim the rotary de-

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

flector or ventilator, constructed and made to operate substantially in the manner and for the purpose specified."

James B. Robb, for complainant.

Causten Browne, for defendants.

CLIFFORD, Circuit Justice. Claims for compensation subsequently relinquished by stipulation exhibited in the record, will not be noticed, nor will defenses set up in an answer be examined, where the burden is upon the respondent, unless some proof is introduced in their support. Letters patent, if in due form, afford prima facie evidence that the person alleged to be the inventor was the original and first inventor of what is therein described as his improvement, and where no proofs are introduced to support the allegation of the answer, that the alleged inventor was not the original and first inventor of the same, the finding of the court in an equity suit must necessarily be for the complainant. No such proofs were introduced in this case, and of course the finding of the court on that issue must be adverse to the respondents. Such being the state of the case, the only issue to be determined is whether the ventilators made and sold by the respondents infringe the letters patent on which the suit is founded. Deflectors or ventilators like Exhibit B, as introduced in evidence, have been made and sold by the respondents "within the time covered by the bill of complaint," and the parties agree that they, the respondents, continue to make devices of that form and mode of operation. Tested by that admission as the case must be, the only inquiry is, whether the deflectors or ventilators made and sold by the respondents infringe the patented invention of the complainants, which must be determined by a comparison of the mechanism described in the letters patent on which the suit is founded with the device introduced in evidence as a specimen device of the deflectors or ventilators made and sold by the respondents. In constructing his invention, the complainant makes use of a bent strip of metal, representing a semicircular or arched deflector or dust-guard, having one edge curved, and the other edge fastened to a circular flanged annulus, formed with a flange or lip extending entirely around it, and arranged with respect to it as exhibited in the drawings. Constructed as aforesaid, the circular flanged annulus is placed with its lip or flange on a stationary supporting ring, formed with a short neck extending within that annulus, and serving to support it in position, the annulus being so applied to the neck as to revolve thereon and be maintained against the stationary annulus by a series of overlapping projections extending from the stationary annulus, and over the flange of the revolving annulus, as more fully exhibited in the drawings annexed to the specification. Superadded to this arrangement a rod is carried diametrically across the supporting ring, and firmly fastened thereto at its ends, which serves the purpose of a lever or means by which the ring and the deflecting guard may be simultaneously rotated on the stationary annulus. Combined as described, the patented invention, called a device for ventilating railway carriages, is fixed flatwise to the vertical side of the car in some convenient position against an opening through the side of the car, the axis of the opening being coincident with that of the neck of the supporting ring, where the diameter of the opening is made to correspond with that of the said neck. Minute description is also given of the operation of the patented device which shows to the satisfaction of the court that it is new and useful in accomplishing the purpose for which it is intended. Whatever may be the direction in which the car may be moved, whether forward or backward, and whatever may be the direction of the external aerial current, whether upward or downward, horizontally or inclined to the horizon, the statement of the patentee is that the deflector, as constructed and combined, may be rotated and fixed in position to operate to the best advantage, the current of air impinging against its external or outer surface, so as to create a current through the opening, and also to exclude dust, sparks, or cinders from entering the car through that aperture. He does not claim the application of a curved deflector on the outside of the window-opening of a railway carriage, nor does he claim the "making the same to extend under the window and up one side thereof." "But what I do claim as my improvement," says the patentee, "is the rotary deflector or ventilator constructed and made to operate substantially in the manner and for the purpose as specified." Examined in the light of these suggestions as drawn from the specification of the letters patent, it is clear that the construction and mode of operation of the complainant's deflector are well described by his principal witness. Speaking of the manner of constructing the device and of its mode of operation, he says that an orifice is made through the side of the car, to the forward side of which a projecting plate is applied, which surrounds the orifice in the forward half of its circumference, and projects outward from the side of the car a sufficient distance so that the deflector or plate, in passing through the air as the car is moved forward, throws a current outward, and away from the side of the car, over the orifice, the effect of which is to produce a rarification of the air between that current and the side of the car, and over the orifice, causing the air to flow outward from the interior of the car through the orifice, and thus producing the necessary ventilation. Deflectors, in order that they may be equally useful on railway cars, whether the car moves backward or forward, must have the means of reversal, as a car may be moved either backward or forward,

and if unprovided with the means of reversal the deflector would be detrimental or useless whenever the car was moved in a direction opposite to that for which the deflector was adjusted. Means for the reversal of a deflector of some kind are essential to the utility of the invention, as the position of the deflector must be changed whenever the car is moved in a direction opposite to the one for which the deflector was adjusted. Applied as the deflector invented by the complainant is, to a circular orifice, the means employed by him to accomplish the reversal of the deflector are different in form from the means employed for that purpose by the respondent in the deflectors which they have made and sold, as exemplified in the specimen introduced in evidence. In the mechanism shown in the specification of the complainant's patent, the deflector is reversed by rotating it half round the axis of the circular orifice by means of a joint, but in the exhibit introduced as a specimen of the deflectors made and sold by the respondents, the reversal is produced by a partial rotation about a vertical axis, the two halves of the deflector upon the sides of the axis being symmetrical, and so formed and arranged that when one side of the deflector is shut down close to the orifice, the other side will project from the side of the car sufficiently to produce the outward current as before explained, by which the air is exhausted through the orifice. Certain additions are made to the deflectors of the respondents, as, for example, they extend the deflector over the orifice to shut out the rain; but so far as the ventilation is concerned, that is, so far as respects the means for exhausting the air through the orifice surrounded by the deflector, they are the same in substance and effect, differing only in form, and they have the same mode of operation. Complainant's invention is called a rotary deflector as contradistinguished from a vibratory deflector, but neither the rotation nor the vibration of the device has anything to do with causing the exhaustion of the air through the orifice to which the deflector is applied. They are employed solely for the purpose of changing the position of the deflector when the direction of the car is reversed, or to accommodate the device to the direction of the wind, but they do not have any effect in exhausting the air through the orifice. Such differences are, in the opinion of the court, mere formal differences, which, in the comparison of the two deflectors, do not make the one substantially different from the other in the sense of the patent law. Attempt is made by the respondents in argument, to show that the complainant, if that construction is given to the claim of his patent, is not the original and first inventor of the improvement; but it is clear that such a defense is not open to the respondents, as they never gave the required notice, and did not introduce any competent proofs to establish any such proposition. Evidence of an expert character was introduced by the respondents to show that the deflectors made and sold by them were in several respects different from the mechanism described in the letters patent of the complainant, and those several suggestions, as expressed in the testimony of the respondents' expert, were urged in argument with much ability, but they are not sufficient to pretect the respondents from the charge of infringement, as they do not touch the means by which the air is exhausted through the orifice surrounded by the deflector.

They all have respect either to the means of changing the position of the deflector, when the direction of the car is reversed, or to certain improvements or additions made by the respondents in their deflectors which are not found in the complainant's patented invention. Some means for changing the position of the deflector when the direction of the car is reversed, are certainly essential, but no alteration of that part of the mechanism employed by the complainant will justify the respondents in appropriating the whole substance of the complainant's invention by which the air is exhausted through the orifice surrounded by the deflector. Mere formal differences of the kind mentioned will not justify a third person in making, using, or vending to others to be used, the invention of another duly secured by letters patent, nor will any improvement which such third person has made to a prior invention, confer any such right, if the prior invention is duly secured by letters patent. Improvements by subsequent inventors are entitled to protection if duly secured by letters patent, but the letters patent must not be so construed as to absorb what is secured to prior patentees.

Decree for complainant.

Case No. 3,161.

COOK v. HUNTER et al.

[1 Brunner, Col. Cas. 125;[1] 2 Overt. 113.]

Circuit Court, D. Tennessee. June, 1809.

EVIDENCE—DEED OF GENERAL WARRANTY—TITLE PAPERS—CERTIFICATION OF PAPERS, SUFFICIENCY OF.

1. It is presumed, where a party holds under a deed of general warranty, that the title papers are in the hands of the warrantor, and the warrantee is not required to produce the originals, but may give in evidence certified copies.

2. A register may certify by his deputy, and the authentication is sufficient. It is immaterial whether the certificate be signed A. B. by C. D., deputy, or C. D., deputy, for A. B.

PER CURIAM. Where it is shown to the court that the party claims under a deed with a general warranty, the law presumes the title papers to be in the hands of the warrantor; and the warrantee is not required to produce them in evidence. Certified copies are sufficient. See 1 Reporter, 2 [Nation-

[1] [Reprinted by permission.]

al Bank of Commerce v. Merchants' Nat. Bank, 91 U. S. 92].

Mr. White, who argued for the person offering the copy in evidence, relied on the practice in the superior courts.

The copy of the deed produced was certified by A. B., deputy register, for C. D., register.

Mr. Haywood, for the defendants, objected that it ought to have been certified by the principal register by his deputy, and not by the deputy for the principal.

PER CURIAM. This is a mere verbal criticism. The meaning is the same, either way. The general rule is that a person can do that by another which he can do himself. The register might by his deputy certify; and whether it is signed thus: A. B., register, by C. D., deputy register, or thus: C. D., deputy register, for A. B., register, is immaterial, for it means the same thing, viz., the act of the principal by the deputy, and is good.

Case No. 3,162.

COOK et al. v. LANSING.

[3 McLean, 571.][1]

Circuit Court, D. Illinois. June Term, 1847.

ASSIGNEE IN BANKRUPTCY—SUIT BY BANKRUPT—PLEA IN ABATEMENT.

1. Under the bankrupt law [of 1841 (5 Stat. 443)], all the interests and effects of a bankrupt may pass to his assignee, and suits should be brought in his name, or for the benefit of the creditors whom he represents.

2. To a suit in the name of the bankrupt the defendant may plead the bankruptcy, and the appointment of an assignee, in abatement.

Mr. Baker, for plaintiffs.
Cole & Brown, for defendants.

OPINION OF THE COURT. This action is founded on a judgment obtained in the state of New York. The defendants pleaded that plaintiffs [Cook & Maxwell] filed their petition in bankruptcy, that an assignee was appointed, that the above judgment was placed on the schedule as assets, and that the right having passed out of the plaintiffs to the assignee, the suit should have been brought in his name. To this plea a demurrer was filed.

Under the bankrupt law, the entire property and interests of the bankrupt were vested in the assignee. Provision was made for the prosecution of suits then pending; but all suits commenced after the appointment of the assignee, should be brought in his name, or at least prosecuted for the benefit of the creditors, whom he represents. And as this suit has not been brought in either of these forms, but by the bankrupts, the demurrer to the plea is overruled.

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

Case No. 3,163.

COOK v. MALLORY.

[44 Hunt, Mer. Mag. 627.]

District Court, New York.[1] 1861.

COLLISION—CHANGE IN THE RULE OF DAMAGES.

The rule of general law which gave damages for a collision to the full amount of the injury is superseded by the statute of 1851 [9 Stat. 635] which limits the recovery to the amount of the interest of the owners in the colliding vessel and her freight pending at the time of the collision, and the power of the court to award greater damage is abolished by positive law.

COOK (NORRIS v.). See Case No. 10,305.

Case No. 3,164.

COOK v. OLIVER et al.

[1 Woods, 437.][2]

Circuit Court, S. D. Georgia. April Term, 1870.

STATUTE OF CONFEDERATE STATE—JUDGMENT RENDERED WITHIN.

1. An act of the insurrectionary legislature of Georgia abolishing the vendor's lien is valid and binding.

2. The judgment of a court of a state in insurrection merely settling the rights of private parties actually within its jurisdiction, not tending to defeat the just rights of citizens of the United States, nor in furtherance of laws passed in aid of the Rebellion, is valid.

This was an appeal from the bankrupt court [of the United States] for the southern district of Georgia.

R. F. Lyon, for Cook.
W. S. Basinger, for defendants.

WOODS, Circuit Judge. This case presents a controversy between two creditors of certain bankrupts as to which has the superior lien upon the proceeds of certain real estate of the bankrupts which has been sold by the assignee in bankruptcy. In June, 1863, while the state of Georgia was engaged in rebellion against the United States, John Neal recovered a judgment in Daugherty superior court against Beers and Brinson, for $5,088, which by the laws of Georgia became a lien on the real estate of the judgment debtors of which they were then seized, or which they might afterwards acquire. On January 5, 1865, Hamlin J. Cook sold and conveyed to Beers and Brinson, the bankrupts, certain real estate, the proceeds of which are the subject of this controversy. A part of the purchase money remained unpaid, and Cook claimed the vendor's lien therefor. The question now is, which has the better right to the proceeds of that real estate? Neal, by virtue of his judgment lien, or Cook, by virtue of his vendor's lien? It is conceded that before sale by Cook to Beers and

[1] [District not given.]

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

Brinson, the legislature of Georgia—the state being then in insurrection against the United States—passed an act repealing what is known as the vendor's lien. But counsel for Cook claimed, first, that the judgment of Neal is void, because rendered by an illegal court: and, second, that the act of the legislature is of no effect, because passed by a revolutionary and unlawful body. The decision of these points will decide the case.

The question of the validity or invalidity of the acts of the legislature of the insurgent states during the Rebellion was considered by the supreme court of the United States in the case of Texas v. White, 7 Wall. [74 U. S.] 733, and the law was laid down in these words: "It is not necessary to attempt any exact definitions within which the acts of such a state government must be treated as valid or invalid. It may be said, perhaps with sufficient accuracy, that acts necessary to peace and good order among citizens, such for example, as acts sanctioning and protecting marriage and the domestic relations, governing the course of descents, regulating the conveyance and transfer of property, real and personal, and providing remedies for injuries to person and estate, and other similar acts which would be lawful if emanating from a lawful government, must be regarded in general as valid when proceeding from an actual though unlawful government, and that acts in furtherance or support of rebellion against the United States or intended to defeat the just rights of citizens, and other acts of like nature, must in general be regarded as invalid and void." This decision lays down the rule by which I feel I ought to be governed, and it accords fully with my own views. The act repealing the vendor's lien was in the exact language of the court, one "regulating the conveyance and transfer of real property." It was not in furtherance of the rebellion against the United States, and although passed by an insurrectionary legislature, must be regarded as valid.

The same principle applies to the courts of the insurgent states. If the acts of the insurrectionary legislature within the limits above indicated were valid, it would seem to follow as an inevitable inference that the proceedings of the courts which enforced and administered such laws must be regarded as valid. When the action of the courts of the rebellious states were simply directed to the settlement of the rights of private persons, when they did not tend to defeat the just rights of citizens of the United States; when they were not in the furtherance of laws passed to sustain or uphold the Rebellion; when they were not used for the purpose of oppressing those who adhered to the United States; in short, when the decision of the court could not from the nature of the case be influenced by the existing Rebellion, in such case the action and judgment of the court is binding on the parties actually within the jurisdiction of the court.

It follows from these views and the agreed facts in this case, that the lien of Neal, the judgment creditor, is superior to the lien of the vendor Cook for his purchase money. I feel that this is a case of hardship on Cook, but that is the fault of the legislature of Georgia and not of this court. The judgment of the district court is affirmed.

COOK (TAYLOR v.). See Case No. 13,789.

COOK (THOMPSON v.). See Case No. 13,952.

Case No. 3,165.

COOK v. TRIBUNE ASSOCIATION.

[5 Blatchf. 352.][1]

Circuit Court, S. D. New York. Nov. 26, 1866.

PLEADING IN ACTION FOR LIBEL—DEFENCES.

1. A special plea which sets up several defences to a cause of action is bad. A special plea must contain one good defence to all that it professes to answer. Where a declaration is founded on a libel charging the plaintiff personally as corrupt and dishonest, a special plea to it, which imputes criminality only to the clerks and employees of the plaintiff, is bad.

2. Where a declaration is founded on a libel charging the plaintiff to be a full-blown scoundrel and knave, and not fit to be trusted with half a million of money, and that, if entrusted, he would convert it to his own benefit, and thereby commit felony, a special plea setting up that the plaintiff knowingly falsified the books of his office as postmaster, to defraud the government, and a special plea setting up that the plaintiff coerced his clerks to subscribe to and support a newspaper of which he was proprietor, are bad, as containing no defence to the libel.

3. Where a declaration is founded on a libel charging that the plaintiff, if entrusted with public moneys, would commit the offence of embezzlement, a special plea to it, setting up that the plaintiff has committed the offence of embezzlement, is bad, as containing no defence to the libel.

4. Where a declaration is founded on a libel charging that the plaintiff, while postmaster, by natural affinity, gathered about him scamps, and wilfully and corruptly employed them to steal the public money, and that, under the conduct or rule of the plaintiff, as postmaster, and while he held the office, it became a den of thieves, a special plea, setting up that the plaintiff, as postmaster, had the appointment of his clerks and other employees, and that they, in the course of their employment and business, abstracted letters from the office, broke them open, and stole the contents, is bad, as containing no defence to the libel.

5. In a declaration founded on a libel, the whole of the libel must be considered, upon the point as to whether the averments in the declaration are sufficient to make the libel applicable to the plaintiff.

This case came up on demurrers by the plaintiff to forty-seven special pleas put in by the defendants to the declaration, which was for a libel. The declaration contained eight counts. The first charged the defendants with wickedly composing and publishing the libel, setting it out in haec verba. The substance of it was, that the plaintiff was a defaulting army paymaster, to the

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

amount of half a million of dollars, and which he had lost in gambling; that some $70,000 had been recovered by arresting blacklegs in various cities, and compelling them to disgorge; that the plaintiff was not an undeveloped knave, but a full-blown scoundrel; that he was made postmaster at Chicago by Senator Douglas; that the office became a den of thieves under his rule; that the plaintiff might not have stolen the money, but he gathered scamps about him by natural affinity, and the public had to suffer; that the essential baseness and rottenness of the fellow (plaintiff) was so thoroughly displayed in turning against his benefactor, (Douglas,) and the malignity of his assaults were such, that the writer did not suppose any honest man had spoken to him since, except by moral coercion; that Senator Douglas openly charged him (plaintiff) with rascality and peculation, and nobody doubted the truth of it; and that now this exploded reprobate turned up a fresh defaulter. The innuendo in the first count was, that the plaintiff, as paymaster in the army, had appropriated to his own use and benefit a large sum of money, to wit, $500,000, belonging to the United States, and thereby had committed wilful and corrupt felony, against the statute. The second count charged the libel to be, that the plaintiff, as such army paymaster, had lost the half a million of money in gambling. The third count charged the libel as in the first count. The innuendo was, that the plaintiff, among other things, was a full-blown scoundrel and knave, and not fit to be trusted with half a million of money, and that, if entrusted, he would convert it to his own benefit, and thereby commit felony. The fourth count charged the libel as in the first count. The innuendo was, that the plaintiff, while postmaster, &c., by natural affinity gathered about him scamps, that is, persons who would, in the course of their employment, steal money, and that the post office thereby became a den of thieves. The fifth count charged the libel as in the first count. The innuendo was substantially the same as in the first count. The sixth count charged that the libel was, that the plaintiff, as army paymaster, was a defaulter in half a million of dollars, as set forth in the first count, meaning that he had lost the half a million of money in gambling. The seventh count was the same as the third, except that the composition of the libel was omitted. The eighth count was the same as the fourth, except that the composition of the libel was omitted.

Edward R. Meade, for plaintiff.
Isaiah T. Williams, for defendants.

NELSON, Circuit Justice. The first plea is the general issue. The second plea is to the third, fourth, seventh, and eighth counts, and is, in substance, that the plaintiff was postmaster at Chicago, and had power to appoint and dismiss clerks; that, during the time the plaintiff held the office, the duties of it were discharged greatly to the prejudice of the public, namely, letters containing money were abstracted from the office, and the contents stolen by the clerks; that there were one thousand dead letters in the office, which should have been sent to the general post office unbroken, but were detained and opened by the clerks, and their contents rifled; that, during the time the plaintiff so held the office, the books of the office were knowingly falsified by the plaintiff and the clerks, whereby large sums of money, amounting in all to $5,000, were not credited to the government, or accounted for to the government; and that the plaintiff was proprietor of a newspaper in Chicago, and coerced his clerks and subordinates to subscribe for the same, and to raise money in support of it, and discharged some of them for refusing to comply with his orders in that respect. This is the substance of the plea. The radical defect in it is, that the pleader has undertaken to set up in the same plea several defences to the two causes of action contained in the third and fourth counts of the declaration. This is against the first principles of special pleading. Besides, no one of the defences set forth in the plea would justify the publication of the libel as charged in the two counts. A plea must contain one good defence to all that it professes to answer. In this case, the plea professes to answer the charge in the third and fourth counts, but no one answer set forth accomplishes this. Again, the libel, as set forth in the third and fourth counts, charges the plaintiff personally as corrupt and dishonest. All the defences, except one, set up in the plea. come short of this, and only impute the criminality to the clerks and employees of the plaintiff. The exception is, the defence that the plaintiff falsified his post office books, to defraud the government. But this, admitting it to be true, constitutes no defence to the libel complained of in the two counts which the plea professes to answer. The same remark is true as to the defence that the plaintiff coerced his clerks to subscribe to and support his newspaper. All of the above observations apply also to the second plea, as a defence to the seventh and eighth counts.

The remaining pleas, down to the forty-first, inclusive, set up, in various forms, as a defence to the third and seventh counts, an embezzlement of the public money by the plaintiff, while postmaster, and as such. The third count charges the libel to be, that the plaintiff is a full-blown scoundrel and knave, and not fit to be trusted with the public money, and that, if entrusted, he would convert it to his own benefit, contrary to the act of congress, and would commit wilful and corrupt felony. The seventh count is the same. These several pleas do not meet and justify the whole of the libel, as set forth in the counts. A plea that the plaintiff has committed the offence of embezzlement is no an-

swer to the charge that, if entrusted with public moneys, he would commit it again. This is not the legal effect or conclusion from the fact of a previous embezzlement by the same person, and hence is bad as a plea. The pleader overlooks the locus penitentiae, to the benefit of which every person is entitled.

The forty-second plea sets up a defence to the fourth and eighth counts of the declaration. Those counts are founded on that part of the libel which charges that the plaintiff, according to the innuendo, while postmaster, by natural affinity, gathered about him scamps, and wilfully and corruptly employed them to steal the public money, and that, under the conduct or rule of the plaintiff, as postmaster, and while he held the office, it became a den of thieves. The forty-second plea, in answer to this, sets up, substantially, that the plaintiff, as postmaster, had the appointment of his clerks and other employees, and that they, in the course of their employment and business, abstracted letters from the office, broke them open, and stole the contents. It requires no argument to show that this plea fails to answer the cause of action stated in the counts.

The same remarks are applicable to the forty-third plea, as to the dead letters.

The forty-fourth, forty-fifth, forty-sixth, and forty-seventh pleas are subject to the same objections as the forty-second.

The forty-eighth plea is as bad, as an attempt to set up a multitude of defences, in one plea, to the causes of action in the third and seventh counts. There are other objections, but the above is sufficient.

I have looked into the averments in the declaration that are objected to, and am satisfied that the same are sufficient, in substance, to make the libel applicable to the plaintiff. The whole of the libel is to be read for this purpose, which will remove all doubt on the point.

There must be judgment for the plaintiff on all the demurrers to the pleas, with leave to the defendants to amend, on payment of costs.

COOK (UNION BANK v.). See Case No. 14,349.

COOK (UNITED STATES v.). See Cases Nos. 14,851 and 14,852.

COOK (VAN BOKKELEN v.). See Case No. 16,831.

Case No. 3,166.

COOK v. WHITNEY.

[3 Woods, 715.][1]

Circuit Court, S. D. Mississippi. Nov. Term, 1877.

REMOVAL—DIVERSE CITIZENSHIP—PRACTICE—REMAND OF CAUSE—PARTIES.

1. To warrant the removal of a cause from a state to a federal court, under the act of March 2, 1867 [14 Stat. 558], it is not necessary that the parties should have been citizens of different states at the time the suit was brought, provided they are citizens of different states when the petition for removal is filed.

[Cited in Hone v. Dillon, 29 Fed. 467.]

2. Under said act, the filing in the federal court of an imperfect transcript of the record in the state court, is no ground for remanding the cause.

3. Garnishees are not parties to the suit. The fact that the plaintiff and the garnishees are citizens of the same state, is no obstacle to the removal of a case from the state to the federal court.

[Cited in Deford v. Mehaffy, 13 Fed. 483; Ahlhauser v. Butler, 50 Fed. 709.]

[See note at end of case.]

[At law. Action by J. Reese Cook against Benjamin D. Whitney (Klein, garnishee) to recover on promissory notes.]

Heard upon motion to remand the cause to the state court from which it had been removed.

G. N. Simrall and L. W. McGruder, for the motion.

G. Gordon Adam and Frederick Speed, contra.

HILL, District Judge. This is an action at law, commenced by attachment, in the circuit court of Warren county, and removed to this court on application of the defendant, under the act of congress of 1867 (14 Stat. 558), providing for the removal of causes, in certain cases, from the state into the circuit courts of the United States. The questions for decision arise upon plaintiff's motion to remand the cause to the circuit court of Warren county, from which it was removed, into this court. The motion assigns the following grounds: First. Because it does not appear that the defendant was, at the time of the commencement of this suit, a citizen of a different state from that whereof the plaintiff was a citizen at said date. Second. Because the defendant did not, on the first day of the present term of this court, or at any other time, enter in this court copies of the process against him, and of all pleadings, depositions, testimonies and other proceedings in this cause. Third. Because this cause is not a suit in which there can be a final termination of the controversy, so far as it concerns the defendant Whitney, without the presence of other defendants to the cause.

These grounds will be considered in the order stated.

Under the judiciary act of 1789 (1 Stat. 73), it was necessary, in order to remove a cause from a state into a federal court, that the non-resident defendant, when sued in a state court of which the plaintiff was a citizen, should have been a citizen of another state at the time the suit was brought. Under this act, it was only a non-resident defendant who could have the cause removed; the plaintiff had no such right. The act of 1866 (14 Stat. 306) amended the judiciary

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

act of 1789, so far as to allow a non-resident defendant who was sued jointly with a resident defendant in a state court, in certain cases, to remove the cause, as to himself, into the circuit court of the United States, provided a final determination of the cause, so far as it concerned himself, could be had without the presence of his co-defendant, a resident of the state in which the suit was brought. This act gives no right to the plaintiff to have the cause removed. The act of 1867, known as the "Prejudice," or "Local Influence" act, is the first act which gave the plaintiff the right of removal, but confines it to non-resident plaintiffs, as well as defendants. The act of 1867 (14 Stat. 558), under which the removal of this cause was made, provides, "That where a suit is now pending, or may hereafter be brought in any state court, in which there is a controversy between a citizen of the state in which the suit is brought, and a citizen of another state, such citizen of another state, whether he be plaintiff or defendant, if he shall make and file an affidavit in such state court, that he has reason to believe, and does believe, that from prejudice or local influence, he will not be able to obtain justice in such state court, may have the cause removed to the circuit court of the United States." This act was passed to prevent injustice to non-resident parties, who might either sue or be sued in state courts, where, from any cause, there might exist prejudice against such non-resident party, in the community where such cause would have to be tried in the state court, and which, as part of the history of that time, was known to exist both north and south, resulting mainly from the war, then just closed. This prejudice might not arise, or be discovered until after the suit was brought, and hence the necessity of allowing the removal as soon as the reason for it should be ascertained after the suit was brought. There is nothing in the language of the act requiring a different construction, and no contrary ruling has been made by the supreme court. Mr. Justice Miller, in the case of Johnson v. Monell [Case No. 7,399], holds that, under the act of 1867, the non-residence of the party applying for the removal at the time of the application, is all that is required. This case is referred to, and the same rule recognized by Judge Dillon in his work on the Removal of Causes to the Federal Courts. I concur in these views, and must hold that the non-resident citizenship of the defendant, at the time of making his application for the removal of the cause, is all that was required, and that the first ground stated in the motion for remanding the cause, must be overruled.

The second ground stated in the motion is, that no such record as the law requires was filed in this court within the time prescribed by law, or at any other time. The application for removal was made in the circuit court of Warren county, at last December term. This is a continuation of the November term, 1877, consequently the defendant has until the first Monday in May next, the commencement of the next regular term, in which to file the proper record; but, if this were not so, what purports to be a certified transcript of the record was filed in this court on January 29, 1877. If it is not complete, a diminution of the record should be suggested, when proper steps can be had to bring up a complete record. Therefore, this ground stated in the motion for remanding the cause must fail.

The third ground stated in the motion is one of first impression in the courts over which I preside, and, so far as I am informed, in any court.

Two questions are raised: First, are the garnishees parties to the suit; and, secondly, if parties, can the controversy between plaintiff and defendant be determined by this court, so far as it concerns the defendant, without their presence? After a careful consideration of the question first stated, I am satisfied that the garnishees are not parties defendant to the suit, as between plaintiff and defendant, and have no interest whatever in the controversy between them. The sole issue between the plaintiff and defendant is the question of indebtedness from the defendant to the plaintiff, stated in the pleadings. It is a matter of no concern to the garnishees which party shall succeed, or to whom they shall pay the money due by them to the defendant. No judgment can be rendered against them until one is rendered against the defendant. If this is never done, the suit is at an end as to them. If, however, a judgment is rendered against the defendant, then their relationship to the defendant is only incidental, as a means of obtaining satisfaction of the judgment. This is done not only without costs as to them, but they are entitled to their costs. The fact that the plaintiff is a citizen of the same state with them interposes no obstacle to the jurisdiction of the court in enforcing satisfaction of its judgment, out of the amount in their hands belonging to the defendant. If this obstacle existed, judgment creditors would often be deprived of the fruits of their judgment. This objection applies with no more force than would be found upon a trial of the right of property, where a judgment was rendered in favor of a resident plaintiff, and levied upon property of the defendant found in the state, and claimed by a citizen of the state. In such case no one, I presume, would question the jurisdiction of the court to try the question as to the rights of the parties. As already indicated, the process of garnishment is but an incident to the suit; the removal of the cause into this court brought with it all its incidents, including the funds belonging to the defendant, or vested in the hands of the garnishees by the process of garnish-

ment, as a means of satisfying plaintiff's judgment, should he obtain one in this court. It is like property which incidentally follows a suit into this court, upon removal from a state court. In such case no question is raised as to the jurisdiction of this court over the property for the purposes of the suit.

I am satisfied that none of the grounds stated for the remanding of the cause are well taken. The result is that the motion must be denied.

[NOTE. The cause proceeded to trial in the circuit court, and there was a judgment for plaintiff. Defendant sued out a writ of error, and plaintiff thereafter moved for an affirmance, which was denied because of the failure to unite with the motion a motion to dismiss, as required by Sup. Ct. Rule 6, as amended. Whitney v. Cook, 99 U. S. 607.

[Subsequently, the court affirmed the judgment, and awarded $250 damages against Klein on account of delay in bringing on the appeal. Whitney v. Cook, 26 U. S. (Lawy. Ed.) 560.]

COOK (WOODWORTH v.). See Case No. 18,011.

COOK COUNTY (WALWORTH v.). See Case No. 17,136.

COOK COUNTY NAT. BANK (UNITED STATES v.). See Case No. 14,853.

Case No. 3,167.

In re COOKE et al.

[30 Leg. Int. 404.][1]

District Court, E. D. Pennsylvania. Nov. 26, 1873.

RECEIVER IN BANKRUPTCY.

[Where there is delay in the prosecution of proceedings in bankruptcy, a receiver may be appointed to conserve the estate.]

In the matter of the bankruptcy of Jay Cooke & Co., the following order has been made:

"Certain creditors asking for the appointment of a receiver, and the bankrupts assenting thereto, it is considered that by reason of the delay of the original petitioning creditors to prosecute their application, and by reason of the intervening writing of October 1st, 1873, such appointment is proper and necessary. Therefore, Edwin M. Lewis, of the city of Philadelphia, Esquire, is appointed receiver of the estate of the bankrupts, with all the usual powers, rights, duties, and responsibilities of a receiver appointed by a court of equity. The bankrupts will forthwith account to him for all their and any or either of their property, real and personal, moneys, rights, credits and effects; the accounts to be taken from the commencement of the proceedings on the 25th of September last, and from such earlier period or periods if any, as may, as to any item or items, be necessary. The receiver will take possession of and keep the said estate under the order and direction of the court, subject to the operation and effect of the warrant. All books and papers of, or concerning the business, etc., of the bankrupts, or any of them, will be placed in the register's office, or where the register may direct, and remain under the control of the receiver, and open to the inspection of parties interested. Any corporeal property in the marshal's custody under the warrant may remain in such custody till further direction. The receiver will, if the marshal shall require it, assist him in making the inventory or appraisement, etc., and in the execution of any other duties under the warrant, and will, if the register shall require it, assist in supervising the schedules exhibited by the bankrupts; and will from time to time report either directly to the court, or through the register, whatever may be necessary or useful to promote the best interest of the creditors. All moneys will be forthwith deposited, etc., in like manner as the receipts or collections of assignees in bankruptcy. The receiver will account weekly to the register, and finally to the assignee, or as the court may direct. The final account of the receiver will be taken before, and audited, settled, and adjusted by, the register, unless the court shall otherwise direct. If the bankrupts, or any or either of them, have, or has, at any time or times, made any conveyance, transfer, payment, or appropriation otherwise than in the regular course of business for valuable consideration, or in the expense of living, or family expenses, the receiver will, through the register, report the same. If any person claiming under the bankrupts, or any or either of them, and asserting any right or pretence of right not prior to the said 25th of September, 1873, shall refuse or neglect to account to the receiver when requested, the receiver may obtain from the clerk's office a citation returnable within five days, or earlier, if the court shall so direct, requiring of such refusing or neglecting person to account in the premises, or show cause why he should not be summarily compelled to do so. The appointment of the receiver will not be permitted by the register to cause any retardment of the first meeting of creditors, or postponement of the choice or appointment and qualification of the assignee, or to cause any delay whatever of the proceedings in the bankruptcy. The register will so conduct and regulate them that the duties of the receiver may terminate as soon as possible by the substitution of an assignee or otherwise. The printing of any papers, if it will facilitate or expedite any business of the bankruptcy, or of the receivership, may be ordered by the register or receiver, respectively."

Joseph Mason, Esq., is the register.

[1] [Reprinted by permission.]

Case No. 3,168.

In re COOKE et al.

[10 N. B. R. 126.][1]

District Court, E. D. Pennsylvania. 1874.

EXAMINATION OF BANKRUPT.

1. A creditor may be entitled to an order for the examination of a bankrupt under the 26th section of the bankrupt act [of 1867 (14 Stat. 529)], notwithstanding the election of a trustee and committee of creditors under the 43d section, the latter section not confining the power of the court to order such examination to the application of the trustee.

2. The duty of a bankrupt is to disclose whatever it may concern any parties interested to know concerning his debts, business, or estate.

[In the matter of Jay Cooke & Co., bankrupts.

[Certificate of Joseph Mason, Register in Bankruptcy:]

To the Honorable John Cadwalader, Judge of said court: I, the undersigned, one of the registers of said court in bankruptcy, and to whom the above matter has been referred, do hereby certify that, in the course of the proceedings in said case before me, the following question arose pertinent to the said proceedings, and was stated and agreed to by the counsel for the opposing parties, to wit: Audley W. Gazzam and J. D. Bennett, Esqrs., who appeared for William Torode, a creditor of said bankrupts, whose claim had been duly proved. Richard C. McMurtrie, Esq., for Jay Cooke, one of said bankrupts. Thomas H. Hubbard, Esq., for Harris C. Fahnestock, another of said bankrupts. Richard L. Ashhurst and John C. Bullitt, Esqrs., for Edwin M. Lewis, trustee of said bankrupts' estate. On the 11th day of June, 1874, an application in writing (herewith forwarded) was made to me on behalf of said William Torode, for an examination of said bankrupts, as provided in the 26th section of the bankrupt act. I thereupon made an order (in form 45) for their examination upon the 25th day of June, 1874, at 2 o'clock p. m. Said order was served on only two ot said bankrupts, Jay Cooke and Harris C. Fahnestock, who attended at my office at the last-mentioned time. At said time (and on the 26th day of June, 1874, 2 p. m., an adjourned sitting under said order), Mr. Gazzam requested that the said bankrupts be sworn. To this objections were made by the respective counsel of the said bankrupts, that of Mr. Hubbard on behalf of Harris C. Fahnestock, being in writing and herewith forwarded. Objections were also made on behalf of the trustee and submitted in writing, and are also herewith forwarded. I stated my opinion to be that the bankrupts should be sworn, and the examination proceeded with. I thereupon proceeded to administer the usual oath, when each of said bankrupts, Jay Cooke and Harris C. Fahnestock, stated that, under the advice of counsel, they declined to be sworn. The said counsel for the trustee and the said bankrupts excepted to my decision, and requested that the same should be certified to the judge for his opinion thereon.

The alleged ground of the objection to the order referred to, and the examination proposed to be made thereunder, is, that the 43d section of the bankrupt act (in accordance with the provisions of which, in this matter, a trustee and committee of creditors have been chosen to wind up and settle the estate), by expressly giving the court, on the application of the trustees, power "to summon and examine on oath or otherwise the bankrupt and any creditor, etc.," has thereby confined the power of the court to order an examination to such application, and excluded the operation of the provisions of the 26th section of the act, as to examination of the bankrupt upon the application of a creditor; and that, while it is admitted that the question of the discharge of the bankrupts is not affected by the provisions of the 43d section, in this case no application for discharge has been made, and, therefore, any examination of the bankrupts, which would be pertinent to the question of discharge, cannot now be made by any creditor. The primary duty of a bankrupt to his creditors is that of disclosure of the causes of his insolvency, together with an account of the property of which he has been possessed, and of his disposition thereof. The sufficiency of such disclosure must materially influence the court in determining his right to a discharge.

Pending the determination of the question of discharge, the creditor is prevented from pursuing any other remedy than that afforded by the bankruptcy proceeding for the collection of his debt. If the discharge be refused, property acquired by the bankrupt after the commencement of proceedings, will be available for the payment of the creditor. It is, therefore, of the utmost importance to both the bankrupt and his creditors, that the question of discharge should be speedily determined. Accordingly the statute has provided that application for discharge may be made in all cases after the expiration of six months from the adjudication of bankruptcy, and, it would seem, must be made within one year. The 21st section, by necessary implication, visits unreasonable delay on the part of the bankrupt in endeavoring to obtain his discharge, with the forfeiture of his right to protection by the court from the suit of a creditor. In this case the adjudication was made on the 26th day of November, 1873, so that, at the time of the making of the order referred to, more than six months had elapsed since the date of the adjudication. The bankrupts, therefore, being in a position to apply for a discharge, can it be that their neglect or omission to do so will prevent a creditor from speeding the cause by making such examination as may be relevant to the issue between him and his debtors, and the result of which may induce opposition or acquies-

[1] [Reprinted by permission.]

cence on his part? He has a right, I think, to presume that his debtors will, without delay, apply for their discharge, and that they intend to do so is not denied by them.

In voluntary proceedings the concluding prayer of the original petition is, that the petitioner "may be decreed to have a certificate of discharge," etc., and after adjudication in involuntary cases, by the 42d section of the act, the proceedings are in all respects assimilated to those of a voluntary nature. A creditor is, I think, undoubtedly justified in assuming that the ordinary course will be taken by his debtor, and has the right to anticipate and prepare for the determination of the question of discharge, and the bankrupt cannot, I think, be allowed to withhold at any time during the course of proceedings any information by which it may be determined that he is, or is not, entitled to the benefit the statute is intended to afford. Not having the slightest doubt of the power of the court to facilitate the speedy determination of the question of discharge, I made the order of the 11th of June, and see no reason why the bankrupt should refuse to obey it.

As to the suggestion of the trustee, set forth in his letter (annexed to the objections made by his counsel), I have only to say that if, during the course of the examination proposed, questions should be asked or matters inquired about, which, in his opinion, it will be injurious to the management of his trust should be made public, the propriety of allowing the examination to proceed as to such matters can be called to the attention of the court, and the objection thereto, at such appropriate time, considered; but I think it is no part of the duty of the trustee to interfere with a creditor at the very threshold of his inquiry into matters which vitally concern his interests, independent of the collection and distribution of the estate, even though there be matters connected with such collection and distribution the investigation of which the trustee may properly consider can only, without jeopardizing important interests of all the creditors, be pursued by himself. Moreover, it is to be observed, that the trustee is mainly concerned with the execution of his trust and not with the discharge of the bankrupts. The creditors are interested in both. It must, perhaps, be conceded that of such examination as may be material or necessary to aid the trustee in the execution of his trust, he alone (and the committee under whose direction he acts) should be the judge, and a creditor should not be allowed to interfere. In short, the reasonable construction of the 43d section, in connection with the question of the examination of the bankrupts is, in my opinion, as follows:

To remove all doubt as to the necessity of the trustee resorting to a bill in equity for discovery, to assist him in the management of his trust, the section referred to has expressly conferred on the court the power to summarily make such examination of the bankrupt, and any creditor, or any other person, whose examination may be material or necessary to aid the trustees in the execution of their trust. Such examination ex vi termini, the right of discharge being unaffected by the section, cannot be exclusive of that which may be made by the court on its own motion, or on the application of a creditor, and which may be relevant immediately or remotely to the question of discharge. The subject-matters being different, the maxim "expressio unius est exclusio alterius" cannot be applicable. The examination upon the application of a creditor and that upon the application of the trustee may be widely divergent, or narrowly concurrent, or even identical in point of fact, but to exclude the former because of the express grant of the latter seems to me to be an unjust and unwarrantable interpretation, and one which would unnecessarily deprive a creditor of a most valuable and important right. Creditors have also an interest in inquiring into the consideration and validity of claims proved against the estate, and, if so advised, may doubtless make objections thereto. The examination of the bankrupt may be very necessary to furnish information upon which such objection may be founded. It is also to be observed that the question of the accountability of the trustee to the creditors may be materially affected by the examination of the bankrupt, although, perhaps, an examination for such purpose could not be made until an account of the trustee had been filed. Of course, it cannot be pretended that an examination under the 26th section of the act is not entirely within the control of the court, and therefore it is unnecessary to consider any possible attempt to abuse the privilege or needlessly annoy the bankrupt by impertinent, frivolous, and indefinitely protracted inquiry into his affairs.

CADWALADER, District Judge. The duty of a bankrupt is to disclose whatever it may concern any parties interested to know concerning his debts, business, or estate. The schedules required by the 11th and 42d sections of the act of congress may constitute a very insufficient disclosure. In this case, if the bankrupts had filed the proper exhibits of a last examination, or had asked the appointment of a public meeting for the purpose, or if the trustee or committee of creditors had compelled full disclosure, it might, perhaps, have been proper to restrict the proposed examination to special written interrogatories. But on this point the expression of a positive opinion is not necessary.

The register's conclusion is approved by the court. But with reference to his reasons, the court is of opinion that the same conclusion might have been correctly reached independently of any question of prospective application for a discharge. The examination of the bankrupts will proceed without interference by the trustee or

the committee of creditors, who, however, will be authorized to participate therein, so far as may promote or facilitate its proper purposes.

Case No. 3,169.

In re COOKE et al.

[11 N. B. R. 1; 10 Phila. 262; 31 Leg. Int. 357; 1 Wkly. Notes Cas. 51; 9 West. Jur. 157; 22 Pittsb. Leg. J. 59; 1 Cent. Law J. 580.][1]

Circuit Court, E. D. Pennsylvania. Oct. 28, 1874.

BANKRUPTCY—POWERS OF COMMITTEE.

Where the proceedings in bankruptcy have under the 43d section [of the bankrupt act of 1867 (14 Stat. 538)] been superseded by arrangement, and the estate directed to be wound up by trustees, under the direction of a committee, the trustee is bound to accept the direction of the committee as conclusive; and neither the district court, nor a general meeting of creditors, have the right to control the discretion of the committee, unless the committee exercise their discretion mala fide. In the absence of fraud, the decision of the committee is conclusive.

[Cited in Re Hicks, 2 Fed. 852; Re Baxter, Case No. 1,122; Re Bonnett, Id. 1,634.]

[Petition to review an order of the district court of the United States for the eastern district of Pennsylvania.]

Chas. S. Pancoast and R. C. McMurtrie, Esqs., for E. W. Clark et al., creditors.

Chas. H. Sidebotham, Esq., for Yeakill.

[1] [Reprinted from 11 N. B. R. 1, by permission. 1 Wkly. Notes Cas. 51, and 1 Cent. Law J. 580, contain only partial reports.]

R. L. Ashurst, for trustee, and Samuel Dickson and J. C. Bullitt, for committee, submitted the following argument, which we publish at length, believing the profession will welcome this carefully prepared review of the history of the 43d section, to which so much additional importance has been given by the recent amendment.

This is an appeal by the trustee and committee, chosen and appointed under the provisions of the 43d section of the bankrupt act, from an order of the district court, calling a second meeting of creditors for the purposes mentioned in the 27th and 28th sections of the act. The reason assigned for a reversal of the order is: The requisite proportion of the creditors having determined that the estate should be wound up in the manner prescribed by the 43d section, and their resolution having been confirmed by the court, there is no longer any power in the district court to order a meeting of creditors for the purposes mentioned in the 27th and 28th sections of the act; nor would such meeting, if called, have any authority to make the resolutions contemplated in those sections. The preliminary objections need only be stated, the substantial question being one of power rather than of discretion.

The 43d section of the act of congress of March 2d, 1867, is, in the main, copied from the English bankrupt act of 1861 (sections 185–191), which was adopted from the Scotch bankruptcy act of 1856 (19 & 20 Vict. c. 79, §§ 35–40). For convenience of comparison they are given in parallel columns:

Act of Congress of 1867, § 43.	24 & 25 Vict. c. 134, §§ 185–191.
If at the first meeting of creditors, or at any meeting of creditors to be specially called for that purpose, and of which previous notice shall have been given for such length of time and in such manner as the court may direct, three-fourths in value of the creditors, whose claims have been proved, shall determine and resolve that it is for the interest of the general body of creditors that the estate of the bankrupt should be wound up and settled, and distribution made among the creditors by trustees, under the inspection and direction of a committee of the creditors, it shall be lawful for the creditors to certify and report such resolution to the court, and to nominate one or more trustees to take and hold and distribute the estate, under the direction of such committee. If it shall appear to the court, after hearing the bankrupt and such creditors as may desire to be heard, that the resolution was duly passed, and that the interest of the creditors will be promoted thereby, it shall confirm the same; and upon the execution and filing by or on behalf of three-fourths in value of all the creditors whose claims have been proved, of a consent that the estate of the bankrupt be wound up and settled by said trustees according to the terms of such resolution, the bankrupt, or his assignee in bankruptcy, if appointed, as the case may be, shall, under the direction of the court, and under oath, convey, transfer, and deliver all the property and estate of the bankrupt to the said trustee or trustees, who shall, upon such conveyance and transfer, have and hold the same in the same manner and with the same powers and rights, in all respects, as the bankrupt would have had or held the same if no proceedings in bankruptcy had been taken, or as the assignee in bankruptcy would have	At the first meeting of creditors held after adjudication in manner herein provided, or at any meeting to be called for the purpose, and of which ten days' notice shall have been given in the London Gazette, three-fourths in number and value of the creditors present or represented at such meeting may resolve that the estate ought to be wound up under a deed of arrangement, composition, or otherwise, and that an application shall be made to the court to stay proceedings in the bankruptcy for such period as the court shall think fit. The registrar shall report such resolution to the court within four days from the date of such resolution; and the bankrupt, or any creditor nominated in that behalf by the meeting, may then apply to the court that the proceedings in bankruptcy may be stayed in the term of such resolution; and the court, after hearing the bankrupt and such creditors as may desire to be heard for or against the resolution, and if it shall find that the resolution was duly carried, and that its terms are reasonable and calculated to benefit the general body of the creditors under the estate, shall confirm the same and make order accordingly, and in such order shall give such directions as to the interim management of the estate as it shall deem expedient. If the proceedings in bankruptcy be stayed as herein provided, the bankrupt, or any creditor nominated in that behalf by the meeting aforesaid, may, at any time within the period during which the proceedings are so stayed produce to the court a deed of arrangement signed by or on behalf of three-fourths in number and value of all the creditors of the bankrupt, and the court may consider the same and may examine on oath the bankrupt and any

done had such resolution not been passed; and such consent, and the proceedings thereunder shall be as binding in all respects on any creditor whose debt is provable, who has not signed the same, as if he had signed it, and on any creditor whose debt, if provable, is not proved, as if he had proved it; and the court, by order, shall direct all acts and things needful to be done to carry into effect such resolution of the creditors; and the said trustee shall proceed to wind up and settle the estate, under the direction and inspection of such committee of the creditors, for the equal benefit of all such creditors; and the winding up and settlement of any estate, under the provisions of this section, shall be deemed to be proceedings in bankruptcy under this act, and the said trustee shall have all the rights and powers of assignees in bankruptcy.

The court, on the application of such trustees, shall have power to summon and examine, on oath or otherwise, the bankrupt and any creditor, and any person indebted to the estate, or known or suspected of having any of the estate in his possession, or any other person whose examination may be material or necessary to aid the trustees in the execution of their trust, and to compel the attendance of such persons and the production of books and papers, in the same manner as in other proceedings in bankruptcy under this act; and the bankrupt shall have the like right to apply for and obtain a discharge after the passage of such resolution and the appointment of such trustees, as if such resolution had not been passed, and as if all the proceedings had continued in the manner provided in the preceding sections of this act.

If the resolution shall not be duly reported, or the consent of the creditors shall not be duly filed, or if, upon its filing, the court shall not think fit to approve thereof, the bankruptcy shall proceed as though no resolution had been passed, and the court may make all necessary orders for resuming the proceedings; and the period of time which shall have elapsed between the date of the resolution and the date of the order for resuming proceedings shall not be reckoned in calculating periods of time prescribed by this act.

of the creditors who may desire to be heard in support of or in opposition to the deed, and may make such other inquiry as it may think necessary; and if the court shall be satisfied that the deed has been duly entered into and executed, and that its terms are reasonable and calculated to benefit the general body of the creditors under the estate, it shall, by order, make a declaration of the complete execution of the deed, and shall direct the same to be registered with the chief registrar, and shall also, if it thinks fit, annul the bankruptcy, and such deed shall thereafter be as binding in all respects on any creditor who has not executed the deed as if he had executed it, provided such deed be registered with the chief registrar in manner directed by the order.

Either before or after such order, the court shall have jurisdiction to entertain any application of the bankrupt, or of any party to the deed, or of any creditor or person claiming to be a creditor, respecting the disclosure, distribution, inspection, conduct, management, or winding up of the bankrupt's estate and affairs, or any act or thing relating thereto, or respecting the execution of any of the trusts or provisions of the deed, or the audit or examination of the accounts of a trustee or inspector, or the taxation or examination of the costs or charges of any attorney, solicitor, accountant, auctioneer, broker, or other person acting or employed under the deed, or generally for the decision of any dispute or question, and shall also have jurisdiction to entertain any application of any such person as aforesaid, respecting any matter for the submission whereof to the court provision is made by the deed, or any matter arising between any of the said persons and any other persons appearing and submitting to the jurisdiction of the court; and the court shall determine all questions arising under the deed according to the law and practice in bankruptcy, so far as they may be applicable, and, on entertaining any such application, shall have power to make all such orders as shall seem just, and to enforce all such orders as in bankruptcy.

The court shall have power, for the purpose of any application under these provisions, or for the better execution of any powers given to the court thereby, to summon and to examine, upon oath or otherwise, the bankrupt and any party to the deed, and any creditor, or person claiming to be a creditor, and any person known or suspected to have any of the estate in his possession, or any person supposed to be indebted to the estate, or whom the court may deem capable of giving any information material to the full disclosure of the debtor's transactions and affairs, or to the carrying into effect the provisions of the deed; and the court may exercise, as to the examination of such persons, and the production by them of any such books, papers, deeds, or documents as it shall deem requisite, the same powers that are vested in the court with relation to the examination of persons and witnesses, and the production of books, papers, deeds, and documents in matters of bankruptcy.

If the resolution aforesaid shall be duly reported, or if the court shall refuse the application to stay proceedings, or if the deed of arrangement shall not be duly produced, or if upon its production the court shall not think fit to approve thereof, the bankruptcy shall proceed as though no such resolution had been passed, and the court may make all necessary orders for resuming the proceedings in bankruptcy; and the period of time which shall have elapsed between the date of such resolution and the date of the order for resuming proceedings shall not be reckoned in calculating periods of time prescribed by this act.

If the bankruptcy be annulled as herein provided, the order annulling the same shall be filed with the proceedings, and notice thereof shall be given in the "London Gazette."

The first attempt in England to give a majority of the creditors of a bankrupt the right to control the settlement of the estate or enforce a compromise which would enable the bankrupt himself to wind up the estate, was made in the act of 6 Geo. IV. §§ 133, 134. By that act nine-tenths in number and value of the creditors might accept a composition which would bind the rest of them. Eden says (Bankr. Law, 443): "The new statute has introduced, from the Scottish sequestration act, a new provision of terminating the bankruptcy, by what is called, in Scotland, a composition contract. All parties, it has been there found, derive advantage from it; the bankrupt can commonly make much more out of the wreck than any one else can, the expense of managing the funds is saved, and the creditors have a certain definite sum to rely on, with surety for its payment." Of course, after such a composition was accepted the proceedings in bankruptcy were at an end. The act of 1849, §§ 211–223 [12 & 13 Vict. c. 106], contemplated two kinds of arrangement—namely, arrangement under the control of the court, and arrangement by deed, independently of the court. The first required the sanctioning of three-fifths of the creditors; an arrangement by deed required the approval of six-sevenths. Jurisdiction was given to the court to interfere if the estate was not properly administered under the deed. The form of a deed of arrangement under this act, which was approved by the court, is given in Irving v. Gray, 3 Hurl. & N. 34. This deed allowed the inspectors to direct and authorize the debtors to carry on and conduct the business in such way as they should think expedient, and generally gave them the right to wind up according to their discretion. Robson says (Law Bankr. 628, Ed. 1872) that: "Objections were made to the provisions of the act of 1849, respecting arrangements by deed, on the ground that they did not enable a composition to be made without a cessio bonorum; and also, that they did not protect a debtor from the proceedings of a hostile creditor pending negotiations for an arrangement. To meet these objections some new provisions, as to arrangement with creditors, were introduced into the bankruptcy act of 1861, in lieu of the clauses for that purpose in the act of 1849. They provided for the allowance to the debtor of a limited period to obtain the assent of his creditors to such an arrangement, without the risk of bankruptcy, and they did not require a cessio bonorum to make an arrangement or composition binding on dissenting creditors; but they empowered a majority in number and three-fourths in value of the creditors to bind the minority, providing the deed effecting the arrangement or composition was duly registered in the court of bankruptcy within twenty-eight days after the execution thereof by the petitioner." The full text of the sections of the act of 1861 [supra], providing for the change from bankruptcy to arrangement or composition, which was borrowed from the Scotch bankruptcy act of 1856 (19 & 20 Vict. c. 79, §§ 35–40) has already been given.

The important provisions of the sections relating to the liquidation by arrangement are as follows:—

"Section 192. Every deed or instrument made or entered into between a debtor and his creditors, or any of them, or a trustee on their behalf, relating to the debts or liabilities of the debtor or his release therefrom, or the distribution, inspection, management, and winding up of his estate, or any of such matters, shall be as valid and effectual and binding on all the creditors of such debtors as if they were parties to and had duly executed the same, provided the following conditions be observed—that is to say: First. A majority in number, representing three-fourths in value of the creditors of such debtor, whose debts shall respectively amount to £10 and upwards, shall, before and after execution thereof by the debtor, in writing, assent or approve of such deed or instrument. Second. If a trustee or trustees be appointed by such deed or instrument, such trustee or trustees shall execute the same. Third. The execution of such deed or instrument by the debtor shall be attested by an attorney or solicitor. Fourth. Within twenty-eight days from the date of the execution of such deed or instrument by the debtor, the same shall be produced and left (having been first duly stamped) at the office of the registrar, for the purpose of being registered. Fifth. Together with such deed or instrument there shall be delivered to the chief registrar an affidavit by the debtor or some person able to depose thereto, or a certificate by the trustee or trustees, that a majority in number, representing three-fourths in value, of the creditors of the debtor, whose debts amount to £10 or upwards, have, in writing, assented to or approved of such deed or instrument, and also stating the amount in value of the property and credits of the debtor comprised in such deed. Sixth. Such deed or instrument shall, before registration, bear such ordinary and ad valorem stamp duties as are hereafter provided. Seventh. Immediately on the execution thereof by the debtor, possession of all the property comprised therein, of which the debtor can give or order possession, shall be given to the trustee."

"Section 197. From and after the registration of every such deed or instrument in manner aforesaid, the debtor and creditors and trustees, parties to such deed, or who have assented thereto or are bound thereby, shall, in all matters relating to the estate and effects of such debtor, be subject to the jurisdiction of the court of bankruptcy, and shall respectively have the benefit of and be liable to all the provisions of this act, in the same or like manner as if the debtor had been adjudged a bankrupt, the creditors had proved, and the trustees had been appointed

creditors' assignees under such bankruptcy; and the existing or future trustees of any such deed or instrument, and the creditors under the same, shall, as between themselves respectively, and as between themselves and the debtor and against third persons, have the same powers, rights, and remedies with respect to the debtor and his estate and effects, and the collection and recovery of the same, as are possessed or may be used or exercised by assignees or creditors with respect to the bankrupt, or his acts, estate, and effects in bankruptcy; and, except where the deed shall expressly provide otherwise, the court shall determine all questions arising under the deed, according to the law and practice in bankruptcy, so far as they may be applicable, and shall have power to make and enforce all such orders, as it would be authorized to do if the debtor in such deed had been adjudged bankrupt and his estate was administered in bankruptcy.

"Section 198. After notice of the filing and registration of such deed has been given as aforesaid, no execution, sequestration, or other process against the debtor's property in respect to any debt, and no process against his person in respect of any debt, other than such process, by writ or warrant, as may be had against a debtor about to depart out of England, shall be available to any creditor or claimant without leave of the court; and a certificate of the filing and registration of such a deed, under the hand of the chief registrar and the seal of the court, shall be available to the debtor for all purposes, as a protection in bankruptcy.

"Section 199. In case any petition shall be presented for an adjudication in bankruptcy against a debtor after his execution of such deed or instrument as is hereinafter described, and pending the time allowed for the registration of such deed or instrument, all proceedings under such petition may be stayed, if the court shall think fit; and in case such deed or instrument shall be duly registered as aforesaid, the petition shall be dismissed."

In respect to the provisions in the English act of 1861, Shelford says (Law & Pr. Bankr. pp. 620, 621): "The clauses included under this section are entirely new, and have been substituted for the repealed sections (224–229) of the act of 1849. The clauses (224–229 of the act of 1849) were introduced with a view to enable a large majority of creditors to make arrangements with their debtor which would bind the minority for the due distribution of the estate among them. The principle of them was not new, for the 6 Geo. IV. c. 16, §§ 133, 134, introduced from the Scottish sequestration act new power to terminate a bankruptcy, by what is termed in Scotland a composition contract. By that act nine-tenths in number and value of the creditors might accept a composition which would bind the rest of them. See Eden, Bankr. Law (3d Ed.) pp. 443–448. The bankers, merchants, and traders in the city of London, in the year 1847, concurred in a statement that it is very advantageous to the 'mercantile community that in all cases of commercial insolvency any mode of liquidation which shall be approved of by a proper majority of the creditors, whether by trust, composition, inspection, or otherwise, should be binding on the rest, and that a small number of dissenting creditors should not be enabled to frustrate such mode of liquidation.' The commissioners under the bankruptcy commission (1854) concurred in that statement, provided there is a large and bona fide majority of creditors who desire a composition or other arrangement out of court as most conducive to their own interests, and the consent of the majority was neither collusively nor fraudulently obtained."—Report of Commissioners, 1854, p. 20.

The bankrupt act of 1869 provides for a liquidation by arrangement, and the acceptance of composition without actual bankruptcy. Under liquidation by arrangement the property is vested in a trustee, without a deed, to be administered under the control of the court, as in bankruptcy, and a composition may be made effectual by a vote of the creditors, at meetings of creditors, without adjudication. The details of the act, in reference to liquidation or composition, need not be stated more at length. The proceedings in liquidation are expressly made proceedings in bankruptcy; but "where no committee of inspection is appointed the trustee may act on his own discretion in cases where he would otherwise have been bound to refer to such committee."

The "committee of inspection," though commonly provided for in the forms for deeds of arrangement, was first mentioned in the English statutes in the 14th section of the act of 1869. The third paragraph is as follows:—

"They (the creditors) shall, by resolution, appoint some other fit persons, not exceeding five in number, and being creditors qualified to vote at such first meeting of creditors, as in this act mentioned, or authorized in the prescribed form by creditors so qualified to vote, to form a committee of inspection for the purpose of superintending the administration, by the trustees, of the bankrupt's property."

By the 27th section it is provided that the trustee, with the sanction of the committee of inspection, may do all or any of the following things:—First. Mortgage or pledge any part of the property of the bankrupt for the purpose of raising money for the payment of his debts. Second. Refer any dispute to arbitration, compromise all debts, claims, and liabilities, whether present or future, certain or contingent, liquidated or unliquidated, substituting or supposed to substitute, between the bankrupt and any debtor or person who may have incurred any lia-

bilities to the bankrupt, upon the receipt of such sums, payable at such times and generally upon such terms as may be agreed upon. Third. Make such compromise or other arrangement as may be thought expedient with the creditors or other persons claiming to be creditors in respect to any debts provable under the bankruptcy. Fourth. Make such compromise or other arrangement as may be thought expedient, with respect to any claim arising out of or incidental to the property of the bankrupt, made or capable of being made on the trustee, by any person, or by the trustee on any person. Fifth. To divide in its existing form amongst the creditors, according to its estimated value, any property which, from its peculiar nature or other special circumstances, cannot be advantageously realized by sale.

The 43d section provides:—"The trustee shall, from time to time, when the committee of inspection determines, declare a dividend amongst the creditors who have proved to his satisfaction debts provable in bankruptcy, and shall distribute the same accordingly: and in the event of his not declaring a dividend for the space of six months, he must summon a meeting of the creditors, and explain to them his reasons for not declaring the same."—Bankr. Act 1869, § 41; Robs. Bankr. 517.

The 83d section makes certain regulations as to the trustee and committee of inspection, and the seventeenth paragraph of the section provides that, "where there is no committee of inspection, any act or thing, or any direction or consent by this act authorized or required to be done or given by such committee, may be done or given by the court on the application of the trustee."

The provisions of the act of congress of June 22d, 1874 [18 Stat. 178], in reference to composition with creditors, are borrowed from the 126th section of the English act of 1869, and are introduced by the words, "That the following provisions be added to section 43 of said act."

It will thus be seen that the 43d section of the act of 1867 was borrowed from a system which had been previously tested, both in Scotland and in England, and which had for its object the withdrawal of the management of bankrupt estates from the courts, and the placing of their administration, either directly in the hands of the bankrupt himself, if a composition could be agreed upon, or in those of the immediate representatives of the creditors. The power of binding a minority by a composition agreement was not given by congress till its last session, but the admirable device of a committee of inspection and direction was certainly not added to the plan of "liquidation by arrangement," in order to impair the powers of the creditors, or enlarge those of the courts, and the true scope and intent of that provision can be best discovered in the definition of the functions of the committee which is given in the English statute of 1869. Nor is it without significance, that, beginning with the act of 6 Geo. IV., both parliament and congress have steadily added to the powers of the majority of the creditors, and yielded more and more to the desire of mercantile men to control and manage their own business.

Studied in the light of past and subsequent legislation, it would seem clear that when three-fourths of the creditors of a bankrupt estate have resolved that it shall be wound up by a trustee, under the inspection and direction of a committee, the ordinary powers of the district court are suspended; and beyond all question that the general meetings of creditors which need only consist of one-half of the creditors, and the action of which may be controlled by a bare majority, or little more than one-fourth of the whole number, have no power to control or direct the action of the representatives of three-fourths of the creditors. How large are the powers of those meetings will be seen by a reference to the 27th and 28th sections of the act of 1867, for the purposes of which the meeting of October 6th was ordered.

It is submitted that the powers given by these sections cannot be exercised where the estate is being wound up under the 43d section, both because they are not expressly given with reference to such a contingency, but are, on the contrary, by necessary implication, withheld; and because, the discretion being confided to the trustee and committee, it cannot be controlled, so long as honestly exercised. Much less could the trustee himself, without the committee, determine the questions which must be decided by the assignee when less than one-half in value of the creditors attend the meeting. In the official copy of the statutes, the 43d section is entitled, "Of superseding the bankruptcy proceeding by arrangement." The resolution provided for is, that "the estate should be wound up, settled, and distribution made among the creditors by trustees, under the inspection and direction of a committee of the creditors." These words are large enough to embrace the entire control and management of the estate. To wind up, settle, and distribute is to do all that is to be done; to inspect and direct how it is to be done is to determine when and how it shall be done. In the case of an assignee, the election is subject to the approval of the judge, who may appoint additional assignees, or order a new election (section 14), and the deed of assignment is executed by the judge or the register; but the choice of the creditors for trustee or committee must be accepted, if the resolution is confirmed and the assignment to the trustee is executed by the bankrupts in person. The resolution may be passed after the assignee has been appointed, and in that event he is to make the con-

veyance to the trustee. To enable the trustee to examine the bankrupt and others, express power is given to compel their attendance. If the resolution is not approved, the bankruptcy "shall proceed as though no resolution had been passed." And the period of time which shall have elapsed between the date of the resolution and the date of the order for resuming the proceedings is not to be reckoned—a clause which is in terms inconsistent with the terms of the sections under which this meeting was called. Nor can the restrictions on the power of an assignee be held to limit the action of a trustee acting with the approval of the committee. By general order fourteen, an order for the redemption of a pledge or composition of a debt can only be obtained by an assignee, at a hearing upon petition, after ten days' notice. By order twenty-one, personal property can only be sold by an assignee after ten days' notice, and real estate after twenty days' notice, unless special cause be shown. And, finally, the supreme court has put an interpretation on the section, in the form prepared under its authority, for the order of the court, to be entered upon the confirmation of the resolution of the creditors. (Form sixty-three.) That form is as follows: "Order of Court. The foregoing proceedings, under the 43d section of the bankrupt act of March 2d, 1867, having been placed on file and read, it is ordered that all proceedings upon said petition in bankruptcy be stayed until the further order of the court. Witness, etc."

From this review of the history of legislation upon this subject and an examination of the section itself, it is believed that it has been made apparent that a winding up by a trustee is essentially different from that by an assignee.

[For the order setting down the argument of this motion, see Case No. 3,171.]

STRONG, Circuit Justice. This is an application made by the trustee and committee chosen and appointed under the 43d section of the bankrupt act, as well as by some of the creditors of the bankrupts, for a review of an order of the district court directing a second meeting of creditors for the purposes stated in the 27th and 28th sections of the act.

Several objections have been made to the order, only one of which do we propose now to notice. It is that three-fourths in value of the creditors whose claims have been proved, having determined that the estate shall be wound up in the manner prescribed by the 43d section, and their resolution having been confirmed by the district court, there is no longer any power in that court to order a meeting of creditors for the purposes mentioned in the 27th and 28th sections of the bankrupt act, and that such meeting, if called, would have no authority to resolve and direct as contemplated in those sections.

The bankrupt act of 1867 has very plainly provided two very different systems for winding up, settling, and distributing the estates of bankrupts. The first, and the ordinary one, is that presented by the 27th and 28th sections, applicable to all cases when the greater part of the creditors in number or in value who have proved their debts, at their first meeting choose an assignee, or assignees, or where the district judge or the register appoints one or more assignees. In such cases the 27th section requires that a general meeting of the creditors be called at the expiration of three months from the adjudication of bankruptcy, or earlier if the court so direct, and requires the assignee to report to the meeting as well as to the court an account of his receipts and payments. The assignee is also required to submit to the meeting the schedule of the bankrupts, creditors, and property as amended, and a statement of the whole estate of the bankrupts as then ascertained, of the property recovered and of the property outstanding, specifying the cause of its being outstanding, also what debts or claims are yet undetermined, and stating what sum remains in his hands. The section further enacts that at such meeting the majority in value of the creditors present shall determine whether any, and what part of the proceeds of the estate, after certain deductions, shall be divided among the creditors, with a proviso that unless at least one-half in value of the creditors shall attend such meeting either in person or by attorney, it shall be the duty of the assignee so to determine, and in case a dividend is ordered, the assignee is required to pay it under the direction of the court.

By the 28th section provision is made for a second and third meeting of the creditors, with like powers, and it is enacted that at the third meeting called by the court a final dividend shall be declared, unless an action at law or suit in equity be pending, or unless some other estate or effects of the debtor afterwards come to the hands of the assignee, in which case the assignee shall, as soon as may be, convert such estate or effects into money, and within two months after the same shall be so converted, it is required to be divided in manner aforesaid. It is further directed that after the third meeting of the creditors no further meeting shall be called, unless ordered by the court; and it is enacted that if at any time there shall be in the hands of the assignee any outstanding debts, or other property due or belonging to the estate which cannot be collected and received by the assignee without unreasonable or inconvenient delay or expense, the assignee may, under the direction of the court, sell and assign such debts or other property in such manner as the court shall order.

Thus it appears that under these provisions very large powers over the winding up, set-

tlement, and distribution of a bankrupt's estate are given to the district court and to a majority in value of the creditors who may be present at a general meeting, or, in case a majority in value are not present at the meeting, to the assignee. But the 43d section of the act prescribed another system, the obvious purposes of which were to arrest the [illegible]dinary mode of proceeding to wind up, settle, and distribute a bankrupt's estates, to suspend some of the powers conferred upon the district court, and to confer upon representatives of the creditors authority not to be exercised by the general body. The system was extraordinary. It was borrowed from a system which had previously existed in Scotland and in England, which had for its object the withdrawal of the bankrupt's estate from the courts in certain cases, and placing its administration in the charge of the bankrupt himself, or in that of the chosen representatives of the creditors.

An examination of the provisions of that section shows very clearly that such was its object, and that the powers conferred thereby are inconsistent with the continued existence of the powers given by the 27th and the 28th sections. It is entitled "Of Superseding the Bankrupt Proceedings by Arrangement." It is true, proceedings under it are declared to be proceedings in bankruptcy, but the ordinary proceedings are superseded by it, and a different system is substituted. It enacts that "if, at the first meeting of creditors, or at any meeting of creditors to be specially called for that purpose, and of which previous notice shall have been given for such length of time and in such manner as the court may direct, three-fourths in value of the creditors whose claims have been proved shall determine and resolve that it is for the interest of the general body of creditors that the estate of the bankrupt should be wound up and settled, and distribution made among the creditors by trustees, under the inspection and direction of a committee of the creditors, it shall be lawful for the creditors to certify and report such resolution to the court, and to nominate one or more trustees to take and hold and distribute the estate under the direction of such committee. If it shall appear to the court, after hearing the bankrupt and such creditors as may desire to be heard, that the resolution was duly passed, and that the interest of the creditors will be promoted thereby, it shall confirm the same; and upon the execution and filing by or on behalf of three-fourths in value of all the creditors whose claims have been proved, of a consent that the estate be wound up and settled by said trustees according to the terms of such resolution, the bankrupt, or his assignee, if one has been appointed, is required to convey all the property and estate of the bankrupt to the trustee nominated, who thenceforth shall hold it with all the powers and rights which the bankrupt would have had if no proceedings in bankruptcy had been taken, or as the assignee would have had were no such resolution passed, and with all the rights and powers of assignees in bankruptcy."

The section also declares that the consent of the three-fourths in value of all the creditors whose claims have been proved, when filed, and the proceedings thereunder, shall be as binding in all respects on any creditor whose debt is provable, who has not signed the same, as if he had signed it, and on any creditor whose debt, if provable, is not proved, as if he had proved it, and the trustee is directed to proceed to wind up and settle the estate, under the direction and inspection of such committee of the creditors. Still further, it is enacted, that the bankrupt shall have the like right to apply for and obtain a discharge after the passage of such resolution and the appointment of such trustee, as if such resolution had not been passed, and as if all the proceedings had continued in the manner provided in the sections of the act preceding the 43d. This last provision, if it were the only one, would leave no doubt in our minds that the manner of winding up, settling, and distributing the estate was intended to be different from that contemplated by the 27th and 28th sections of the act. And if this is not so, the 43d section has accomplished no practical results.

If, when three-fourths in value of the creditors who have proved their debts have resolved that the estate shall be wound up, settled, and distributed under the direction, not of the court, or the general body of the creditors, but of a committee chosen by them, and their resolution has been confirmed by the court, and when consent to such an administration has been filed, either the court, or a general meeting of the creditors, can control the discretion thus vested in the committee; if a general meeting of creditors composed of one-half in value may determine what part of the estate shall be divided, and when a dividend shall be made, how does the manner of administering the estate differ in substance from the ordinary manner prescribed in the 27th and the 28th sections? What becomes of the power of the committee to direct the settlement and distribution? Moreover, it is worthy of observation that three-fourths in value of the creditors are required for the adoption of the resolution, and only one-half in value are required by the 27th section to constitute a creditors' meeting, competent to exercise the powers described in that section. May a majority of the creditors in value, present at such a meeting, annul or override the action of the trustee and committee chosen by three-fourths? If so, how can it be said that the creditors who did not sign the consent that the estate should be wound up, settled, and distributed according to the terms of the res-

olution adopted by three-fourths and confirmed by the court are bound by the consent and proceedings thereunder, as the statute declares they shall be?

The questions when a dividend shall be made, and what portion of the estate in the trustee's hands shall be divided at any particular time, as well as what sums shall be retained to provide for all undetermined claims not proved, other expenses and contingencies, are questions relating directly to the settlement and distribution of the estate. By directing that over the settlement and distribution the creditors' committee shall have the direction, the statute, in our opinion, has withdrawn control over them from every other power, and to that extent has superseded the ordinary proceedings in bankruptcy. And this, we think, was not without reason. The ordinary proceedings are intended to be summary. It is intended by them to conclude the settlement and distribution with the utmost dispatch. Thus, the 28th section requires a second meeting of creditors to be called at the expiration of six months from the adjudication of bankruptcy, or earlier, and at a third meeting, when a final dividend is to be declared, unless an action at law or a suit in equity be pending, or other estate come to the hands of the assignee, in which case he is required to convert it into money, as soon as may be, and within two months after such conversion the money is directed to be divided. And it is provided that if at any time there shall be in the hands of the assignee any outstanding debts or other property which cannot be collected and received by him without unreasonable delay or expense, he may sell such debts or property under the direction of the court. It was such hurried settlement of the estate that was regarded as prejudicial in some cases to the interests of the creditors. For this reason, both in the Scotch and English law, provision was made for administering bankrupt estates in some cases by the creditors themselves, or by the bankrupt under their direction. And for the same reason the 43d section of our act was enacted, by which the power to direct was given to certain representatives of the creditors; that is, to a committee chosen by them. No doubt if that committee exercise their discretion mala fide they may be controlled, but in the absence of fraud their direction to the trustee must be conclusive. Certainly the discretion vested in them cannot be controlled by any meeting of the creditors called after their appointment.

Holding such opinions, we feel constrained to reverse the order of the district court, which directed a second meeting of the creditors of the bankrupts for the purposes mentioned in the 27th and 28th sections of the bankrupt act. The order of the district court is reversed.

Case No. 3,170.

In re COOKE et al.

[12 N. B. R. 30; 1 Wkly. Notes Cas. 318.][1]

District Court, E. D. Pennsylvania. March 23, 1875.

PROOF OF DEBT IN BANKRUPTCY—PARTNERSHIP.

1. One member of a copartnership of banking firms termed a "syndicate," having in its possession certain moneys belonging to the syndicate as the result of transactions on its account, became bankrupt.

2. Upon a statement of the accounts of the syndicate, it was ascertained, as alleged, that, including the said moneys as portion of the common fund for division among the respective constituents of the syndicate, there was due to the bankrupt firm a certain sum less in amount than the said moneys. Another member of the syndicate upon behalf of itself and its associates, sought to prove a claim against the bankrupt's estate for the whole of said moneys in the possession of the bankrupt firm, at the time of its failure, claiming dividends, however, on the same only until they should amount to the difference between the said sum and the portion of the profits to which the bankrupt firm appeared to be entitled, upon the statement of the account of all the profits of the syndicate, including the said moneys first mentioned.

3. Upon objection by the trustee of bankrupt's estate, it was *held* that the proof could not be allowed for more than the difference between the bankrupt's share of the profits, and the amount claimed to be due by them at the time of the failure; and that an absolute allowance of proof for this amount, could not be sanctioned independently of any question of equalization or adjustment that might arise upon examining the final account of every one of the several firms of which the so-called syndicate was composed, with such syndicate, and comparing those several accounts with one another, and with the final account of the bankrupts.

[Cited in Re May, Case No. 9,328.]

4. Semble, that a partnership cannot prove against the estate of one of its members, except for a debt arising by fraud, as distinguished from contract.

[Certificate of Joseph Mason, Register in Bankruptcy:]

To the Honorable John Cadwalader, Judge of the Said Court: I, the undersigned register in bankruptcy, to whom the above matter was referred, respectfully report:

That, on the 17th day of March, 1874, on behalf of Jay Cooke, McCulloch & Co., and certain other banking houses composing a copartnership or association, known by the name of "syndicate," a deposition was made for the proof of a claim against the estate of the said bankrupts, amounting to the sum of two hundred and fifty-five thousand four hundred and ninety-three dollars and fifty-eight cents gold. That on the 15th day of September, 1874, a deposition in amendment of the proof of said claim was made and filed. On September 18th, following, the trustee of the said bankrupt's estate presented a petition for the re-examination of said claim as amended. On September

[1] [Reprinted from 12 N. B. R. 30, by permission. 1 Wkly. Notes Cas. 318, contains only a partial report.]

22d, 1874, 11 a. m., Richard C. McMurtrie, Esq., appeared for the said claimants, and Richard L. Ashhurst and John C. Bullitt, Esqs., for the trustee. The objections set forth in the petition of the trustee were duly argued. The said depositions and petition are herewith forwarded. The business of the said partnership or association was the negotiation of certain bonds of the United States. The agreement of the said banking houses with the secretary of the treasury of the United States is annexed to the second deposition. It is alleged in said deposition, that it was the duty of each party to the agreement to pay into the hands of Messrs. Rothschild of London, one of the parties thereto, any money received in the business. That the business had at the time of the failure of the bankrupts been completed, and nothing remained but to settle the accounts of the parties concerned. That in the course of the business, Jay Cooke & Co. had in their possession, as the result of transactions for account of the syndicate, the sum of two hundred and fifty-five thousand four hundred and ninety-three dollars and fifty-eight cents, gold. That there was in the hands of the syndicate a fund which were the profits of the concern, independent of the amount due from Jay Cooke & Co. That that sum was divided, and the amount that Jay Cooke & Co., and Jay Cooke, McCulloch & Co., would have been entitled to receive, had there been nothing due from Jay Cooke & Co., would have been each twenty-two thousand six hundred and twenty-three pounds, five shillings, eleven pence, or one hundred and eight thousand two hundred and twenty-two dollars and thirty-seven cents, gold. That the united shares of the profits of these two houses is less by seven thousand four hundred and thirty-eight pounds, nineteen shillings and two pence, than the amount due the syndicate from Jay Cooke & Co. That this division was made among the respective houses composing the syndicate, exclusive of Jay Cooke & Co., and Jay Cooke, McCulloch & Co., the latter assenting thereto, without, however, agreeing that it could be done lawfully. That there was no connection between Jay Cooke & Co., and Jay Cooke, McCulloch & Co., other than that between any other two parties to the syndicate contract. That on account of many of the partners in the one firm being also partners in the other, it was provided in the articles of copartnership of Jay Cooke, McCulloch & Co. that the profits of all business, which in its inception or completion should require the agency of both houses, should be equally divided between them, but that there was no agency assumed by either house for the other, in respect to the syndicate transactions. That of the sum of two hundred and fifty-five thousand four hundred and ninety-three dollars and fifty-eight cents, gold, received by Jay Cooke & Co., as alleged, in order to pay the parties other than Jay Cooke & Co., and Jay Cooke, McCulloch & Co., their full share of the profits, seven thousand four hundred and thirty-eight pounds, nineteen shillings and two pence is required, and to pay Jay Cooke, McCulloch & Co. for its full share, twenty-two thousand six hundred and twenty-three pounds, five shillings and eleven pence, leaving with Jay Cooke & Co., also, the sum of twenty-two thousand six hundred and twenty-three pounds, five shillings, and eleven pence, or one hundred and nine thousand two hundred and twenty-two dollars and thirty-seven cents, gold.

The claimants contend that they should be allowed to prove for the sum of two hundred and fifty-five thousand four hundred and ninety-three dollars and fifty-eight cents, gold, and receive dividends thereon, until they shall have received the sum of one hundred and forty-six thousand two hundred and seventy-six dollars and sixteen cents, gold. To this the trustee has objected, and has replied that, had the syndicate made no such application of the profits, in payment of the claim, the share of profits due said bankrupts would have been applicable as a set-off to the said claim, and since they have expressly made such an application, the claimants cannot contend, that it is anything else than a payment of the claim, pro tanto, and therefore, a reduction of the claim to that extent; so that the total amount which Jay Cooke, McCulloch & Co., or the syndicate, can claim is one hundred and forty-six thousand two hundred and seventy-six dollars and fifteen cents, gold. I can find no precedent or authority for the claim being made as set forth in the depositions by the syndicate, as a partnership, composed of the several banking houses, including that of Jay Cooke & Co., against the estate of Jay Cooke & Co., in bankruptcy. In the Case of Buckhause [Case No. 2,086], a firm of which only one of the bankrupts was a member, was allowed by its solvent partner to prove a debt against the bankrupts, contracted by them as a partnership with the other. Lowell, J., says, "I have often decided that equitable debts may be proved under our bankrupt act, and I am not aware that a contrary decision has ever been made. Holding this to be a debt in equity and finding the decisions in bankruptcy in favor of allowing its proof, I admit it, though without any intimation that as between one partner or any number of partners and the others, where there is no firm with a foreign member, the Massachusetts cases" (which appear not to permit such a proof) "may not express the true doctrine for this country." But this is not the present case, and the difference is expressly stated in the case just cited, as follows, "It cannot be denied that, in substance, a debt due from A and B to A and D is a very different thing from a mere overdraft by A from the funds of A and B. To refuse to notice the distinction, is to disregard the credit of D altogether." The cases

of Ex parte Harris, 2 Ves. & B. 209, and Ex parte Yonge, 3 Ves. & B. 31, seem to decide that a partnership or the assignee of the partnership, cannot prove against the estate of one of its members, except for a debt arising by fraud as distinguished from contract, as by an act against the expressed or implied contract, and without the expressed or implied authority of the copartner, as by an overdraft to increase the separate estate, or under circumstances implying fraud as for private purposes, without the knowledge, consent, privity or subsequent approbation of the other, inferred from his giving the whole control to his partner, but such form of proof seems to have been restricted to the case of a joint commission; for in Ex parte Yonge the proof appears to have been made by the solvent partners and not on behalf of themselves and the bankrupt. The question is perhaps one of form rather than substance, and is not important excepting in so far as error in form may tend to obscure a correct view of the substance. In Ex parte Yonge, Lord Eldon states the case thus: "In bankruptcy there is both a legal and equitable jurisdiction, and previously to the bankruptcy the Botfields (the two solvent partners) might have filed a bill to compel Slaney (the bankrupt partner), to repay that money so fraudulently abstracted; that right can never be taken away from them by the bankruptcy of Slaney, and the fact that his separate creditors have a right to his separate estate, although in law the two solvent partners cannot strictly be creditors of Slaney; and although if all were solvent, the three could not maintain an action against one of them, yet, in equity, upon such a transaction the money so abstracted by that one is the debt of the two, to be applied by them as trustees for the three; and the bankruptcy would not alter that."

The depositions offered by the claimants do not set out any such case of fraud, and, therefore, the doctrine illustrated in the cases just cited affords them no assistance. The moneys for which the claim is made are admitted to have come into the hands of the bankrupts in the course of the business. The counsel for the claimants has, however, ingeniously argued that, until the bankrupts have paid to the syndicate the moneys received on account of its transactions, they cannot, nor can their creditors, receive any portion of the profits. That to allow the claimants to prove only for the difference between the profits as estimated upon the supposition of payment, and the amount actually received by the bankrupts, would be to allow the other creditors of the bankrupts to have all the benefit of the partnership with the claimants without having complied with its stipulations. It is further contended that, until the bankrupts have paid into the common fund the moneys received by them, there are no profits, or at least none to which the bankrupts can be entitled. But that, I think, is begging the question; for the receipt by one partner is the receipt of all, and, if the aggregate receipts, no matter whether in the hands of two or one only of the firm, are greater than the expenses, and the capital contributed, there must be a resulting profit to the firm. That the one or the two, as the case may be, have the shares of the others as well as his or their own, does not affect the existence of that in which they, as well as he or they, are jointly interested. Upon the first consideration of the question I was inclined to favor the view of the claimants, and was influenced partly by the following course of reasoning: The measure of the claims against a bankrupt's estate must be in proportion to the contribution made thereto by the respective claimants. The estate may be regarded as a fund whose component parts consist of such contributions, which have become respectively proportionally diminished. That equality of distribution requires the preservation of the same relation of parts in the analysis as in the synthesis. That applying this to the present case the syndicate must be considered as having contributed the sum claimed, and are, therefore, entitled to its proportionate share of the whole estate. That the interest of the bankrupts, whatever it may be, in the syndicate property, was a matter of separate estimation, and to be rendered available only on the same conditions as would have been necessarily imposed on the bankrupts themselves had there been no bankruptcy. But such a statement of the case I found to be erroneous in its postulate—that the syndicate had contributed to the bankrupt's estate the sum named. Upon reflection I became satisfied that such was not its contribution. For the portion of said sum to which the bankrupts are admitted to be entitled, provided the whole amount be paid by them, is the exact measure of the contribution by the bankrupts in the first place to the syndicate. The difference, therefore, is all that in point of fact has been contributed by the syndicate, and the amount by which the bankrupt's estate has been augmented. The 21st section of the bankrupt act [of 1867 (14 Stat. 526)] provides as follows: "No creditor, whose debt is provable under this act, shall be allowed to prosecute to final judgment any suit at law or in equity, therefor, against the bankrupt," "provided" "that, if the amount due the creditor is in dispute, the suit, by leave of the court in bankruptcy, may proceed to judgment for the purpose of ascertaining the amount due, which amount may be proved in bankruptcy." What could the claimants, upon the facts as stated, recover at law? For, in the present condition of the partnership accounts, it would not seem to be necessary to resort to a court of equity. Simply the balance due—no more. See Add. Cont. 733–735, and the cases there cited. Suppose the estate of the bankrupts should pay no dividend, and they are

not discharged, the claim, as at present made, could not be sustained in a suit against them; judgment would be entered only in such amount as, if paid by them, would give the claimants their share of the moneys received.

If a solvent partner pay all the partnership debts, his proof against the separate estate of his bankrupt partners cannot include the portion of the said debts which, upon a settlement of the accounts, would be properly payable by him. See Ex parte Watson, Buck, 449; Ex parte Smith, Id. 492; Ex parte Plowden, 3 Mont. & A. 402; Ex parte Moore, 2 Gill & J. 166. For, although the last case establishes a different rule as to the amount for which partners may prove as against the estates of their copartners than that laid down in the first two cases, yet in none do I apprehend is the partner proving allowed to include his own share of the indebtedness paid in the proof against the others or any one of them. Now the bankrupt partner, although liable to the joint creditors for the whole debt, is entitled to the benefit of the payment by his solvent partner to the amount of said solvent partner's liability, and by the decisions referred to he obtains it by deducting from the claim of the creditor the proportionate share of the liability of his solvent copartners, and the claim by the latter against him cannot be for more than the balance. Now the bankrupt's share in the profits of the firm is a benefit of the same nature, and arises from the contract of copartnership in the same manner, and in any claim against him by his copartners arising out of partnership transactions can be made available to him in the same way, to wit, by a reduction of that claim. In other words, if there is a joint loss and one bears it all, his claim can only be for that part which he should not have borne; and, e converso, if there is a joint profit and one receives it all, the claim of those who have received nothing can only be for what they should have received. Accordingly, in Ex parte Tyrrel, Buck, 345, it was held that if, on the bankruptcy of one or several partners, the joint creditors are paid in full out of the joint estate, but upon taking the partnership accounts a balance appears to be due to the solvent partners, the surplus of the joint estate will be paid to the solvent partners in part payment of the balance due to them, with liberty to prove against the separate estate for the difference.

The counsel for the claimants has cited the case of Ex parte Graham, 3 Ves. & B. 130, where it was held that the banker appointed under a commission of bankruptcy becoming bankrupt, his estate is not entitled to any dividend on a debt proved by him against the other, until full reimbursement of all property of that estate beyond the amount of his dividend, as analogous to the present question. This was held in Ex parte Bebb, 19 Ves. 222; Ex parte Bignold, 2 Mad. 470,—and necessarily results from the principle that the assignees of a bankrupt are subject to all the same equities affecting the bankrupt's rights which could have been enforced against the bankrupt himself. See Grant v. Mills, 2 Ves. & B. 306; Ex parte Hartop, 12 Ves. 349; Mitford v. Mitford, 9 Ves. 87. The debt due by a creditor of a bankrupt to the assignee, and the debt from the bankrupt to such creditor, cannot be said to be mutual—they are contracted en autre droit. In Ex parte Graham, the banker to the commission, had he remained solvent, could not have set off his claim against the bankrupt in an action to recover the moneys deposited with him; and the rights of his creditors could be none other than his own. The claims of partners against each other are clearly the subject of mutual debt and credit, and bear no resemblance to the relations existing between a creditor of a bankrupt and one of their number to whom has been entrusted the moneys of the estate. I therefore reported that the claim of Jay Cooke, McCulloch & Co. and others, styled "syndicate," should be reduced as claimed by the trustee to the sum of one hundred and forty-six thousand two hundred and seventy-one dollars and twenty-one cents, gold, being two hundred and fifty-five thousand four hundred and ninety-three dollars and fifty-eight cents (which, by reference to the account annexed to the first deposition, I think must be the correct amount, and not two hundred and fifty-five thousand four hundred and ninety-three dollars and fifty-three cents, which is probably a clerical mistake of transposition of figures) less one hundred and nine thousand two hundred and twenty-two dollars and thirty-seven cents, estimated share of profits of Jay Cooke & Co.

CADWALADER, District Judge. The question is whether one hundred and nine thousand two hundred and twenty-two dollars and thirty-seven cents, the bankrupt's share of the profits of the joint concern, is to be deducted from the claim of two hundred and fifty-five thousand four hundred and ninety-three dollars and fifty-eight cents, before proof is allowed. The question answers itself. The proof cannot be allowed for more than the difference, one hundred and forty-six thousand two hundred and seventy-one dollars and twenty-one cents.

BY THE COURT. The register is instructed that the court's order of yesterday does sanction an absolute allowance of proof of the amount of one hundred and forty-six thousand two hundred and seventy-one dollars and twenty-one cents, independently of any question of equalization or adjustment that may arise upon examining the final account of every one of the several firms, of which the so-called syndicate was composed, with such syndicate, and comparing those several accounts with one another, and with the final account of the bankrupts.

Case No. 3,171.

In re COOKE et al.

[1 Wkly. Notes Cas. 10.]

Circuit Court, E. D. Pennsylvania. Sept. 22, 1874.

POWERS OF CREDITORS UNDER SECTIONS 28 AND 29 (27 AND 28) OF ACT OF 1867 (14 STAT. 530, 531), WHERE TRUSTEE AND COMMITTEE APPOINTED.

[Petition to review an order of the district court of the United States for the eastern district of Pennsylvania.

[In bankruptcy. In the matter of Jay Cooke, W. G. Morehead, H. C. Fahnestock, H. D. Cooke, Pitt Cooke, G. C. Thomas, James A. Garland, and Jay Cooke, Jr.]

The district judge, having on the 11th of September, 1874, ordered a meeting for the purpose of a declaration of a dividend in said estate, to be held the 6th of October, 1874, Edwin M. Lewis, trustee, and John Clayton et al., committee of creditors, and E. W. Clark et al., creditors, filed their petition, setting forth that the settling and winding up of the estate had been entrusted to a trustee and committee of creditors, and claimed that the powers given to the creditors by the 28th and 29th sections of the bankrupt act had been thereby waived and that said order of the district judge had been erroneously made, and prayed that said order might be so reversed or modified as in no way to "supersede, change or affect the winding up and settlement of the estate by the said trustee under the inspection and direction of said committee of creditors."

Whereupon McKENNAN, Circuit Judge, made the following order at chambers: And now, September 22d, 1874, the petitions of Edwin M. Lewis, trustee, and John Clayton and others, committee of the estate of Jay Cooke et al., bankrupts, and of E. W. Clark et al., creditors of said estate, having been presented at chambers, it is thereupon ordered that the same be filed, and that the argument thereon be heard at Philadelphia on the 5th day of October, 1874, and all proceedings under the order of the 11th of September, 1874, are thereby suspended till further orders.

[NOTE. After hearing argument, the order of the district court was reversed. Case No. 3,169.]

Case No. 3,172.

In re COOKE et al.

[1 Wkly. Notes Cas. 30.]

District Court, E. D. Pennsylvania. Oct. 14 and 15, 1874.

SUIT IN STATE COURT PENDING PROCEEDINGS IN BANKRUPTCY—LEAVE TO CONTINUE FOR PURPOSES OF LIQUIDATION.

[Where suit is pending against a bankrupt in the court of another state, the federal court may allow the debt to be proved provisionally, and authorize the suit to proceed for the purposes of liquidation; securing to the trustee of the creditors the right to resist the claim, either in the pending suit, or by a proceeding in equity.]

[In bankruptcy. In the matter of Jay Cooke, W. G. Morehead, H. C. Fahnestock, H. D. Cooke, Pitt Cooke, G. C. Thomas, James A. Garland, and Jay Cooke, Jr.]

De Graff & Co. brought suit in Minnesota against Morehead, one of the bankrupts, before petition filed, to recover for breach of a construction contract, and applied for leave to proceed in that suit for the purpose of liquidation.

Dickson and Ashurst, for the trustee in bankruptcy, read affidavits showing that the real question in the Minnesota suit was not as to the amount of damages suffered by the breach of contract, but whether there was a liability on the part of the defendant; and that this latter question depended upon the right of the defendant to reform the contract, and show that it was made with Morehead as agent of a corporation merely, his agency being known at the time by the plaintiffs.

Mr. Clough, of Minnesota, for De Graff & Co.

Mr. Murtrie, for bankrupts.

THE COURT, after a long discussion, ordered proof of De Graff's debt to be made before the register provisionally, and authorized the suit in Minnesota to proceed for the purpose of liquidation, securing to the trustee the right to resist the claim, either in the suit brought, or by a proceeding in equity.

COOKE (CATLETT v.). See Case No. 2,515.

Case No. 3,173.

COOKE v. FORD et al.

[2 Flip. 22; 16 Am. Law Reg. (N. S.) 417; 4 Am. Law T. Rep. (N. S.) 280; 3 Law & Eq. Rep. 715; 4 N. Y. Wkly. Dig. 407; 4 Cent. Law J. 560; 2 Cin. Law Bul. 108; 9 Chi. Leg. News, 291; 23 Int. Rev. Rec. 218.][1]

Circuit Court, D. Kentucky. May Term, 1877.

REMOVAL—DIVERSE CITIZENSHIP—PROCEEDINGS—CONSTRUCTION OF STATUTES—REPEAL BY IMPLICATION.

1. The act of March 3, 1875 [18 Stat. 470], does not entirely repeal section 639 of the United States Revised Statutes, which relates to the removal of causes from the state to the federal courts. Third subdivision of section 639, which relates to suits between citizens of the states in which they are brought and citizens of other states, is not inconsistent with the provisions of the act of March 3, 1875.

[Cited in La Mothe Manuf'g Co. v. National Tube Works Co., Case No. 8,033; Sims v. Sims, Id. 12,894; Eureka Consol. Min. Co. v. Richmond Min. Co., 2 Fed. 829; Melendy v. Currier, 22 Fed. 129.]

[1] [Reported by William Searcy Flippin, Esq., and here reprinted by permission. 3 Law & Eq. Rep. 715, and 4 N. Y. Wkly. Dig. 407, contain only a partial report.]

2. Taking the act of March 3, 1875, and provisions of third subdivision of section 639 together, the result is: first, that no citizen of a state in which a suit is commenced can remove it, except by filing a petition either before or at the term at which it might first be tried.

[Cited in Eureka Consol. Min. Co. v. Richmond Min. Co., 2 Fed. 829.]

3. If a suit be brought between a citizen of the state in which it is brought and a citizen of another state, the latter may remove it by petition, if filed at any time before trial or final hearing, on making an affidavit of prejudice or local influence—such as will prevent a fair trial from being had.

[Cited in Sims v. Sims, Case No. 12,894; Eureka Consol. Min. Co. v. Richmond Min. Co., 2 Fed. 829; Melendy v. Currier, 22 Fed. 129.]

4. The law does not favor the repeal of statutes by implication. The two must be such as that they cannot be reconciled.

[Cited in Whitehouse v. Continental Fire Ins. Co., 2 Fed. 499.]

This cause came up on motion to remand the same to the state court. The action was commenced [by W. H. Cooke against C. C. Ford and H. T. Arnold] in the circuit court of Warren county, Kentucky, January 7, 1874, but was subsequently transferred to the common pleas of the same county. Ford, one defendant, made no defense, and judgment was consequently entered up against him by default, which was according to the practice in this state. Arnold, the other defendant, put in an answer, tendering an issue of fact before a jury. The time at which the cause could have been at first tried had passed by, and even a mistrial had taken place before the act of congress of 1875, when Arnold filed a petition in said court for the removal of the cause to the United States court. At the time of filing his petition, he made affidavit to the effect that he had reason to believe and did believe that he would not be able to obtain justice in the state court by reason of local influence and prejudice. The defendant filed a copy of the record in this court, when Cooke, the plaintiff, appeared and moved to remand the cause to the state court.

H. T. Arnold, Mr. Muir, and Bijur & Davie, for plaintiff.

Seymour & Edwards, for defendant.

BALLARD, District Judge. The sole ground of the motion is that the petition for removal was filed in the state court too late. The counsel of plaintiff, with a frankness characteristic of those counsel only who perceive with clearness the true question involved in a case, concedes that the defendant's application for a removal is literally covered by the provisions of the third subdivision of section 639 of the Revised Statutes; and he stakes his case on the position that these provisions are repealed by the act of March 3, 1875 (18 Stat. 470).

The question thus presented for a decision is a narrow one, but it is by no means free from difficulty. Neither the researches of counsel nor my own examination have developed any case which decides or even throws much light upon the question. The only authority to which I have been referred bearing on the precise question at issue, is the late pamphlet by Judge Dillon, on the "Removal of Causes from State to Federal Courts." The learned author, after indicating, doubtfully, his own opinion that the part of subdivision three which refers to the time of removal is not repealed by the act of 1875, says: "This has been decided to be so in the eighth circuit by Mr. Justice Miller, and generally in the courts of that circuit, and, so far as we are advised, by the circuit courts elsewhere."

I should be disposed to follow, without question, a single decision of so eminent a judge as Mr. Justice Miller, if such decision were supported by a written opinion, and I should certainly not hesitate to follow the settled rule of decision in the several circuits; but the bare statement that Judge Miller has decided the question on the circuit, that his decision has been followed in his circuit, and, as far as known, in other circuits, though made by so accurate an author as the able judge of the eighth circuit, cannot dispense with the necessity of an independent examination of the question. Counsel have therefore discussed the question before me as an open one, and as such I propose to consider it. In prosecuting this examination I shall not refer to the acts of congress relating to the removal of causes which were passed prior to the Revised Statutes. As the Revised Statutes repealed all such prior acts, reference to them, would, I think, tend only to embarrass the inquiry. Indeed, the proposition discussed by counsel renders such reference supererogatory. The defendant's counsel rests his right to the removal on the ground that the third subdivision of section 639 of Revised Statutes is still in force; and the plaintiff's counsel rests his motion to remand on the ground that it is repealed.

Plaintiff's counsel does not, of course, insist that it is in terms repealed, but he maintains that its provisions are inconsistent with those of the act of 1875, and hence that it is repealed by the express provision of that act, which declares that "all acts or parts of acts in conflict with the provisions of this act are hereby repealed." I shall, for a like reason, confine my attention to the provisions of the statute which relate to the removal "of controversies between citizens of different states," and shall omit all reference to the provisions contained in them which prescribe the amount necessary to give the court jurisdiction.

Omitting, then, all except what is necessary to elucidate the question before us, let us bring the provisions of the Revised Statutes and of the act of 1875 together, and we shall then be the better able to see whether the latter are in conflict with the former. Section 639 of the Revised Statutes provides that "any suit commenced in a state court

* * * may be removed for trial into the circuit court: * * * First—When the suit is * * * by a citizen of the state wherein it is brought and against a citizen of another state. Second—When the suit is by a citizen of the state wherein it is brought against a citizen of the same and a citizen of another state. Third—When the suit is by a citizen of the state in which it is brought and a citizen of another state."

The act of 1875 authorizes the removal of any suit of a civil nature * * * now pending, or hereafter brought in a state court in which there shall be a controversy between citizens of different states. In the first case the suit may be removed on the petition of the defendant only, filed in the state court at the time of entering his appearance in said court. In the second case the suit, as against the citizen of another state, may be removed on his petition filed at any time before trial or final hearing. In the third case the suit may be removed by the citizen of the state other than that in which the suit is brought, whether he be plaintiff or defendant on his petition filed at any time before trial or final hearing of the suit, if before, or at the time he files his petition he makes and files in the state court an affidavit stating that he has reason to believe, and does believe, that from prejudice or local influence he will not be able to obtain a fair trial in the state court. In the last case (act of 1875) the suit may be removed by either party—whether he be plaintiff or defendant—a citizen of the state in which the suit is brought, or a citizen of another—on his petition filed in the state court, before or at the term at which the suit could be first tried and before trial.

The first subdivision of section 639 is doubtless superseded by the more comprehensive provisions of the act of 1875; and there is much ground for the position that the second subdivision is likewise superseded by a provision in the act of 1875, which has not been here mentioned; but I cannot perceive that subdivision three is superseded by the latter act, or that the provisions of the two are in any respect inconsistent. The act of 1875 provides that, when the suit presents a controversy between citizens of different states it may be removed by either party on his petition, filed before or at the term at which the suit could be first tried and before the trial. Subdivision 3 provides that when the suit is between a citizen of the state in which it is brought and a citizen of another state, such citizen of the other state may remove it on petition filed at any time before the trial or final hearing, if before or at the time he files the petition, he makes his affidavit of "prejudice or local influence."

Taking the provisions together, it follows: First—That no citizen of a state in which a suit is brought can remove it, except on petition filed before or at the term the suit might first be tried. Second—That when the suit is between citizens of different states, neither of whom is a citizen of the state in which the suit is brought, neither party can remove it except on petition filed before or at the term the suit might be first tried. Third—But when the suit is between a citizen of the state in which it is brought and a citizen of another state, the latter may remove it on petition filed at any time before the trial or final hearing, if before or at the time he files his petition he makes an affidavit of "prejudice or local influence."

The first and second propositions are founded on the act of 1875, and the third on subdivision three, and thus reading the provisions of these statutes, they seem to me entirely consistent; nay, it appears that the failure of the act of 1875 to repeal subdivision three was suggested by a sound policy. In a suit between citizens of different states, when neither party is a citizen of the state in which the suit is brought, there is no ground for investing either party with more than his strict right of removal. There is no ground for supposing that "prejudice or local influence" will affect one party more than the other, and therefore no ground of extending the time of his application beyond an early stage in the cause. So when the suit is between a citizen of the state in which it is brought and a citizen of another state, there is no ground for supposing that "prejudice or local influence" will operate against the former, and therefore there is no ground for extending the term of his application; but when the suit is between a citizen of the state in which it is brought and a citizen of another state, there may be many instances where "prejudice or local influence" may prevent justice being done the latter. This prejudice or local influence may not exist in the first stages of the cause, or, if it existed, it may not then be discovered. It may be subsequently developed.

There seems, then, to be the most substantial reason for allowing such citizen of another state to remove a suit at any stage before trial or final hearing when it appears that, owing to such "prejudice or local influence," he cannot obtain justice in the state court.

Here I might rest the argument, but I think it possible to make the demonstration still more complete. Subdivisions 1 and 3 of section 639, and the act of 1875, all authorize the removal of a suit on the petition of the defendant when the suit is by a citizen of the state in which it is brought against the citizen of another state. Of course I know that subdivision 3 also authorizes the removal of such a suit on the petition of the plaintiff when he is not a citizen of the state in which the suit is brought, and that the act of 1875 not only authorizes the removal of such suits, but of all suits between citizens of different states at the instance of either party. But, as I wish to compare the provisions which relate to the same char-

acter of suit, and to a removal demanded by the same party, I omit all reference to the provisions of subdivision 3, and the act of 1875, which relate to a removal on the application of the plaintiffs; and I also omit all reference to the provisions of the act of 1875, which authorize a removal in any suit between citizens of different states, though neither party is a citizen of the state wherein the suit is brought. I omit them because their presence only obscures the inquiry, by diverting attention from the true question, namely, the consistency or inconsistency between subdivisions 1 and 3, and the act of 1875, as they all relate to a suit of the same character; that is to a suit by a citizen of the state in which it is brought against a citizen of another state, and to a removal demanded by the same party.

I repeat, then, that subdivisions 1 and 3, and the act of 1875, all authorize the defendant to demand a removal in a suit by a citizen of the state in which the suit is brought against a citizen of another state. By subdivision 1 he may have a removal on petition filed at the time he enters his appearance in the state court. By the act of 1875, he may have it on petition filed before or at the term the cause could be first tried, and before the trial. By the third subdivision, he may have it on petition filed before the trial or final hearing of the suit, if, before or at the time of filing of said petition, he make and file an affidavit as to prejudice or local influence.

It is thus readily seen that the provision of the act of 1875 is inconsistent with that of subdivision 1. Each covers precisely the same ground, and, of course, both cannot stand. But it is just as readily seen that there is no inconsistency whatever between subdivision 3 and the act of 1875. The one confines the application to a limited time; the other extends the time for a good and substantial reason. Indeed, it must be seen that there is as perfect consistency between subdivision 3 and the act of 1875 as between subdivisions 1 and 3.

I have not overlooked the opposing argument founded on the title and scope of the act of 1875. It is entitled "An act to determine the jurisdiction of the circuit courts of the United States, and to regulate the removal of causes from state courts, and for other purposes." To determine the jurisdiction of circuit courts seems to imply that this act only is to be referred to in order to determine what the jurisdiction of the circuit court is. "To regulate the removal of causes from the state courts" seems to imply that in this act only are to be found the rules which govern the removal of causes. But the title of an act is entitled to little or no consideration in determining the meaning of provisions found in the body, and can never work the repeal of a prior act by its own force. If the provisions of the last act are consistent with those of the first, such consistent provisions remain in force, however clearly the legislature may have indicated, in the title of the last act, an intention to repeal the former.

Nor is the argument founded on the scope of the act more forcible. Its scope is, indeed, broad. It greatly enlarges the civil jurisdiction of the circuit courts, but it does not embrace the whole. It limits the jurisdiction which it confers to suits "where the matter in dispute exceeds $500;" but there are several provisions of the Revised Statutes which extend the jurisdiction to suits involving less than this amount. See section 629, subds. 10–12, 16, 17. Nor can it be contended that it embraces all prior acts which confer jurisdiction or authorize removal of suits. See Rev. St. §§ 640, 641, 643. Of course, as it does not embrace all prior acts which confer jurisdiction or authorize removal of suits, and does not, in terms, repeal them, it cannot, under any rule of interpretation, be held to repeal them by implication.

At one time, during the course of this investigation, I was strongly inclined to think that, although the act of 1875 does not either in terms or by implication, repeal all prior acts which relate to the removal of civil causes from state courts to the circuit courts of the United States, it should be held to furnish the one rule for the removal of all such suits as it authorized to be removed, and thus to repeal all prior acts which prescribe a different rule; that as it authorizes and prescribes a rule for the removal of all suits in which there is a controversy between citizens of different states, it repeals by implication all prior acts which relate to the removal of similar suits, and that, as subdivision three does relate to the removal of a similar suit, that is, a suit between a citizen of the state where it is brought and a citizen of another state, which is certainly included in a suit between citizens of different states, it is repealed. But subsequent reflection has satisfied me that this argument is more specious than sound, and that its whole force is derived from its omission to notice the provision in subdivision 3 relating to "prejudice and local influence," which is nowhere found in the act of 1875.

It is true, I suppose, that congress cannot authorize the removal of a suit in the circuit court, of which it cannot confer original jurisdiction on that court, and it is true that congress cannot confer jurisdiction on the circuit court to try an ordinary suit between citizens of the same state on the ground of prejudice against one party or of local influence of the other; but it is also true that within the constitutional limits of the jurisdiction it may vest the right of removal upon such grounds as it deems best. It may authorize none to be removed, except on the ground of prejudice in the state tribunal against the party asking the removal, or the local influence of the opposite party, or it may authorize the removal of suits between citizens of different states

where nothing more is shown than different citizenship at one stage of the proceedings, and the same suits to be removed at another stage, when prejudice, local influence or other matter is shown. Now, this is precisely what is accomplished by the joint operation of the act of 1875 and subdivision 3. The former requires the application for the removal of all suits, including a suit between a citizen of the state in which it is brought and a citizen of another state, when nothing more than different citizenship appears, to be made before or at the time at which the cause could be first tried. The latter allows the application for removal of such a suit to be made at any time before trial or final hearing, when it also appears that the applicant is not a citizen of the state wherein the suit is brought, and that, owing to prejudice or local influence, he could not obtain justice in the state court. But were the consistency between the act of 1875 and of subdivision 3 less apparent, I should still be constrained, in view of the leaning of courts against implied repeals, to hold that the latter is still in force.

"To repeal a statute by implication, there must be such positive repugnancy between the provisions of the new law and the old, that they cannot stand together or be consistently reconciled." Wood v. U. S., 16 Pet. [41 U. S.] 342; McCool v. Smith, 1 Black [66 U. S.] 459; U. S. v. Tynen, 11 Wall. [78 U. S.] 92; Hartford v. U. S., 8 Cranch [12 U. S.] 109; Brown v. County Com'rs, 21 Pa. St. 37; Bowen v. Lease, 5 Hill, 221; Daviess, etc., v. Fairbairn, etc., 3 How. [44 U. S.] 639; Potter's Dwar. St. 154; Sedg. St. & Const. Law, 129. In Wood v. U. S., Mr. Justice Story said: "There must be a positive repugnancy between the provisions of the new laws and those of the old; and, even then, the old law is repealed by implication only pro tanto to the extent of the repugnancy." In McCool v. Smith, Mr. Justice Swayne, quoting Mr. Sedgwick, said: "A repeal by implication is not favored." "The leaning of the courts is against the doctrine, if it be possible to reconcile the two acts of the legislature together." Mr. Dwarris says: "Every affirmative statute is a repeal of a precedent affirmative statute when its matter necessarily implies a negative, but only so far as it is clearly and indisputably contradictory and contrary to the former act in the very matter (Foster's Case), and the repugnancy such that the two acts cannot be reconciled."

A citation of these authorities was hardly necessary to support the argument in this case. The provisions of the act of 1875, and those of subdivision 3, have been shown to be perfectly consistent. The latter, therefore, must be held to remain unrepealed without invoking any technical rule of construction, or relying on the disfavor in which the courts hold implied repeals; but I have not thought such citation entirely out of place, since, if doubt remains in the mind of any one after reading the preceding abstract decision, it must be dispelled on considering the authorities.

Let an order be entered overruling the plaintiff's motion.

COOKE (GRAHAME v.). See Case No. 5,678.

COOKE (HARPER v.). See Case No. 6,086.

COOKE (MAYOR & COMMONALTY v.). See Case No. 9,358.

Case No. 3,174.

COOKE v. MYERS.

[1 Cranch, C. C. 6.][1]

Circuit Court, District of Columbia. April Term, 1801.

ACTION AGAINST ASSIGNEE OF LEASE—PROOF OF ASSIGNMENT.

In debt, by the lessor against the assignee of the lessee, the plaintiff is not bound to show an assignment by deed acknowledged or proved and recorded agreeably to the fourth section of the act of 13th December, 1792, "for regulating conveyances."

Debt for rent, by [Stephen Cooke] lessor against [William Myers] assignee of lessee.

The plaintiff produced a paper signed by the defendant, in which he agreed to take the residue of Thompson's lease, and bound himself to Thompson in the penal sum of —— to pay all the rents which should become due to the plaintiff, Dr. Cooke, upon his lease to Thompson.

Mr. Swann, for defendant, objected that it was not competent evidence to prove an assignment from Thompson to Myers, and cited the act of assembly, p. 165 (Ed. 1803, p. 157).

Mr. Simms, for plaintiff, cited 1 Esp. 247 (Large Ed. 220); Cotes v. Wade, 1 Lev. 190; Pitt v. Russel, 3 Lev. 19; and Watson v. Alexander, 1 Wash. [Va.] 351,—and insisted that the paper produced was in this case evidence proper and competent to go to the jury, to prove an assignment; and of such opinion was THE COURT.

Mr. Swann took a bill of exceptions, but never carried the cause to the supreme court.

Case No. 3,175.

COOKE v. MYERS.

[1 Cranch, C. C. 166.][1]

Circuit Court, District of Columbia. June Term, 1804

COSTS OF MOTION.

Upon a judgment on motion upon a replevy bond for rent, the plaintiff is entitled to costs of the motion.

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

Motion on a replevy bond for rent. The rents were attached in the hands of the tenant at the time of the distress. The bond included costs of distress.

Mr. Youngs, for the defendant, contended that no costs could be given upon this motion, the plaintiff having released the costs of distress.

Judgment for the amount of rent due, and costs of this motion; the plaintiff having released the costs of the distress.

Case No. 3,176.

COOKE et al. v. NEW YORK CENT. & H. R. R. CO.

[4 Ban. & A. 398;[1] 16 O. G. 856.]

Circuit Court, N. D. New York. July, 1879.

PATENTS—"RAILWAY SWITCH"—ANTICIPATION.

A patent for a railway switch, in the claims of which an important element is the rail sections used to guide the wheels from the back to the flange-supporting block, in an easy manner without any jarring or abrupt change of motion, and in a proper direction for the wheels to drop into the main track at the proper point, is not anticipated by a prior switch which had no rail-section or equivalent therefor.

[In equity. Suit by Charles L. Cooke and others against the New York Central & Hudson River Railroad Company to restrain alleged infringement of reissued letters patent No. 7,690, granted to plaintiffs May 22, 1877. The original patent was granted to C. L. Cooke November 21, 1871, and is numbered 121,158.]

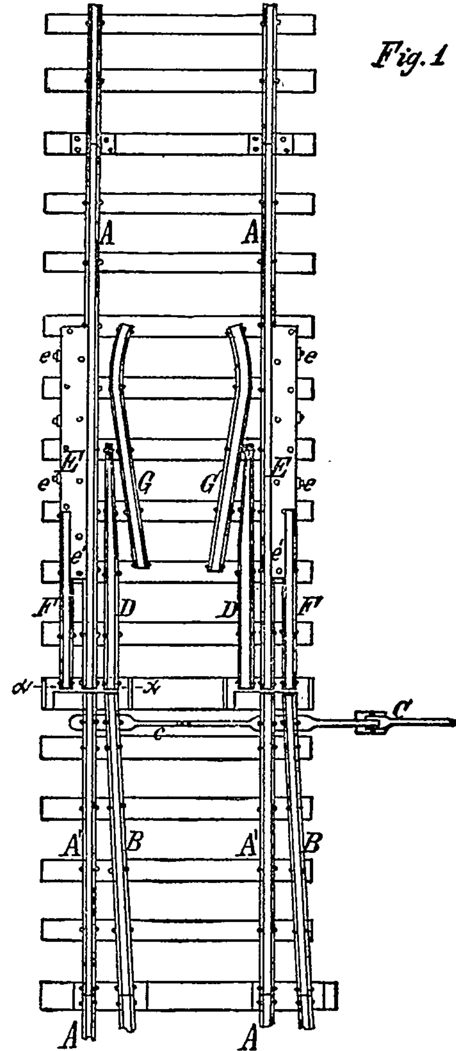
Bowen, Rogers & Locke, for complainants.
J. Thomas Spriggs, for defendant.

BLATCHFORD, Circuit Judge. This suit is brought on reissued letters patent granted to the plaintiffs May 22d, 1877, for an improvement in railway-switches, the original patent having been granted to said Cooke, November 21, 1871.

The specification of the reissue says: "My invention relates to that class of switches which are provided with a device for preventing the wheels from running off the rails to the ground, when the switch has been improperly placed. The object of my invention is to construct a safety-switch of this class, which shall guide the wheels upon the track in a natural and easy manner, without any sudden or abrupt changes of motion, and which shall be constructed of substantially the same material of which the main track is composed, so as to avoid injury to or breakage of the wheels as they pass over the switch.

"The nature of my invention will be fully understood from the following description: In the accompanying drawing, Figure 1 is a top plan view of a switch provided with my improvements. Fig. 2 is a detached perspective view of the flange-supporter. Fig. 3 is a fragmentary cross-section in line x x, Fig. 1. Like letters of reference refer to like parts in each of the figures.

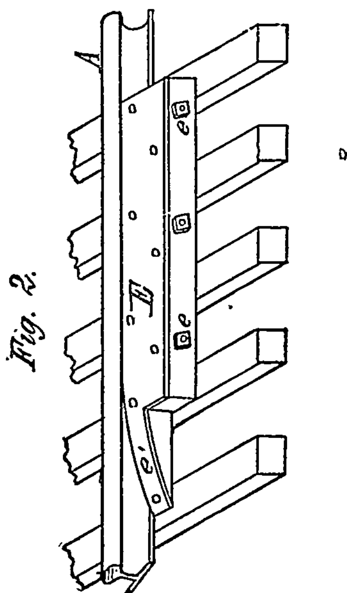
"A, A, represent the rails of the main track, and A′, A′, the main switch-rails, forming continuations thereof. B, B, represent the rails of the siding, connected with rails A′, A′, by rod C, operated by a lever C in

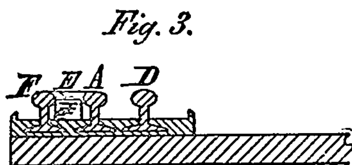


the usual manner, so that the free ends of either the rails A′, A′, or B, B, may be placed opposite the main rails A, A. D represents two pointed rails arranged on the inner side of the main rails A, A, so as to form a continuation of the inner switch-rails. E represents the flange-supporting blocks arranged on the outer side of the main rails A, and F, a rail section forming a continuation of the outer switch-rails and abutting against the flange-supporter E. The latter is preferably composed of a wooden body secured to the

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

main rails by bolts c, and a plate-iron covering secured to the wooden body by countersunk screws or rivets, or in any other suitable manner. The upper side of the flange-supporter, E, is made flush with the tread of the rails A and F, and of a width to extend to the outside of the tread of the rail F. e′ is an inclined or wedge-shaped lip, formed at the forward end of the flange-supporter E, between the rails A and F, as clearly shown in Figs. 1 and 2. G are two guide-rails arranged at an angle on the inner side of the pointed rails D and main rails A, and having their forward ends opposite the inclined lips e′ of the flange-supporter E, so that one wheel will be fully under the control





of the guide-rails G before the other wheel leaves the rail-section F. The rear ends of the guide-rails G approach the main rails to such a distance as to cause the wheels running on the flange-supporter to cross the adjacent main rail and drop into the main track before the opposite wheel leaves the guide-rail G.

"When a locomotive or car comes in on the wrong track, in the drawing on the rails B B, the right-hand wheels will pass from the rail B upon the rail-section F, while the left-hand wheels will pass upon the pointed rail D. The rails D and F, being fixed in their relative position to the main track, guide the wheels along in a perfectly steady and safe manner until the flange of the right-hand wheel strikes the inclined lip e′ of the flange-supporter E, when the right-hand wheel begins to rise thereon, but is still held by the rail F. At the same time the left-hand wheel comes in contact with the guide-rail G, which gives both wheels a tendency to travel toward the main track, which tendency is increased as the right-hand wheel mounts the support or block E, and runs on the larger circle of its flange. Both wheels now travel under these combined influences toward the main track, and finally drop into the same without being subjected to any sudden change in their movement. The flange-supporter E, being composed of wood and an iron covering, has a certain degree of elasticity, and does not stiffen the main track as heavy cast parts do, thereby preventing the chipping off or breaking of the wheels as they run over the switch in ordinary use. The flange-supporting blocks E and rail-sections F, when worn out, are readily replaced by new ones without interfering with the use of the track."

The claims, three in number, are as follows: "1. The combination, with the main-track rails A A and switch-rails B B, of the flange-supporting blocks E E, secured to the outer side of the main rails, and rail-sections F F, connecting the flange-supporting blocks with one or the other of the outer switch-rails, substantially as and for the purpose hereinbefore set forth. 2. The combination, with the main track rails A A and switch-rails B B, of the flange-supporting blocks E, secured to the outer side of the main rails and provided with inclined lips e′, and rail-sections F, points D, and guide-rails G, arranged as shown and described, substantially as and for the purpose hereinbefore set forth. 3. The combination, with the main-track rails A, pointed rails D, guide-rails G, and rail-sections F, all constructed of rails, of the flange-supporters E, constructed of wood, and provided with a covering of plate-iron, substantially as and for the purpose hereinbefore set forth."

The rail-sections F F are an element of each of the three claims of the patent. It is conceded on the record that the switches used by the defendant, represented by the model W^4, are substantially alike, in principle, construction and method of operation, to the switch patented to the plaintiffs. The only defence is want of novelty.

The defendant introduces a prior switch, Y^2, called the White or Tyler switch. It had no rail-section and no equivalent therefor. This rail-section is an "important" and useful device in the plaintiffs' arrangement. It is arranged, as the plaintiffs' expert testifies, so as to guide the wheels from the track-rail to the flange-supporting block in an easy manner, without any abrupt change of motion or jars, and in a proper direction for the wheels to drop into the main track at the proper point. He adds: "This rail section locates the switch-point at a certain dis-

tance, greater or less, in front of the block, and enables the wheel to pass upon the inclined plane without any jar or jolt. This inclined plane at the front end of the block forms an obstruction to the passage of the wheel on that side, and retards the progress of that wheel to a greater or less extent, while the wheel on the other end of the axle, which does not encounter any obstruction, is free to move on. This inclined plane then causes the truck to turn on the centre-pin toward the side on which the inclined plane has come in contact with the wheel, and will cause the wheel to travel away from the proper or main track, and not toward the main track. This tendency of the wheel is counteracted by the section-rail on the outer side of the inclined plane, and the flange of the wheel is held in its proper place and confined by the section-rail until the wheel has reached the surface of the block. The tendency of the wheel to travel toward the main track on that side, by reason of that wheel running on its flange while the other wheel runs on its tread, does not come into play until after the wheel has mounted the block, because the concussion on striking the incline would be more apt to change the course of the wheel toward the wrong direction or away from the main track than the increased diameter of the wheel could turn it toward the main track, because the concussion will operate instantaneously, while the increased diameter of the wheel can affect the direction of the wheel only slowly or gradually, as the wheel runs along over the surface of the block. Furthermore, the increased diameter of the wheel is counteracted as the wheel passes over the incline, to a greater or less extent, for the reason that the wheel running up the incline has to travel a greater distance than the wheel running on its tread, in order to make it travel the same distance horizontally. The section-rail also reduces the distance that the wheel has to travel on its flange, and it relieves the guard-rail to a large extent, and prevents the wheel which runs on its tread from striking the guard-rail with great force when the other wheel strikes the incline, so that the wheels will pass over the switch, when misplaced, more smoothly and more safely than if the section-rail were not there."

He further says that he does not find, in the White or Tyler switch, any of the combinations described in the plaintiffs' patent, or any equivalent mechanical device for the plaintiffs' rail-section.

The defendant's switch W^4 embodies the first and second claims of the plaintiffs' patent and contains the section-rails, and they are not found in the White or Tyler switch. It is clear that the plaintiffs' improvements are patentable. Some evidence was put in as to an old switch, Z^5, but it fails to show that the switch embodies the combinations claimed in the plaintiffs' patent.

There must be a decree for the plaintiffs for a perpetual injunction, and, under the stipulation of the parties, a decree for the plaintiffs for $3,750, damages for past infringements, and for costs.

Case No. 3,177.

COOKE v. O'BRIEN.

[2 Cranch, C. C. 17.][3]

SLANDER—EVIDENCE IN MITIGATION OF DAMAGES.

In slander, the defendant may, in mitigation of damages, give evidence of the grounds of his belief of the truth of the charge which he has made.

Slander. The defendant said the plaintiff was a perjured villain. The defendant, in mitigation of damages on the plea of not guilty, offered to give evidence of the grounds of his suspicion and belief that the plaintiff had committed perjury.

Mr. Jones, for plaintiff, objected, but THE COURT (nem. con.) permitted the evidence to be given. See Peake, Ev. (2d. Am. Ed.) 287.

Mr. Key and Mr. Law, for defendant.

Case No. 3,178.

COOKE et al. v. UNITED STATES.

[12 Blatchf. 43; 19 Int. Rev. Rec. 181.][1]

Circuit Court, S. D. New York. May 13, 1874.[2]

REDEMPTION OF FORGED TREASURY NOTES—RECOVERY BACK BY THE UNITED STATES—ESTOPPEL—ACT OF ASSISTANT TREASURER.

1. The act of April 12th, 1866 (14 Stat. 31), authorized the secretary of the treasury to dispose of any bonds authorized by the act of March 3d, 1865 (13 Stat. 468), "for lawful money of the United States, or for any treasury notes * * * issued under any act of congress, the proceeds thereof to be used only for retiring treasury notes, or other obligations, issued under any act of congress, but nothing herein contained shall be construed to authorize any increase of the public debt." Under the act of 1865, treasury notes were issued, dated June 15th, 1865, payable June 15th, 1868. In October, 1867, the assistant treasurer of the United States, at New York, paid out money of the United States in the purchase, from J., of what purported to be some of such treasury notes, but which were afterwards pronounced, at the treasury, not to be genuine and not to have been issued by the United States. Suit was, before June 15th, 1868, brought against J., by the United States, in the district court, to recover back the money so paid, and they had a verdict and judgment. The treasury notes so issued were printed from engraved plates, with the engraved signatures of the proper officers, and were stamped with the proper seal, and were lettered and numbered by a machine, and no writing appeared on them. On a writ of error, *held*, if the notes were in fact wholly forged and counterfeit, the assistant treasurer had no authority to purchase them, and the plaintiffs were entitled to recover.

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

[1] [Reported by Hon. Samuel Blatchford, District Judge, and here reprinted by permission. 19 Int. Rev. Rec. 181, contains only a partial report.]

[2] [Affirming Case No. 14,854. Decree of circuit court reversed by supreme court in U. S. v. Cooke, 91 U. S. 389.]

2. The government is not estopped, by the purchase and payment, from recovering back the money, not only because the government is not, in general, bound by the negligence of its officers, acting under a limited authority, but also because the defendants could, by refunding the money, be placed in the same situation as they were before the transaction.

3. The case bears no just analogy to the acceptance or payment of a forged bill of exchange by the drawee thereof, in which case the holder acts in faith of the drawee's acceptance or payment, and is disarmed of his usual recourse to prior parties. There, the drawee is estopped from setting up a state of facts which would practically operate as a fraud on the holder.

4. The decision in Bank of U. S. v. Bank of Georgia, 10 Wheat. [23 U. S.] 333, holding a bank concluded by receiving its own bank bills, which had been fraudulently altered, and crediting them as cash, seems to have depended upon the special circumstances of that case.

5. Neither that nor other cases establish, that an agent, having authority to retire genuine notes of his principal, not yet due, can conclude his principal by purchasing forged notes; still less, that the government can be concluded by such an unauthorized act of a subordinate officer.

6. There is no material difference, in this respect, between this case and any other purchase by an agent, where a mutual mistake of fact is discovered after payment of the consideration.

7. The questions, whether the government is liable on its commercial paper precisely as an individual, and whether it may be bound to pay, at maturity, treasury notes printed from genuine plates, sealed with the genuine seal, and complete in form, even though fraudulently abstracted and put into negotiation, when presented by bona fide holders for value without notice, discussed.

8. But the charge to the jury in this case was based on the proposition, that the assistant treasurer had no authority, under the act, to retire any notes, however printed, not actually issued, as a "physical fact," by the authority of the government. This construction of the act is sustained by considerations of such force, that this court deems it its duty to affirm the judgment of the court below in favor of the government.

[See note at end of case.]

[In error to the district court of the United States for the southern district of New York.

[Action by the United States against Jay Cooke, William J. Morehead, H. D. Cooke, H. C. Fahnestock, Edward Dodge, and Pitt Cooke, comprising the firm of Jay Cooke & Co., to recover back money paid them by the assistant treasurer in New York for certain counterfeits of treasury notes, in the belief that they were genuine. There was a judgment for the plaintiff in the district court (Case No. 14,854), and the defendants bring error.]

John E. Burrill, for plaintiffs in error.

Thomas Simons, Asst. Dist. Atty., for the United States.

WOODRUFF, Circuit Judge. On the 3d of March, 1865, congress authorized the secretary of the treasury to borrow, on the credit of the United States, not exceeding six hundred millions of dollars, and to issue therefor bonds or treasury notes of the United States, bearing interest not exceeding seven and three-tenths per centum per annum, payable semi-annually. 13 Stat. 468. Such notes were not made a legal tender. Under this act, treasury notes to a large amount were issued by the secretary of the treasury, payable three years after date. On the 12th of April, 1866, congress, by another act (14 Stat. 31), authorized the secretary of the treasury, at his discretion, to receive any treasury notes or other obligations issued under any act of congress, whether bearing interest or not, in exchange for any description of bonds authorized by the previous act of March 3d, 1865, and also to dispose of any description of bonds authorized by such previous act, "for lawful money of the United States, or for any treasury notes * * * which have been or which may be issued under any act of congress, the proceeds thereof to be used only for retiring treasury notes or other obligations issued under any act of congress; but nothing herein contained shall be construed to authorize any increase of the public debt."

On each of several days from and including September 20th and October 8th, 1867, the defendants, (the plaintiffs in error,) presented to the assistant treasurer of the United States, at the city of New York, large amounts of treasury notes, purporting to be issued under the act of 1865, dated June 15th, 1865, and payable three years after date, and, in the language of the then assistant treasurer, examined as a witness in this case, "he purchased the amount and description of notes at the prices and premium mentioned" in bills of sale therefor made by the defendants, (plaintiffs in error,) which, together with the notes which they purported to include, were purchased and paid for with the money of the United States, by such assistant treasurer, and at a premium above the face thereof, shown by the said bills of sale. Such bills of sale were in the following form:

Sold Hon. H. H. Van Dyck, assistant treasurer of the United States (No. 700), by Jay Cooke & Co., corner of Wall and Nassau streets, September 20,

400,000..June..7³/₁₀..107	$428,000
97 days	7,760
100,000..July.. " ..107	107,000
67 days	1,340
	$544,100

Upon the back of each of the treasury notes the defendants, (plaintiffs in error,) by a stamp which, for their convenience, they were permitted to employ in lieu of their written signature, before such delivery, printed the words, "Pay to the secretary of the treasury, for redemption, Jay Cooke & Co." By the form of the transaction, therefore, the defendants, (plaintiffs in error,) professed to sell the several notes, and, by endorsement, to authorize the secretary of the treas-

ury to receive them for redemption at the treasury. This appears to have been the mode which, in these cases, at least, the secretary adopted for retiring treasury notes, under the act of 1866, before mentioned. The notes thus received from the defendants were forwarded by the assistant treasurer to the secretary of the treasury at Washington, and, on examination there, eighteen thereof, of one thousand dollars each, were pronounced not to be genuine treasury notes issued by the government of the United States, and were, therefore, returned to the assistant treasurer at New York, who, on the 13th of October, 1867, notified the defendants (plaintiffs in error) that they were counterfeit, and required them to refund the money paid for them or substitute other notes for them. The defendants below, neglecting or refusing to do either, this action was brought in the district court, on or prior to the 4th of March, 1868, to recover back the money, and, on the trial hereof, the United States had a verdict for the amount paid to the defendants below for such eighteen notes, with interest thereon,—$23,630 88. Judgment being entered, the defendants below have brought this writ of error, to review decisions made on the trial and portions of the charge of the judge to the jury (4 Ben. 376 [U. S. v. Cooke, Case No. 14,854]), which appear in the bill of exceptions made for that purpose.

The declaration herein contained special counts describing the cause of action as an indebtedness by the defendants to the plaintiffs for money had and received by the defendants to and for the use of the United States and of their property, which money was obtained by the defendants upon occasion of their delivering to the plaintiffs what purported to be obligations of the United States, known as seven-thirty treasury notes, which were, by the defendants, when they delivered them to the officer of the sub-treasury, professed to be, and by the plaintiffs and their officer aforesaid were then supposed to be, valid genuine notes, and by the defendants' representations and inducements the same were received as valid genuine notes by the plaintiffs and their officer aforesaid, at the sub-treasury of the United States aforesaid, at the city of New York. The declaration averred, that the said notes were, in fact, counterfeit, and had never been executed or issued by the United States of America, their officers or agents, but had been forged and falsely made and uttered, and were no obligations of the United States aforesaid, and were, by their officer aforesaid, received as aforesaid, under the belief, created by the representations and inducements aforesaid, that the notes were good and formed a valuable and adequate consideration for the money received by the defendants, which money was retained by the defendants from the plaintiffs, after discovery that the said notes were counterfeit, whereof prompt notice was given to the defendants; and that, being so indebted, the defendants promised, &c. Other counts were also contained in the declaration, in general indebitatus assumpsit, for money had and received by the defendants to and for the use of the plaintiffs. To the declaration the defendants pleaded non assumpsit only.

The proofs on the trial were mainly addressed to the inquiries, whether the notes in question were a part of the regular series of notes printed at the treasury of the United States under the said act of 1865, and issued by the secretary of the treasury; and whether the said notes were wholly spurious and counterfeit, not made nor printed upon any plates made or engraved at the treasury; and further, whether the said notes were surreptitiously and fraudulently printed from the plates and dies in the treasury department, or, being in fact lawfully printed, were fraudulently, by some means not disclosed, put in circulation as treasury notes. On these last named questions, there was no evidence whatever of such fraudulent or surreptitious printing, or of such fraudulent putting in circulation of notes lawfully printed, except so far as the evidence introduced on the part of the defendants to show that these notes might have been printed from the lawfully made plates at the treasury, in connection with the evidence that the said notes were not part of the series of treasury notes lawfully issued by the secretary of the treasury, might create a suspicion that the government plates were used by some one and by some means to make the notes in question. The evidence that the notes were not printed from the government plates, but were wholly counterfeit and spurious, was very strong, and the conflict of evidence was so slight, that, had the case gone to the jury upon that sole question, it seems hardly possible that the jury could have hesitated to find them wholly false, forged, and counterfeit. Indeed, I think a finding that they were printed from the government plates, and were sealed with the genuine seal of the treasury, would have been so against the weight of the evidence, that it must have been set aside, if the jury had rendered such a verdict. But, as will be hereinafter more fully stated, the case did not go to the jury on that sole question, as the test of the right to recover, but on the question whether the notes in controversy were in fact issued by the secretary of the treasury, the question whether or not they were printed from the government plates and actually sealed with the treasury seal being regarded by the court as material only from its incidental bearing on the question whether they were in fact issued by the secretary of the treasury.

A distinction is, therefore, raised between notes which, being printed from the government plates and sealed with the seal of

the treasury, as evidence of lawful issue, were never in fact issued by the secretary of the treasury, but by some surreptitious and unlawful means may have been thrown into negotiation or circulation, and, on the other hand, notes which the secretary of the treasury actually issued from his department of the government. Notwithstanding the dearth of evidence tending to show any surreptitious or clandestine use of the government plates, or of any fraudulent abstraction of notes printed therefrom, the theory which governed the trial requires that such a possibility be contemplated in reviewing the rulings of the judge and his charge to the jury.

The case is one of great importance, not only from the amount directly involved in the recovery, but because there are believed to be a very large amount of notes which are claimed to be counterfeit, a considerable amount of like notes, retired at or about the same time, which have been pronounced counterfeit, and many suits are pending to recover back money paid by the assistant treasurer for such notes, and because, also, the questions of law involved may, in the future, affect the government and parties who hold other apparent securities purporting to be negotiable obligations of the government. The case will, as I understand, by reason of that importance, be taken to the court of last resort, and it is not, therefore, very material how the questions shall be decided in this court, through which the parties must pass on their way to the supreme court, save only that the decision here made may determine who shall be plaintiffs in error before that tribunal.

To the full understanding of the case, it may be material to bring again into distinct view the statute under which treasury notes called "seven-thirties" were issued, the manner in which such notes were prepared to be issued, and the precise terms of the statute which authorized the secretary to retire such notes before they had become payable, and to pay a premium therefor, in order to withdraw them from the market. The authority to issue such notes, given by the act of March 3d, 1865, to an amount not exceeding six hundred millions, is above firstly stated. 13 Stat. 468. It authorized the secretary of the treasury to borrow, on the credit of the United States, from time to time, in addition to the amounts theretofore authorized, any sums not exceeding in the aggregate six hundred millions of dollars, and to issue therefor bonds or treasury notes, in such form as he might prescribe. It fixed the rate of interest. It specified various purposes for which (instead of an actual loan of money) the secretary of the treasury might, as he might think advisable, dispose of such bonds or other obligations issued under the act, and gave him a discretion as to the manner, rates, and conditions of such disposition. It further applied to the bonds and other obligations issued under it, all the provisions of the act of June 30th, 1864, in relation to forms, inscriptions, devices and the printing, attestation, sealing, signing and counterfeiting thereof. But it also expressly provided that the act should not be construed as authorizing the issue of legal tender notes in any form.

The act of June 30th, 1864 (13 Stat. 218), pro hac vice adopted by the above named act of 1865, provided, in the 6th section thereof, for the making, engraving, sealing, &c., of bonds therein referred to, and then that the treasury notes and United States notes authorized thereby "shall be in such form as the secretary of the treasury shall direct, and shall bear the written or engraved signatures of the treasurer of the United States, and the register of the treasury, and shall have printed upon them such statements, showing the amount of accrued or accruing interest, and the character of the notes, as the secretary of the treasury may prescribe, and shall bear, as a further evidence of lawful issue, the imprint of the seal of the treasury department, to be made under the direction of the secretary of the treasury, as before directed."

The material words in the act of April 12, 1866 (14 Stat. 31), under which the transactions between the defendants and the assistant treasurer at the city of New York were had, and which is above in part recited, are those which, after authorizing certain exchanges of bonds for treasury notes or other obligations issued under any act of congress, also authorized him to dispose of any of the bonds mentioned, for lawful money of the United States, "the proceeds thereof to be used only for retiring treasury notes or other obligations issued under any act of congress; but nothing herein contained shall be construed to authorize any increase of the public debt."

By virtue of the above named two acts, of 1864 and 1865, all the notes issued by the secretary of the treasury, of the description, in form and date, corresponding with those now in question, (called, for convenience, seven-thirty treasury notes,) were printed from engraved plates, with the engraved signatures of the treasurer of the United States and the register of the treasury, were lettered and numbered by a machine, and were stamped with the seal of the treasury department. No writing whatever appeared thereon, either of names, numbers or words of any kind. They were made and issued in series, each series being designated, and the notes in each series distinguished, by the numbers or letters printed thereon. Those which were produced by the plaintiffs as genuine notes which had been issued by the secretary of the treasury, and put in evidence in this case, like those sold by the defendants and subject to this controversy, were dated June 15th, 1865, payable three years after date, i. e., on the 15th of June,

1868, and were, therefore, not due at the time when the notes in question were sold by the defendants, nor when this action was brought to recover back the money paid for the said last named notes.

1. Numerous questions touching the admissibility of evidence were raised in progress of the trial. Most of them related to the question, whether the notes in question were printed from government plates in the treasury department. This inquiry was deemed proper, because, if they were so printed, then some presumption would arise that they were issued by the government. Some of them related to the proof of the notes which were in fact issued in due course, and the books and papers of the department showing to whom issued, and when, and what were their numbers, &c., as tending to show what notes, and what only, were issued by the government. Some related to other particulars. It must suffice, without taking up and discussing each exception in detail, that I am of opinion that, if the principle of liability governing the trial was correct, then no error was committed in those rulings. A large range of speculative inquiry was urged by the defendants into possible and conjectural modes of accounting for the differences between the alleged counterfeit notes and those which were testified to be genuine, and I think the defendants were allowed quite as much latitude as they were entitled to.

2. It is manifest, that, upon the merits of the controversy, the statutes and the facts above detailed suggest several interesting questions, which were raised on the trial, and were discussed in this court, on the writ of error.

(1.) The notes in question having been, in fact, purchased from the defendants by the assistant treasurer at New York, is the government concluded, or are the questions whether the notes so purchased are forged and counterfeit, and whether they were, in fact, ever issued under the acts of congress, open to inquiry and proof?

(2.) The question of fact—Are the notes in question forged and counterfeit?

(3.) If not forged and counterfeit, then the question of fact—Were they issued under any act of congress?

(4.) If not so issued in fact, are they obligations of the government which, in law, the government is bound to pay, if they were either printed from the government plates surreptitiously and unlawfully used for the purpose, or were unlawfully and surreptitiously abstracted, without any authority of the officers of the government, and were negotiated, so that they came to the hands of the defendants as bona fide holders for value, without notice?

(5.) Had the secretary of the treasury, or, more definitely, had the assistant treasurer at New York, any authority to purchase the notes in question, for the purpose of having them retired, if they were not notes which had been in fact issued by the authority of acts of congress, even though they were printed from the government plates, and came to the hands of the defendants for value paid, bona fide, and without notice, and in such wise as, upon the principles of commercial law, to create an obligation on the part of the government to pay them when they should become due?

(1.) Upon these questions, it is strenuously insisted, by the defendants, that, as the notes in question purported, on their face, to be obligations of the government, purported to be issued under and in virtue of the act of congress, purported to be treasury notes, of the description authorized by the act, and as the defendants sold them in good faith to the officer of the government, believing them to be what they purported to be, and such officer purchased and paid the defendants for them in the like belief, the plaintiffs are concluded, the inquiry whether the notes are genuine or counterfeit, and the question whether the notes were or were not, in fact, issued by due authority, is not open, and, in either event, the plaintiffs are not entitled to recover. I am not able to assent to this claim of the defendants. If the notes in question were, in fact, wholly forged and counterfeit, then they were in no sense obligations of the government, and the assistant treasurer at New York had no authority to purchase them. He acted without authority and under a mistake of facts. Even if he was negligent, the government is not to be prejudiced on that ground, where such unauthorized act wrought no prejudice to the defendants. I might, perhaps, go further and say that the government is not, in general, bound by the negligence of its officers acting under a limited authority. It is enough for this point to say, that the transaction between the defendants and the assistant treasurer has none of the features which are sometimes held to create an estoppel in pais, and so forbid a disavowal of the act. It was simply a purchase of apparently negotiable paper, not yet due, which, even if genuine, the government was not bound to pay at that time—a purchase made in the mistaken belief that the paper was genuine, and the return of which to the defendants, and reclamation of the consideration money, placed the defendants in precisely the same situation as they were before the transaction. Immediate notice of the claim to such reimbursement of the consideration being given, the defendants had every recourse to those from whom the paper was received by them that they would have had if the falsity of the paper had been detected by the assistant treasurer himself, and he had refused to buy them.

The case bears no just analogy to the acceptance of a forged bill of exchange by the drawee thereof. Such acceptance prevents

its protest. It is a direct assurance to the holder that the bill is properly drawn and will be paid, upon which he has a right to rely and does rely. It disarms him of his usual and ordinary means of direct and obvious recourse to prior parties. It immediately changes his relations to such prior parties. It thus comes plainly within the doctrine by which conduct or declarations of one made or done to influence the conduct of another, upon which such other has a right to rely and does rely, are held to constitute an estoppel in pais and conclude the former, when to permit him to contradict his conduct or declarations would place the other at a disadvantage or loss, and practically operate as a fraud upon him. Such cases are here cited and relied upon by the defendants, as, also, cases of the payment of a bill of exchange by the drawee, who, for like reasons, is held concluded thereby. This case involves no such consideration. The defendants here lost nothing either of property or security by the mistaken payment. They did nothing in faith of the transaction but receive the money, and lose nothing when they refund it. If their prior purchase of the notes gave them a right of reclamation against others, that right was unimpaired.

The case of Bank of U. S. v. Bank of Georgia, 10 Wheat. [23 U. S.] 333, is also relied upon by the defendants. There a bank received what purported to be its own circulating notes, and credited them as cash, and was held, in the circumstances of that case, concluded, so that, after the lapse of a considerable interval, having discovered that the bank bills so received were forged by fraudulent alteration, it could not use that fact as a defence to an action to recover the balance of account including such credit. Various considerations appear to have influenced the court in that decision, viz., that these were bank bills, circulating as money; that there was negligence in receiving and placing them to the credit of the plaintiff, which ought to conclude them; and that there was further laches, in the delay which allowed a considerable time to elapse before the discovery. I am, probably, not at liberty to question the correctness of the decision made by the supreme court in that case. But it is by no means clear that the supreme court would have applied the doctrine of that case to a purchase of a note or bill of exchange not yet due, and which was not a circulating medium.

These cases by no means establish that an agent, having authority to purchase the promissory notes of his principal not yet due, can conclude his principal by buying forged notes, he neither being authorized, nor professing to be authorized, to buy any but genuine notes. Still less do they establish, that the government can be estopped by such an act of its officer—an act which the government had not authorized—one which secretary of the treasury had not authorized—and where the assistant treasurer did not profess to have any authority but to buy genuine notes. I, therefore, see no material difference in this respect, between this case and any other purchase of property or supposed property under a mutual mistake of fact, where the consideration has been paid, and the thing purchased turns out not to be what it was represented and believed to be. If, therefore, this transaction was not authorized by the act of congress under which the purchase was made, there is nothing in it which operates to estop the government to prove the acts which take the transaction out of the operation of that act, whether the proof offered be that the notes are counterfeit or not within the purview of the act on other grounds. To hold otherwise, would be to say that the mere act of the agent operates to estop the principal to deny the authority of the agent to do the act.

(2.) The question of fact, whether the notes in question were forged and counterfeit, in this, that they were printed from false and fraudulent plates, prepared in imitation of the plates in the treasury, was a question for the jury, if material. If the views which governed the trial were correct, then, as already suggested, this question was only an incidental question bearing on the principal inquiry, whether the notes in question were actually issued by the secretary of the treasury or by his authority. If printed from the government plates, some presumption of fact would arise, that they were so issued, which it might be material for the government to rebut. If, on the other hand, printed from false or spurious plates, made in imitation of the plates in the treasury, then there was no evidence, and I do not understand it to be, or to have been, claimed, that they were issued by the secretary of the treasury, or constituted government obligations, in any sense whatever; and hence, if the purchase did not estop the govenment, the plaintiffs were entitled to recover.

(3.) If not forged and counterfeit, in the sense last above suggested, but actually printed from the same plates as the confessedly legal notes, then were these particular notes ever issued under any act of congress? This question, as a mere question of fact, viz., were they, as "a physical act" of the secretary of the treasury, issued by him, was submitted to the jury, and they have found for the plaintiffs. Such finding calls for no discussion of the question as one of mere fact. It leaves, however, the two remaining questions, as questions of law, to be adverted to.

(4.) If the notes in question were not, in fact, issued by the secretary of the treasury, or by his authority, then, did they constitute obligations which the government, as matter of law, was bound to pay when they should come to maturity, if they were actually, though surreptitiously and fraudu-

lently, printed from the government plates, dies and stamps, or, being printed, were unlawfully and fraudulently abstracted without such authority, and negotiated, so that they came to the hands of the defendants as bona fide holders for value, without notice? This question is one of an importance that can hardly be overstated. It is such to the government, which has, by act of congress, provided for the manufacture of commercial paper by means that require no other authentication than the impress of the machinery by which it is produced, and to the people in this country, and wherever the government of the United States has credit, and who accept and receive, in the ordinary course of business, such paper bearing every evidence of authenticity which the acts of congress prescribe, in affirmance of the legal validity of any of their obligations. The case is, in this respect, peculiar. The moment a note was produced, by the use of the plates, dies and stamps prepared by the secretary of the treasury, it was a completed instrument, as perfect as a note would be if it had been required to be in the handwriting of the secretary himself and to be signed by him, and he had written and signed it. The acts of congress provided for the making and issue of many hundred millions of dollars in such notes, and in small amounts adapted to the capacity of our humblest citizens whose patriotism might prompt them to lend their money thereon, or to receive them in course of negotiation, and thus aid the government in its exigency. They were negotiated, and the form and nature of the transaction show that it was the hope and intent of the acts of congress that they should be negotiated throughout the whole of our loyal territory, and in every town and village in its remotest sections. It may be asked, therefore, with great pertinency and force—Was it intended that every one who took such notes should first inquire, not alone whether they were made by printing from the government plates and stamps, and sealed with the treasury seal, and bear on their face all the genuine marks and evidence of lawful issue which the acts of congress prescribed, but, also, and further, whether the secretary, or some one authorized by him, issued them, as a "physical act?" Is such a requirement, according to legal principles, just and reasonable, to constitute the holder a bona fide holder; and, if not so issued, is there no legal obligation binding the government to their payment? It would, nevertheless, be difficult to hold, that the circumstance that the government had procured the requisite machinery, plates and stamps, was enough to bind the government to the payment of all notes which by any means were printed thereon or therewith. If such instruments, though provided for the making of valid notes, should be stolen or be fraudulently used to make such notes, it would not be true that they were negotiable paper made by government authority. Providing the means of making such paper, and so carelessly guarding it that innocent persons were deceived, by one or some who, without authority, used those means, might lay the foundation for a strong appeal to a sense of justice and equity, but the holders of paper so made would find some difficulty in sustaining the averment, at law, that the government made the notes. Be this as it may, when the government has not only prepared the instruments, but has authorized the making of the paper, and it is actually made, (printed, numbered, stamped and sealed,) bearing all the marks of genuineness prescribed by law, and is thus in existence in the keeping of the secretary of the treasury or his subordinate agents, the question may, perhaps, present a different aspect. If fraudulently or feloniously abstracted and negotiated, do the notes constitute valid legal obligations in the hands of innocent persons receiving them for value without notice? Such completed paper, in the actual possession of the secretary of the treasury, may be likened to notes complete in form and signed by an individual and locked in his desk. In the latter case, is it doubtful that, if the notes be fraudulently or feloniously abstracted from the desk, and be negotiated, so that they come to the hands of an innocent person, who gives value therefor, before maturity, without notice, the signer is bound, by the settled rules of commercial law, to pay them?

It has been said, with what I deem just accuracy, that, when the government engages in the making and negotiation of commercial paper, it submits itself to the settled rules of commercial law, and, in that respect, stands before the courts of law (whenever jurisdiction is properly obtained, as is the case when the government is plaintiff) to receive the application of those rules precisely as they would be applied to an individual.[3] If a bank issuing bills for circulation should resort to the like mode of making bills which was adopted by the government, and the names of its officers purporting to be signed to the bills actually issued by the bank were, in fact, fac similes, in lithograph, it would not be doubted that the bank was bound to redeem such bills. If such bills were fraudulently obtained from the bank vaults and put into circulation, the obligation of the bank to pay them would be no less clear. In this respect, is there any difference in the question of liability, when the paper is a negotiable note payable in the future, intended not for circulation as money,

[3] The Floyd Acceptances, 7 Wall. [74 U. S.] 666, 675; U. S. v. Bank of the Metropolis, 15 Pet. [40 U. S.] 392; U. S. v. Barker, 12 Wheat. [25 U. S.] 559; Delafield v. State of Illinois, 26 Wend. 192; Davis v. Gray, 16 Wall. [83 U. S.] 203, 232; Curran v. State of Arkansas, 15 How. [56 U. S.] 309, and cases there cited.

but for negotiation, in the course of business, for loans or otherwise?[4]

This question, whether, under the circumstances, on this point, above embraced in the fourth question, the notes would constitute government obligations, enforcible as such wherever jurisdiction was obtained for the purpose, was largely discussed on the argument, and its interest and importance led me into a very extended examination of the subject, and of the authorities, in England and this country, which bear upon it. But, it would not be profitable to pursue the discussion here, since the case was not made to turn, in the district court, upon this question. The final proposition upon which the case went to the jury, and upon which their verdict must be taken to have been founded, does not require the determination of the question whether, upon the facts here assumed, the government would, at the maturity of the notes, be legally bound to pay them, although not in fact issued physically by the secretary of the treasury, or by any lawful authority. The charge to the jury was, in effect, that, if not so issued, then the act of April 12th, 1866, did not authorize the secretary of the treasury to retire them, and the payment by the assistant treasurer in New York, to the defendants, of moneys of the United States, was wholly unwarranted by any legal authority, and such payment was properly repudiated.

(5.) If this instruction was correct, it disposes of the case; and this is the subject of the question above fifthly stated—Had the assistant treasurer at New York any authority to pay the money of the United States to the defendants in the purchase, for retiring, of the notes, if they were not, in fact, issued by the authority of acts of congress, even though they were printed by the agents of the government from the government plates, were duly stamped and sealed, and came to the hands of the defendants in such manner as, upon the principles of commercial law, to create an obligation on the part of the United States to pay them when they should become due? The answer to this question was made, and properly made. to depend upon the construction of the act of April 12th, 1866, authorizing the secretary of the treasury to retire treasury notes which were not then due. In words, that act directs the proceeds of the bonds therein mentioned "to be used only for retiring treasury notes or other obligations issued under any act of congress." The charge hereupon was: "The authority it conferred upon the secretary of the treasury and the subordinate officers of the treasury department, was solely to retire treasury notes issued under some act of congress. If they were not issued under some act of congress, they were not within the lawful powers delegated to the secretary of the treasury by the act of 1866. The entire matter is regulated by statute; and, if these notes were, in fact, not issued under an act of congress, there was no authority on the part of the secretary of the treasury, or of any other officer, high or low, not even of the president of the United States himself, to retire or redeem them." To make more plain what was meant by "issued," it was subsequently charged: "The act of issuing the notes was, under the statute, a physical act. The notes may be printed in the department from the genuine plates, and may be all ready to issue, and yet, if they are not, in fact, issued, they do not come within the statute. It is for the purpose of showing the physical act of issuing the notes, that the government has given the testimony to which I have referred. The United States are not bound to redeem any notes which were not in fact issued. There is no authority to retire the notes unless they were issued, as a physical fact." There are some remarks in the charge which may be deemed to hold that, if not so issued, the government was under no obligation to pay them when due, however printed and gotten into course of negotiation. But, the authority to retire them under the act of 1866, before maturity, was really the point in issue, and it was that which was made the test of the plaintiffs' right of recovery, as still further indicated thus: "If you find that, in point of fact, these C notes were not issued by the United States, then the plaintiffs are entitled to recover, provided," &c. * * * "The ultimate question is not whether the C notes are spurious or genuine; * * * that is a collateral question, * * * gone into as bearing on the question whether the C notes were ever issued by the United States." These instructions made the question of ultimate duty to pay the notes when due, immaterial, if the act of 1866 did not authorize the secretary of the treasury to retire them; and, as they were not due at the time this action was commenced, the ownership thereof by

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[4] Liability of individuals—Peacock v. Rhodes, 2 Doug. 633; Miller v. Race, 1 Burrows, 452; Vallett v. Parker, 6 Wend. 615; Michigan Bank v. Eldred, 9 Wall. [76 U. S.] 544; Ingham v. Primrose, 7 C. B. (N. S.) 82; Van Duzer v. Howe, 21 N. Y. 531; Young v. Grote, 4 Bing. 253; Bank of Pittsburg v. Neal, 22 How. [63 U. S.] 96. Liability of corporations for acts of their agents—Farmers' & Mechanics' Bank v. Butchers' & Drovers' Bank, 14 N. Y. 623, and 16 N. Y. 125; New York & N. H. R. Co. v. Schuyler, 34 N. Y. 30; Merchants' Bank v. State Bank, 10 Wall. [77 U. S.] 604, 645. Liability of the agents of the government—U. S. v. Macdaniel, 7 Pet. [32 U. S.] 1. Liability of municipal bodies on negotiable paper—Commissioners of Knox Co. v. Aspinwall, 21 How. [62 U. S.] 539; Same v. Wallace, Id. 546; Bissell v. City of Jeffersonville, 24 How. [65 U. S.] 287; Mercer Co. v. Hacket, 1 Wall. [68 U. S.] 83; Gelpcke v. City of Dubuque, 1 Wall. [68 U. S.] 175; Thomson v. Lee County, 3 Wall. [70 U. S.] 327; Supervisors v. Schenck, 5 Wall. [72 U. S.] 772; Lexington v. Butler, 14 Wall. [81 U. S.] 282; Lynde v. The County, 16 Wall. [83 U. S.] 6; St. Joseph v. Rogers, Id. 644. See The Floyd Acceptances, 7 Wall. [74 U. S.] 666.

the defendants constituted no defence in the nature of a set-off, if such ultimate duty to pay them were conceded.

We are, therefore, brought distinctly to the construction of the act of 1866 [14 Stat. 31]. Did it authorize the secretary of treasury to pay out the money of the United States to retire any treasury notes not actually, ("as a physical fact,") issued by the secretary of the treasury or by his authority? There is room for grave doubt of the correctness of the ruling at the trial on this point; and, not only in reference to this case, but to several others now pending, it is important that the opinion of the court of last resort should be had at as early a day as is practicable. Large amounts may depend upon the question. Time is of great importance, where witnesses are numerous and are liable to be removed by death or otherwise. I ought not to reverse and send the case back for another trial, with the necessarily incidental delays in the progress to a final determination, unless a very clear and decided conviction makes it my duty to do so.

The notes which the secretary was authorized to retire were "treasury notes, or other obligations, issued under any act of congress." It may be plausibly, at least, suggested, that the object of this statute was to change the form of the public debt, to substitute, for obligations having but a short time to run before maturity, other obligations payable at a day comparatively remote, to reduce, in short, the outstanding debt, rapidly approaching maturity; that, if such notes constituted obligations of the government, they were within the scope and meaning of the act, by whatever agency or means they were put into circulation or negotiation; that the fair and natural construction of the terms embraces whatever notes made, printed and sealed, as evidence of lawful issue, pursuant to acts of congress, were bearing interest against the government, and were then outstanding; that these terms of description are broad and comprehensive, neither suggesting, nor intended to suggest, any distinction between such notes as were issued legally or by lawful authority, and any which might have been surreptitiously and fraudulently abstracted and put into course of negotiation; that, in proper and commercial sense, any negotiable paper is "issued" by the maker, if he has made it and it has passed into negotiation, so as to bind him to pay it, whether this was effected by fraud, or otherwise without his consent; especially, that such language, applied to bank bills of a bank issuing circulating paper, would be construed so as to include, under a description "bills issued by the bank," all bills outstanding which the bank was bound to pay, even though it was known that a considerable amount or number of bills were in circulation which had been fraudulently abstracted from its vaults, and, in construing these terms of description in this statute, there is no reason for giving to the term "issued" a more rigid or restricted meaning; that there is nothing, true in fact, or in the history of the subject, of which the court has any notice, to indicate that congress had in view any occasion for such a discrimination; that, had congress intended to discriminate between notes which were lawfully put into negotiation by the secretary of the treasury, and notes made and completely ready for negotiation, but surreptitiously or fraudulently abstracted and negotiated, the act would have stated such intent in more distinct terms, for the guidance of the officers of the government; and, finally, that there is no just reason for making such a discrimination on the one hand, while, on the other, the presumption is, that the government, having engaged in the issue of commercial paper, and being jealous of its honor and credit, would not make such a discrimination against those who, in reliance on the faith of the government, have innocently taken notes genuine, in all respects, in their preparation and authentication, and bearing every prescribed mark and indicium of lawful issue, but only distinguishable from others by a fact not appearing upon their face, viz., that they were put into negotiation without lawful authority.

It should, however, be borne in mind, that, however impressive these considerations are in their bearing on the question whether the government ought to pay such notes, they are not necessarily applicable to the gratuitous act of retiring treasury notes before they become due, or to a voluntary purchase of treasury notes. So long as such notes had not become payable, the question of ultimate liability to pay them might be postponed without injustice to any one. There was, therefore, no consideration of justice or equity towards third persons, to operate upon congress in providing, for reasons of its own, for retiring any notes which it saw fit to retire. Such considerations cannot, therefore, be properly invoked, to affect the construction of an act of congress in its nature, as to third persons, wholly gratuitous and voluntary. It was, therefore, wholly competent, and entirely equitable and just, for congress to designate, in any terms deemed appropriate, the notes to the retiring of which the "proceeds" mentioned in the act might be applied, and limit such application to those "only."

Again, it is quite obvious, that the question, whether the United States is bound to pay, in a given case, treasury notes which have not in fact been negotiated by the secretary of the treasury, or by his authority—whether, in a given case, the holder is entitled to recover, upon the rules of commercial law—may be a difficult and complicated question, depending upon proof of facts, and, often, upon the weight of testimony, which may be nicely balanced. The extended and complicated litigation in this very case may be an illustration of the uncertainty thus suggested. The question, where notes have been

surreptitiously or fraudulently abstracted, whether they are held under circumstances which make them government obligations at all, is a judicial, not an administrative, question. Facts to be ascertained and found by a jury, and rules of law to be declared by a court, are involved in the inquiry.

The theory of the charge in this case may be stated to be, that it was not the intention of the act of congress to confer upon the secretary of the treasury or his subordinate officers the exercise of judicial powers in this respect; that it was not for them to inquire into those questions of notice, bona fides, or payment of value, upon which the ultimate liability of the government to pay notes thus fraudulently abstracted from the treasury would depend. As to notes actually issued by the secretary of the treasury, no question of liability could arise. For retiring those he was authorized, at once and summarily, to use the proceeds mentioned in the act. As to any others, the holders would, at maturity, have such recourse to the government, through congress or the court of claims, as the laws will warrant, and would have such relief as might be justly due. Not only so, the investigation which might then be had, and the disclosures which, in such investigation, might be compelled, might result in enabling the government to reach the fraudulent parties, even though it should be deemed bound to pay the amounts to innocent holders. There were, therefore, reasons, and important reasons, for the discrimination in question. Congress should not be deemed to have invested the secretary of the treasury, or his subordinates, with such extraordinary, summary, judicial powers—powers which might operate to increase the public debt, if erroneously exercised, and that in the face of the express limitation in the same statute, which declares that the public debt shall not be thereby increased. The authority to retire these notes is a special statute authority, and is not to be extended by construction; and especialy so in view of the considerations above suggested. The meaning of the word "issued" is satisfied by the construction given to it in the charge. It imports an official act, not the possible legal effect of a felonious or fraudulent abstraction. For illustration of the strictly legal question, it may be supposed, that, after the preparation, in full and complete form and detail for issue, of six hundred millions of notes, or any other amount, one-half were negotiated by the secretary of the treasury, but the other half were fraudulently abstracted from his office—reasons of obvious importance to the government might suggest the propriety, not only of giving every possible description of notice and warning to put the community on their guard, but of at once retiring all that were duly issued, by substituting other obligations distinguishable therefrom. An act, simply authorizing that, should not lightly be construed to authorize, also, the retiring of the others, if found in the hands of persons claiming to be bona fide holders for value without notice. It may be true, that, in such an act, it would be fitting and proper to declare the discrimination in clear and distinct terms; but, if the terms used were such as could be satisfied by excluding the notes so fraudulently abstracted, courts would be reluctant to hold that it intended to authorize the secretary of the treasury, or his subordinates, to sit as court and jury, to try the question, with each holder, whether he had received such paper under such circumstances that, upon the principles of commercial law, the government was liable thereon. No special circumstances of this kind are known to the court to have led to the act now under consideration; and yet, if the act is satisfied by limiting the authority of the secretary of the treasury, in the performance of this gratuitous and voluntary act, to notes which were in fact issued, it may be the duty of courts, in view of the considerations suggested, to give it that limitation.

These views are of such force and significance as to warrant my conclusion, upon the whole case, that it is my duty to affirm the judgment.

[NOTE. The rule of the commercial law, that if one accepts forged paper purporting to be his own, and pays it to a holder for value, he cannot recall the payment, is applicable as well to the United States as to individuals.

[If the notes were in fact counterfeit, their receipt by the assistant treasurer, and his payment therefor, did not preclude the United States from receiving back the money paid.

[The act of April 12, 1866 (14 Stat. 31), authorized the retirement of all outstanding notes of the class in question which the government would be required to meet at maturity.

[Synopsis of the opinion of the majority of the supreme court, delivered by Mr. Chief Justice Waite, reversing the circuit court decree on the writ of error brought by the defendants. Cooke v. U. S., 91 U. S. 389.]

COOKE (UNITED STATES v.). See Cases Nos. 14,854 and 14,855.

Case No. 3,179.

COOKE v. VOSS.

[1 Cranch, C. C. 25.][1]

Circuit Court, District of Columbia. July Term, 1801.

EJECTMENT—PLEADING—PROOF.

In ejectment upon re-entry for non-payment of rent by tenant in fee, the plaintiff need not show that his own title was in fee, if he shows a possession of forty-four years; nor that there were not sufficient goods on the premises, within the first thirty days after the rent became

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

due, whereof distress might be made; nor that he demanded the rent on the day it became due; nor on what part of the lot the rent was demanded.

At law. The jury found a special verdict, which stated, that William Thornton Alexander and those under whom he claimed, were seized and possessed of the lot of land in the declaration mentioned for the space of about forty-four years next before the 25th December, 1794, and being so seized and possessed on the said 25th December, 1794, by deed of bargain and sale of that date, conveyed the said lot to the said Stephen Cooke, the lessor of the plaintiff, who being seized and possessed thereof on the 25th of May, 1795, by his deed of that date, conveyed the same to Edward Ramsay in fee simple, he "yielding and paying for the same on the first day of January yearly £16 Virginia currency as an annual rent to the said Stephen Cooke, his heirs and assigns. This deed contained the usual clause of distress, and re-entry, if the rent should be in arrear thirty days, and sufficient goods and chattels should not be found upon the said premises, of which distress and sale might be made to satisfy the rent. By virtue of which deed the said Edward Ramsay entered into the said lot of land, and was seized and possessed thereof. That on the 1st day of January, 1798, there were in arrear £16 for the rent which became due on the 1st day of January, 1797, and £16 for the rent which became due on the 1st day of January, 1798. That on the 31st day of January, 1798, about fifteen minutes before the setting of the sum, the said Stephen Cooke went upon the said lot and demanded payment of the rent of £16 due on the 1st day of January, 1797, and also of the rent of £16 which became due on the 1st day of January, 1798; and continued on the said lot of ground until after the setting of the sun, and no person appearing to pay the said rent, and no goods and chattels being thereon whereof distress could be made to satisfy and pay the aforesaid rents, or either of them, the said Stephen Cooke re-entered on the said lot of ground, declaring that he did so in consequence of the said rent not being paid, and there being no goods and chattels on said lot whereof distress could be made, by virtue of the clause of re-entry contained in the aforesaid deed from the said Stephen Cooke to the said Edward Ramsay. The jury did not find that a demand was made of the rents aforesaid at any time before the said 31st day of January, 1798; nor that Nicholas Voss, the defendant, to whom Ramsay had coveyed the premises, had notice of the aforesaid demand of rent and re-entry previous to the 6th day of May, 1798. The jury found that in the summer of 1798, there was a kiln of bricks on the said lot of ground to the value of three hundred dollars, the property of the said Nicholas Voss, who during the said summer erected buildings on the lot to the value of six hundred dollars. They also found the lease, entry, and ouster.

Mr. Jones and E. J. Lee, for defendant.

This is a case of forfeiture, and therefore the plaintiff must entitle himself strictly. The jury, although they find that Alexander was seized, yet do not say of what estate. The re-entry of Doctor Cooke was not lawful. He could not re-enter for the rent due 1st January, 1797, because it does not appear that there were not goods enough on the premises within the first thirty days after the rent became due to satisfy it. It was too late to demand the rent of 1797 in January, 1798, for the purpose of creating a forfeiture. It ought to have been demanded in January, 1797. For the rent of 1798, the reentry on the 31st of January was too soon. The rent was payable on the 1st of January. The tenant had the whole day to pay it in. On the 31st of January, the thirty days after the rent became payable had not elapsed. The thirty days ended with the 31st of January. The demand might be made on the thirtieth day after, &c., but the re-entry could not be until after the thirty days had completely expired. The demand of the rent ought to have been made on the 1st day of January, and continued until the thirty days had expired. 4 Bac. Abr. 353. For if a sufficient distress could have been made on any one of the thirty days no re-entry could be made. The jury have not found the manner of the re-entry nor the mode of demand. The verdict does not state whether there was a mansion-house on the lot, nor that the demand was made on the most public part of the lot. The demand ought to be made at the front door of the house; if there was no house it ought to be made at the most notorious part of the land. 4 Bac. Abr. 358; 1 Croke, 15. The landlord must enter the house to demand the rent, if the door be open; if there be no house, then it must be demanded at the most notorious part of the land. They cited Esp. 177, that courts lean against forfeitures.

Mr. Swann, for plaintiff.

Twenty years' possession is sufficient to support an ejectment, whether the seizin be in fee or otherwise; unless the verdict had stated it to be under a lease. The verdict does not say that the re-entry was made on the 31st, but says the demand was a quarter of an hour before sunset on the 31st, and that Dr. Cooke remained on the land until after sunset, and that afterwards he re-entered. Oates v. Brydon, 3 Burrows, 1897. It is of no consequence on what part of a lot of 40 feet by 123 the demand is made. There is no part of it on which a man may not be seen from every other part. Har. Co. Litt. 202a, note 3.

Judgment for the plaintiff.

Case No. 3,180.

COOKE et al. v. WEIGHTMAN.

[1 Cranch, C. C. 439.] [1]

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

ENDORSEMENTS OF PROMISSORY NOTE—RIGHTS OF HOLDER.

If a promissory note, payable to A, or order, be indorsed in blank by B and by A, (B's name being written over that of A,) the plaintiff has not a right at the trial to fill the blanks by an indorsement from A to B and from B to the plaintiff, there being no evidence that such was the intention of the parties, but the note and blank indorsements. Quaere.

[Cited in McComber v. Clarke, Case No. 8,-711.]

At law. Assumpsit by the holder against the indorser of Pancost's note to Cohagan, or order, indorsed Richard Weightman, John Cohagan, in blank. On the trial, the plaintiffs' counsel filled up the blank indorsements with an assignment from Cohagan, the payee, to Weightman, and from Weightman to the plaintiffs. The plaintiffs also offered in evidence, (to show the insolvency of Pancost,) the proceedings in a suit by the plaintiffs against him, admitted to be on the same note—the declaration in which proceedings stated it to be a note made by Pancost payable to Cohagan, and indorsed by Weightman to Cohagan, and by him to the plaintiffs.

Mr. Swann, for defendant, prayed, and THE COURT instructed the jury, that if they should be satisfied by the evidence that the note was indorsed by Cohagan to the plaintiffs, they could not recover against Weightman.

CRANCH, Chief Judge, contra, because there was no evidence before the jury upon which the prayer could be predicated; the declaration in suit against Pancost was admitted to be upon the same note; and the note, being produced, does not appear to have been assigned by Weightman to Cohagan, but by Cohagan to Weightman, and not by Cohagan to the plaintiffs, but by Weightman to the plaintiffs. The proceedings, therefore, contained no evidence to contradict that arising from the assignments written on the back of the note.

Mr. Taylor, for plaintiffs, then prayed the court to instruct the jury that if they should be satisfied, by the evidence, that the indorsements of Cohagan and Weightman were in blank, and intended by the parties to give the plaintiffs the security of both indorsers, and that it was delivered to the plaintiffs, for value received, so indorsed, the plaintiffs had a right to fill up the indorsements as they have; but he offered no other evidence of such intention than the said note and indorsements, the name of Cohagan being written on the back of the note below that of Weightman.

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

But THE COURT (CRANCH, Chief Judge, contra) refused.

Verdict for the plaintiff.

Case No. 3,181.

COOKE et al. v. WOODROW.

[1 Cranch, C. C. 437.] [1]

Circuit Court, District of Columbia. July Term, 1807. [2]

EVIDENCE OF HANDWRITING OF SUBSCRIBING WITNESS—TROVER.

1. If the subscribing witness has not been inquired for at the place to which he was last traced, evidence of his handwriting cannot be admitted to prove the instrument.

[See note at end of case.]

2. General property in the goods, without actual possession, is sufficient to maintain trover.

3. An agreement to sell and transfer goods seized and held as a distress for rent due from the vendor, will transfer the general property so as to enable the vendee to maintain trover after the goods have been replevied.

Trover.

Mr. Swann, for plaintiff, offered a paper signed by J. Withers, not under seal, witnessed by one subscribing witness, purporting to be a mortgage of goods, and acknowledged in open court to be his act and deed.

E. J. Lee and C. Simms, contra.

A mortgage of chattels must be under seal, and executed before three witnesses, and recorded according to Act Assem. Va. Dec. 13, 1792, p. 157, § 4.

PER CURIAM. The paper is not evidence. The recording gives no authenticity to a paper, which the law does not require to be recorded, and nothing but a deed under seal is entitled to be recorded; here is no seal.

Mr. Swann then offered evidence of the handwriting of Withers to the deed, and of the handwriting of the subscribing witness, having first examined a witness, who testified that he knew the subscribing witness; that he understood he had a wife in Philadelphia; that the witness was in Alexandria two or three months, and when he went away said he was going to Philadelphia. The witness had written to him according to his directions at Philadelphia, but had received no answer, and had heard that the subscribing witness had gone to Norfolk and not to Philadelphia; but he had made no inquiries for him at Norfolk, and did not know where he was.

THE COURT (nem. con.) said there was not sufficient evidence of due diligence on the part of the plaintiff to find the witness, and get his testimony.

C. Simms, for defendant, contended that the sale, if any, was while the goods were in the custody of the law, under a distress for rent.

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

[2] [Affirmed in Cooke v. Woodrow, 5 Cranch, (9 U. S.) 13.]

Mr. Swann, for plaintiff. A general property, without actual possession, will support trover. 5 Bac. Abr. 258, 280; Ward v. Macauley, 4 Term R. 489.

Mr. Simms. But the plaintiffs have not proved a general property. A bargain while the goods were in custody of the law, under the distress, could give no property, because they were bound by the distress. 2 Bl. Comm. 447.

THE COURT (nem. con.) instructed the jury, that if they should be satisfied by the evidence, that Withers agreed to sell and transfer the goods in the declaration mentioned to the plaintiffs, upon consideration that the plaintiffs would, at his request, become security for him in a replevy-bond to replevy the said goods, which were then held by a distress for rent, and in further consideration, that they would place the overplus of such goods, after satisfying the replevy-bond, to the credit of the said Withers in their private account against him, and further, that the plaintiffs did become his security accordingly, and are ready to place the said overplus to his credit, as aforesaid, as soon as such overplus can be ascertained; —the plaintiffs, upon becoming security, as aforesaid, had such a general property in the said goods as will enable them to maintain this action of trover, although the plaintiffs never have had the actual possession in fact of the said goods.

The jury found a verdict for the defendant. The plaintiffs took a bill of exceptions, and a writ of error; but the judgment was affirmed by the supreme court of the United States. [Cooke v. Woodrow] 5 Cranch [9 U. S.] 13.

[NOTE. In the supreme court the plaintiffs in error suggested that the court must be satisfied that the sum in dispute exceeded $100, but Chief Justice Marshall said that that rule only applied to cases where the property itself, and not the damages, was the matter in dispute, and, proceeding to consider the case on the merits, held that, if inquiry was made at the place where the witness was last heard of, and he could not be found, evidence of his handwriting was admissible. Cooke v. Woodrow, supra.]

COOKENDERFER (MANDEVILLE v.). See Cases Nos. 9,009 and 9,010.

COOKENDORFER (UNITED STATES v.). See Case No. 14,856.

COOKER, The JOHN. See Case No. 7,337.

Case No. 3,182.

COOKINGHAM v. FERGUSON et al.

[8 Blatchf. 488;[1] 4 N. B. R. 635.]

Circuit Court, N. D. New York. June 20, 1871.

SUIT BY ASSIGNEE IN BANKRUPTCY TO SET ASIDE CONVEYANCE — PARTIES—LIMITATIONS — INTENT TO DEFRAUD.

1. Whether an assignee in bankruptcy can, in a suit in equity against the bankrupt and an alleged fraudulent grantee of his, of real estate, set aside the grant, as void, without making parties to the suit persons to whom such grantee executed mortgages on the premises subsequently to the making of the grant, quere.

2. Whether an assignee in bankruptcy can assail a conveyance, as fraudulent against creditors, made by the bankrupt two years before the petition in bankruptcy was filed, quere.

3. Whether the limitations as to time, prescribed in the 35th and 39th sections of the bankruptcy act of March 2, 1867 (14 Stat. 534, 536), apply to all conveyances which the bankrupt himself could not impeach as fraudulent as against creditors, quere.

4. An intent on the part of a debtor to prefer his individual creditors over persons who might charge him with a statutory liability for the debts of a corporation of which he is a stockholder, is not an intent to defraud creditors.

5. A transfer of real estate was made by A. to his son, in March, 1866. In January, 1868, A. was adjudged a bankrupt. The assignee in bankruptcy brought this suit against A. and his son, to set aside the transfer, as fraudulent, as against the creditors of A., on the ground that the transfer was a sham sale, that the price was inadequate, and that A. continued to use and possess the property, after the sale. On the facts of the case, the bill was dismissed, with costs.

[In equity. Suit by Henry J. Cookingham, assignee in bankruptcy of Amos S. Ferguson, against Amos S. Ferguson and Charles A. Ferguson to set aside a conveyance as fraudulent.]

William Kernan, Jr., for plaintiff.
E. J. Richardson, for defendants.

WOODRUFF, Circuit Judge. In its chief characteristics this case is most extraordinary. On the 26th of March, 1866, Amos S. Ferguson was the owner of a farm of thirty-nine acres, in the town of Frankfort, and of sundry articles of personal property, including household furniture, and, also, of forty acres of land in a western state. He was sick and insolvent. His chief and almost sole individual creditors were his brother-in-law, John W. Bridenbacker, and his brother, James D. Ferguson, who, besides some claims in their own favor against him, were endorsers of his note at bank for $6,900, or thereabouts. He was pursued by another party, who alleged that he was a member of a towing company, and, as a stockholder therein, was liable for their debts, by virtue of the statutes of the state. This membership and liability Amos S. Ferguson appears to have denied, and an action was then pending by which it was sought to charge him. The debts of the towing company were very large, amounting, in all, to upwards of sixty thousand dollars.

In this situation, and in a state of health in which he had been advised that he was liable at any moment to sudden death, from what one of his physicians deemed disease of the heart, he sent for his said brother and brother-in-law to come to his house, for a

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

consultation regarding his affairs. He declared his wish and intention to apply his property to the payment of his debts. The proof may be taken to show that he declared his purpose to apply it to the payment of his individual debts, and especially to the protection of them, his principal individual creditors and endorsers, to the exclusion of alleged liability for the debts of the towing company, for one only of which he had then been, or was ever afterwards, prosecuted. He proposed to his brother-in-law, Bridenbacker, to purchase his farm, and he declined. He had a son, then twenty-four years of age, who, though residing with his parents, had been, for several years, doing business on his own account, buying and selling cattle, speculating in grain, and raising and selling tobacco, and therein had made some money, his property then being worth, according to his own statement, which is not disproved, fifteen hundred dollars. As a result of the consultation, it is proposed to sell the farm to this young man. To this Bridenbacker and James D. Ferguson not only make no objection, but, I think, the preponderance of the evidence is, that Bridenbacker himself proposed it. The value of the farm is discussed, and seven thousand dollars is agreed upon, both Bridenbacker and James D. Ferguson declaring that seven thousand dollars is an outside price or estimate. The son, Charles, consents to purchase, provided he can be allowed time within which to make the payments; and he is assured by his uncle Bridenbacker, and in the presence, if not with the express assent, of his uncle James, that he shall have all the time necessary, and that they will take care of the note held by the bank, which they had endorsed. There was already a mortgage upon the farm of three thousand dollars, and the balance, four thousand dollars, it was agreed should be appropriated to their security or indemnity against their indorsement. An inventory of the farming utensils, and two horses, wagons, harness, sleighs, an interest in two canal boats, and some household furniture, not exempt from execution, is made by Bridenbacker, and, on consultation, and after careful inquiry into the actual cost of the articles of furniture, an appraisal is made and set down by him, amounting in all to two thousand and eighty-four dollars, against which is set down the sum of four hundred dollars, (which, it was agreed between the father and son, on an examination of their accounts, was then due to the young man), and one thousand six hundred and eighty-four dollars is fixed as the sum or balance to be paid therefor. Counsel is sent for, a deed is prepared and executed, a bill of sale of the personal property is drawn, and bonds and mortgages for the four thousand dollars, payable in sums of one thousand dollars each, at one, two, three, and four years, with intent that the latter should be assigned to Bridenbacker, or to him and James D. Ferguson, for their indemnity. On further consultation, in view of the giving, by the young man, of his note for one thousand six hundred and eighty-four dollars, payable in one year, with interest, Bridenbacker agrees to receive for the four thousand dollars, four notes, each for one thousand dollars, payable at two, three, four, and five years, with interest from date, reiterating his assurance that Charles, the son and nephew, shall have time within which to make the payments; and the notes are made and delivered to Bridenbacker, with the promise of Charles to give him a mortgage on the farm, if he requests it, and Bridenbacker carries the notes away. All this appears to have been quite satisfactory. Charles, the son, takes charge of the farm, and improves it, by planting a hop yard of three acres, and by some ditching, and makes sale of portions of the personal property. His father sells his western land, and, by some trade, makes a further small profit, and, by the contribution of Charles thereto of some seven hundred and fifty dollars or nine hundred dollars, a payment of one thousand five hundred dollars is made on the bank note, in relief of Bridenbacker and James D. Ferguson to that extent. Charles pays other debts of his father, until, by his payments on his father's account, the note for one thousand six hundred and eighty-four dollars is satisfied. Meantime, the eldest daughter employs herself in teaching music, in which she has before had experience, and earns thereby sufficient for her own clothing and expenses, lodging at home, and contributing small amounts to the support of the family. A younger brother goes to Utica, finds employment, and supports himself. The mother keeps the house, as theretofore, and the invalid father and the remaining child, a young daughter, reside with Charles, making up the family.

After a time, and in or about June, 1867, Bridenbacker desiring security for the $4,000, Charles executes and delivers to him a mortgage on the farm, to secure their payment. In August, 1868, the first mortgage upon the farm, which, on the purchase, Charles had assumed to pay, is called in, and Charles negotiates a loan of $3,000, gives his own obligation, secured by mortgage on the farm and by other collaterals, and takes up the first mortgage, thus making his mortgage to Bridenbacker a first mortgage upon the farm. In all this, everything appears to have been done beneficially to Bridenbacker and James D. Ferguson, agreeably to their wishes and assent, and to their entire satisfaction. True, it is testified that James D. Ferguson stated, at the time, that the price to be paid would not be sufficient to pay and protect him and Bridenbacker to the full extent of their liabilities, but he did not then suggest or intimate that the price Charles agreed to pay

was not the full value of the property. But, in January, 1868, their brother, Amos S. Ferguson, had made application to the district court, and was adjudged thereupon a bankrupt; and, at some time thereafter, Bridenbacker and James D. began to manifest unfriendliness, in view of the losses they were likely to sustain, and to threaten Charles, that, if he did not pay his father's indebtedness to them, they would break up the sale made to him. Their testimony in this suit indicates the ground upon which they intended to assail it, namely, that the sale was a sheer fraud, a cover of their brother Amos' property, made to cheat his creditors, and accompanied by an assurance by both Amos and Charles that they should be paid or protected, notwithstanding the sale and conveyance. I do not, as will be presently stated, think such fraud is established, but, taking the claim as made. the practical result is, that these uncles, having aided by their counsels in seducing the young man into the transaction, having thereby secured to themselves his personal obligations to the amount of four thousand dollars, secured amply by a first mortgage on the farm, having led him to make payments to an amount in all more than he was worth when he made the purchase, of which they have largely shared the benefit, to employ his time and industry upon the premises, to some extent improving the same, and to involve himself in further personal responsibility for the three thousand dollars with which he paid off the prior mortgage and made their four thousand dollars unquestionably secure, after nearly three years have elapsed, threaten, with all the fruits of the transaction still in their possession and enjoyment, to set up this charge of fraud, conceived and carried into execution as the result of their consultation and co-operation, in the hope of reaping, from the setting aside of the fraudulent sale, an additional benefit; and the principal allegations of fact urged in corroboration of this story are, first, that the price agreed upon, with their approval, at the time of the sale, $7,000, was inadequate, and, second, that Charles, the son, did not, on receiving his deed, turn his invalid father, his mother, and his helpless little sister into the highway, to shift for themselves.

It can hardly be necessary to say, that if they, John W. Bridenbacker and James D. Ferguson, had, as creditors, come into a court of equity, to set up their claim, under circumstances such as these, the court would receive them with small favor. Of that they were, no doubt, fully conscious, and they have sought an ingenious, though indirect, mode of accomplishing the result, through the assignee in bankruptcy of the estate of their brother Amos, who is, in form and in law, trustee for all of his creditors. In fact, they are the only persons who have proved debts against that estate, and they will, if no other creditors appear, enjoy all the benefit of any recovery by the assignee. They seek the assignee, they assume the burthen of the litigation, they give him their obligation for his indemnity against costs, and this suit is the result, and they are their own anxious, willing witnesses, and vigilant, active promoters of the prosecution, devoting, further, their time and industry to the procurement of evidence; and, though it is not specifically proved, there is ground for inferring, that counsel are employed by them, to set aside the transaction, have the sale and conveyance declared void, compel the defendant Charles to give up the farm, and account for and pay over all the property and the proceeds of sales, and that, without allowance for what he has paid, or protection against the obligations which he has assumed.

It is insisted by the counsel for the plaintiff, the assignee in bankruptcy, that the circumstances above alluded to, however clear it may be that Bridenbacker and James D. Ferguson were, upon their own evidence, parties to the transaction, do not bar him, as assignee for the benefit of all creditors who either have or may hereafter prove their debts; and that the misconduct, or even fraud, of some of the creditors of a bankrupt, is no hindrance to his proceeding to recover all that, in law or in equity, he, as assignee, is entitled to recover, as part of the estate in which creditors are entitled to share. There is no occasion here to controvert or deny that proposition. It is sufficient to say, that the relation which Bridenbacker and James D. Ferguson bear to the transactions in question, and their conduct herein, impairs confidence in their testimony, and it is chiefly upon that testimony, contradicted in all important particulars, that the claim that there was an actual intent to defraud creditors, rests; and, in view of that conduct, and of the very large contradiction by numerous witnesses who testify on the subject of inadequacy of price, it is not unreasonable to say, that the testimony of these witnesses falls under liability to large qualification, in the estimate the court should place upon its weight in this controversy.

It is in this view that I have deemed it relevant to consider the history of the transaction, the share the chief witnesses and sole creditors who have proved their debts have had therein, and their actual relation to the litigation itself, carried on at their cost and risk, and for their benefit, while they are themselves in the possession and enjoyment of the fruits of what they, after nearly three years of acquiescence and enjoyment, claim to have been a fraud. I am aware that, in the narrative I have given, I have not alluded, in detail, to the evidence, nor noticed many particulars relied upon by

the plaintiff's counsel. But they have not escaped my attention, and I have contented myself with giving the results of a consideration of all the testimony and of the degree of credit to which I deem it entitled.

Subject to these observations, I must dispose of the case as it is, in form and legal effect—an endeavor by an assignee in bankruptcy to set aside a conveyance of property made by the bankrupt, declare it void, and compel a delivery of the property and the proceeds of all that has been sold, to the plaintiff. Viewing the case solely in that aspect, my conclusions may be briefly stated.

1st. It was not suggested on the argument, but it is by no means clear, that the decree prayed for could be granted in a suit to which the holders of mortgages upon the farm, made by the defendant Charles A. Ferguson, subsequently to the conveyance to him, are not parties. Surely, the mortgage to Bridenbacker, upon the proofs in the case, must, if the sale were declared fraudulent and void, fall with the conveyance. It was taken with full knowledge of all the facts, if any there be, which invalidate the sale; and, as to the other mortgage, it is difficult to see how the presence of the holder can be dispensed with, when the foundation of his title is attacked and sought to be wholly defeated. The bill does not recognize its existence, nor does it seek to recover the equity of redemption, leaving that mortgage a subsisting lien. Observations pertinent to this subject, and to the duty of the court to take the objection, though not raised by the defendants, may be found in the decision of this court in Florence Sewing Mach. Co. v. Singer Manuf'g Co. [Case No. 4,884], and in cases there referred to; Mallow v. Hinde, 12 Wheat. [25 U. S.] 193; Elmendorf v. Taylor, 10 Wheat. [23 U. S.] 152; Coiron v. Millaudon, 19 How. [60 U. S.] 113, 115; Shields v. Barrow, 17 How. [58 U. S.] 130; Greene v. Sisson [Case No. 5,768]; and other cases. It is, however, unnecessary to consider this point, or, in this case, to express an opinion upon it.

2d. It is unnecessary, in the view I take of the proofs, to inquire whether the assignee in bankruptcy can assail a conveyance made by the bankrupt two years or thereabouts before the petition whereon he was adjudged bankrupt was filed, or whether the limitations prescribed in the thirty-fifth and thirty-ninth sections of the bankrupt law, apply to all conveyances which the bankrupt himself could not impeach as fraudulent against creditors. I am, however, not willing to give any assent to the argument, that the assignee is, in such sense, the representative of the bankrupt, that he cannot attack and set aside a conveyance on the mere ground that the bankrupt himself is bound by it. If, in another case, it should be material, that question will receive the consideration it deserves.

3d. The transaction between the defendants is assailed upon the ground of fraud, and three sources of evidence of fraud are relied upon by the plaintiff, namely: (1) Testimony claimed to warrant the inference of actually expressed intent, at the time of the conveyance, to cover the property, by a sham sale, to be held by the defendant Charles in form, but in fact for the benefit of his father, in order that the same might be kept from his creditors; (2) Testimony claimed to corroborate the other, by showing that the price was greatly inadequate; and, finally, (3) Testimony claimed to show continued use and possession of the property by the bankrupt, after the sale.

(1) Some reasons for deeming the proof to fail in establishing an expressed intention to defraud creditors may be inferred from the narrative I have above given. But, even taking the testimony of Bridenbacker and James D. Ferguson, the plaintiff's chief witnesses to this precise point, it fails to establish it; and, for reasons already suggested, I should deem it overborne by the testimony in behalf of the defendants, if it were more specific. All that can justly be claimed, on this portion of the proofs, is, that Amos S. Ferguson intended to give a preference to his individual creditors, and especially to Bridenbacker and his brother James, over persons who might charge him with liability for the debts of the towing company, and that the sale to Charles was made for that purpose, and with intent to appropriate all the property of the bankrupt to such individual debts. If this transaction had taken place within four months of the filing of the petition upon which Amos S. Ferguson was adjudged a bankrupt, it would have fallen under the condemnation contained in the thirty-fifth section of the bankrupt law. But, unless fraudulent upon other grounds than because it was made for that purpose and with that intent, the assignee cannot impeach it or recover. This subject has been discussed in Collins v. Gray [Case No. 3,013].

(2) In respect to the alleged inadequacy of price, the testimony is greatly conflicting. But the opinions expressed by Bridenbacker and James D. Ferguson, as witnesses, is impeached by their own account of the transaction. If the farm was, in fact, deemed of greater value, at the time, than the price Charles agreed to pay, there was no motive for the undervaluation. It would have been easy, and according to what they say was understood should be done, to have Charles give notes for the full amount due to them, or for which they were liable, and so carry into effect what they say was actually agreed, and, at the same time, avoid the appearance of evil. Besides, they stood by, assenting to the transaction, without a suggestion that the price was not the full value of the farm, subject to the inchoate right of dower, or that the personal property was worth more than the appraisal then made,

and, in part at least, made by Bridenbacker himself.

Again, more than twenty apparently disinterested witnesses testify to its value, whose estimate shows that $7,000, subject to that right of dower, was all or more than the farm was worth; and, an estimate founded on the value of that right of dower, if Amos S. Ferguson had then died, and treating the annual value as equal to the legal interest, will show, that, allowing $7,000 for the farm was, according to modern approved annuity tables, equivalent to an aggregate valuation of the farm at over $9,400. No one of these witnesses estimates the value as greater, subject to the right of dower, than Charles agreed to pay.

Bridenbacker and James D. Ferguson, as witnesses herein, and eleven witnesses whom they have produced, and who swear almost in their words, estimate the gross value of the farm at twelve thousand dollars, a price plainly speculative, and based upon a supposed practicability of selling the land, or parts of it, for building lots, without showing that there is any demand for such building lots at that distance from the city of Utica, and notwithstanding there are very many farms nearer to the city, recently sold at much less prices than even the estimates of the defendants' witnesses. If it were conceded that the industry and zeal of Bridenbacker and Ferguson had succeeded in finding persons who will say that the land is worth more than was paid for it, or that they would give more, this is by no means conclusive. This is no uncommon state of things. What is more frequent, after a sale of valuable property, than the finding of some prepared to say they would have given more? Looking at the circumstances already alluded to, and the very large contradiction of those who give the larger estimates, I am constrained to say, that there was no such inadequacy of price as warrants the inference of fraud in the sale.

(3) As to the continued residence of Amos S. Ferguson with his son. The proof satisfactorily shows he was an invalid, and that Charles did, in fact, take charge of the farm and direct its cultivation, hiring and paying the laborers, and providing for the support of the family, aided, no doubt, by such assistance as his father was able to render, and, to some small degree, by contributions of his sister, from her earnings. This is in perfect consistency with good faith and honesty in the transaction, and, coupled with the positive testimony of both Charles and his father, to the absence of any fraudulent design, the relations of the son to such a father, and the son's obvious need of his mother's assistance, at least, in keeping the house, repels any presumption or inference arising from the father's continued residence and occasional assistance on the farm. I am disposed to judge much more favorably of the reasonable, just and fair intent of the defendant Charles, from what he did in this respect, than I should be if he had turned his father and mother out of the house.

My conclusion hereupon is, that the bill of complaint should be dismissed, with costs.

Case No. 3,183.

COOKINGHAM et al. v. MORGAN et al.

[7 Blatchf. 480;[1] 5 N. B. R. 16.]

Circuit Court, N. D. New York. June Term, 1870.

TRANSFER BY INSOLVENT TRADER—PROOF OF DEBT BY TRANSFEREE.

1. A transfer of property made by a bankrupt trader, when he was insolvent, to a person who then had reasonable cause to believe such insolvency, such transfer having been made with the intent on the part of both parties to give a preference to the transferee, as a creditor, *held* void, and the transferee excluded from proving his debt as a claim against the estate of the bankrupt.

[Cited in Curran v. Munger, Case No. 3,487; Fairbanks v. Amoskeag Nat. Bank, 38 Fed. 634.]

2. The assignees in bankruptcy were, in this case, *held* to be entitled to recover back the property transferred, and the value of any of it that had been sold, with interest from the time they demanded it; and, as the transferee had not acted in good faith and under an honest mistake, he was not allowed amounts which he had paid to obtain the benefit of the transfer.

[Cited in Sill v. Solberg, 6 Fed. 477.]

[In equity. Suit by Henry J. Cookingham and others against Sewell S. Morgan and others to set aside a transfer as in fraud of the bankrupt act.]

George W. Smith and A. J. & I. C. McIntosh, for plaintiffs.

Sewell S. Morgan, for defendants.

WOODRUFF, Circuit Judge. The evidence in this case establishes, as I think, conclusively, (1) that, on the 18th of February, 1868, John P. Babcock, the bankrupt, was hopelessly insolvent; (2) that the defendant Morgan had reasonable cause to believe that Babcock was at that time insolvent; (3) that the sale by Babcock and the purchase by Morgan were made with intent to give to the latter a preference over other creditors. Although the instrument of transfer does not in terms so express, I am satisfied that the agreement, understanding and intent were that the purchase price, and the collections to be made from the accounts, &c., should be applied first to the payment of the judgments whereon executions had been levied on the goods, and next to the payment of the debts for which Morgan was liable as endorser. The sale of Babcock's entire stock of goods, &c., and the placing of his accounts and credits in Morgan's hands, including his entire property, he being a trader, (property exempt from execution only excepted,) was

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

so entirely out of the usual course of business, as to raise the presumption of fraud declared by the statute; and the evidence fails, in my judgment, to overcome that presumption.

Babcock was a trader. He was not only embarrassed, but was so entirely unable to meet his engagements, that judgments had been recovered against him, and his entire stock of goods,) which constituted nearly all of his property liable to execution,) was held by the sheriff under the levy of executions, and two or more of the notes endorsed by Morgan had been protested. This, Morgan knew. No reasonable man could, I think, then doubt Babcock's insolvency. Surely, this was reasonable cause for believing it. Indeed, the weight of the evidence inclines me not only to think that Morgan knew of this insolvency, but that the purchase and the taking of the notes and accounts for collection were for the distinct purpose, in his mind, of securing such control as would secure him against loss by his endorsements for Babcock. It follows, that the transaction is void; and Morgan is expressly excluded, in such case, from proving his debt as a claim against the estate of the bankrupt. The assignees, the plaintiffs herein, are entitled to recover back all the property which Morgan received; and, as to any part thereof which the latter has sold or appropriated to his own use, they are entitled to recover the value thereof, with interest from the time of the conversion or collection thereof, and its demand by the assignees.

If the transfer were set aside upon technical or other grounds entirely consistent with good faith in the transferee, and he appeared to have acted under an honest mistake, it might be proper to allow him the amount of the judgments which he paid in order to obtain the benefit of his purchase, and the amount which he collected from the accounts and paid over to his principal, which is testified to have been about three hundred dollars. Not so where the facts are as above found. He obtained the property by means which were a clear fraud upon the bankrupt act [of 1867 (14 Stat. 534)], and under circumstances which made it a fraud upon the other creditors, and presumptively he knew it; and the moneys which he collected from the accounts went directly to the performance of the understanding that they should be applied in discharge of his endorsements. I am aware that there is contradictory testimony, but I state my conclusions upon all the proofs. I do not think it necessary to discuss the evidence in detail. The defendant Morgan, himself a lawyer, and presumptively familiar with the law governing the subject of transfers of property by insolvents, and familiar, also, with the proper influence of facts and circumstances, as well as of direct testimony, in establishing the allegations of intent, cannot, I think, doubt the correctness of the conclusions I have reached thereupon. Possibly, he may, under the strong influence of interest, have deceived himself into a belief that what was done and intended was consistent with the laws relating to the property of an insolvent. But, if I had concluded that preference to himself was not the immediate purpose of the transaction, I must still hold that it was a transfer in fraud of the bankrupt law, and set it aside on that ground, holding him liable to account. The bankrupt law, conceived and enacted in the belief that it provided the best mode of administering the estate of an insolvent, will tolerate no attempt by individuals to devise and carry into effect some other plan inconsistent therewith, nor permit such an attempt to be justified by the excuse that they thought such other plan wiser or better.

The defendant must, therefore, account for all the property received. He must deliver to the assignees all that remains in his possession. He must pay the market value of all that he cannot so deliver, with interest thereon from the time he sold or appropriated it to his own use, with this qualification, that interest will not be computed against him from a day earlier than the 29th day of June, 1868, when the assignees demanded the same from him; and, in like manner, he must pay the amount of his collections, with interest since such demand. A decree must be entered in conformity with these views, and referring it to a master to take the account, and superintend the delivery of the property, and report the amount due. On the coming in and confirmation of his report, a final decree will be entered for the plaintiffs, to recover such amount, with costs.

COOLEDGE v. McCONE. See Case No. 3,186.
COOLEY (HALL v.). See Case No. 5,928.

Case No. 3,184.

COOLIDGE et al. v. CURTIS et al.

[1 Bond, 222;[1] 7 Am. Law Reg. 334.]

Circuit Court, S. D. Ohio. Feb. Term, 1859.

ASSIGNMENT FOR BENEFIT OF CREDITORS—STATUTORY CONSTRUCTION BY STATE COURT.

1. In Ohio, a failing debtor may prefer creditors by assignment or otherwise, if done under circumstances which repel the inference of a fraudulent purpose.

2. If the construction of a state statute has been settled by the decision of the highest court of the state, the courts of the United States uniformly adopt such construction.

3. The supreme court of Ohio have decided that the act of March 14, 1853, "declaring the effect of assignments to trustees, in contemplation of insolvency, and the statute of 1838, of the same import, do not affect assignments or transfers made for the sole benefit of the assignees or transferees; but if made trustees

[1] [Reported by Lewis H. Bond, Esq., and here reprinted by permission.]

for other parties, the statute applies, and the property is held for the equal benefit of all the creditors."

4. But no trust will be implied merely from the fact that an assignment or transfer has been made by an insolvent debtor to indemnify a surety for such debtor, if no more property has been assigned than was necessary for that purpose and the facts warrant the presumption that nothing was designed but the bona fide indemnity of the surety.

5. Although such surety may be liable to respond to the creditors not provided for, for any surplus after paying the debts for which he was bound, he is not a trustee within the contemplation of the statute referred to.

[In equity. Bill by Coolidge and Dubarrow against Nicholas G. Curtis and others.]

Worthington & Matthews and Thompson & Nesmith, for plaintiffs.

Fox & Fox, James Clark, and Thomas Milliken, for defendants.

LEAVITT, District Judge. The plaintiffs allege in their bill that the defendant, Nicholas G. Curtis, is indebted to them in the sum of $1,368, to recover which, a suit at law is now pending in this court, in which certain property, claimed by other parties, has been attached as the property of said Curtis. They also set forth that Curtis, in contemplation of insolvency, assigned and transferred to the defendants, Wilkinson Beatty, Joseph Curtis, Thomas Moore, and others, all his property for the purpose of preferring creditors in Ohio, to the exclusion of those residing in eastern cities. The object of the bill is to charge the persons just named as trustees of the property transferred to them, for the benefit of all the creditors of Curtis; and the prayer is, that a receiver may be appointed to take possession of the property, and hold the same subject to the further order of the court, and that, on the final hearing, the proceeds may be apportioned equally among all the creditors. The defendants, in their answer, admit the insolvency of N. G. Curtis, as averred in the bill, and allege that the sale or assignments of property or assets to them, was made in good faith to pay or secure debts justly due them, and indemnify them for liabilities incurred for said Curtis, by indorsements and other modes of suretyship. They deny any sale or assignment to them in trust, for the benefit of any other creditor; or that they received or hold property, as trustees, either expressly or by legal intendment. Referring to the bill, it will be seen the plaintiffs do not ask for the cancelment of the alleged assignments or transfers as illegal and void, on the ground of fraud; but they insist that they fall within the operation of the statute of Ohio, passed March 14, 1853, "declaring the effect of assignments to trustees, in contemplation of insolvency;" and that they inure to the equal benefit of all the creditors of Curtis. The important question in this case, therefore, is, whether the parties to whom the assignments or transfers have been made by the debtor, are trustees within the meaning of the statute referred to.

There are three separate transactions stated in the bill, and insisted upon in the argument, as within the operation of the statute. I will first notice the sale of the stock of goods by N. G. Curtis to Beatty. The answers of the defendants, Curtis and Beatty, and the evidence on file, sufficiently show, that for several years prior to the autumn of 1857, Curtis had been engaged in the dry goods business, at Hamilton, in Butler county, Ohio. He had become greatly embarrassed in his pecuniary affairs. His paper had been protested and suits had been brought against him on claims which he was unable to meet. His friends and others in the community regarded him as insolvent, and it was apparent he could not continue his business. He was in possession of a stock of dry goods, nominally worth, at the invoice prices, about $31,000, and he had notes and book accounts amounting to about $20,000, but available for not more than half that sum. He had previously owned real estate worth from $6,000 to $8,000, which had been mortgaged for its entire value. His debts amounted to about $66,000, of which $30,000 was due to persons residing in Butler county, and $36,000 to creditors in New York and Philadelphia. He was indebted to Beatty in the sum of $4,453, and Beatty was liable for him, as indorser and otherwise, in the sum of about $2,650. Beatty was a citizen of Butler county, of large pecuniary means, and of respectable standing. On November 19, 1857, after a good deal of conference on the subject, Curtis agreed to sell his entire stock to Beatty, and a written agreement of sale was executed by the parties. This agreement purports in its terms to be an absolute and unconditional sale of the goods. It provides, among other things, that the goods shall be invoiced by three persons named in the writing, and that Beatty shall pay for them at the rate of sixty-six and two-third cents on the dollar, of the cost or invoice prices. At the invoice prices the stock amounted to $31,000; and at the rate agreed on, the sum to be paid by Beatty was about $20,666. He executed his notes for $16,666.66. These notes, at the request of the counsel of Curtis, after the sale and while the invoice was in progress, were given in sums to enable Curtis to transfer them to creditors, in payment, or as collateral security for debts. Though not stated in the written contract, it was the understanding of the parties, that Beatty should have a credit on the purchase to the amount of the debt due from Curtis; and this arrangement was carried into effect in giving the notes. It is in evidence that these notes were delivered to Curtis, and by him transferred to creditors, in some cases as absolute payment, in others as collateral security.

In his answer, which is sworn to, Beatty avers that the purchase of the goods by him was in good faith; that he paid the full

value for them; and that his sole object was to secure the debt due him, and obtain indemnity as security; and that at the time of the purchase he had no knowledge of any intention by Curtis to prefer a portion of his creditors. It is, perhaps, not material to notice, that before the invoice of the goods was completed, they were attached by process issued from this court, as the property of Curtis, and subsequently taken from the custody of the marshal by a writ of replevin from the court of common pleas of Butler county, and delivered to Beatty, who has since sold the entire stock. The transactions between N. G. Curtis and Joseph Curtis, referred to in the bill, are briefly these: Prior to the sale to Beatty, N. G. Curtis was indebted to Joseph Curtis, directly, by note and book account, in the sum of $568. Joseph Curtis was liable, as the indorser of N. G. Curtis, on paper held by the banking firm of Shaffer, Curtis & Potter—of which Joseph Curtis was a partner—in the sum of about $12,471; and he was also liable as the guarantor of other paper of N. G. Curtis, held by said banking house, to the amount of $4,982.34; making an aggregate of indebtedness and liability, as surety, of $18,021. It also appears Joseph Curtis was contingently liable for N. G. Curtis, as surety on a bond to the treasurer of the school board of the city of Hamilton, and also on other bonds given by him in a fiduciary character. Immediately after the sale to Beatty, N. G. Curtis transferred several of the notes given for the goods to Joseph Curtis. These notes were payable at different times, from four months to three years, and amounted to $7,000, but with the rebatement of interest were worth only $6,340. In addition to this N. G. Curtis assigned to Joseph Curtis notes and book accounts amounting nominally to $8,352, but worth not exceeding the half that sum. The parties both swear that these transfers were made for the sole purpose of securing Joseph Curtis, and without any purpose, express or implied, that the latter was to hold the assets as a trustee, or for the benefit of N. G. Curtis, or any creditor but himself. In relation to the transfers to Thomas Moore, it appears that N. G. Curtis was indebted to him directly, in the sum of $500, and that Moore was liable as indorser for $1,718. Curtis transferred to Moore one of Beatty's notes for $1,440, due in three years from its date, without interest, and worth only $1,200, together with sundry small accounts, of the nominal amount of $1 000, but really not available for more than fifty per cent. of that sum. Curtis and Moore state in their answers, that these transfers were in good faith, and intended solely to indemnify Moore, and not in trust for any purpose. The bill also avers a transfer of a portion of his stock of goods by N. G. Curtis to Levi S. Curtis. It will not be necessary to notice this transaction or to decide whether fraud may not be implied in connection with it. The sale has been annulled by the parties, and it is in evidence that the goods have been delivered by N. G. Curtis, in payment of bona fide debts.

The question arising on these facts is, whether the sale to Beatty, and the transfers to Joseph Curtis and Thomas Moore, or any of them, import assignments in trust to prefer creditors within the meaning of the act of March, 1853. The statute provides "that all assignments of property in trust, which shall be made by debtors to trustees, in contemplation of insolvency, with the design to prefer one or more creditors, to the exclusion of others, shall be held to inure to the benefit of all the creditors in proportion to their respective demands; and such trusts shall be subject to the control of the courts, which may require security of the trustees for the faithful execution of the trusts, or remove them and appoint others, as justice may require." A statute, identical in its terms with that just quoted, with one unessential exception, was passed by the legislature of Ohio in 1838, and was in force until the act of 1853 took effect. Under these statutes a number of cases have been before the supreme court of the state, and their purpose and meaning seem now to be well settled. In accordance with the approved and established practice of the federal courts, affirmed by repeated decisions of the supreme court of the United States, this court, in giving a construction to the statute under consideration, will be guided by the decisions of the supreme court of the state. The cases which have arisen under the statute have been referred to in the argument of counsel, and such of them as bear upon the question before the court will be noticed. Before referring to these cases, it may be remarked that prior to the passage of the act of 1838, declaring the effect of assignment in trust, by a failing debtor, to prefer creditors, it had been held by the supreme court of the state that such debtor could lawfully prefer a creditor, if the preference was in good faith, and under circumstances repelling the presumption of a fraudulent purpose; and since the enactment of that law, the validity of such a preference has been affirmed, unless made through the intervention of a trustee, in which case, under the statute, the assignment is not void, but inures to the equal benefit of all the creditors. It is, therefore, settled law in Ohio, that a debtor, in a state of insolvency, may pay a creditor his entire debt, although such payment may operate to the injury of other creditors; and it can make no difference whether the payment is made in money or in property. A debtor may also, indirectly, give preference to a creditor by confessing a judgment, and thus enabling the creditor to obtain a priority, by the levy of an execution on the property of the debtor. It is equally clear that the debtor may dispose of his property by an absolute sale, if no fraud is intended, and

pay the proceeds to some of his creditors, in exclusion of others. In these cases, in the contemplation of law, the creditor is entitled to the benefits resulting from his diligence. It is not clear of doubt whether this right of preference, even with the limitation stated, can be vindicated either on the basis of strict morality or commercial expediency. A pro rata division of the proceeds of an insolvent debtor's property among all his creditors, under all circumstances, and an unconditional prohibition of all preferences from the actual occurrence of insolvency, is more accordant with all our views of justice and fair dealing. But the law on this subject is now too firmly settled in Ohio, by the adjudications of her courts, to be changed, except by positive legislative interposition.

In the case before the court, there is no reason to doubt that, in the sale to Beatty, and in the transfer of assets to Joseph Curtis and Thomas Moore, the debtor, with a knowledge of his insolvency, designed to provide for creditors residing in Butler county, leaving his eastern creditors to share pro rata whatever residuum there might be. The evidence is clear that he made declarations, before the sale to Beatty, of such a purpose; and, especially, that he intended to secure those who had become his sureties. Beatty, in his answer, denies that, at the time he purchased the stock of goods, he had any knowledge of Curtis' intention to prefer his home creditors. It is not material to inquire, in the decision of the questions arising in this case, whether Beatty, or the other parties to whom transfers or assignments were made, were cognizant of such a purpose. If the insolvent debtor could lawfully sell or transfer his property, intending to prefer certain creditors, the knowledge of such intention, by the parties preferred, can not affect the question whether the transactions are within the operation of the statute. The legal right to prefer a creditor, to whom the insolvent debtor is directly indebted, is not denied by the counsel for the plaintiffs, but they insist, if property is assigned to indemnify against loss as a surety for such debtor, the assignee holds the property in trust for the creditor for whom he is surety, and may be called on to account in equity for the property assigned; and, therefore, that such assignment falls within the statute by necessary implication. In the case before the court, there is no claim that there was an express trust in the sale to Beatty, or in the other transfers made by Curtis. If, therefore, a trust can be predicated of the facts in proof, it must be implied, and does not result from the patent acts of the parties. And this presents the question, whether a trust can be implied from the fact that the sale and transfers of property were designed, in part, for the indemnity of sureties. The decisions of the supreme court of Ohio uniformly sustain the principle that, under the statute, an assignment or transfer of property, by a failing debtor, intended to prefer certain creditors, is not within its intention or scope, unless such preference is to be effected through the agency of a trustee. But, in determining whether a trust is created, within the meaning of the statute, that court holds that a strict construction is not to be given to the assignment or transfer, and that, without regard to form, the nature and character of the transaction must have the controlling influence. Thus, in the case of Harkrader v. Leiby, 4 Ohio St. 602, the court say: "After a very careful examination of the subject in all its bearings, we are unanimously of the opinion that our statute requires us to hold, that when any valuable interest of the insolvent debtor is transferred by any species of conveyance, binding the recipient, either expressly or by necessary implication, to account in chancery, to any creditor of the assignor, the statute enlarges the trust, and makes it inure to the benefit of all his creditors, and distributes the fund to all, in proportion to their respective demands." And in the same case the court say: "To bring a case within the operation of the law, there must be a transfer or conveyance of property, or some valuable interest belonging to the insolvent debtor, in view of his insolvency, to be held by the person taking it, for the benefit of some one or more of the creditors of the debtor, other than himself." The same principle has been substantially affirmed in other cases, to which it is not necessary specially to refer.

It is now proper to inquire, whether the several transactions, under consideration in this case, or any of them, are within the principle thus laid down by the supreme court of Ohio. And a reference to the cases decided by that court leads to the conclusion, not only that a failing debtor may indemnify a surety by transferring property to him, but that such a transfer does not raise a trust by implication, or necessarily impose an obligation on the transferee, to account to other creditors for the property transferred. The case of Atkinson v. Tomlinson, 1 Ohio St. 237, seems to be in point on this question. In that case, an insolvent debtor assigned his entire property to two persons, to indemnify them as sureties. The property so assigned was sold by the sureties, and the proceeds were applied in payment of the debts for which they were liable. Other creditors filed their bill, charging fraud in the assignment, and praying for a pro rata distribution of the proceeds of the property. The court held the assignment to be valid. In the conclusion of their opinion they say: "Now, in the present case, the defendants were the sureties of Tomlinson; they took an assignment of about enougn property to pay off their liabilities for him; and although they showed themselves very anxious to obtain the security, as all men would, under similar circumstances, yet securing themselves appears to have been their sole object; and we think

they had a legal right to do it." In the case of Bloom v. Noggle, 4 Ohio St. 56, the court say: "It has been fully settled by repeated decisions of this court that a creditor of an insolvent debtor, or one having assumed liabilities for him as surety, may lawfully take from him a mortgage to secure such debt, or save harmless from such liability, and as the reward of his diligence, will be protected in the priority thus obtained;" and in the case of Harkrader v. Leiby, before cited, the court say: "The statute does not affect a mortgage given by an insolvent debtor to secure the debt of one of his creditors, or to indemnify him against a liability, by indorsement or otherwise, assumed for the benefit of the debtor, although it may have the effect to prefer such creditor." From these and other cases that might be referred to, the principle seems well settled by the decisions of the supreme court of Ohio, that a mortgage or other transfer of property may be given by a failing debtor, not only to secure a debt due by such debtor, but also to indemnify a surety; and it is most obvious, that if the right to prefer a creditor has any foundation in justice, it should be extended to the case of a surety. It is not only a popular principle, but one which accords with the most obvious dictates of honor, that a surety of a failing debtor occupies a more meritorious position than any other creditor, and has a moral claim to indemnity superior to that of one who has become a creditor in the ordinary business transactions of life. Hence, it is an established maxim that sureties are favorites with courts of equity.

It is insisted, however, by the counsel for the plaintiffs, that the cases in the supreme court of Ohio, to which he refers, sustain the doctrine of an implied trust in all cases where a conveyance or transfer of property is made by an insolvent debtor, to indemnify a surety, and that the surety is liable to account for the proceeds of the property as a trustee; and, if so liable, the case comes within the statute. The cases relied on do not seem to sustain this position to the extent claimed. In those cases the court adjudged the conveyance or assignment to be within the statute, not because preferences were made to sureties, but because there was an express trust for the benefit of some creditor other than the grantee or assignee. Thus, in the case of Harkrader v. Leiby, the mortgage was held to be an assignment in trust to prefer creditors, because it was given for the benefit of persons who were not mortgagees, and that, as to them, there was a trust. The entire opinion of the court leaves no doubt, that if the mortgage had been given for the indemnity of the mortgagees only, as sureties of the debtor, the transaction would not be brought within the operation of the statute. The case of Dickson v. Rawson, 5 Ohio St. 224, is relied on as sustaining the implication of a trust in the sale to Beatty, and the transfers to Joseph Curtis and Thomas Moore. But in the case referred to, the insolvent debtors assigned their property to some of their creditors, not only to secure them, but in trust that another person not named as an assignee, a surety of the debtor, should be indemnified for his liability. This was clearly a trust within the meaning of the statute; but there is no intimation in the opinion of the court, that a trust would be implied if the assignment had been solely for the benefit or security of the assignees. The judgment of the court was based on the fact that there was an express trust in favor of a person who was not an assignee. The court say, referring to the statute under consideration, "It does not in any way affect conveyances or mortgages made by a failing debtor to his creditors for the purpose of paying or securing his debts; but it does control every transfer or conveyance of property, whether by mortgage or otherwise, made by an insolvent debtor, in view of his insolvency, to be held by the person taking it for the benefit of some one or more of the creditors of the debtor, to the exclusion of others. To bring the case within the operation of the statute, the conveyance must be in trust, and the person receiving the property thereby constituted a trustee for some one or more of the creditors of the debtor, to the exclusion of others." In this opinion of the court there is no intimation of a doubt as to the correctness of the principles decided in previous cases, involving the construction of the statute. It is, in fact, an affirmance of the decisions in those cases, and the court refer to them, by name, as "carefully considered cases." The last case before the supreme court of Ohio is that of Bagaley v. Waters, 7 Ohio St. 359. The material facts were, that a merchant, in failing circumstances, sold and transferred his stock of goods, notes, and book accounts, and also his real estate, amounting to about $30,000, being the principal part of his property, to a person who, with others, was liable for him to the amount of about $20,000, and who assumed the payment of the debts for which he was liable as surety, and also other debts which were specified in the written agreement between the parties. The creditors not provided for in this arrangement brought suit to charge the assignee, as a trustee, under the act of 1853. The supreme court held that the statute does not prohibit a failing debtor from applying his property or means, to the payment in full of a part of his creditors, though nothing should be left for others equally meritorious. They say, "The sole object of the statute is to prevent his effecting this purpose by an assignment in trust;" and they hold, as there was no proof in conflict with the conclusion, that the agreement was what it purports to be, an absolute and unconditional sale of the property, in consideration of the promise of the vendee to pay certain debts, for a part of which he was surety, no trust to prefer creditors could be

implied, and that the assignment was not within the statute.

The case just referred to, in some of its aspects, is similar to that before the court, and would seem to be conclusive on the question now to be decided. The assignment in that case was made for the sole purpose of indemnifying a surety, who, it would seem, in addition to his legal liability to pay the debts, as surety, had expressly assumed their payment. The court held, that although the assignee thus made himself responsible for those debts to the creditors, and would be bound to apply the proceeds of the property assigned or sold for that purpose, it was not an assignment in trust, as contemplated by the statute. The facts in relation to the several transactions charged in the bill, as within the act of 1853, have been already stated. As to the stock of goods, the evidence leaves no room for a doubt that there was a positive, unconditional sale to Beatty, exclusively for his benefit and indemnity as a creditor of and a surety for Curtis. The goods were sold at their full value—in the opinion of several witnesses, for more than they were worth—and the notes given for the purchase were transferred by Curtis, with the knowledge and consent of Beatty, to creditors, either in actual payment of debts, or as collateral security. It is a fact, not controverted, that Beatty has the ability to pay, and, without doubt, will promptly pay these notes as they mature. It would seem clear, under the authorities that have been cited, that Curtis had the legal right to sell this property, with the purpose of preferring certain creditors, and that Beatty, with a view to his own security, had a right to purchase. In paying for the goods, he retained so much as was deemed necessary to pay the debt due from Curtis; and it was also a part of the arrangement that he should be indemnified to the extent of his suretyship for him. It would seem, however, from the evidence, that the difference between the value of the goods as appraised, and the notes given by Beatty, was something less than the actual indebtedness of Curtis to him; and hence there is no ground for an inference that there can be a residuum in his hands, for which he can be held liable to account to the creditors who are not provided for. There is, therefore, nothing in this transaction from which a trust can be implied, within the contemplation of the statute, or which can be a basis for a proceeding in equity, to charge Beatty as an assignee. In reference to the transfers to Joseph Curtis and Thomas Moore, it would seem clear that within the principles of the decisions of the supreme court of Ohio, they also are protected from the operation of the act of 1853. They were separately creditors of the insolvent debtor, and they were liable for him as sureties. To pay the debts due them, and as an indemnity for their suretyship, notes and other assets were assigned to them respectively, less in amount in both cases than the sums for which they were liable. There is no evidence contradicting or disproving the allegations of their answers, that their sole object in this arrangement was to protect themselves from their liability, and both deny that there was any other purpose in view.

To bring an assignment within the operation of a statute, there must be, in the words of the statute, "a design to prefer one or more creditors to the exclusion of others;" and this purpose must be accomplished through the agency of a trustee. It is true, as already stated, that the insolvent Curtis intended to prefer some of his creditors, but such intention does not bring the transactions within the statute. The pertinent inquiry is, has he assigned property in trust for this purpose? In the case of Bagaley v. Waters, before noticed, the court, in reference to the cases that had been before the court, involving the construction of the statute, say: "In each of them that has not been overruled, the instrument which was held to be an assignment in trust, gave to other creditors, besides the assignees, or reserved for the assignor, an interest in the property transferred, or in its proceeds, and thus laid the foundation for chancery jurisdiction, to compel an account." And again: "In each of them, it will be found that the assignee held the property as mortgagee, or, otherwise, in part, at least, merely to secure other creditors beside himself, or was to account for a residuum to the assignor. Such instruments might well be declared assignments in trust." And in the case of Doremus v. O'Harra, 1 Ohio St. 45, the court held, that "the statute of 1838, relating to assignments of the property of a failing debtor for the purpose of preferring creditors, does not embrace all cases of assignments made by such debtor, but refers only to those cases where the assignee stands in the character of a trustee, other than his merely receiving a conveyance to secure his own claim."

These authorities seem clearly to warrant the conclusion that no one of the several transactions in question in this case falls within the statute. In the sale to Beatty, and the transfers to Joseph Curtis and Thomas Moore, no trust can be implied in favor of any creditors other than the vendee or the transferees. The cases referred to establish the doctrine that, to the extent of their liability as sureties, they had a legal right to obtain indemnity by any species of assignment or transfer, which, in its benefits, was limited to them, and made no provision for a preference in behalf of any other creditor. This right being conceded, they can not be viewed as trustees under the statute. As sureties, the legal obligation to pay the creditors, to whom they stood in that relation, upon the failure or inability of their principal to make payment, was complete, and could not be affected by any assignment for

their indemnity. The debtor was hopelessly insolvent; and their liability to pay the debts for which they were surety, rested upon no contingency. Their entire property—not only that assigned to them, but all they then owned, or might subsequently acquire—was liable for the payment of these debts. These considerations, in connection with the fact that no more property was placed in their hands than was necessary for their indemnity, strongly negative the existence of an implied trust, and repel the conclusion that they are chargeable, in equity or otherwise, as trustees under the statute. It may be conceded that if, after applying the proceeds of the property transferred to the sureties, there should be a surplus in their hands, the creditors not paid or provided for would be entitled to the benefit of such surplus. But their claim would not rest on the basis of an assignment in trust to prefer creditors, within the meaning of the statute, but upon the legal and equitable principle that one who holds money to which another is entitled, may be sued for its recovery. In the case of Atkinson v. Tomlinson, 1 Ohio St. 243, the court decide that a liability to account for a surplus, where property has been assigned or conveyed by a failing debtor, to pay a debt or indemnify a surety, does not necessarily raise a trust, within the scope and meaning of the statute. In illustration of the views of the supreme court on this point, they refer to the case of a mortgage given by such debtor, and remark in these words: "Now, it may be said that a mortgagee is, in some respects, a trustee; but this arises merely as an incident to his relation as mortgagee, and is not the kind of trustee designated in the statute."

The views thus indicated relieve the court from the necessity of expressing an opinion on the point made by the counsel for defendants, that a decree can not be rendered for the plaintiff, for the reason that all the parties in interest are not before the court. For the same reason, it is unnecessary to decide whether the proceedings in replevin, in reference to the goods purchased by Beatty, are an estoppel to the plaintiffs to the assertion of the claim set up in this bill. The bill is dismissed.

COOLIDGE (GORDON v.). See Case No. 5,606.

Case No. 3,185.

COOLIDGE v. GUTHRIE.

[1 Flip. 97; 8 Am. Law Reg. (N. S.) 22; 3 Am. Law Rev. 582.][1]

Circuit Court, S. D. Ohio. Nov. 21, 1868.

JURISDICTION—SEIZURE OF PROPERTY AN ACT OF WAR—HOW AND WHEN—RIGHTS OF CLAIMANT.

1. During the late civil war, where an United States officer in command of troops, while in an insurgent state, seized property belonging to a citizen of that state, and sold it to a third person, and the latter was sued after the war by the owner at the time of the seizure: *Held*, that the court had no jurisdiction over the subject matter.

[Cited in Mitchell v. U. S., 21 Wall. (88 U. S.) 352; Dow v. Johnson, 100 U. S. 169; U. S. v. Smith, Case No. 16,335.]

2. The validity of such seizure could not be tried in a municipal court in a common law proceeding, as such seizure was an act of war, and no action can be maintained in such court against the captor of booty.

3. Under the general issue in trover this defense was admissible.

4. After the cotton seized had been in the firm possession of the captor twenty-four hours, it became booty by the laws of war, and the title to the same was wholly lost to the former and hostile owner. If the plaintiff had any right which can be recognized, it is against the government, and must be asserted elsewhere.

[2] [At law. This was an action of trover brought to recover the value of cotton mentioned in the plaintiff's declaration. The defendant pleaded the general issue. The parties submitted the cause to the court, waiving the intervention of a jury.

[According to the statute regulating the practice in such cases, "the finding of the court upon the facts—which finding may be either general or special—shall have the same effect as the finding of a jury." "When the finding is special, the review" (by the supreme court of the United States) "may extend to the sufficiency of the facts to support the judgment." Act March 3, 1865, c. 86, § 4 (13 Stat. 501). As this case was important in the principles which it involved, it was deemed proper to find the facts specially.

[The facts were accordingly found upon the evidence as follows:

[1. On the 12th of July, 1862, General Samuel R. Curtis, commanding an army of the United States, took military possession of the town of Helena, in the state of Arkansas. That state was then in rebellion against the United States.

[2. The cotton was all raised upon farms belonging to General Gideon J. Pillow, who was, at the time of the seizure of the cotton, in the military service of the rebel government. The farms were in the immediate vicinity of Helena.

[3. General Curtis ordered the cotton in controversy to be seized and brought into Helena; and it was seized and brought there accordingly. The wagons conveying it were protected by troops detailed for that purpose.

[4. He sold and delivered the cotton to the defendant and one William W. Babcock, jointly. There were two sales—one 200 bales, and one of 36 bales. Both sales were made at Helena, on the 26th of July, 1862. The agreed price was 14½ cents per pound. The average weight of the bales was 400 pounds.

[1] [Reported by William Searcy Flippin, Esq., and here reprinted by permission. 3 Am. Law Rev. 582, contains only a partial report.]

[2] [From 8 Am. Law Reg. (N. S.) 22.]

[5. Subsequently the defendant Guthrie delivered 82 bales of the cotton to Alfred Spink, at Memphis, pursuant to the order of a quartermaster of the army. Spink paid Guthrie $45 per bale delivered. Fourteen bales more of the cotton were taken by a gunboat, to be used, as was alleged, for caulking purposes. The residue, consisting of 140 bales, was shipped by the defendant to the city of New York, and there sold.

[6. General Curtis alleged at the time of the seizure and sale of the cotton that his object was to apply the proceeds to the support of the starving negro population in the neighborhood of his camp. A small part of the proceeds were so applied. He received full payment for the cotton at the contract price. He never reported the seizure and sale to the authorities at Washington, nor to any other public officer, and died without having accounted for the proceeds to any one.[3]

[7. When the defendants bought the cotton, it had been for several days at Helena, in the military possession of General Curtis, It was in a damaged condition. The navigation of the Mississippi was at that time attended with peril to life and property. Babcock was killed at a landing twenty miles below Memphis, by guerrillas, on the 20th of October, 1862. The value of the cotton at the time and place of purchase was 14½ cents per pound,—what the defendant and Babcock paid for it. The whole quantity of the cotton purchased and received by the defendant and Babcock was 94,400 pounds. The legal title and ownership of the cotton at the time of its seizure by General Curtis was in the plaintiff, Coolidge. He was a resident of Arkansas, but was in no wise engaged in the Rebellion. All the facts relating to the cotton were known to the defendant and Babcock when they purchased.][4]

George H. Pendleton and Thomas M. Key, for plaintiff.

Sage & Hinkle, for defendant.

SWAYNE, Circuit Justice. The plaintiff is entitled to recover, unless the grounds of defense relied upon by the defendant shall be found sufficient to protect him. If liable, the measure of his liability is the value of the entire amount of the cotton which he received, at 14½ cents per pound, with interest from the 20th day of July, 1862, the time of the alleged conversion. If he was then guilty of an illegal and wrongful act touching the cotton, his liability was fixed at that time, and the subsequent delivery to another of 82 bales upon the order of the quartermaster, and the taking of 14 bales by the gun-boat, can have no retroactive operation, or in anywise affect the amount for which he must respond. Where property is tortiously taken, every one who receives it and exercises acts of ownership over it is guilty of a conversion, and is liable for its full value, without reference to the liability of others through whose hands it may also have passed, either before or after the conversion by the defendant. Williams v. Merle, 11 Wend. 81.

In the eyes of the law the order of the quartermaster, and the act of the gun-boat, are immaterial facts in the case, and may be laid out of view.

Two defenses are relied upon by the defendant, Guthrie: 1st—That this court has no jurisdiction of the case. 2d—That as soon as General Curtis acquired a firm possession of the property by having it conveyed infra praesidia, the title of the plaintiff became ipso facto extinguished, and a complete title vested in the United States; and that if the plaintiff has any rights left in respect to the cotton, they must be asserted against the United States, and that he has none which can be enforced against the defendant.

When the transaction occurred the Rebellion had risen to the proportions of a civil war, and was fully flagrant. Arkansas was enemy's territory, and all the property there was enemy's property. Cotton was an article of foreign and domestic commerce. It was one of the main sinews of the power of the insurgents. They relied upon it for the purchase of arms and other munitions of war, and chiefly to supply them with financial means for the prosecution of the strife. Important belligerent rights were conceded to them by the government of the nation. Their soldiers, when captured, were treated as prisoners of war—they were exchanged, and not held for treason. Their vessels, when captured, were dealt with by our prize courts. Their ports were blockaded, and the blockade proclaimed to neutral powers, and property found on board such vessels, belonging to persons residing in the rebel states, was uniformly held to be confiscable as enemy's property. All these things were done as if the war had been a public one with a foreign power. The Prize Cases, 2 Black [67 U. S.] 687; Mrs. Alexander's Cotton, 2 Wall. [69 U. S.] 417; Mauran v. Insurance Co., 6 Wall. [73 U. S.] 1.

No act of congress had then been passed which affects the case. No regulations issued by any department of the government prior to that time, relating to the subject, have been brought to our attention. The acts of August 6, 1861 [12 Stat. 319], and of July 17, 1862 [12 Stat. 589], have no application. Gen-

[3][The court doubtless found the facts as they were shown by the evidence or admitted by the counsel for the defendant, but the court says, "No act of congress had then been passed" regulating such seizures, and we are advised from another source that General Curtis satisfied the government that all the moneys which he so received were expended in the public service. —Eds. Am. Law Reg.]

[4] [From 8 Am. Law Reg. (N. S.) 22.]

eral Curtis and his army are to be regarded, for the purposes of this case, as if prosecuting hostilities in a foreign country with which the United State were at war, and the case is to be decided upon the principles of law applicable in that condition of things. 1st—In respect to the defense first mentioned, the inquiry arises whether it should not have been presented by a special plea, and whether it can be considered under the general issue.

The question is the same whether a seizure jure belli be made upon land or water. The case of Le Caux v. Eden, 2 Doug. 594, was of the latter class. The vessel had been restored and the captors condemned in costs and damages by a decree of the prize court. It was held, upon the fullest consideration, that the defense was admissible under the general issue. The grounds of the judgment were, that the capture of the vessel and the imprisonment of the crew were not trespasses by the common law; that, if wrong had been committed, they were triable only by the law of nations, and that no municipal court had authority to adjudge upon the subject. Such was the unanimous judgment of the court. If there were no trespasses by the common law there, a multo fortiori, there was by the common law here no conversion.

In Lindo v. Rodney, 2 Doug. 613 [note], the point of pleading was not raised, but the same doctrine of the want of jurisdiction in the courts of common law was affirmed by Lord Mansfield in a learned and elaborate judgment. In Elphinstone v. Bedreechund, the seizure was by military force on land. A judgment had been rendered by the supreme court of Bombay, from which an appeal was taken. Lord Tenterden, delivering the opinion of the privy council, said: "We think the character of the transaction was that of a hostile seizure made, if not flagrante, yet nondum cessante bello, regard being had both to the time, the place, and the person, and consequently that the municipal court had no jurisdiction to adjudge upon the subject; but that if anything was done amiss, recourse could only be had to the government for redress. We shall, therefore, recommend it to his majesty to reverse the judgment." 1 Knapp, 316.

It should also be observed that according to English law, which in this respect is in accordance with the principles of general law and public jurisprudence, no action can be maintained in a court of municipal law against the captor of booty or prize. If an English naval commander seize property as belonging to the enemy, which turns out clearly to be British property, he forfeits his prize in the court of admiralty, and that court awards the return of it to the party from whom it was taken; but the case of Le Caux v. Eden decided the question that no British subject can maintain an action against the captor. * * * In like manner, property taken under color of military authority falls under the same rule. If property be taken by an officer under the supposition that it is the property of an enemy, whether of a state or of an individual, which ought to be confiscated, no municipal court can judge of the propriety or impropriety of the seizure. It can be judged only by the authority delegated by the crown. 3 Phil. Int. Law, p. 192, § 130.

See, also, Alexander v. Duke of Wellington, 2 Russ. & M. 54; The Army of the Deccan, 2 Knapp, 106; Nicol v. Goodall, 10 Ves. 156; Hill v. Reardon, 2 Sim. & S. 431; Duckworth v. Tucker, 2 Taunt. 7; 1 Chit. Gen. Pr. 2, 18, notes; Porte v. U. S., Dev. Ct. Cl. 171. These authorities are decisive upon the subject. If the action would not lie against General Curtis, obviously it will not against his vendee. The principal fact, and the incident which followed, are governed by the same rule. The case of The Admiralty, 13 Coke, 53; Anon., Cro. Eliz. 685; King v. Broom, Carth. 398; Turner v. Neele, 1 Lev. 243; Ridly v. Egglesfield, 2 Lev. 25. It was competent for congress to give the jurisdiction, but it has not seen proper to do so. Const. U. S. art. 1, § 8. We hold this objection to the plaintiff's right to recover well taken. This conclusion does not conflict with the ruling of the supreme court in Mitchell v. Harmony, 13 How. [54 U. S.] 115. There the property in question belonged to a citizen, and not to an enemy.

2d—It remains to consider the second proposition relied upon by the defendant. Chancellor Kent says: "In a land war, movable property, after it has been in the complete possession of the enemy twenty-four hours (and which goes by the name of booty, and not prize), becomes absolutely his without any right of postliminy in favor of the original owner; and much more ought this species of property to be protected from the rule of postliminy when it has not only passed into the complete possession of the enemy, but been bona fide transferred to a neutral." 1 Kent, Comm. (Last Ed.) 120. "The title to property lawfully taken in war may, upon general principles, be considered as immediately divested from the original owner, and transferred to the captor." * * "As to personal property, or movables, the title is in general considered as lost to the former proprietors as soon as the enemy has acquired a firm possession, which, as a general rule, is considered as taking place after the lapse of twenty-four hours, or after the booty has been carried to a place of safety infra praesidia of the captor." Law. Wheat. 629. "If the hostile power has an interest in the property, which is available to him for purposes of war, that fact makes it prima facie a subject for capture. The enemy has such an interest in all convertible and mercantile property within his control, or belonging to persons who are living under his control,

whether it be on land or at sea, for it is a subject of taxation, contribution, and confiscation." Dana, Wheat. § 256, N. 171.

Vattel says: "We have a right to deprive our enemy of his possessions of every kind which may augment his power and enable him to make war." "Whenever we have an opportunity we seize on the enemy's property and convert it to our own use; and thus, besides diminishing the enemy's power, we augment our own, and obtain at least a partial indemnification or equivalent, either for what constitutes the subject of the war, or for the expenses and losses incurred in its prosecution. In a word, we do ourselves justice." * * * "As the towns and lands taken from the enemy are called conquests, all movable property taken from him comes under the denomination of booty. This booty naturally belongs to the sovereign prosecuting the war, no less than the conquests, for he alone has such claims against the hostile nation as warrant him to seize on such property and convert it to his own use. His soldiers, and even his auxiliaries, are only instruments which he employs in asserting his right. He maintains and pays them. Whatever they do is in his name and for him." Vat. Law Nat. pp. 364, 365, bk. 3, c. 9.

It is usual to allow those making the capture to appropriate more or less of the property to their own use; but the paramount right and title are, nevertheless, in the sovereign, who may assert them whenever it is deemed proper. Congress, in passing the act of March 3, 1863 [12 Stat. 820], in relation to "captured and abandoned property," proceeded upon this ground. The doctrines thus laid down are in accordance with those of all approved publicists. (See the authorities cited by the authors from whom we have quoted.) There can be no doubt that the facts as found bring this case within the authorities. The commanding general caused the cotton to be seized and brought within his lines. He had a firm possession of it there for more than the requisite time. There is no question as to the right of postliminy. The possession by both the general and the purchaser was unchallenged by the enemy. The purchaser conveyed the property to New York, and there sold it. Under the law arising upon these facts there can be but one result. We hold the second objection fatal, also, to the right of the plaintiff to recover in this action. If he has any right which can be recognized, it is against the government, and must be asserted elsewhere.

Judgment must be for the defendant, with costs.

COOLIDGE (HUBBARD v.). See Case No. 6,816.

Case No. 3,186.

COOLIDGE v. McCONE.

[1 Ban. & A. 78; 2 Sawy. 571; 5 O. G. 458; 1 Am. Law T. Rep. (N. S.) 214.] [1]

Circuit Court, D. Nevada. March Term, 1874.

PATENTS—"AMALGAMATING PAN"—CONSTRUCTION—INFRINGEMENT.

1. The claim, in a patent for an amalgamating pan, was, "constructing and placing the shoes and dies upon upper and nether disks obliquely, at about the angle as described, together with the beveled bars B, B, B, etc., substantially as described and for the purposes set forth." The inventor in his specification states, "the nature of my invention consists in the arranging of shoes and dies having grooves or channels cut obliquely from the circumference to the centre or axis. My invention also relates to beveled bars, placed between each die and partially filling the grooves, for the purpose of keeping the ore near the same as they pass each other." * * * "I do not claim broadly the use of shoes and dies for the purpose of reducing amalgamating ores, for these are well known and used." *Held*, that the claim was for the shoes and dies as described, in combination with the beveled bars.

2. The patent is not infringed by making and vending the shoes and dies without the beveled bars.

[Cited in Fisher v. Craig, Case No. 4,817.]

In equity. The plaintiff [C. C. Coolidge] is assignee of a patent issued to one Belknap, for a combination of certain shoes and dies, and beveled bars, used in amalgamating pans for the amalgamation of silver ores. The defendant [John McCone], a foundryman, is charged with making and selling the invention in violation of plaintiff's rights. It appeared in the testimony that some time in 1866, before the assignment under which plaintiff claims, the patentee, Belknap, brought the patterns of his shoes and dies to defendant's foundry, and procured him to cast shoes and dies from those patterns, which the patentee himself put into the pans of certain mills in the neighborhood, without charge, for the purpose of introducing them. But the defendant made no "beveled bars" to go with the shoes and dies. These could be made of wood as well as of iron, and Belknap himself made the beveled bars for those mills, wherein he had introduced his invention, the defendant casting from the patterns furnished only the shoes and dies. Afterward, between 1867 and the commencement of this suit, and after the assignment of Belknap's patent to plaintiff, the defendant cast and furnished to various mill-owners shoes and dies of the same kind. Mill-owners would bring to defendant their own patterns in such form as they desired the castings to be made, and the defendant would cast the shoes and dies from the patterns so furnished, and the parties for whom they were cast would take them away, put

[1] [Reported by Hubert A. Banning, Esq., and Henry Arden, Esq., and here reprinted by permission. 5 O. G. 458, contains only a partial report.]

them into the pans in their mills themselves, and there use them. They sometimes obtained dies without the shoes, and used them with other kinds of shoes, and sometimes obtained shoes without the dies, and used them with other kinds of dies. The shoes and dies were not necessarily used together, as the Belknap shoe could be, and sometimes was used with other kinds of dies, and the Belknap die with other shoes. Defendant never inquired what use was to be made of the shoes and dies cast by him, but he simply cast and furnished them from patterns brought by his customers. There was no testimony tending to show that he ever cast or furnished any of the "beveled bars," either with or without the shoes and dies. On the contrary, the testimony showed affirmatively that he never did cast or furnish any beveled bars. There was, also, no testimony tending to show that the parties using the shoes and dies cast and furnished by defendant ever procured from other sources, or used in connection with the shoes and dies furnished by him, any of the "beveled bars" mentioned in the plaintiff's patent, or any mechanical substitute therefor, except in those instances where the patentee himself furnished them as aforesaid, in his efforts to introduce his invention. The casting and furnishing of shoes and dies, as before stated, to parties other than Belknap, are the acts complained of as constituting an infringement of plaintiff's rights.

At the close of plaintiff's testimony, counsel for the defendant moved the court to advise the jury to find a verdict for the defendant on the ground that there was no testimony to show that the defendant had manufactured or sold the plaintiff's invention; the invention claimed and patented being, as defendant insisted, a combination of shoes, dies and the "beveled bars;" and as the beveled bars had not been made or sold, or even used in connection with the shoes and dies furnished by defendant, the whole combination had not been made or sold; and that there was no infringement by making and using a part only of the combination.

Williams & Bixler, for plaintiff.

Lewis & Deal and Beatty, for defendant.

Before SAWYER, Circuit Judge, and HILLYER, District Judge.

SAWYER, Circuit Judge. We have examined the specifications annexed to the patent very carefully, and it is very plain to our minds that the patent is for a combination of several elements or parts. The petitioner commences by describing the drawings, and then states as follows:

"The nature of my invention consists in the arranging of shoes and dies, having grooves or channels cut obliquely from the circumference to the centre, terminating in a line of a radius to the centre or axis. My invention, also, relates to beveled bars placed between each die, and partially filling the grooves, for the purpose of keeping the ore near the same as they pass each other."

Then he describes how the dies are fixed to the disks, and tells us how other dies have been used in a different arrangement; points out how the beveled bars are arranged in connection with the other parts; describes their operation, and concludes with the claim, which is in the following words:

"I do not claim broadly the use of shoes and dies for the purpose of reducing amalgamating ores, for these are well known and used. What I do claim, however, and desire to secure by lettters patent, is, constructing and placing the shoes and dies upon upper and nether disks obliquely at about the angle as described, together with the beveled bars B, B, B, etc., substantially as described, and for the purposes set forth."

The claim is for a combination. There is no claim that the dies are new; that the direction of the grooves is new, or that the bars are new; but what he does claim, is the arrangement of these together, "placing the shoes on upper and nether disks about the angle described, together with the beveled bars B, B, B, substantially as described, and for the purposes set forth." These shoes and dies, arranged as described, "together with," that is to say, united with, in conjunction with, in combination with, the beveled bars, substantially as described. Now, it may be that this claim is not made in such a way as to be so advantageous to the patentee as he was entitled to make it. It may be, that he has arranged his dies in connection with the disks in such a way as to be an improvement by itself, and which may entitle him to a patent for that arrangement, unconnected with the beveled bars; and that he might have put in a claim and obtained a patent for such arrangement, independent of the beveled bars. It may be, that, having obtained a patent for such arrangement, he could also have obtained a patent for a further combination of that arrangement in connection with the beveled bars. If that was the object intended to be covered by this patent, the claimant has failed to express it. It is for the arrangement of the dies and shoes together with, that is to say, in combination with the bars, that it patented. The claim to the whole is made as one indivisible claim, as an entirety, and the entire combination must be made and sold or used in order to constitute an infringement. If the patentee failed to get all he desires, or failed to get his patent in such a form that any part could not be used without an infringement, he has only done what, perhaps, a majority of the patentees before him, in the first instance, have done. It may be necessary to surrender the patent and procure a reissue, in order to secure the full benefit of his invention. However this may be, he has made his claim in his own way, and the patent on that claim is for this

one single indivisible combination of all the elements as an entirety, in manner substantially as described, and for the purpose indicated, that is to say, to cut the pulp, like shears, and throw it up to the cutters by means of the bars.

The charge in this complaint is, that the defendant has made and sold this invention as one single invention. The testimony shows that the defendant has manufactured, and furnished to mill-owners, dies, and manufactured and furnished shoes. One witness testifies that the defendant put the dies and shoes together, in some instances, in the shops, for the purpose of trying them to see if they would fit; but there is no testimony which shows that he has ever manufactured any of these "beveled bars." On the contrary, Tyrrell and Horn, his employees, and Belknap, say distinctly, that defendant never manufactured any of the bars, so far as they are aware; but he has manufactured shoes and dies upon the request of parties desiring to have them manufactured. There is no testimony showing that defendant ever manufactured or sold the beveled bars.

The testimony shows, too, that these dies may be, and sometimes are, used in connection with other shoes, and the shoes in connection with the other dies. They are not necessarily used together in the combination.

It is claimed that the defendant has made the shoes and dies without authority from the patentee, knowing they were to be used in violation of the patent, and that this renders him liable even if he did not make the entire machine. Now, if several different parties conspire together, one to make one part of a patented machine, another another, and so on, in order to avoid responsibility, it may well be, that each party so conspiring and engaged in making a complete mechine, would, nevertheless, be liable, although he, himself, should actually make but one part of the perfected machine. However that may be, it is not this case. There is no testimony tending to establish such a case. Defendant casts certain parts for customers from patterns furnished by them, without inquiry as to their use. The pieces or elements of this combination are not new, and are capable of use out of this combination. Defendant had a right to cast and sell them to be used separately; and there is no testimony showing either that the beveled bars, or any mechanical substitute for them, were used in connection with any of the dies and shoes which defendant made without authority from Belknap; or that defendant understood that they were to be so used. Belknap, I believe, does say that bars were made by himself to use in combination with those dies and shoes which he ordered made by defendant for the purpose of introducing his invention; but, beyond that, there is no testimony tending to show that any of the parties made and used the beveled bars in connection with any of the dies and shoes which defendant made without authority from the plaintiff.

We have looked over the testimony carefully. My associate, Judge HILLYER, took very full notes, and I find that they agree with my recollection of the testimony. There is nothing, then, to show that this combination was made or sold by the defendant, or that he has made portions of it and sold them to other parties, with the knowledge that they were to be used in connection with the "beveled bars" for the purpose of making up a single complete machine.

We think, therefore, we are bound to advise the jury as asked.

(At the close of the opinion the counsel for plaintiff offered to prove further, that the "beveled bars" were, in fact, of no advantage or use in the combination, and might be dispensed with in practice without in any degree impairing the efficiency of the machine; that the whole advantage of the machine really consisted in the arrangement of the shoes and dies obliquely in connection with the disks, as in the other particulars described in the specifications, so as to cut outward in the manner of shears. But the court held that the whole combination, as an entirety, is the thing claimed as the invention, and patented; and that no part, however useless, can be dispensed with for the purpose of working out an infringement; citing Rich v. Close [Case No. 11,757]; Vance v. Campbell, 1 Black [66 U. S.] 427; Eames v. Godfrey, 1 Wall. [68 U. S.] 78; Carter v. Baker [Case No 2,472]. See, also, Hailes v. Van Wormer, 20 Wall. [61 U. S.] 353; Gould v. Rees, 15 Wall. [82 U. S.] 194.)

THE COURT thereupon advised the jury to return a verdict for the defendant, which was accordingly done.

Case No. 3,187.

COOLIDGE v. PAYSON.

[See Case No. 10,860.]

COOLIDGE (UNITED STATES v.). See Cases Nos. 14,857 and 14,858.

COOLY (UNITED STATES v.). See Case No. 14,859.

COOLY (WASHINGTON v.). See Case No. 17,226.

COOMBE (HOMANS v.). See Cases Nos. 6,653 and 6,654.

Case No. 3,188.

COOMBE v. MEADE.

[2 Cranch, C. C. 547.][1]

Circuit Court, District of Columbia. May 3, 1825.

EQUITY JURISDICTION.

If the plaintiff has a legal claim, he must pursue his remedy at law as far as he can before resorting to equity.

[In equity. Bill by Griffith Coombe against Thomas Meade and others to enforce a judgment.]

CRANCH, Chief Judge. The bill states that a judgment at law had been recovered by the Bank of the Metropolis against the complainant, G. Coombe, as indorser of Simon Meade's note, made payable to and indorsed by Thomas Meade, and that the complainant paid to the Bank of Washington $280 with interest upon another note of Simon's indorsed by Thomas and the complainant, which notes had been discounted for the accommodation of Simon or Thomas. That Simon purchased of Thomas Law a city lot in Washington, upon which there is still a small part of the purchase-money due to Mr. Law. That Simon took possession of the lot under his purchase, and assigned his right in it to Thomas Meade. That the legal title yet remains in Thomas Law. That Simon died leaving a widow and children, who are made defendants. That the complainant has received no part of the notes, although he has requested the administratrix and the said Thomas Meade to pay them; the administratrix alleging that she has not assets, and Thomas Meade alleging and giving out "that he has made over the lot as a gift to one of Simon's children, which if true is fraudulent and void;" and that the said Thomas Meade alleges and pretends that he has no means of paying the said notes, "so that by these fraudulent contrivances your orator may be deprived of said debts and defeated from the recovery thereof, unless by the aid of this honorable court." In tender consideration whereof, &c., "and that the said lot may be decreed to be sold to satisfy the judgment and note aforesaid, with costs, damages, and interest; and that T. Law may render an account of what is due on the lot, and may convey the legal title to the purchaser, upon receiving the balance of the purchase-money, the complainant prays subpoena, &c., and for general relief." To this bill the resident defendants, Thomas Meade and Jane Gorman, one of the children of Simon Meade, demurred for want of equity as against them, and contend, by Mr. Worthington, their solicitor, that the complainant has a legal remedy which he must show he has pursued as far as he could, before he can ask the aid of a court of equity.

In the case of Brinkershoff v. Brown, 4 Johns. Ch. 671, Chancellor Kent says: "But I am sorry to say that the plaintiffs have not shown enough when they only show themselves to be judgment creditors. If they want relief touching the personal assets of their debtor, they must show that they have taken out execution at law, and pursued it to every available extent against the property, before they can resort to this court for relief. I apprehend this to be the settled rule in chancery; and that this court does not as of course assume jurisdiction in taking executions upon judgments at law into its own hands. Such power would be oppressive to the debtor and to the court. The presumption is that the court which renders judgment is competent to enforce it; and it is only in special cases, in which property cannot be found to satisfy it, that this court interferes to discover and reach the property. But the legal remedy by execution must first be tried. This court is not to know by anticipation, that it will be ineffectual. Upon such an allegation, it might assume the collection of all simple-contract debts in the first instance, without even requiring the creditor to prosecute his demand to judgment at law. It is sufficient, however, to observe, that I find the rule to have been long and uniformly established, that, to procure relief in equity by bill brought to assist the execution of a judgment at law, the creditor must show that he has proceeded at law to the extent necessary to give him a complete title." "If he seeks aid as to real estate, he must show a judgment creating a lien on such estate. If he seeks aid as to personal estate, he must show an execution giving him a legal preference, or lien upon the chattels." And the chancellor cites the following cases: Wiggins v. Armstrong, 2 Johns. Ch. 144; Hendricks v. Robinson, Id. 290; Angell v. Draper, 1 Vern. 399; Balch v. Wastall, 1 P. Wms. 445; Shirley v. Watts, 3 Atk. 200; King v. Marissal, Id. 192; Burden v. Kennedy, Id. 739; Scott v. Scholey, 8 East, 467; Mountford v. Taylor, 6 Ves. 788. And he says: "Some of these latter cases are peculiarly forcible, since they require a previous execution at law, even in cases in which the creditor is pursuing a mere right in equity, not tangible at law, or vendible under a fi. fa."

In the present case of Griffith Coombe v. Thomas Meade, the bill does not state that the complainant has even commenced a suit at law against either of the Meades, nor that their estates are insolvent; nor that there is no other property which can be reached by an execution at law. Nor does it state that the complainant has satisfied the judgment obtained against him by the Bank of the Metropolis. The bill charges no fraud in Simon Meade's assignment to Thomas Meade; nor does it seek to charge the lot as the real estate of Simon. Admitting that the conveyance from Thomas Meade to one of Si-

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

mon's children was fraudulent and void, yet the bill lays no ground for the complainant's proceeding in equity against Thomas, or his property; and admitting all the averments in the bill to be true, he may still have a complete remedy at law. It seems to us, therefore, that there is no such equity stated in the bill, as will give this court, as a court of equity, jurisdiction of the cause.

THE COURT (nem. con.) rendered judgment for the defendants on the demurrer.

See, also, Williams v. Brown, 4 Johns. Ch. 682, and McDermott v. Strong, Id. 687.

COOMBS (HUTCHINSON v.). See Case No. 6,955.

Case No. 3,189.

COOMBS v. NOLAN et al.

[7 Ben. 301.][1]

District Court, S. D. New York. May Term, 1874.

DEMURRAGE—BILL OF LADING—DUE DILIGENCE—EPIDEMIC AMONG HORSES.

1. A load of granite blocks was brought to New York in a schooner, under a bill of lading, which contained no special clause as to the delivery. They could not be discharged without the aid of horses, and, owing to the prevalence of an epidemic among horses, the consignees of the goods were not able to obtain horses for the discharge for several days. The owners of the vessel filed a libel against the consignees to recover demurrage for the detention of the vessel during the delay. *Held*, that under the bill of lading, the consignees were bound to discharge the cargo in the usual way, with reasonable diligence.

[Cited in Bowen v. Decker, 18 Fed. 752; Houge v. Woodruff, 19 Fed. 137; Addicks v. Three Hundred and Fifty-Four Tons Crude Kainit, 23 Fed. 730; The J. E. Owen, 54 Fed. 187.]

2. Under the circumstances, the consignees had used reasonable diligence in the discharge, and were not liable for demurrage.

[Cited in Henley v. Brooklyn Ice Co., Case No. 6,363; One Hundred and Seventy-Five Tons of Coal, Id. 10,522; Addicks v. Three Hundred and Fifty-Four Tons Crude Kainit, 23 Fed. 729.]

[This is a libel in admiralty brought by Pilsbury Coombs, master of the schooner Yankee Blade, to recover damages for the detention of the vessel by Michael Nolan and Michael McGrath, consignees.]

Scudder & Carter, for libellant.

Matthew Daly and F. R. Coudert, for respondents.

BLATCHFORD, District Judge. In October, 1872, the schooner Yankee Blade, of which the libellant was master, brought a load of granite blocks to New York, under a bill of lading therefor which contained no provision in respect to their discharge, except that they were to be delivered to the respondents, and to be discharged with the assistance of the crew of the vessel. The libel claims $300 damages for the detention of the vessel by the respondents, on the allegation that they took fourteen days to discharge her, whereas they ought to have discharged her in two days, and that the delay was caused by the negligence of the respondents after the arrival of the vessel, and after they received notice of her readiness to discharge. She arrived on the 19th of October, and reported to the respondents. She did not obtain a berth at the proper wharf for unloading, so that her unlading could have been commenced, until the 25th. She actually began discharging on the 31st, and finished discharging on November 2d. Due diligence was used after she began discharging, and, on the evidence, the only delay for which the respondents could, in any event, be held liable, would be for the six days from October 25th to October 31st. As to this delay, the defence set up in the answer is, that it was not possible to procure the necessary horses for the discharge of the cargo until the 31st of October; that horses were indispensable for the purpose; and that, owing to an epidemic or contagious disease which then prevailed among horses, it was not possible to procure them at any price. The evidence shows the prevalence of such an epidemic among horses; that the respondents, after the vessel obtained her berth for unloading, used all reasonable diligence to obtain horses; that horses were indispensable, not only to hoist the stone on to the dock, but to cart it away, because the owner of the wharf would not allow stone to lie on the wharf; that the respondents finally obtained and used three horses for the work, one to hoist the stone from the vessel, and two to cart it away; and that they paid for the use of the three $20 per day, when the ordinary price would have been, for the three, $8.25 per day.

On these facts, the question of law arises, as to whether the respondents are liable for the delay caused by their inability, because of the epidemic, to procure the necessary horses. There can be no doubt, I think, that the only obligation resting on the respondents, under the contract in question, was to take the stone in the usual and customary way, with reasonable diligence. There was no contract binding the respondents to discharge the cargo in a specified number of days. According to all the authorities, a delay caused by the act of God, or other vis major, while it will not relieve a freighter from paying demurrage, where he enters into a positive undertaking to discharge a cargo in a given number of days, will not be visited upon him where his liability results from implication of law, and extends only to the exercise of proper diligence in the customary manner. In such cases, the delay is re-

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

garded as a misfortune, caused by vis major, and each party must bear the loss he has suffered, if no fault can be imputed to him; and the discharge of the cargo was rendered impossible by a cause over which he had no control. Ford v. Cotesworth, L. R. 4 Q. B. 127, 5 Q. B. 545; Cross v. Beard, 26 N. Y. 85. In the present case, in view of all the circumstances, I think that the respondents discharged the cargo in a reasonable time; that they were guilty of no fault or laches; and that any delay which occurred was attributable to causes over which they had no control.

The libel must be dismissed, with costs.

COONS (UNITED STATES v.). See Case No. 14,860.

Case No. 3,190.

In re COOPER.

[16 N. B. R. 178.][1]

District Court, E. D. Michigan. July 9, 1877.

BANKRUPTCY—RESTRAINING PROCEEDING IN STATE COURT.

Where an assignee sold property encumbered by a chattel mortgage, without an order of court, and the mortgagee brought trover against the purchaser in a state court, in a county where the parties and their witnesses resided, *Held*, that if even if the district court had jurisdiction to restrain the prosecution of the suit, it ought not to do so under the circumstances of the case.

[Cited in Re Litchfield, 13 Fed. 867.]

On petition of assignee for an injunction restraining the prosecuting of a suit in the state court.

The petition set forth that, on the 20th day of April, 1875, the bankrupt [Abram Cooper] executed to Grove & Whitney a chattel mortgage upon his undivided one-half interest in certain machinery and fixtures, these being his principal assets; that the actual indebtedness to Grove & Whitney did not exceed one-half the nominal amount secured by the mortgage; that on the 3d day of July, 1876, petitioner made a conditional private sale of said half-interest to Alfred Wise, receiving therefor certain notes to the amount of two thousand three hundred and eighty-eight dollars and twenty-five cents, the purchaser being at that time the owner of the other half of the property; that the sale was made without an order of the court, but with the approval of the petitioning creditors, and with the agreement that Wise should be insured against any loss by reason of the chattel mortgage. he to have the property free from encumbrance; that the amount realized upon the notes exceeded considerably the claim of the mortgagees; that the petitioner believed the mortgage to have been procured by fraud and deceit, and that nothing was due to the mortgagees, and that he desired to contest the same, that on the 10th of October, the mortgagees commenced an action of trover in the state court, against the purchaser, Wise, to recover damages for the conversion of their half-interest in the property; that, by the trial of the cause in the state court, the assignee will be occasioned much trouble and expense, and the question of the validity of the mortgage be undetermined; that the sale to Wise was a most fortunate transaction for the creditors, as they will receive a much larger dividend than could have been secured in any other way, and prayed that the sale to Wise might be ratified and confirmed, and be declared to be free and clear of any lien or encumbrance by reason of any claim of the mortgagees; that petitioner be directed to pay into court the sum of one thousand five hundred dollars, a portion of the proceeds, and that the sum be declared to be subject to the amount actually due them, and that the mortgagees might be restrained from further prosecuting the suit in the state court. The answer admitted that the indebtednes did not exceed twelve hundred dollars, and that the mortgage was made for a larger amount to secure other creditors, who were to be paid by the mortgagees, but further averred that the trover suit was instituted for the sole purpose of recovering the actual mortgage interest in the property, and that the assignee undertook the defence of the suit, procured a continuance for one term, announced himself ready for trial, and then procured an injunction. The further allegations of the answer were immaterial. It appeared that the mortgagees had proved their debt as a secured claim.

Don. M. Dickinson, for assignee.

M. V. Montgomery, for mortgagees.

BROWN, District Judge. The assignee having sold the property without an order of court directing a sale free of encumbrances, conveyed simply the interest of the bankrupt, subject to the lien of the mortgage. Kelly v. Strange [Case No. 7,676]; In re Mebane [Id. 9,380]; In re McClellan [Id. 8,694]; Second Nat. Bank v. State Nat. Bank [10 Bush (73 Ky.) 367]; Ray v. Brigham [23 Wall. (90 U. S.) 128]; Wicks v. Perkins [Case No. 17,615]. If the assignee had desired to test the validity of the mortgage, he should have petitioned the court, upon notice to the mortgagee, for an order to sell the property free from encumbrance. Ray v. Brigham [supra]; Meeks v. Whatley [48 Miss. 337]. So long as the property remained in the hands of the assignee, the regular practice for the mortgagees was undoubtedly to prove their debt, and ask leave to sell the property themselves, or require the assignee to sell it, and pay the amount justly due them from the proceeds.

But, the assignee having sold the property subject to the mortgage, and having thereby released the possession he held on behalf of the court, I see no impropriety in the mort-

[1] [Reprinted by permission.]

gagees bringing suit in the state court to enforce their security. Indeed, I can hardly see what other remedy they would have had except upon the theory that the property was sold free of encumbrance; but, as no notice was given them of the sale, it would be obviously inequitable to hold that the property had been discharged of the lien. As matter of law, I see no objection to their proceeding in a state court. King v. Bowman, 24 La. Ann. 506; Douglas v. St. Louis Zinc Co., 56 Mo. 388; In re Clark [Case No. 2,801]; In re McGilton [Id. 8,798]; Whitridge v. Taylor, 66 N. C. 273; 58 Ill. 176. It is well settled, too, that if the proceeding is instituted without the authority of this court, it will not be void; nor will this court interfere where no injury can result to the bankrupt estate. In re Iron Mountain Co. [Case No. 7,065]; In re Bowie [Id. 1,728]; In re Brinkmann [Id. 1,883]. The property having been sold by the assignee, and the action of trover being brought against the purchaser, it seems to me doubtful whether this court has any power to interfere. But, viewing it simply as a matter of discretion, I see no objection to the mortgagees proceeding to determine the amount of their lien in the state court. The mortgage was given more than three months before the commencement of proceedings in bankruptcy, so that any peculiar defence based upon the provisions of the bankrupt act [of 1867 (14 Stat. 517)], has been barred by lapse of time. In any event, they will not be allowed to recover more than the amount of their lien. The suit is prosecuted in a county where the parties, the assignee and the witnesses, all reside. I cannot assume that complete justice will not be done all parties, and no reasons seem to me to exist for interfering with the action of the state court. The petition must be denied.

Case No. 3,191.

COOPER v. BROWN et al.

[2 McLean, 495.][1]

Circuit Court, D. Illinois. June Term, 1841.

SPECIFIC PERFORMANCE—DISAFFIRMANCE OF CONTRACT—TENDER—LACHES.

1. A court of equity will not decree a specific performance of a contract, at the instance of the vendor, where he has been guilty of a gross negligence, and the property has greatly deteriorated in value.

2. The consideration of the purchase having been paid to the vendee, in case of his death, his representatives are bound to use, at least, reasonable diligence in executing a conveyance.

3. Where the vendor has been so negligent as to have no claim on a court of equity, for a specific performance, the vendee may disaffirm the contract, and recover back the money paid, in an action for money had and received.

[Cited in Dudley v. Hayward, 11 Fed. 546.]

4. The vendor is bound to make and tender the deed.

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

5. Where a specific performance can not be enforced by the vendor, by reason of his own laches, it would seem that a demand for a deed, by the vendee, can not be necessary, before bringing of the action for the consideration money.

6. It is not perceived why the bringing of the action, in such a case, by the vendee, is not, of itself, a disaffirmance of the contract. In this case, however, there was a demand.

[Cited in Hoffman v. John Hancock Mut. Life Ins. Co., 92 U. S. 165.]

Mr. Morris, for plaintiff.

Mr. Butterfield, for defendants.

OPINION OF THE COURT. This is an action of assumpsit, brought to recover the consideration paid for certain lots of ground, sold by the defendants to the plaintiff, in June, 1836, and which they agreed to convey by a deed of general warranty, but which they had failed to do. One of the parties from whom the deed was to come, deceased, and no steps were taken to procure a conveyance from the representatives of the deceased, by the defendants, until August, 1838, when a bill was filed. This bill is still pending, and has not been prosecuted with ordinary diligence. In the mean time the property purchased has so deteriorated in value as not to be of one fourth the value it was at the time of the purchase. Upon this state of facts, the court instructed the jury to find for the plaintiff, which they did, in order that the points raised by the defendants' counsel might be considered, on a motion for a new trial.

This motion was made, and rested upon two grounds—First: A sufficient excuse has been shown for the delay in executing the deed. Second: The remedy of the plaintiff is on the contract to convey, and not on the general money counts. Several years have transpired since this deed was to have been executed, and it appears that the defendants are chargeable with negligence. A demand of it has been made by the plaintiff. On the death of the person in whom the fee of the lots was, in part, vested, they should have obtained an order of court, by bill in chancery or otherwise, under the statute, for the executors or heirs to make a conveyance, in fulfillment of the contract. But great delay took place before this application was made, and the bill has been pending nearly three years, and no final order or decree has yet been obtained. This shows a want of that diligence which the law imposes. In addition to the unnecessary delay, the property is now not worth, perhaps, the one fourth of the price which the plaintiff agreed to pay for it. A delay in the performance of a contract, where a sufficient excuse for the nonperformance is given, and the condition of the parties and value of the property remain the same, substantially, as at the time of the contract, may be no obstacle to a decree for a specific performance. But there is no instance where the delay has been unreason-

able, and without sufficient excuse; and the property has greatly fallen in value, where a court has decreed a specific execution of the contract. Under such circumstances, it would not be in the power of the court to place the parties in the condition they would have been, had the contract been performed; and this is a sufficient reason why a court of equity will not decree an execution of it. This rule applies, with unanswerable force, to the case under consideration. Longworth v. Taylor [Case No. 8,490]; McKay v. Carrington [Id. 8,841]; Taylor v. Longworth, 14 Pet. [39 U. S.] 174.

The second ground on which the motion for a new trial is founded is equally unsustainable. Where the vendor neglects, refuses, or is unable to make an operative conveyance, the vendee, having paid the consideration, may sue on the covenant for a deed, or disaffirm the contract, and bring assumpsit to recover back the money paid. By bringing an action on the covenant he may recover the damages he has sustained by the breach, on the part of the vendor. And these are, in some cases, ascertained by the estimated value of the property covered by the contract. In the case of Weaver v. Bentley, 1 Caines, 47, Kent, J., in giving the opinion of the court, said: "We are of opinion the plaintiff had his election, either to proceed on the covenant and recover damages for the breach of it, or to disaffirm the contract, and bring assumpsit to recover back what he had paid on a consideration which had failed." To the same effect are the cases of D. Utricht v. Melchor, 1 Dall. [1 U. S.] 428; Howes v. Barker, 3 Johns. 509. Where the purchaser has paid any part of the purchase money, and the seller does not complete his engagement, so that the contract is totally unexecuted, he, the purchaser, may affirm the agreement for the nonperformance of it, or he may elect to disaffirm the agreement ab initio, and bring an action for money had and received to his use. Sudg. Vend. 234; Gillet v. Maynard, 5 Johns. 85, note a, p. 88. In Giles v. Edwards, 7 Term R. 181, Lord Kenyon, C. J., said: "As, by the defendants' default, the plaintiffs could not perform what they had undertaken to do, they had a right to put an end to the whole contract, and recover back the money they had paid under it." Assumpsit for money had and received, lies when a payment has been made on a contract which is put an end to. Towers v. Barret, 1 Term R. 133. This action cannot be sustained while the special contract or covenant is open and subsisting. If it remain open, the remedy is on the covenant; and this leads to the consideration of the ground on which the vendee may disaffirm the contract. This, it is conceived, he may do, in all cases where the vendor has failed, and has been guilty of such gross negligence as to prevent a court of equity from decreeing, at his instance, a specific performance. Whether or not the contract has been put an end to, may always be a subject of inquiry at the trial. In Fuller v. Hubbard, 6 Cow. 13, the court held where a contract to pay for and receive a conveyance of land, the money has been paid, though a conveyance has not been given, the vendee can not rescind the contract, and sue for the purchase money and interest, but must bring his action on the contract, as one still subsisting. That where one agrees to convey land, on the payment of money, the vendee must not only tender or pay the money, but he must demand a conveyance, and, after waiting a reasonable time for it to be made out, must present himself to receive it.

The contract in the above case was made, in 1812, by the plaintiff, to purchase one hundred acres of land for six hundred dollars. The sum of one hundred dollars was paid down, and the residue was to be paid in three yearly instalments, with interest. The vendee entered into the possession, and he made the last payment, in May, 1819, to the administrators of Smith. And the court say: "The payments were made by the plaintiff upon the fact of the special contract. Every thing has gone on, for a series of years, upon the supposition that the agreement was valid and subsisting." And the court held that it was the duty of the vendee to prepare a deed for the land, and tender it to the vendor, in pursuance of the custom at common law. There were circumstances, in that case, of acquiescence by the vendee, in the protracted payments, and in his occupancy of the land, which might go far to excuse the delay in making the deed. A new trial was granted; and the same case is reported in 7 Cow. 53, where the court again held that the plaintiff could not recover on the general counts, for money had and received. The second opinion of the court rested upon the ground, that the heirs of Smith could not be considered in default, as a deed had never been demanded of them by the plaintiff. And they held that, where a vendor dies, the same demand must be made of, and time allowed to his heirs, before a suit can be brought against his personal representatives for damages. Some time before the commencement of this suit, a demand of the deed was made by the plaintiff of the executors of the deceased vendor, who were authorized, in the will, to execute a conveyance. The rule of the common law, as to the preparation of the deed by the vendee, has not, generally, been adopted in this country. It is not in force in this state. The vendor, who binds himself to make the conveyance, must make it. 1 McLean, 104, 105 [Mitchell v. Thompson, Case No. 9,669]; Taylor v. Longworth, 14 Pet. [39 U. S.] 175. Doubts are entertained whether, under the circumstances of this case, a demand of the deed, though made, was necessary. Such had been the deterioration in the value of the property, connected with the lapse of time, that no court of equity could compel the vendee to

receive a deed. Had the deed been made when the vendors were bound to make it, the property might have been disposed of at little or no loss to the vendee; but, now, he would lose at least three fourths of the consideration paid. A demand can, in no case, be necessary as a mere matter of form. It presupposes a willingness, and, indeed, an obligation on the part of the person making the demand, to receive the deed demanded. And, in this case, it would seem not to have been necessary for the plaintiff to make a demand of a deed from the defendants; for, assuredly, he was not bound to receive a deed, and give up his claim to a return of the consideration money, when the demand was made. This would clearly be the case, if the action were founded upon the agreement; and the rule would seem equally to apply where the action, for money had and received, is brought. That contract, which can not be enforced by one party, by reason of lapse of time and his own laches, may, it would seem, be disaffirmed by the other party. The contract, in fact, is of no force in behalf of the vendor, either in a court of law or equity. The plaintiff never had possession of any part of the premises, nor are there any circumstances which can go to show, on his part, an acquiescence in the delay of making the title. Upon the whole, the motion for a new trial is overruled, and a judgment is entered on the verdict.

Case No. 3,192.

COOPER v. DUNGLER.

[4 McLean, 257.][1]

Circuit Court, D. Ohio. July Term, 1847.

JURISDICTION—CITIZENSHIP—AFFIDAVIT TO HOLD TO BAIL.

1. An affidavit to hold to bail under the statute of Ohio, need not state that the affiant is a citizen of any other state.

2. Citizenship must be alleged in the declaration, to give jurisdiction to the circuit court, but it is never necessary to state that fact in a collateral proceeding.

[3. Since the act of congress abolishing imprisonment for debt, to the extent of its abolishment by the respective states, no process can be issued to arrest a defendant in a civil suit, except under the state law.]

[Action by George Cooper against David A. Dungler.]

Cartlee & Hulbert, for plaintiff.
Folger & Keith, for defendant.

OPINION OF THE COURT. This is a motion to release the defendant from the custody of his bail, on the ground of the insufficiency of the affidavit of the plaintiff. Since the act of congress abolishing imprisonment for debt, to the extent that the same has been abolished by the respective states, no process to arrest a defendant in a civil case, can be issued except under the state law. By the practice act of Ohio (Swan's Ed. 1841, § 3), it is provided: "If any creditor, etc., shall make an oath or affirmation in writing, etc., that there is a debt or demand justly due to such creditor, of one hundred dollars or upward, specifying, as nearly as may be, the nature and amount thereof, and establishing one or more of the following particulars, etc., 'that he has property or rights in action, which he fraudulently conceals,' etc., the clerk shall issue a capias," etc. In this case, the plaintiff made an affidavit to hold the defendant to bail, and among other things swears "that he is a resident and inhabitant of the state of New York, and that David A. Dungler, who resides in the state of Ohio, is justly indebted to him in the sum of $1,185.50, and that he has property and rights which he fraudulently conceals, and that he has disposed of his property with intent to defraud his creditors." On this, a writ of capias was ordered for his arrest.

Two objections are made to the sufficiency of the affidavit. 1st. Because it does not contain a statement by the plaintiff that he is a citizen of the state of New York, it only says he is a resident and inhabitant of that state. It is not necessary that the affidavit should contain an allegation of citizenship. Such an allegation is necessary in the declaration to give jurisdiction to the court, but it is not necessary in an affidavit to hold to bail. And the second objection is, that the affidavit does not show the said Cooper is a citizen of any other state than the state of Ohio, nor does it show that he is an alien. Such an allegation is not necessary, the jurisdiction must appear in the pleadings, but it is never necessary to state the fact on which it rests on any collateral procedure. The motion is overruled.

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

Case No. 3,193.

COOPER v. GALBRAITH.

[3 Wash. C. C. 546.][1]

Circuit Court, D. Pennsylvania. Oct. Term, 1819.

SHERIFF'S SALE—INADEQUACY OF CONSIDERATION—PURCHASE BY JUDGE—EJECTMENT BY PURCHASER—PLEADING—PROOF—DEFENSES—JURISDICTION—CITIZENSHIP.

1. Ejectment for a tract of land purchased at a sheriff's sale, under a venditioni exponas against the defendant.

2. The plaintiff in ejectment must show a legal right to entry in general; and unless under special circumstances, the defendant should be let in, to prove the title an equitable one.

3. No person can recover or defend himself against his own grant or covenant; nor can any one controvert, against his own acts, though not

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

by deed, a title which he has thus acknowledged.

4. In an ejectment by a second mortgagee, against the mortgagor, the latter cannot set up the title of the first mortgagee.

5. The sheriff is empowered, by law, to convey to the purchaser under an execution, all the right, title, and interest of the defendant; and he acts as the defendant's attorney, appointed by law to sell and convey the land.

6. In an ejectment, by the purchaser at a sheriff's sale, against the defendant in the execution, or those who may claim under him, the plaintiff need not show any other title than the judgment, execution, and the sheriff's deed; and this title the defendant cannot controvert.

7. Citizenship, when spoken of in the constitution, in reference to the jurisdiction of the courts of the United States, means nothing more than residence.

[Followed in Butler v. Farnsworth, Case No. 2,240. Cited in Prentiss v. Brennan, Id. 11,385; Cheever v. Wilson, 9 Wall. (76 U. S.) 123; Doyle v. Clark, Case No. 4,053; Poppenhauser v. India Rubber Comb Co., 14 Fed. 708; Ward v. Blake Manuf'g Co., 56 Fed. 440.]

8. If a citizen of one state thinks proper to change his domicil, and to remove with his family, if he have one, to another state, with a bona fide intention to reside there, he becomes instantly a citizen of that state, and may sue in the courts of the United States as such.

[Cited in Burnham v. Rangeley, Case No. 2,176; Kemna v. Brockhaus, 5 Fed. 764; The Garland, 16 Fed. 288; Morris v. Gilmer, 129 U. S. 328, 9 Sup. Ct. 293.]

9. Fraud and official misconduct are not to be presumed, but should be proved; and it is not a fraud, or illegal, in a judge, who has presided in the court in which the judgment was rendered, to purchase property sold under an execution issued upon such judgment.

10. Inadequacy of consideration is no objection to a sale made under an execution; provided the sale was legally and fairly made.

[Cited in Clark v. Trust Co., 100 U. S. 152.]

This was an ejectment for land in the county of Northumberland, called the Limestone Lick tract. This land was purchased at sheriff's sale by George Lang, on the 17th of November 1807, under a venditioni exponas, and by regular conveyances, the title to the said land became vested in the lessor of the plaintiff. Possession was obtained by the purchaser some time after the sale, and continued in him until about the year 1812; when the defendant [Galbraith] entered into a part of the land for which this ejectment is brought. It was proved, that the lessor of the plaintiff [Cooper] was a naturalized citizen of Pennsylvania, and resided in this state, in the county of Northumberland, until the year 1816. In September 1815, he resigned his professorship in the College of Carlisle, with an intention, as he declared, of removing to New-Orleans, with a view of engaging in the practice of the law. About the same time, he broke up his family establishment, disposed of his furniture, and remained, with his family, for some time, at the house of a friend, as a visitor. He afterwards relinquished his intention of going to New-Orleans; and, in the autumn of the following year, he removed, with his family, consisting of his wife, two children, and his wife's sister, to Camden, in New-Jersey, on the opposite side of the river to Philadelphia; where he rented a house for a year, and continued to reside there until November 1817; when he removed to Philadelphia, where he has ever since resided. In December 1816, he was elected a professor in the College of Philadelphia, where he delivered a course of lectures, coming to the city for that purpose, and returning in the afternoon to his family in Camden.

The defendant offered in evidence to show, that the title to the land in question, when purchased by George Lang, was merely an equitable estate; which, it was contended by his counsel, is insufficient to support an ejectment in this court.

This evidence was objected to, upon the ground that a defendant, whose land has been sold under an execution, and those claiming under him, will not be permitted, in an ejectment, to recover the possession, to impeach the title, or to show an outstanding better title in a third person. The plaintiff need only show the judgment, the execution, and the sheriff's deed. 3 Caines, 188; 10 Johns. 223; 2 Yeates, 443; 5 Binney, 270; 4 Johns. 22; 2 Binney, 468. The legal right of possession which the defendant had, together with all his right and title to the land, passed by the sheriff's deed to the purchaser, which, as between the purchaser and the defendant in the executions, or those claiming under him, is sufficient in ejectment. The case of Carson v. Boudinot [Case No. 2,462], which will be relied on by the other side, does not contravene this doctrine; because Boudinot, the defendant in the ejectment, was not the defendant in the execution; nor did he claim under that defendant;—the legal estate was in Boudinot, and the equitable estate of the defendant in the execution, which alone was sold, was derived under a contract with the defendant in the ejectment.

In support of the evidence, it was contended, that the ground upon which all the decisions which have been read proceed, are, that the defendant in the execution is considered, quasi a tenant holding over; and therefore, he cannot deny the title of his landlord. But the reasons which govern those cases, do not apply to this; because it appears, that the defendant relinquished the possession for about four years, and that he afterwards re-entered. Whether his re-entry was tortious, or under a claim of title, is immaterial. The privity of landlord and tenant was destroyed by his relinquishment of possession; and he has now a right to stand upon his newly acquired possession, and to call upon the lessor of the plaintiff to show a legal right of entry; an equitable title will not do in this court, as has been repeatedly decided. The counsel referred to the act of assembly of the 6th of April, 1802, giving a speedy remedy to purchasers at sheriff's sales

to recover the possession. They also relied on the case of Carson v. Boudinot [supra].

Binney & Chauncey, for lessor of plaintiff.
Rawle & Tilghman, for defendant.

WASHINGTON, Circuit Justice, delivered the opinion of the court.

The general rule is undeniable, that the plaintiff in ejectment, must show a legal right of entry, to entitle him to a verdict; and that, if his title appear to be merely equitable, he does not maintain his action. If, then, the defendant is permitted by the rules of law, to disclose the real facts of the case, and to avail himself of defects in the title of the lessor of the plaintiff, by showing that that title is merely equitable, or is inferior to some other outstanding title in a third person; the evidence now offered ought to be received.

The question is, can the defendant oppose the title of the plaintiff's lessor, claimed under the sheriff's deed, by showing that the title of the defendant, at the time of the sale, was merely equitable, or was for any other reason defective? Let this question be considered under the following aspects: 1st, as if this deed had been made by the defendant himself; and, 2d, as made by the sheriff.

In the first case, it is clear, that this defence would have been inadmissible, upon the principle, that a man cannot recover in ejectment, nor defend himself against his own covenant or grant. He is estopped by his own act, from saying that his title was defective, when his deed professes to pass a good title. Upon a similar principle, a man will not be permitted, against his own act, though not by deed, to controvert the title which he has thus acknowledged; as if one man came into possession of land, by permission of another, he thereby admits the title of that other; and, in an ejectment to recover back the possession, he cannot question it. Upon this principle it is, that, in an ejectment by a second mortgagee against the mortgagor, the latter cannot protect his possession, by setting up the outstanding legal title in the first mortgagee; 3 Burrows, 1416; 4 Johns. 216; 1 Term R. 758. And in an ejectment by the lessor against his lessee, or any person claiming under the lessee, the defendant will not be allowed to set up a defect in the title of the plaintiff, or to show an outstanding title in a third person. Driver v. Lawrence, 2 W. Bl. 1259; 12 Salk. 347; 10 Johns. 358, 292; Doe v. Clarke, 14 East. 488; 3 Caines, 188. The doctrine maintained by these decisions, does not in any manner infringe upon the rule first stated, that the plaintiff must show a legal right of entry; because a conveyance by a person in possession, passes, prima facie, a legal estate; which the defendant, being estopped by his own act from controverting, by showing that he only could convey an equitable estate, no such defect in the plaintiff's title does or can appear; as between those parties, the plaintiff's title appears to be founded upon a legal right of entry.

2. The sheriff is empowered by law, to convey by deed to the purchaser, under an execution, all the right, title, interest, and estate of the defendant, as fully as the defendant himself, or an attorney empowered for that purpose by him, could have done. The officer, in fact, acts as such attorney, appointed for that purpose by law. The purchase money is paid to the defendant, in the execution, or is applied to his use, in discharge of his debt; between whom and the purchaser, the law raises a contract, in like manner as if the conveyance had been made by him. The cases cited by the plaintiff's counsel, are full to the point, that a purchaser under an execution, in an ejectment against the defendant in the execution, or one claiming under him, need not show any other title than the judgment, execution, and sheriff's deed; and that the defendant will not be permitted to controvert such title, by showing it to be defective, or by setting up a better outstanding title in a third person. To these cases, may be added the case of Doe dem. Da Costa v. Wharton, 8 Term R. 2. The case of Carson v. Boudinot [supra], in this court, was that of an ejectment, brought by the purchaser of a mere equity, under the sheriff's sale, not against the debtor, or a person claiming under him; but against the owner of the legal estate, under whom the debtor claimed an equitable title. It is therefore consistent with all the cases that have been referred to. But it is contended, by the defendant's counsel, that the present case differs from those which have been cited, in the circumstance, that the lessor of the plaintiff had the full effect of his purchase, by having had the possession of the premises; and that the defendant, having afterwards gained the possession, has a right to rely upon that, until the lessor of the plaintiff has shown a legal right of entry in himself. The difference in point of law, produced by this circumstance, is not discerned by the court. By resigning the possession at one time, and afterwards regaining it, the defendant does not cease to be the same person, whose entire interest in this estate was conveyed by the sheriff, and subject to every disability which that conveyance imposed upon him. If the conveyance had been made by himself, instead of the sheriff, it is obvious, that, against his own act, he would be as much estopped to set up a defect in the title he had passed to the plaintiff in this case, as he would have been had he refused at first to surrender the possession. The disability to make this defence is so firmly attached to him, and to all those claiming under him, that he cannot shake it off by any device of this kind. Having shown that there is no difference between a sheriff's deed regularly made, and a deed by the defendant himself,

the same conclusion follows. If the defendant had entered upon this land, under a title better than that which the plaintiff's lessor obtained under the sheriff's deed, afterwards acquired, he might certainly have availed himself of it in this ejectment. The opinion of the court, then, is, that the evidence offered ought not to be admitted.

The objections made by the defendant's counsel were, 1st. That the lessor of the plaintiff, notwithstanding his temporary removal to the state of New-Jersey, continued to be a citizen of this state, and therefore this court has not jurisdiction of the case. That, although his family resided in the former state, during a year prior to the institution of this suit, and the plaintiff generally returned to Camden at night; still his professional duties, as a member of the university, were performed in this city, and here he spent his days during a great part of that year. 1 Maule & S. 103; 5 Ves. 787. 2d. The fieri facias, under which the sale of the land was made, commanded the sheriff to levy on the real estate of the defendant, in case he had no personal estate; and the sheriff not having returned that the defendant had no personal estate, it does not appear that he had any authority to serve and sell his land; and consequently, the sale was void. The deed of the sheriff is not even prima facie evidence, that all proper steps were pursued by the officer, to justify the sale. [Williams v. Peyton] 4 Wheat. [17 U. S.] 77; 2 Bin. 231; 4 Yeates, 341. 3. There is no evidence that the sale of this land was adjourned to the 17th day of November, when it was sold; and the 16th having been the day mentioned in the sheriff's advertisement, the sale could not legally take place on any other day, without a new advertisement. 4. On the merits of the case, it was contended, that the lessor of the plaintiff was the presiding judge of the court in which this judgment was rendered; and it appears in evidence, that he purchased an interest in that judgment, and was concerned with the nominal purchaser and others in the purchase of this land under the execution;—that this conduct amounted to a breach of his official duty; and, in short, that the whole transaction was tainted by such marks of fraud, imposition, and misconduct, as ought to invalidate the purchase.

It was answered, by the plaintiff's counsel,—1. That the evidence in the cause is complete, to show an abandonment of Pennsylvania, and a bona fide removal to the state of New-Jersey. 2. The act of assembly of this state, passed the 13th April, 1807, made no other alteration in the law of 1705, than to forbid a ca. sa. to issue where the plaintiff had personal or real estate: and the act of 1705 was equally imperative, that the real estate was only to be levied upon in defect of the personal. Yet, during the course of a century, the return of the fieri facias has uniformly been similar to that under which this land was taken in execution; and the doctrine contended for on the other side, if upheld by the court, would uproot most of the landed titles in this state. The protection of the real estate against seizure and sale, where there is personal property, is a privilege intended for the advantage of the debtor. If he chooses to waive it, he is at liberty to do so, either expressly or by implication. In this case, he has done so expressly, by an agreement made in August, 1807; that if he did not pay the executions which had been levied on this land, and also on the Beaver Dam tract, in four weeks, the land might then be sold. This agreement amounts to an acknowledgment that there was no personal property; or, if there was, it is a waiver of the defendant's privilege of insisting that his personal property should be first seized and sold; and he thereby consents, unconditionally, to the sale of the land, if the executions should not be satisfied within the time mentioned. Cases cited: 8 Johns. 365; 1 Johns. 45; 4 Yeates, 22. 3. This objection is contradicted by the record; which states, that this land was offered for sale on the 16th and adjourned over till the succeeding day. 4. The argument, under this head, proceeded principally upon the evidence given in the cause, which was voluminous.

WASHINGTON, Circuit Justice, charged the jury:

The question of jurisdiction is first to be considered. It is composed of law and fact; and as soon as the latter is ascertained, the question is relieved from every difficulty. Citizenship, when spoken of in the constitution in reference to the jurisdiction of the courts of the United States, means nothing more than residence. The citizens of each state, are entitled to all the privileges and immunities of citizens in the several states; but to give jurisdiction to the courts of the United States, the suit must be between citizens residing in different states, or between a citizen and an alien. If a citizen of one state should think proper to change his domicil, and to remove himself and family, if he have one, into another state, with a bona fide intention of abandoning his former place of residence, and to become an inhabitant or resident of the state to which he removes; he becomes, immediately upon such removal, accompanied with such intention, a resident citizen of that state, and may maintain an action in the circuit court of the state which he has abandoned, or in that of any other state, except the one in which he has settled himself. Time, in relation to his new residence, occupation, a sudden removal back to the state he had abandoned, after instituting a suit in the circuit court of that state; and the like; are circumstances which may be relied upon, to show, that his first removal was not bona fide, or intended to be permanent; but they will not be suf-

ficient to disprove his citizenship in the place of his new domicil, and to exclude him from the jurisdiction of the circuit court for the district in which he had formerly resided; if the jury are satisfied, from the evidence, that his first removal was bona fide, and without an intention of returning. And, if the jury be so satisfied, the jurisdiction will not be ousted, though it should appear, that one of the motives of the plaintiff in removing, or indeed his only motive, was to enable him to bring a suit in a court of the United States, sitting in the state he had removed from. The circumstances to prove a bona fide intention in the lessor of the plaintiff, to change his domicil, are very strong. He was the professor of chemistry, in the College of Carlisle; the salary was small; and it is probable, insufficient to support his family. He spoke to his friends, at different times, of his determination to remove to New Orleans, or to Alabama; and there to prosecute the practice of law. He accordingly resigned his professorship, sold his furniture, broke up his family establishment; and, after spending some time in the family of a friend, as guests, he rented a house for a year, in Camden, and there re-established himself and his family. It was after this step was taken, that he was elected a professor in the university of this city; where he was seen in the forenoon attending to his duties; and in the evening he returned to his family. His occupation in Philadelphia, under these circumstances, is not of itself sufficient to disprove his having been, at the same time, a resident citizen of the state where his family was. In Hylton's Lessee v. Brown [Case No. 6,981], in this court, the case was, that Joseph Griswold, who resided with his family in New-York. came to Philadelphia, with his son, in order to establish him here as a distiller, and to instruct him in that art. He continued here, engaged in that business, for eight or nine months, returning at intervals, during that period, to visit his family; and, after he had completed the business which caused his visit to this city, he returned to his family in New-York, and there remained. The court decided, that the temporary abode of Griswold in Philadelphia, without his family, for a special purpose, with the animo revertendi always continuing, did not make him an inhabitant of this state.

Having thus stated what are the principles of law which must govern this case, the jury will decide, whether, upon the evidence, the removal of the plaintiff to New-Jersey was bona fide, and with intention to become a resident and inhabitant of that state.

2. & 3. The answers given to these objections, by the counsel for the plaintiff, are entirely satisfactory. No case was produced, in which it has been decided by any court of this state, that it is necessary for the sheriff to return on the fieri facias, that the defendant has no personal estate. This is a matter which must always be within the defendant's own knowledge; and it would seem reasonable, at least, that if, in point of fact, he has personal property, and intends to object on that account, to the levy on his real estate, he should make it before the court from which the execution issued. But be this as it may, there is strong evidence in this case, of the defendant's consent that the land should be sold, upon a certain event which took place. This amounted to a waiver of the objection, by which the defendant ought to be bound.

4. Upon the merits of this cause, we can do no more than lay down a few principles of law, which ought to govern the jury, in the decision which they may come to. The lessor of the plaintiff is charged with judicial misconduct, and gross fraud, in acquiring the title on which this action is founded. Let it be premised, that fraud and misconduct, of the gross nature, imputed to Mr. Cooper, are not to be presumed; but the reverse. He who makes these charges, must establish them by evidence to your satisfaction. It should also appear, that the fraud or misconduct imputed to him, was of a nature to injure the defendant, and was applicable to the particular subject which you have to decide. We understand from the evidence, as well as from the admission of the defendant's counsel, that, whatever interest the plaintiff acquired in the execution, under which this land was sold, was subsequent to the time it was issued; and that no question respecting that execution, or the sale of the Limestone Lick tract, was ever brought before the court of which the plaintiff was a judge, until the 19th of November, when the sale of this tract, and of the Beaver Dam tract, purchased by Mr. Albright, was confirmed; on which occasion, the record states, that Judge Cooper declared he had an interest, and left the bench.

The assertions that a judge cannot legally become interested in an execution, which has issued under the authority of the court of which he is a member, or in property sold under such execution; and that by making such acquisitions he is guilty of a breach of his duty as a judge, do not receive the sanction of this court. It may be indiscreet in him to do so; and it may be unbecoming the dignity of his station to speculate in purchases of this sort, unless under very peculiar circumstances. Whenever a question comes before a court, in which the judge knows that he has an interest of any kind, he violates decorum, morality, and law, by remaining on the seat of justice, and giving an opinion in the case. We should not hesitate in saying, that a claim, founded upon such a gross breach of duty, ought not to receive the countenance of any court. But we do not understand, even from the defendant's counsel, that the plaintiff gave any judicial opinion respecting the sale of this property; or that any question was, at any

time, brought before the court, which called for judicial interposition, except on the 19th, when he very properly retired from the bench. His direction to the sheriff, to sell this land for hard money, was not given judicially, nor could it be; nor does it appear that it was so understood by the sheriff. As a party concerned in interest, he had a right to direct the sheriff to sell for specie, and for ready money. The writ was returnable to that session of the court, and therefore the sheriff had no authority to give credit without the consent of the person interested in the execution; and it is no just or legal ground of complaint against them, that they did not give such consent. As to all that has been said and proved, respecting the sale of the Beaver Dam tract, it can have nothing to do with the question now under discussion,—that land was not purchased by the plaintiff, and is not involved in this controversy.

As little have you to do with the inadequate price at which it is said this land was sold. If the sale was fair, and in other respects legal, inadequacy of value, given for property sold at public auction, was never yet supposed, much less decided, to be a ground for invalidating the sale.

Verdict for plaintiff.

Case No. 3,194.

COOPER v. GIBBS et al.

[4 McLean, 396.][1]

Circuit Court, D. Michigan. June Term, 1848.

PAYMENT OF PROMISSORY NOTE—NOTICE TO INDORSERS—EXTENSION TO MAKER.

1. An accepted draft will not be considered in payment of an indorsed note, unless there was an express contract that it should be so received.

2. Notice to indorsers is sufficient, if it describe the note so that the indorsers must know it, and state the payment was demanded and protest made, and that the holders look to the indorsers for payment.

3. If time be given, for a valuable consideration, the indorsers are discharged.

[At law. Action by James F. Cooper against George C. Gibbs, J. Wright Gordon, and —— Sanford as joint indorsers of a promissory note. The defendant Sanford was not served with process, and the other defendants pleaded that fact in abatement. Plaintiff replied, and the demurrer of defendants to the reply was overruled. Case No. 3,195, next following.]

Mr. Hand, for plaintiff.

OPINION OF THE COURT. Gentlemen of the Jury: This suit is brought by the indorsee against the indorsers of the following promissory note: "Six months after date I promise to pay on the order of George C. Gibbs, James S. Sanford and J. Wright Gordon, two thousand two hundred and fifty dollars, with interest, for value received, at the office at the North American Banking and Trust Company, in the city of New York. (Signed) Sidney Ketchum." Indorsed by the payers in blank. The note was not paid at maturity. Stephen Merrihew, of the city of New York, a notary, was sworn as a witness, who stated that at the maturity of the note he presented it for payment, at the North American Bank and Trust Company, in the city of New York, and finding no funds in the bank to pay it, he protested the note for non-payment, and gave to the indorsers the following notice: "New York, 3d July, 1839, $2,250.00. Gentlemen—Please to take notice, that a promissory note, made by Sidney Ketchum, for two thousand two hundred and fifty dollars, with interest, indorsed by you, is protested for non-payment, and that the holders look to you for payment thereof. (Signed) Stephen Merrihew, Notary Public," and directed to George C. Gibbs, Jas. S. Sanford, J. Wright Gordon, at Marshall, Michigan.

First Ground of Defense. This notice is objected to as insufficient. We think it contains all the requisites of a good notice. In the first place, it describes the note with such certainty as not to be mistaken by the indorsers, and they are informed that it was protested for non-payment, and that the holder will look to them for payment. Nothing more than this was required. The signatures are printed, which is proved to be the mode of signing in New York.

Second Ground of Defense. That the note was paid. Sidney Ketchum being sworn, states that the defendants were accommodation indorsers. The note was not paid by him, and the witness does not know that it would do to say it was paid. Witness was in New York, and Ogden informed him if he would get a good acceptance he would take it for the note, and witness proposed the name of Schuyler, a flour dealer, then in New York City. Ogden said he would inquire into the circumstances of Schuyler, and in a day or two he told witness that he would take the acceptance. Witness procured the acceptance, went to Ogden's office, found him absent. Ogden's clerk took the acceptance, and, on calculation, found it overpaid the note about fourteen or fifteen dollars, witness thinks, and the clerk paid to witness the balance at the time. Witness requested the delivery of the note, but the clerk declined giving it, saying that Ogden would return in a few minutes, and witness had better speak to him on the subject of the note. Ogden advanced some money to the plaintiff, and was the holder of the note now sued on, at least one-half of the amount of it, and he received it for collection. Ketchum called on witness and inquired whether witness would take a good acceptance in

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

payment of the note. Witness said he would. The acceptance of Schuyler was offered. Witness made inquiry as to his responsibility, and could ascertain nothing. Then he informed Ketchum that he could not take the acceptance in payment of the note, but would receive it and any thing else in the shape of security, and would apply any payments in discharge of the note. The acceptance was taken on these conditions. Witness instructed his book-keeper to apply any payments, made on the acceptance, in discharge of the note. The acceptance was for $2,350. The note was for $2,250. The acceptance dated 6th July, 1839; interest up to that time $80.07; interest for sixty days, the time of the acceptance, $57, making the sum of $2,387.07, from which deduct $37 there will be left the sum $2,350.07, for which the acceptance was drawn. The thirty seven dollars were paid by Ketchum. Witness never agreed to give up the note on the receipt of the acceptance; but gave Ketchum to understand that he would not receive the acceptance in payment; that he received it as security. The plaintiff afterward took up the note, paying witness the amount advanced by him.

Mr. Ketchum speaks with much hesitancy, gentlemen, in regard to the payment of the note by the acceptance. Indeed, he does not say when the acceptance was handed to Ogden, that it was received in payment. He requested of the clerk the delivery of the note, but he declined giving it, and referred the witness to Mr. Ogden. And on his suggestion, witness permitted the note to remain in his hands until the acceptance was due. If the acceptance was given in payment of the note, it was a discharge of it as fully as if the money had been paid. And if this had been done, the note would hardly have been left in the hands of Mr. Ogden. The fact of retaining the note, with the assent of Ketchum, until the acceptance was due, would seem to imply that the note was not considered as discharged by the accepted draft. If by this the note were paid, it could be of no value in the hands of Ogden, or of any other person, who had notice that it had been paid. The statement of Mr. Ogden, who has no interest in the transaction, is explicit, that he informed Mr. Ketchum the draft would not be received in payment of the note, but as security; and that any amount paid upon it should be applied in discharge of the note. And the note, after the delivery of the acceptance to Ogden, being left in his possession, is corroborative of his statement. It will be for the jury to pass upon the fact of payment. To make the acceptance a payment of the note, it must be made clearly to appear to the jury, that it was so received. It seems that the suit which had been commenced on the note, was discontinued on the acceptance being given. And the second acceptance was given for the same amount as was due on the note. There was some money paid at the time the acceptance was renewed. This money, Mr. Ketchum says, was paid to him by the clerk; but Schuyler and Ogden both say the money was paid by Ketchum. Ogden says that he was not satisfied with the responsibility of Schuyler.

That time was given for the payment of the money, which releases the indorsers, is the third and last ground of defense. Was the acceptance given for, or on account of, the note? If it were so given, as a security, it did not postpone an action upon the note. To discharge the indorsers, there must be a valid agreement between the holder and maker of the note, to postpone the payment for some time. And to have this effect, witness says that Ogden said he believed Schuyler was good, but he would rather that witness would leave the note until the acceptance became due, for the reason that he had no interest in the matter—was doing business for others; to which witness assented. Witness was arrested in New York, on the note, and was required to give bail, unless the suit should be settled. Ogden agreed with witness that he would receive an acceptance in payment of the note; and the acceptance was given, and the suit was settled. Ogden is reputed to be a lawyer in New York. Witness has been sued on the note in Michigan. The acceptance has never been given up. It was, witness thinks, payable in sixty days. It was due before witness was again sued on the note, a year or more. At the time Ogden agreed to take a good city acceptance, and when the acceptance was taken, nothing was said as to what should be done with the note. At the time the acceptance was given, and ever since, witness has been greatly embarrassed; thinks he gave but one acceptance. Witness is positive that at the time the acceptance was given, a sum of money was paid to him, which was the amount the acceptance exceeded the note. Schuyler had no assets of witness. Schuyler says, on or about the 4th of September, 1839, witness accepted a draft drawn by Ketchum, payable to his own order, for two thousand three hundred and fifty dollars, payable in sixty days. It was indorsed to Ogden. This draft became due about the 6th of November, following. Witness accompanied Ketchum to Ogden's office, where Ketchum gave Ogden his draft or note indorsed by witness, for the above amount, and took up the first acceptance. Witness was able to pay the amount when the second draft became due. Ketchum paid some money on the renewal of the acceptance. It must be an agreement, as if suit should be commenced before the time agreed upon, a court of chancery would enjoin the party from prosecuting the suit. And such an agreement must be founded on a valuable consideration.

Such an agreement may be proved by parol or by writing, and must have been so expressed as to be understood by the parties. Such an agreement does an injury, in a legal

point of view, to the indorsers. They have the right to pay the note to the legal holder, and be subrogated into the rights of the holder, to prosecute the makers of the note. But if he has made such a contract with the holder, as to prevent any action from being brought on the note for a given time, this right of the indorsers is impaired, and they are consequently relieved from responsibility. If the acceptance was not received in payment, but was received with an express agreement that there should be no proceeding on the note until the acceptance become due, the defendants are discharged. The holder of the note was not bound to sue the maker, but he discharged the indorsers if he made a contract, founded on a valuable consideration, that he would not sue for a given time. And if, as a condition to the giving of the acceptance, the holder agreed to wait until the acceptance became due, the defendants are discharged. Whether there was such an agreement, is for the jury to determine. If there was a contract of this import, it must have been made with Mr. Ogden, the witness. All that is pretended to have been done in regard to the acceptance was done by him; he, in fact, at the time, being the holder of the note, owning one half of it, and having it in his hands for collection. And Ogden, from general recollection, says that he made a general agreement with Ketchum respecting the note, except what he has stated on his examination, that on taking the acceptance there was no agreement to give time. If you find for the plaintiff, you will give interest on the note; if for the defendant, your verdict will be general.

Jury could not agree, and were discharged.

Case No. 3,195.

COOPER v. GORDON et al.

[4 McLean, 6.][1]

Circuit Court, D. Michigan. June Term, 1845.

JURISDICTION—ACTION AGAINST JOINT INDORSERS—SERVICE OF PROCESS—PLEA IN ABATEMENT.

1. Where there are three joint indorsers, and the process is served on two of them, under the act of 1839 [5 Stat. 321], the suit may be prosecuted against the two.

2. A plea in abatement can not be retained, on the ground that the other joint indorser is a citizen of another district.

[At law. Action by James F. Cooper against James Wright Gordon, George C. Gibbs, and —— Sanford, as joint indorsers of a promissory note.]

Mr. Hand, for plaintiff.
Mr. Romeyn, for defendants.

OPINION OF THE COURT. This action is brought by the plaintiff, a citizen of New York, against the defendants as indorsers of a note. The defendants pleaded in abatement that one Sanford, who is living, was a joint indorser with defendants. To this the plaintiff replied, that Sanford was not a citizen of Michigan, but of another state, at the time the suit was commenced. The pleadings raise the question whether, under the act of congress of the 25th February, 1839, this action is maintainable. That act provides, "that where any suit at law or equity commenced in any court of the United States, there shall be several defendants, any one or more of whom shall not be inhabitants or found within the district where the suit is brought, or shall not voluntarily appear thereto, it shall be lawful for the court to entertain jurisdiction, and proceed to the trial and adjudication of such suit between the parties who may be properly before it; but the judgment or decree rendered therein shall not conclude or prejudice other parties not regularly served with process, or not voluntarily appearing to answer; and the misjoinder of parties who are not so inhabitants, or found within the district, shall constitute no matter of abatement or other objection to said suit." Under this act, where an individual is served with process, he being within the district temporarily, but a citizen of another district, he may waive his objection to being sued out of his district, and appear in the suit. But there can be no doubt under the act that a service of process being made on a part of the defendants, they being citizens of the district, that the suit may be prosecuted against them. The statute was intended to provide for a case like this; and words could not be more appropriately used to effectuate the object.

The defendants are both citizens of Michigan, and having been served with process they are bound to answer. The demurrer is overruled.

[NOTE. On the trial of the action, the jury were unable to agree. See Case No. 3,194.]

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

Case No. 3,196.

COOPER v. HARDY.

[Cited in Ten Broeck v. Pendleton, Case No. 13,827, in brief of counsel, to the point that on attachment the court may amend the declaration, if the justice of the case requires. Nowhere reported; opinion not now accessible.]

COOPER (ISAACS v.). See Case No. 7,096.

Case No. 3,197.

COOPER v. JOHNSON.

[Cited in Trustees of Mut. Bldg. Fund & Dollar Sav. Bank v. Bosseuix, 3 Fed. 835. Nowhere reported. This case was decided in the third district court of Louisiana, and is probably a state case.]

COOPER (KEENE v.). See Case No. 7,641.

Case No. 3,198.

COOPER v. LABER.

[1 Biss. 539.][1]

Circuit Court, N. D. Illinois. Oct. Term, 1866.[2]

SECURITIES GIVEN TO RAILROADS TO AID IN CONSTRUCTION—BONA FIDE HOLDERS MAY ENFORCE—COLLATERAL AGREEMENT — PRESENTATIONS — INFORMAL INDORSEMENT CURED — MAKER MUST RESPOND TO INNOCENT HOLDER.

1. A note given to a railroad company as subscription for stock, may be enforced by a bona fide holder, notwithstanding existing agreements or equities between defendant and the company.

2. An agreement made by the company at the time of the giving of the note, and as a part of the same transaction, that it would save defendant harmless on his subscription, does not constitute a valid defense unless the plaintiff can be charged with notice.

3. The fact that the plaintiff knew for what the note and an accompanying mortgage were given, makes no difference; nor do any false or fraudulent representations made to induce defendant to execute the note, unless notice of them is brought home to the plaintiff.

4. The plaintiff having received the note and mortgage attached to, and as collateral security for a bond of the company, containing a clause that the note and mortgage were assigned and transferred "in connection with the bond and not otherwise," but without any written indorsement, any informality in such transfer is cured by the written indorsement of the note made before maturity by the president with the knowledge and consent of the board of directors.

5. The rule of law that the defendant having executed the note and enabled the company to raise money on it, must respond to an innocent holder, is well established and founded on the plainest principles of justice and equity.

[See note at end of case.]

This was an action by [Tunis Cooper] the indorsee of a promissory note given by the defendant [Jacob Laber] on the 6th day of May, 1856, for the sum of thirty-seven hundred dollars, to the Racine and Mississippi Railroad Company, and payable with ten per cent. interest, at the office of the company, in Racine, Wisconsin, on the 10th day of May, 1861.

Lewis Umlauf, for plaintiff.

Knowlton & De Wolf, for defendant.

DRUMMOND, District Judge, charged the jury as follows:

It is necessary that you should understand clearly the circumstances under which this note was given. By acts of the legislatures of Wisconsin and of Illinois, certain corporations were authorized to construct a railroad from Racine, partly through Wisconsin and partly through Illinois to the Mississippi river at Savannah, and to consolidate those roads with each other, so as to make one continuous line of road. Articles of association were entered into to accomplish that purpose. After this was done, the company sought to raise money by obtaining subscriptions to the stock of the road from different parties along the line, and took from them notes similar in character to the one that is in evidence here, and to secure their payment mortgages were given on real estate. Accordingly, to secure the payment of this note, the defendant executed a mortgage on his farm. At the time this note and mortgage were given, the Racine and Mississippi Railroad Company entered into an agreement with the defendant to the effect that, in consideration that the defendant assigned to the company his right to any dividends that he might be entitled to on his stock, the company would save him harmless from the payment of interest and from any loss whatever for his subscription to the stock. On the 29th day of May, 1856, the railroad company executed a bond, with coupons attached, and in June of that year this bond, together with the note and mortgage, were assigned to the plaintiff, he paying the amount of the note. The bond recited that the company was indebted to the bearer in the sum of thirty-seven hundred dollars, payable at their office, in the city of New York, on the 10th of May, 1861, with interest from and after the 10th of May, 1856, at the rate of ten per cent., payable semi-annually, and that as security for the same it assigned and transferred to the holder of the bond the note and mortgage of the defendant. The note unindorsed, the mortgage and bond, were fastened together and delivered to the plaintiff's son and agent, Fletcher Cooper, at the time the money was paid. There is evidence tending to show that certain representations were made at the time by parties who procured the note and mortgage from the defendant, and which it is said caused him to execute them, and there has been also a good deal of evidence introduced, the object of which, on the part of the defendant, is to show that these representations were untrue, and therefore it is claimed the defendant was not bound to pay the note and mortgage. The only remark the court desires to make in relation to that is this: It is necessary for you to distinguish between statements made by way of expressing an opinion or a simple recommendation, and those made by the parties with a view of inducing the defendant to execute the note. A mere expression of opinion, or a recommendation in relation to certain things should, of course, be regarded merely as the judgment of the party. A statement of the facts which the defendant would not be presumed to know, and had not the means of knowing, with a view of inducing him to execute the note, would be different.

The court will leave it to you to determine whether there were representations made as facts to the defendant, with a view to induce him to execute the note and mortgage, which

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

[2] [Affirmed in Laber v. Cooper, 7 Wall. (74 U. S.) 565.]

were false. If you should find that these statements were made, and were untrue, the next question would be whether they would affect the plaintiff.

It was in June, 1856, that the note and mortgage were transferred to the plaintiff. You have to take the state of facts as they existed at that time, in order to ascertain the bona fide character of the assignment; whatever might occur afterwards could not affect the plaintiff. It is made a question how far the facts at the time bound the plaintiff. There can be no doubt, from the evidence in the case, that the plaintiff knew for what the note and mortgage were given; that they were given as a subscription for so many shares of the capital stock of the company. The main question is, whether the plaintiff knew of the existence of the representations alleged to be made, at the time, or prior to the execution of the note, and also knew that they were untrue. Is there evidence in the case that tends to show that the plaintiff or his son, Fletcher Cooper, at the time the bond, note, and mortgage were taken, knew, or had reason to know, that there were any false or fraudulent representations made to the defendant to induce him to execute them? If there is not any such evidence in the case, then, according to the view which the court takes, the plaintiff would be as to that a bona fide holder of the note and mortgage, and would not be bound by any equities which might exist between the railroad company and the defendant.

The defendant's counsel has contended that the note and mortgage were invalid, for the reason that the articles of consolidation were void; that there was in reality no foundation in law for the note and mortgage to rest upon; and some authorities have been cited on this point. I have not had as much time as I would desire to consider this question. The main ground upon which he puts it, as I understand, is, that those articles of association between the different corporations were not under seal, and therefore the union of the roads in the two states was illegal. So far as I am at present advised, I am inclined to think, considering the manner in which this question arises, so far as the authority was concerned on the part of the railroad company to receive this note and mortgage, we must treat them as a valid note and mortgage.

I have spoken of the alleged misrepresentations that were made at the time, and of the necessity of the plaintiff or his agent knowing that these misrepresentations were made, before that part of the defense can be made out. I will now particularly call your attention to the fact that at the time the note and mortgage were given, the railroad company entered into a written agreement with the defendant. There is no doubt that the note and mortgage, and the agreement, were all one transaction. The question is, was the plaintiff, at the time of the transfer to him, aware of that agreement? Did he know the nature and contents of that contract? If he did, then he was bound by it, not otherwise. You will see that the agreement, by its terms, seems to contemplate that the note and mortgage were to be transferred, because in the case of transfer the company guarantees the defendant against loss. The view that I take of it is that, unless the plaintiff or his son, as agent, knew of the existence of this agreement made by the company, he is not bound by it.

The only remaining question is whether there was an indorsement or assignment of the note to the plaintiff. The evidence shows that the Racine and Mississippi Railroad Company appointed agents to negotiate the loan of these notes and mortgages, and by virtue of the authority so given, as I understand, this and similar bonds were executed by the company, which were secured collaterally, as in this case, by notes and mortgages. As I have stated, the note was not indorsed by the company. By the terms of the bond, they transferred and assigned the note; but there is a clause in the bond that declares that the note and mortgage were assigned and transferred in connection with the bond—"in connection with the bond, and not otherwise." So that I think it is quite clear that it was the intention of the company that the bond, the note, and the mortgage, should all go together, forming one security to the holder or bearer. They were all attached together, and transferred at the same time to the plaintiff.

There may be a question whether this was not legally a good indorsement of the note by the payees, the Racine and Mississippi Railroad Company. It is true the indorsement was not written on the back of the note, but it was written upon a paper which was attached to it, and which it was intended should become a part of it. However that may be, there was a written indorsement afterward, and years before its maturity, made upon the note by the president of the company to the plaintiff. Some question has been made whether this indorsement was authorized. You have heard the testimony of Mr. Durand, the president, on that subject. There is no doubt that it was the intention of the company to transfer whatever right of property it had in the note to the plaintiff, at the time that the money was received and the negotiations consummated. Therefore, the written indorsement upon the note, which was subsequently made, was only carrying out the intention of the parties at the time. He says that it was the subject of conversation in the board of directors; that indorsements were made by him from time to time in the presence and with the knowledge of the board; and he gives the reason why. It was supposed that under the law of Illinois a written indorsement of a note was necessary. It was

thought, he says, by the board, that no additional authority was necessary in order to enable him to make the indorsement, and it was made accordingly. If you believe this, then I think there is no doubt that there was a valid technical indorsement made on the note, because if his statement is true, it was done with the knowledge and consent of the board of directors, and in fact it would have been a breach of faith for the board of directors to withhold the indorsement from the note, if that were necessary, because they had transferred the note for which they had received value in cash, and it was right that they should give to the plaintiff all the power and control over the note which they themselves had.

You will perceive, therefore, that according to the view which the court takes in this case, the plaintiff was a bona fide holder of the note, and can recover, if he did not know that there were any false or fraudulent representations made at the time, or previous to its execution, and which caused its execution, and if he did not know of the existence of the contract or agreement given by the railroad company at the time that it was executed, and if he paid value for it. The reason of this is apparent. It is said to be a hard case for the defendant, as the stock has become worthless, that he should pay his money for nothing. That may be true, but the question is, who should suffer a loss in a case like this? Admitting that he has been imposed upon, and as between the original parties themselves he ought not to pay it, still if he or the plaintiff has to suffer, the rule is that by executing the note and enabling the company to put it in circulation and raise money on it, the defendant must suffer the loss, for if he had never executed the note, or caused it to be put in circulation, the plaintiff never would have advanced his money on it. That is the reason of the rule of law on the subject, and it is founded, it seems to me, on the plainest principles of justice and equity.

Therefore you will see that the case turns, so far as you are concerned, upon this, viz: whether there is any evidence in the case which shows that the plaintiff knew that there were misrepresentations made (if there were misrepresentations of the character that I have stated) and whether the plaintiff knew of the existence of the agreement that was made at the time by the railroad. If he did not, and if there was no fact brought to his knowledge which would cause a prudent man to make inquiry, then I think that the plaintiff is entitled to recover. If, however, he knew of the existence of any fraud —if he knew of this contract and its terms— then he is not a bona fide purchaser without notice, but he takes the note and mortgage subject to the equities which exist between the parties, and the defendant would not be liable. The other questions raised by the defendant I shall reserve for future consideration, if it becomes necessary. If you shall find for the plaintiff, of course he is entitled to recover the amount of the note with interest from the last payment, which was the 10th day of May, 1857.

Verdict for plaintiff.

[NOTE. Defendant moved for a new trial. The motion was overruled, and judgment entered upon the verdict.

[From statement of case by Mr. Justice Swayne in the supreme court, see post.]

NOTE [from original report]. This case was carried by writ of error to the supreme court and the judgment below affirmed, the position and reasoning of Judge Drummond being adopted as the views of the supreme court. [Laber v. Cooper] 7 Wall. [74 U. S.] 565. A bona fide holder of bonds may enforce them, independent of any equities between the original parties. Morris Canal & Banking Co. v. Fisher, 1 Stock. [9 N. J. Eq.] 667; Finnegan v. Lee, 18 How. Pr. 186; Bank of Rome v. Village of Rome, 19 N. Y. 20. To the same effect, see State of Illinois v. Delafield, 8 Paige, 527; on appeal, 2 Hill, 159; Mechanics' Bank v. New York & N. H. R. Co., 3 Kern. [13 N. Y.] 625; cited and approved in Bank of Rome v. Village of Rome, 19 N. Y. 20. That fraudulent representations, made at the time of subscription do not constitute a good defense, see opinion of Hopkins, J., in Upton v. Hansbrough [Case No. 16,801] Feb. 1873, to appear in subsequent volume of these reports.

[NOTE. In addition to the adoption of the views expressed by the circuit court, the supreme court further held, as to the additional grounds assigned as error, that an irregularity consisting in a failure to reply to a plea was cured by the trial and verdict; moreover, the objection could not be raised for the first time in the supreme court; and, furthermore, section 32 of the judiciary act forbids a judgment to be reversed for any want or form in the proceedings except such as shall have been specially pointed out by demurrer. Also, that an objection that the verdict was not responsive to the issues submitted was too late for the like reasons, and that an exception to the overruling of an objection to certain testimony could not be considered, because not distinctly taken and placed upon the record. Laber v. Cooper, 7 Wall. (74 U. S.) 565.]

Case No. 3,199.

COOPER v. MATTHEYS.

[See Case No. 3,200.]

Case No. 3,200.

COOPER v. MATTHEYS.

[5 Pa. Law J. 38; 8 Law Rep. 413.]

Circuit Court, E. D. Pennsylvania. May, 1842.

ENJOINING INFRINGEMENT OF PATENT—LACHES.

1. An injunction will not be granted to restrain the violation of a patent or copy-right, where the defendant has been in possession a length of time, claiming by an adverse title, until the right is first settled at law; nor will it be granted in any case where the party applying for it has not shown good faith, conscience, activity and diligence, nor where there is any doubt or uncertainty as to the facts.

2. If, on a motion for an injunction, there appears from the affidavits of the parties, or witnesses, such a repugnancy in point of fact as makes it necessary to decide as to the rela-

tive truth of their conflicting statements, or the credibility of the witnesses, the injunction will not be granted.

[Cited in Stimpson v. West Chester R. Co., 4 How. (45 U. S.) 387.]

3. The loss of a patent issued under the act of 1793 [1 Stat. 318], which directs it to be recorded, is no excuse for the plaintiff's delay to apply for an injunction to restrain its violation, nor where his improvement or patent has come into public use during his inaction, or from a state of things of which he might have had notice by the use of due diligence, although he had no notice of the violation by the defendant.

On motion for an injunction to restrain the infringement of a patent [granted to I. Cooper, October 25, 1832], after bill filed and suit at law commenced at the same time.

J. R. Ingersoll, for plaintiff.

William L. Hirst and James Todd, for defendant.

BALDWIN, Circuit Justice. The plaintiff in his bill sets out a patent for a new and useful improvement in constructing carriages for railroads, granted in October, 1832, which he alleged was lost before 15th of December, 1836, and a new one granted in October, 1839, for the same improvement; that he has sold the invention, reserving the right to use it; that it is used by his vendees, and that from the date of the patent the defendant had made and sold, and is now making for sale, carriages with the improvements patented, with notice of the patent, &c. In a special affidavit attached to the bill, the plaintiff states that he is in possession of the improvement patented, and has made sales of rights to use and sell it to the persons, and for the sums specified; that defendant is a car builder, engaged in infringing the plaintiff's right. In an affidavit made before filing the bill, the plaintiff states that he sold the right to use his invention to the New Castle and Frenchtown Railroad Company, in 1832, and knew of no others using it but himself till 1835, when he found Leech's line using them, and gave notice to their agent at Johnstown, and one of the parties interested in that line, that he would bring suit, that he employed an attorney to sue another person who used the improvement, who he was informed settled for the same, that the patent was lost in 1836, and he has never been able to find it. That he knew of no persons infringing his right till lately, that he has resided in Johnstown since 1834, that he has but lately heard of the use of his improvement in Philadelphia, and lost no time in giving notice of his right, and forbidding the use thereof. The bill was filed the 15th of April; on the 16th, defendant stated in an affidavit, that he had been engaged for three years past, and is still engaged as a master workman in making cars for the railroads in Pennsylvania, without any notice or application of the plaintiff, and never saw the model of plaintiff's improvement till the 14th inst., that to the best of his knowledge he has never used the plaintiff's improvement or any part of it, nor ever heard of its being patented, that he builds on his own plan as directed by the Pennsylvania engineers, and does not interfere with plaintiff's improvement; employs twelve hands, and is under a contract to build five cars for carriers on the Pennsylvania improvement. That he follows the plan of one Arnold, to whom he succeeded; that Arnold carried on the business many years in the same shop immediately preceding the defendant's taking it. In a supplementary affidavit on the 11th of April, he states that Arnold made cars similar to what defendant makes since 1831 or 1832, without any claim by plaintiff, and that defendant has never built a car on plaintiff's plan, and does not intend to do it—that any sales made by plaintiff have been made within a few months past—that he never heard of any such sales till within two weeks, and will answer the bill.

Thomas B. Parker states in his affidavit taken 17th April, that he commenced building cars as a master workman in 1836, and continued to do so till 1839, on the same plan as Arnold and Mattheys, as directed by the engineers of Pennsylvania; that he never heard of plaintiff's patent till about the 1st of April, and first saw his model on the 15th; that he has never used plaintiff's improvement or intended to use it. By his counter affidavit on the 17th April, though plaintiff stated that he never knew of the defendant's infringement of his right till a few days ago, or that it had been infringed by others, except those with whom he made arrangements, whom he names, and states the sums they paid him, and that the defendant's cars are a direct violation of plaintiff's patent by using the improvement specified. Peter Allison, in his affidavit on the same day, states that defendant uses the plaintiff's improvement in all its parts, and that the improvement is original. The defendant produced the affidavit of F. D. Sanno, that he saw cars on the Mauch Chunk Railroad in 1836, which were constructed in the same manner substantially as those of the defendant and Parker, and that they were in common use as passenger cars.

On this state of the case as disclosed by the bill and affidavits, it will be asumed for the purposes of this motion, that the facts therein stated and not contradicted, are true, though they will not have the same effect as on a motion to dissolve an injunction on the coming in of an answer after the return of a subpoena, or on the final hearing of the cause. On the motion to award an injunction, the plaintiff must rest on the case stated in the bill, though he may by affidavit state any matters which it sets forth with more particularity, and a reference to collateral matters which explain, or which tend to support and strengthen it; he may, also, in the same way, contradict any statements made by the defendant in his affidavit, and

either party may take and read the affidavits of other persons. 19 Ves. 621. But no affidavit of the defendant (or his answer in this stage of the case, which is considered an affidavit,—1 Russ. 362; 1 Cord. c. 66; 19 Ves. 351; 1 Jac. & W. 590) can be considered as evidence to overthrow any averments in the bill, not supported by other testimony; it is only affidavit against affidavit, on which the chancellor decides if he is fully satisfied how the fact may be; or if there is such contradiction in the respective affidavits as leaves him in doubt, he refers the matter to a master, or directs an issue to inform his conscience before deciding the motion.

In awarding an injunction a very delicate and highly responsible power is used, which ought not to be exerted when there is reasonable doubt as to the existence of any fact on which the application is founded. 2 Dickens, 600; Cowp. 7. If there appears from the affidavits of the parties or witnesses, such a repugnancy in point of fact as makes it necessary to decide on the relative truth of their conflicting statements or the credibility of the affirmants, no prudent judge will undertake so dangerous an inquiry in the first stage of the cause. Great latitude is allowed in order to present the application with all its attendant circumstances operating in favor of or against it, though the range may be wider than the bill. It depends on the matters of fact or law, which appears to be contested, whether the chancellor will examine the above case involving the respective rights of the parties. The great object is to look for that full information which will lead his mind to a certainty as to all material facts, for doubt or uncertainty is fatal to the motion to grant the injunction (2 Atk. 182; 1 Dickens, 101; 1 Baldw. 218 [Bonaparte v. Camden & A. R. Co., Case No. 1,617]; 4 Wash. C. C. 260 [Isaac v. Cooper, Case No. 7,096]), though it is a good cause for continuing it on a motion to dissolve (3 Ves. 140); the burthen of proof being on the plaintiff in one case and on the defendant in the other. On the other hand if the bill or affidavit state any facts not denied in the affidavits on the part of the defendant, or the plaintiff by counter-affidavits does not deny the statements of the defendant, such facts are assumed as a safe basis for a decision on the motion, though they may be open to inquiry at a subsequent state of the cause, and the matters of law involved in the motion will be considered with reference thereto.

The reason on which any action is declined, when there is an issue of fact between the parties or their affirmant, is obvious. By granting the injunction, positive credence is given to the affidavits on the part of the plaintiff, and those of the defendant are repudiated directly, whereas by refusing the injunction nothing more is done or intended than a decision that the fact is so doubtful as not to be safe to act on the assumption of its truth, thus leaving it entirely open to future investigation. It must be obvious too, that in applying for an injunction, the plaintiff seeks either to interrupt the course of the common law or to ask for some relief which he cannot have at law; he must consequently state and make out a case for equitable relief on such facts as bring his case within the jurisdiction of courts of equity and proper for its exercise. Hence if he fails to satisfy the conscience of the chancellor affirmatively, he has no case before him, for the doubt or uncertainty as to facts is of the same effect on a motion, as their non-existence.

In this case the grant of a patent to the plaintiff for the improvements specified, its validity, or his possession of the exclusive right to use it as stated by the plaintiff, or the fact of his using, selling and making contracts for its sale and use, is not controverted by the defendant, and will be assumed as sufficiently made out. Nor has the plaintiff contested the facts that the defendant is, and for three years has been, a car builder, or that Arnold, to whom he succeeded, was not so engaged for some years before—that either had notice of the patent or of plaintiff's claim otherwise than is stated, or denied that Parker had been engaged in building on the same plan as Arnold and the defendant, from 1836 to 1839. There is however, a direct issue between the parties on the fact of infringement of the patent right; by its positive averment on one side, and as positive denial on the other, after having seen the plaintiff's model; though the defendant's first affidavit was to the best of his knowledge, his supplementary one is unqualified that he never used the plaintiff's improvements—so that, as both sets of affidavits cannot be true, the fact of infringement depends on which are entitled to credence. The exhibition of the models on which the parties construct their respective carriages, does not suffice to turn the scale either way, without an examination into the details of the construction, combination and operation of all their parts by competent mechanics, who, on a comparison of the models, might decide the fact of infringement, if they concurred in opinion, but if they differed, would leave it as doubtful as it is on the affidavits; and, as the fact depends on the substantial identity of the cars in their parts, combination and effect, with no other sources of information than the affidavits and an inspection of the models, it would be incurring great danger of error, were the infringement to be taken as proved on such evidence as has been exhibited by the plaintiff, when it is opposed by the oath of those who bring master workmen in the construction of the cars, who must be equally competent to know whether the patent is violated or not. Assuming, then, that all the other averments in the plaintiff's bill and affidavits are true, he has

not made out so clear a case of an infringement of his right, as to come within the rules of equity, as laid down by the court in the various cases which have arisen; he has not satisfactorily established the fact on which the motion turns, in the absence of which he has no case at law or in equity, or, which is of the same effect on this motion, he has not so clearly established it as to leave no reasonable doubt or uncertainty respecting it. 4 Wash. 261 [Isaac v. Cooper, Case No. 7,096]. On this ground alone the motion must be overruled; but there are others equally decisive and more general, as well as more important, in their application. Taking the plaintiff's right to be unquestioned—assuming the violation by the defendant, as well as all the averments in his bill and affidavits to be true—they do not so account for the lapse of time before bringing a suit at law, or applying for an injunction, as to bring his case within the settled rules of equity, which require the plaintiff to be prompt in his application for that summary and prompt relief which is afforded only in cases where there has been due diligence in asserting his rights. Indeed, the nature of the relief points directly to its requisites; it is to protect from impending danger a right, or property, which the law cannot avert. If he acquiesces, or is inactive, while the danger exists or the mischief is done, it negatives the necessity of action in equity, unless the inaction is accounted for.

The loss of his patent is no excuse for delay. It was issued under the act of 1793, which directed it to be recorded. 1 Story's Laws, 301 [1 Stat. 318]. A copy could have been obtained, which would have been full evidence of his right as the original. [Patterson v. Winn] 5 Pet. [30 U. S.] 241. A new patent issued under the 3d section of the act of 1837, gave no better evidence of his right, than a copy of the old one; nor afforded any additional protection. 4 Story's Laws, 2547 [5 Stat. 192]. The case stands, therefore, as if the original patent had not been lost. The want of actual knowledge of the infringement by the defendant and Parker or Arnold, is not, under the circumstances of the case, a sufficient excuse. The plaintiff states in his first affidavit, that he knew of the use of his improvement on Leech's, in 1835; that his residence for the past six years has been at the end of the western section of the Pennsylvania Railroad, and that he then gave notice of his patent, &c.; but he does not state that he has brought suit, or permitted the use of his improvement by that company. This is such knowledge of a public use on one end of the great line of transportation traversing nearly the whole state; and there is such a connection between the railroads and intermediate canal, that notice of the infringement at one end, by one of the transportation companies, gave the strongest reasons for believing that it had happened at the other end, such as ought to have led to prompt inquiry to ascertain the fact, which was easily done. Under such circumstances, the want of knowledge is so far evidence of negligence in not preventing the public use of the invention patented, both by the construction and use of the carriages on which it is used on the great route of transportation, as to impress on the case such laches as leaves the plaintiff to his remedy at law. The inquiry is not whether the plaintiff had notice of the violation of his right by the defendant, but whether his improvement has come into public use during his inaction on a state of things of which he might have had notice by the use of due diligence, or when the law of equity deems negligence to be the same as notice. A court of equity, which is never active in relief against conscience or public convenience, has always refused its aid to stale demands, where the party has slept upon his rights, or acquiesced for a great length of time. Nothing can call forth this court into activity but conscience, good faith, and reasonable diligence; while these are wanting, the court is passive and does nothing; laches and neglect are always discountenanced; and therefore, from the beginning of this jurisdiction, there was always a limitation of suit in this court. [Piatt v. Vattier] 9 Pet. [34 U. S.] 416, 417; Smith v. Clay, cited from 3 Brown, Ch. 640. This principle is peculiarly applicable to motions for injunction in cases of patent and copyright, and has been uniformly applied to them. It will not be granted against a party who has been led into the publication by the encouragement and acquiescence of the author. Jac. 311; 1 Cox, Ch. 283. When the author suffers time to run on the violation of his right—where ten have been allowed to publish, the court will not restrain the eleventh. A court of equity frequently refuses an injunction, where it acknowledges a right, when the conduct of the party had led to a state of things which occasions the application, and therefore will refuse or dissolve an injunction, without saying in whom the right is. 4 Con. Ch. 140. Or where the copy right is admitted, if the violation has been of long continuance. 19 Ves. 447, 448. An injunction will not be granted to restrain a party who has been in possession any length of time, claiming by a title adverse, till the right is first settled at law. 7 Ch. 165; 6 Jac. Dict. 20; 19 Ves. 448; 1 Cox, Ch. 283; 6 Ves. 51. A plaintiff who states such a case, puts himself out of court. 4 Jac. Dict. 22. It is a proper remedy to protect a possession till it appears to be against right, but is never used to disturb a possession under claim and colour of right. 1 Ves. Sr. 476, S. P. 4 Wash. C. C. 260, 261 [Isaac v. Cooper, Case No. 7,096]. Had the plaintiff used due diligence in asserting his right, when he knew of its violation in 1836; had he put himself on inquiry whether others had violated, or were about to violate it, and

sought relief by a prompt application, his case as stated in the bill and affidavits, was a proper one for an injunction.

The sale of his invention, its use by himself and vendors, was sufficient evidence of an exclusive possession by claim and colour of title, so that equity would have protected him in the continued enjoyment, whatever doubts might have existed as to the validity of his patent. 6 Ves. 707, 708. Such possession would have been secured from disturbance, till on a trial or a final hearing, it should appear to be without right. 3 Mer. 628.

The rule on which courts of equity act by an injunction in the first instance, is to leave the parties in the same position as it finds them when the application for relief is made, by protecting the plaintiff in the same possession which he had before enjoyed, and when the possession of the defendant had been unmolested, leaving the right of possession to be settled at law. No cases come before courts of equity, in which a greater degree of diligence is required, than applications for injunctions (2 Dow. 6, 536); their nature and effect are such as to produce the most irreparable injury when they are improvidently granted. Time, which bears heavily on all rights or violations of right which are not asserted with diligence, has run on the possession of Arnold and the defendant for eight or nine years, and of Parker for three, by which the use of the plaintiff's improvement has become public, without any resort to legal remedies till the present application was made. Had this public use existed before the application for the patent, with the consent of the plaintiff or with his knowledge and acquiescence, it would have been void, as held in Pennock v. Dialogue, 2 Pet. [27 U. S.] 18, 20, and as expressly declared in the 15th section of the act 1836 (4 Story's Laws, 2511 [5 Stat. 123]). If, then, the want of actual knowledge of the long continued construction and public use of cars, on the plaintiff's plan, shall be considered as sufficiently accounting for his inaction, it will follow that an injunction will be granted, notwithstanding the lapse of time, unless the defendant will make out such a case after the patent has issued, as would make it void if it had existed before the application; in other words, such a case as would justify the presumption of abandonment, or dedication of the improvement to the public. Such a principle cannot be adopted without reversing the established course of equity, and confounding cases where the injunction is applied to protect a right or continue a possession till the right is decided; it would also operate most severely and unjustly on the plaintiff, if the same state of things which would defeat the injunction on a motion, would annul his patent on a trial, which must be the result if the public use before a patent is applied, which avoids it, must be made out after it is granted in order to prevent an injunction. Equity acts on different principles in protecting the possession of the plaintiff, or declining to disturb the defendant; it leaves the rights of the parties as they stand at law. Though a plaintiff may have been wanting in that degree of diligence which entitles him to relief in equity, yet that alone does not impair his right or remedy in damages at law.

A defendant, though enjoined in equity from interrupting the possession of the plaintiff, may contest the right at law to the same extent as if equity had not interfered. In refusing the injunction in this case, no more is done or intended, than to decide that the plaintiff has not made out a case which entitles him to any relief which he cannot have at law. Every right which he may have to damages in the pending suit remains wholly unimpaired, and if he establishes his right and its violation on the trial, he will be entitled to an injunction on the final hearing of this cause. The motion for an injunction, however, in this case, rests on much narrower ground than has been thus far assumed in favour of the plaintiff. On the actual posture of the case, there are two objections to the injunction, which in the words of my predecessor, "are insurmountable" and "fatal." The positive denial that the defendant makes cars upon the plan of the plaintiff's asserted improvement, and his averment that the cars he makes do not interfere with the plaintiff's patent, is not disproved; and from the uncontradicted affidavits on the part of the defendant, it appears that the cars made by him, Arnold and Parker, were in public use from the date of the original patent. On both grounds, therefore, this case comes fully within the principles of Isaacs v. Cooper [Case No. 7,096]. The infringement is denied, the plaintiff's possession was not exclusive, and excepting the sale to the New Castle company, all the acts which evidence the actual enjoyment of his improvement, were subsequent to the actual possession and continued use by the defendant, of the plan on which he now constructs his car, or, at most, simultaneous herewith. In addition to which, the plaintiff has failed in showing that due diligence which is indispensable to give him a standing in a court of equity, before a trial of his right to interrupt the defendant in the practical, useful, and public employment, in which he has been actively engaged for years. As just regard to private right as well as public convenience, forbids the exercise, in such a case, of the high, delicate, and dangerous power now invoked; the courts of this circuit, and its judges, have exerted this part of their jurisdiction with great caution, always declining it in a doubtful case, or one not brought forward by a party who was vigilant, nor ever disturbing the course of the common law, by awarding to a party that extraordinary remedy in equity which goes beyond the rules of law, unless he presents a case clearly within those

established rules and principles which are the basis of equity jurisprudence.

The motion for the injunction is, therefore, overruled.

NOTE [from original report]. We have published in the foregoing pages the elaborate opinion of the late Mr. Justice Baldwin in the case of Cooper v. Mattheys, on the subject of granting injunctions, particularly in reference to restraining the infringement of patent and copy rights. This opinion comprehends the whole learning of the subject granting injunctions; and the principles which it settles, have since been uniformly adhered to by the court, in the exercise of this important branch of their jurisdiction. This decision was published on the 22nd of May, 1842 (a few days after it was pronounced), in the Public Ledger, but the few copies that were preserved have rendered the case less known, and therefore less useful, than a larger acquaintance with it, and easier access, will effect.

COOPER (PATTON v.). See Case No. 10,834.

COOPER (PRESTON v.). See Case No. 11,-395.

COOPER (RENWICK v.). See Case No. 11,-701.

COOPER (RILEY v.). See Case No. 11,836.

Case No. 3,201.

COOPER v. ROBERTS.

[6 McLean, 93.][1]

Circuit Court, D. Michigan. June Term, 1854.[2]

FRAUDULENT LAND PATENT — SCHOOL LANDS — RESERVATION.

1. Fraud may be shown in procuring a patent at law, as the execution of a deed, being executed fraudulently, may be avoided at law. But in neither case can fraud be alleged and proved at law, except in the issuing of the patent, or, of the other, in the execution of the instrument.

2. Under a compact with a state to give to it section 16, unless it shall be sold or otherwise disposed of, congress have a right to reserve all mineral lands, and if section 16 contains mineral land, a section may be given, as provided in the compact, as contiguous to section 16 as may be.

3. The right to a particular tract, under the grant, did not exist until a survey was made, and if the section should be found to contain minerals, it is appropriated, by a general law reserving all such lands before survey, and another section for school lands must be selected.

4. The power of reserving lands for mines or salt springs, has uniformly been exercised by congress, notwithstanding the compact that section sixteen shall be given for schools, and other lands have been substituted for it. This is within the compact.

5. Doubts may exist whether the state of Michigan could sell the school lands without the consent of congress, as they were given in trust to the state, for school purposes.

[See note at end of case.]

[At law. Action of ejectment by James M. Cooper against Enoch C. Roberts to recover a part of section 16, in township 50 north, range 39 west, lying within the mineral district south of Lake Superior, in the state of Michigan. The plaintiff claims under the state, and the defendant claims through the Minnesota Mining Company, under a right of pre-emption from the United States.]

Vinton & Howard, for plaintiff.

Smith & Campbell, for defendant.

OPINION OF THE COURT. This is an action of ejectment, to recover the possession of one hundred and sixty acres of land claimed by the plaintiff, and of which the defendant is alleged to be in possession. The plaintiff claims under a patent from the state of Michigan, on a public sale. It was agreed that the land in controversy was advertised by the commissioner of the state land office, four weeks; that pursuant to the notice, Alfred Williams, for the sum of two thousand five hundred dollars, became the purchaser; that at the time of the sale he paid six hundred and forty dollars in part, and that afterwards he paid the full amount of the purchase money, and received the state land commissioner's certificate, which entitled him to a patent, and that in pursuance of the certificate the patent was issued to him. It is also admitted, that on the 19th of May, 1852, Williams, for the nominal consideration of ten thousand dollars, sold and conveyed the land by a quit claim deed to the plaintiff. The patent was in evidence, and also the deed from Williams to Cooper. In the compact made between the United States and Michigan, on its admission as a state into the Union, it is provided that, "section numbered 16 should be reserved for schools, in every township of the public lands within the state; and where such section has been sold or otherwise disposed of, other lands equivalent thereto, and as contiguous as may be, shall be granted to the state for the use of schools." By an act of 1844, the state of Michigan established a land office, and appointed a commissioner, &c. And the same act provided that the "commissioner shall have the general charge and supervision of all lands belonging to the state, or which hereafter may become its property; and also all lands in which the state has an interest, or which may be held in trust by the state for any purpose mentioned in this title, and may superintend, lease, sell and dispose of the same in such manner as shall be directed by law." By a subsequent act, the Michigan legislature provided, that, "the minimum of the unsold and unimproved school lands shall be four dollars per acre; but no lands shall be otherwise sold until they shall once have been offered at public auction. Twenty-five per centum was required to be paid at the time of purchase; and a certificate of the purchase was to be made out by the com-

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

[2] [Reversed by the supreme court in Cooper v. Roberts, 18 How. (59 U. S.) 173.]

missioner, describing the land, price, and the terms of payment, &c. And if any sale should be made by mistake, or not in accordance with law, or obtained by fraud, the same shall be void. On the presentation of the certificate of purchase, given by the commissioner, the secretary of state was required to issue a patent.

The defendants alleged that the above patent was fraudulently procured; and witnesses were called to establish the fraud. To this evidence the plaintiff objected, that fraud could not be shown. But the court held, that fraud at law might be shown in the execution of a deed, or in the procurement of a patent, as well at law as in chancery; but that at law the fraud was limited to the execution of the instrument, and no matter behind that transaction was admissible as evidence to show fraud. Mr. Gibson, who is deputy secretary of state, filled up the patent, the governor having signed in blank. At the time, Governor Barry was not at the seat of government, and Mr. Gibson states that the patent was issued according to usage. Mr. Williams, the patentee, states, that the purchase was made by Bacon, in the name of the witness, without his knowledge or assent. In another instance a similar act was done by Bacon, and in that case as in this, he executed a quit claim deed. The consideration named in the deed to the plaintiff was nominal, so far as the witness was concerned. By the 57th section of the act of 1844, the legal assignee of a purchaser at the sale, is vested with the same rights as the original purchaser. Evidence was offered, to show that Bacon, who was substantially the purchaser, knew that the school section contained a valuable mine, and deceived the commissioner, &c. But the court held this was a question between the state and the purchaser.

1. The defendant's title consisted in the assignment of a miner's lease, dated 1845. 2. In a patent from the United States, dated 9th of April, 1852, reserving any right the state might have as school land. The reservation in the patent was, "any right which the state of Michigan may have in and to the east half of the northeast quarter, and the east half of the southeast quarter of section sixteen in town fifty, under or by virtue of the provisions of the act of 23d June, 1836" [5 Stat. 59]. The patent to the defendant was issued under the act of congress, 1st March, 1847 [9 Stat. 146], which was an act "to provide for the sale of mineral lands in the state of Michigan." The second section of this act requires, "that the secretary of the treasury shall cause a geological examination and survey of the lands embraced in said district, to be made and reported to the commissioner of the general land office. And the president is hereby authorized to cause such of said lands as may contain copper, lead, or other valuable ores, to be exposed to sale, giving six months' notice of the time and places, &c., showing the number and localities of the mines known, the probability of discovering others, the qualities of the ores," &c. "And all the lands embraced in said district, not reported as aforesaid, shall be sold in the same manner as other lands are sold under acts now in force for the sale of the public lands, excepting and reserving from such sales section sixteen in each township for the use of schools, and such reservation as the president shall deem necessary for public use." The third section provides, "that all those persons who are in possession, by actual occupancy, of any portion of the district described in the first section of this act, under authority of a lease from the secretary of war, for the purpose of mining thereon, and who have fully complied with all the conditions and stipulations of said lease, may enter and purchase the same at any time during the continuance of such lease, to the extent of such lease, and no less, by paying to the United States therefor at the rate of two dollars and fifty cents per acre. Provided, that said entry and purchase shall be made to include the original survey of such lease, as near as may be, conforming to the lines of the public surveys of sections and subdivisions thereof. And all those persons who are in possession by actual occupancy, of any of said lands, for mining purposes, under authority of a written permit from the secretary of war, and who have visible landmarks and muniments as boundaries thereon, and who have in other respects complied with the conditions and stipulations contained in such permit, may enter and purchase the same, to the extent of the tract selected by them, and reported to the secretary of war, as required by said permit and no less, in the same manner as those who held under leases, and at the same price:" provided such entry and purchase be made before the day said land shall be offered for sale by order of the president; and in the same section, all who were in actual occupancy of mines before the law, and had paid rents, were authorized to purchase, &c. The fourth section provides, that all mineral lands shall be offered for sale in quarter sections, and no bid shall be received at a less rate than five dollars per acre.

The jury will observe that by the second section of the above act, the secretary of the treasury is to cause to be made a geological survey of the entire land district, in which shall be specially noted the extent and quality of the mines, and the distance from market. All lands not reported to be mineral lands, excepting a reservation of number 16 for schools, and such other reservations as the president might make, were directed to be sold on six months notice. And by the third section, rights of pre-emption were given to all those who

held leases from the secretary of war for mining purposes, who had complied with their leases, so that they were permitted to purchase at any time during their leases, at two dollars and fifty cents per acre; and such purchase was required to be made to the extent of the lease. Also, a right of purchase was given to those who were in possession by permit—provided the purchase was made before sale by order of the president. And also, the right of purchase was given to all who were in actual occupancy of mines, before the passage of the act, and who had paid rents. By the fourth section, all mineral lands, not occupied as above, were required to be sold in quarter sections, at not less than five dollars per acre; but not to embrace outstanding leases.

It is proper here to consider the effect of the above act of 1847. It withholds the mineral lands from sale under the general law. This is clear from the geological survey in which mineral lands were to be noted, the express provision that such lands should not be advertised and sold as the other lands, the pre-emption rights given to all who were in possession of mines, and the different prices at which such lands were permitted to be entered, without being offered at public auction. All the other lands, except section sixteen, which was reserved for school purposes, were to be sold. And lands not occupied nor claimed, on which there were mines, were not to be sold under five dollars per acre. If the mineral lands were withdrawn from the operation of the general law; if a different appropriation of them was made by the act of 1847, the sale to the defendants is a matter between them and the government. And here a question arises whether congress had power to dispose of section sixteen, as was done under this act. There is no controversy as to the fact, that a part of the school section is included in the patent of the defendant, which is referred to in his patent. And it is proved that the mine of the defendant, under the license, occupies a part of section 16—that from twelve to twenty thousand dollars have been expended on it, and one of the witnesses says, the mine is very rich, and worth two hundred thousand dollars. It must be observed that section 16, for school purposes, is not an absolute grant to the state. It was impossible to locate the grant until the surveys were made: there was this uncertainty on the subject; and to avoid any embarrassment arising out of this uncertainty, or the exercise of the powers of congress, it was provided, that where such section had been sold or otherwise disposed of, other lands equivalent thereto, and as contiguous as may be, shall be granted to the state for the use of schools. This left congress free to exercise its discretion in selling or reserving section 16. The grant is fulfilled literally by giving any other section as near to section 16 as may be practicable. By the act of 1847, all mineral land in the land district was reserved for special disposition. Now, the only objection to this reservation is, that it interfered with section 16 previously reserved for schools. The answer to this is, that section 16 was not given absolutely for school purposes; but only on condition that such section, when ascertained, should not have been sold or otherwise disposed of. This refers to the location of the tract by the surveys. But before this is ascertained, the mining lands within the district are not only reserved from the mass of the other lands, but an absolute right of pre-emption is given to those who occupy the mining lands, for mining purposes. The sale is made to them absolutely, if the land be embraced in the lease, and the terms of the lease have been complied with. The lease is proved in this case, and the rents have been punctually paid. All the conditions required to make the right absolute, if claimed, with the further condition that the miner shall purchase all the lands included in his lease, have been performed. And there seems to be no ground on which this purchase can be defeated, except by the prior vested right of the state to the school section. And it appears that no such right was vested in the state. It had a claim to a section, under the circumstances, as near to the section numbered 16 as practicable. Aside from the sale of this school section there is no hardship in the case, as the state receives what the United States were bound to give, and the state agreed to receive. In this view the sale was prematurely made, for the reservation of mining lands had disposed of a part of section 16, which must have been known to the purchaser, from the fact that large and expensive mining works had been constructed on the land, which were in operation at the time of the purchase and for years before, of which the purchaser is presumed to have had notice. The geological surveys too, which were filed in the general land office at Washington, and in the land office of the United States, in Michigan, which gave a description of the mineral lands in the district, might have been examined. The purchaser of this section from the state had at least the means of knowledge, and this is notice. But, this is not a question, gentlemen of the jury, which turns on notice. It is simply a question of power in the United States, to reserve the mineral lands and give a pre-emption right, as has been done in this case. Of this, as a matter of law, there would seem to be little doubt.

It has been long the policy of the United States to reserve mineral lands, salt springs, &c. Under the act of 8th May, 1786, the first act that authorized the sale of public lands, salt springs were reserved. The act of the 30th April, 1802 [2 Stat. 173], to authorize the people of the eastern division of the

Northwestern Territory to form a state, contained the above provision in relation to section 16. An act of congress, 3d March, 1803 [2 Stat. 226], provided, that the sections heretofore reserved for the use of schools, in lieu of section 16, as have been otherwise disposed of, shall be selected by the secretary of the treasury, out of unappropriated reserved sections most contiguous. Indiana and Illinois had the same reservation in regard to section 16. And by the act of 3d of March, 1807 [2 Stat. 437], mines in Indiana, then including Illinois, were reserved, and it was declared that all grants for the same should be void. This being the course of the government, it would seem that the power in congress to reserve the mineral lands in question cannot be doubted; and if you find, gentlemen, that the land now claimed by the plaintiff is, with the mineral land, claimed by the defendant, first under a license and now under a patent, you will find the defendant not guilty.

There is another question in the case which has not been pressed in the argument, and that is, the power of the state of Michigan to sell the school lands. They were held in trust by the state, and unless the donor, the government of the United States, should assent to the change in the trust fund, it is difficult to say that the state may sell and convey the lands. A trust must be executed in good faith, under the conditions of the donor. The United States, so far as appears in this case, have not assented to the sale, nor have they declared in what way the land shall be used for school purposes. Had the intention been that these lands should be sold, would not some act have so provided? In giving the lands, the most natural inference would seem to be, that a revenue from the use of the lands was designed, rather than a sale of them. A sale exhausts the fund, and the proceeds become mixed up with the funds of the state, and in the course of events, may be lost sight of. If all the school lands in the state have been sold, this question is of great interest to the state, as it would affect titles to a very large amount of property, and also the policy of the state in the application of the proceeds of the school lands. Verdict for defendant.

Exceptions were taken to the points ruled, and the case is now in the supreme court on a writ of error, and if the judgment shall be reversed, it will relieve the circuit court from a painful responsibility.

[NOTE. The plaintiff sued out a writ of error, and the supreme court reversed the judgment, remanded the cause, and directed a venire to issue.

[The court assigned, as ground for the reversal, that the act of March 1, 1847, did not have the effect to withdraw the mineral lands from the compact with Michigan; that whatever legal impediment existed to the compact with the state, either by section 2 of the act of 1847, which separated for some purposes the mineral lands from other public lands, or by the privileges granted to the lessees or their assigns in the third section of the act, was removed by the repealing clause of the act of 1850, and the noncompliance with the conditions on which the privilege depended, and, therefore, section 16 of the public land was at the date of the latter act disincumbered and subject to the operation of the compact; that the section in question was vested in the state of Michigan at the date of the entry by the Minnesota Mining Company, and the company acquired no title by its patent; that it was competent for the state to sell the school reservations without the consent of congress; that, the state not having complained of the sale, and retained the price paid, the patent should be regarded as conclusive of the fact of a valid and regular sale; and, further, that the jury should have been instructed that the facts, if true, entitled plaintiff to recover the premises in question. Cooper v. Roberts, 18 How. (59 U. S.) 173.

[On the new trial, the plaintiff recovered judgment. Defendant brought error, and the judgment was affirmed.

[The court declined to reconsider the points raised on the first appeal, and confined itself to the consideration of three questions, i. e. the refusal of the court to allow the reading to the jury of a deposition setting forth the opinions of some of the officers of the land office, and of the attorney general, in opposition to the view of the supreme court expressed on the former appeal, the refusal to admit certain evidence, and the refusal of an instruction involving the same question.

[As to the first point, the court held that the court below correctly refused to allow the reading of the deposition, stating in the principal opinion, delivered by Mr. Justice Grier, that "it is the province of the court to instruct the jury as to the principles of law affecting the case, and counsel cannot appeal to a jury to decide legal questions by reading cases to them, or giving in evidence the opinions of public officers."

[The evidence offered and overruled was as follows: "Defendant produced, and offered to prove, a deed of release from Alfred Williams and wife to the Minnesota Mining Company, dated June 20, 1856, covering the lands in controversy; and further offered to prove, in connection therewith, that, at the time when the said Cooper obtained the deed of the premises in controversy from Alfred Williams, the Minnesota Mining Company was in actual and open possession of the same, claiming title under their patent from the United States, and that the said Cooper knew of such claim and occupancy before and at the time of his purchase, and of said conveyance; that he obtained said title from Alfred Williams, he being the naked trustee of John Bacon, and that all the negotiations for the said purchase, and the purchase itself, were had between said Cooper and Bacon, the said Williams acting under the directions and for the benefit of said Bacon, and having or claiming no personal interest in said lands; that said purchase and conveyance were made for the following purpose, viz. that said Cooper should hold the same in trust for a corporation known as the National Mining Company, all of whose stock was held by said John Bacon, and, by the conditions of said sale, the said Cooper was to receive, and did receive, with said conveyance, six-tenths of the stock aforesaid, and the said Bacon was to retain, and did retain, four-tenths of said stock; that the said Cooper purchased said stock, and took said conveyance, with a full knowledge of the claims and occupancy of the Minnesota Mining Company, and with the intention of prosecuting the title purchased by him, by legal proceedings in this court, against the Minnesota Mining Company, for the benefit of the National Mining Company; and that, before said conveyance was delivered to him by said Williams, the said Cooper, in conjunction

with the said Bacon, applied to counsel in the city of Detroit to employ such counsel in the litigation aforesaid, which was to be had with the Minnesota Mining Company." As to that, the court held that the deed to the Minnesota Mining Company was for portions of the land not demanded in this suit, and, by itself, was not relevant. It could have no relevancy, unless to show the title to the plaintiff below to be void, because purchased and obtained with full knowledge of an adverse possession, and to support the following instruction, which was refused by the court below: "* * * If, when said Williams conveyed to said Cooper the premises in question, the said Minnesota Mining Company was in actual and open possession of said lands, claiming title thereto under their patent, the said conveyance was void in law against the said company, and all claiming under them,"—which instruction the court refused to give; and to this ruling the defendant excepted. As to this point, the court held that the possession of the mining company under claim of title, and Cooper's knowledge of it when he purchased, could not affect the validity of the deed of Williams to him, Rev. Code Mich. 1846, p. 262, enacting that "no grant or conveyance of lands, or interest therein, shall be void for the reason that at the time of the execution thereof such land shall be in the actual possession of another claiming adversely." Roberts v. Cooper, 20 How. (61 U. S.) 467.

[For denial of a motion by Cooper to require Roberts to give additional security for the prevention of the writ of error sued out by him, see Roberts v. Cooper, 19 How. (60 U. S.) 373.]

Case No. 3,202.

COOPER v. THOMPSON.

[13 Blatchf. 434.][1]

District Court, S. D. New York. June Term, 1876.

MUNICIPAL AID—LEGALIZING ISSUE OF BONDS—CONSTRUCTION OF STATUTE—ACT MARCH 3, 1875—ACTION ON COUPONS.

1. A statute validated the action of commissioners in issuing the bonds of a town in aid of a railroad company, and in exchanging them for the stock of the company, and declared that no bonds held by any person "in good faith or for a valuable consideration" should be void or voidable by reason of any defect or omission in the consents of the tax-payers, but that the bonds should be as valid as if such defect or omission had not occurred, provided that any exchange of the bonds for such stock was made at the par value of the bonds. Certain of the bonds had been exchanged for stock of the company at par value. Afterwards they were sold at a discount to A., who sold them to T. He owned them when the legalizing act was passed, and subsequently detached certain coupons from them, and sold such coupons to C. In a suit by C., to recover the amount of such coupons, against the town. *Held*: The legislature had power to validate the bonds. The fact that the bonds stated, upon their face, that they were issued in exchange for stock, while the original statute only authorized them to be negotiated for cash and at par value, did not affect the position of C., as a holder in good faith, of the coupons, he being a purchaser of them for value, nor was such position affected by the fact that C., when he bought the coupons, was aware that the town contested its liability upon the bonds. The legalizing act validated all bonds that were originally exchanged at par value for the stock, unless the subsequent purchaser of them had notice of the illegality in their issue, and did not part with value on his purchase.

[Followed in Perrine v. Thompson, Case No. 10,997.]

2. The holder of a coupon payable to bearer is not an assignee of the cause of action, within the 1st section of the act of March 3d, 1875 (18 Stat. 470).

[Cited in Pettit v. Town of Hope, 2 Fed. 623; Whiting v. Wellington, 10 Fed. 815.]

3. A coupon payable to bearer is a promissory note negotiable by the law merchant, within said 1st section.

[Action by Joseph P. Cooper against the town of Thompson on coupons of municipal aid bonds issued by defendant. There was a verdict for plaintiff, and defendant moves for a new trial.]

Rastus S. Ransom, for plaintiff.
Timothy F. Bush, for defendant.

WALLACE, District Judge. Conceding for the purposes of this case, that the bonds to which the coupons in suit were originally attached were issued in contravention of the statute (Act May 4, 1868; Laws N. Y. 1868, p. 1128) which authorized the town to lend its aid to the railroad, the defence is untenable, by force of the act (Act April 28, 1871; Laws N. Y. 1871, p. 1838) legalizing the acts of the commissioners in issuing and disposing of the bonds. That act validates the action of the commissioners in issuing the bonds, and in exchanging them for the stock of the railroad company, and declares that no bonds held by any person "in good faith, or for a valuable consideration, shall be void or voidable by reason of any defect or omission in the consents in writing of the tax-payers, * * * but that the said bonds shall be as valid and effectual for every purpose, as if such defect or omission had not occurred, provided, that such or any exchange of bonds made by said commissioners for the stock of said company was made at the par value of the said bonds." It is in proof that the bonds were exchanged for stock of the railroad company at par value; that, very soon after they were issued, they were bought by the Atlantic Savings Bank for eighty-two and a half cents of their par value, with interest accrued; that the savings bank sold them shortly afterwards to Mr. Toucey, who owned them when the legalizing act was passed, and that he subsequently detached the coupons in suit, and sold them to the plaintiff.

The power of the legislature to validate such bonds is established by repeated adjudications, and is not contested here; but it is asserted that the plaintiff is not a holder in good faith, or for a valuable consideration, and is, therefore, not within the protection of the act. It is insisted that he is not such a holder, because the bonds recite, upon their face, that they were issued in exchange for stock of the railroad company, while the statute only authorized them to be negotiated for cash, and at par value; and,

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

also, because, when he purchased the coupons from Mr. Toucey he was aware that the town contested its liability upon the bonds. If Toucey could have maintained an action on the bonds before he sold the coupons to the plaintiff, it will not be controverted that the plaintiff has all his rights and can maintain this action on the coupons. If Toucey was not a bona fide holder of the bonds, because of the recital, clearly no purchaser could be, because the bonds themselves, which the legislature proposed to validate, carried, on their face, notice of their invalidity, to all who purchased them. And if, because of this recital, there could not be a purchaser in good faith, the act, so far as it attempts to validate the bonds, is inoperative and nugatory. It is to be assumed that the act was passed with an understanding of all the facts that made the legislation necessary, and it follows, that a purchaser for value must be deemed a holder in good faith, within the meaning of the act, when there is nothing to militate against his title, except what is presented by the bonds themselves. It is not shown that Toucey had notice of any defence to the bonds, when he purchased, except that contained in the recitals.

The act also validates the bonds in the hands of a purchaser for a valuable consideration, as well as in those of a purchaser in good faith. The language used clearly protects, not only all purchasers who have not acquired title mala fide, but, also, all who have advanced a present, as distinguished from a precedent, consideration, upon the purchase of the bonds. Where a purchaser had notice of the illegality of the proceedings to bond the town, and did not part with value upon the purchase, the act affords no aid; but, in all other cases, it imparts validity to all of the bonds that were originally exchanged at par value for the stock of the railroad company. For these reasons I reach an adverse conclusion to the defendant, upon this branch of the case.

It is insisted by the defendant, that, inasmuch as Toucey, from whom the plaintiff derived title to the coupons, could not have maintained an action himself in this court, because not a non-resident of the state, the plaintiff cannot, under the first section of the act of March 3, 1875 (18 Stat. 470), which provides that no circuit court shall "have cognizance of any suit founded on contract, in favor of an assignee, unless a suit might have been prosecuted in such court to recover thereon, if no assignment had been made, except in cases of promissory notes negotiable by the law merchant, and bills of exchange." Prior to this provision, the prohibition, (Rev. St. U. S. § 629,) was against cognizance "of any suit to recover the contents of any promissory note or other chose in action, in favor of an assignee, unless a suit might have been prosecuted in such court to recover the said contents, if no assignment had been made, except in cases of foreign bills of exchange;" and it was uniformly held, under that act, that the holder of a promissory note, payable to bearer, was not an assignee, within the meaning of the statute, for the reason that a note payable to bearer is payable to any body who may become the holder, and the contract is with the holder, and the holder does not acquire title by an assignment, but by delivery. Bank of Kentucky v. Wister, 2 Pet. [27 U. S.] 318; Bullard v. Bell [Case No. 2,121]; Wood v. Dummer [Id. 17,944]; Bradford v. Jenks [Id. 1,769]; Bonnafee v. Williams, 3 How. [44 U. S.] 574; Noell v. Mitchell [Case No. 10,287]. Under these decisions, the holder of a coupon payable to bearer is not an assignee of the cause of action. He acquires title by delivery, and the promise to pay the bearer, in the coupon, is a promise to him directly. City of Lexington v. Butler, 14 Wall. [81 U. S.] 283.

But, irrespective of this answer to the objection urged, the act of 1875 excludes from its operation promissory notes negotiable by the law merchant. Coupons, when payable to bearer, are promissory notes negotiable by the law merchant, and possess all the attributes of promissory notes. A very recent case goes to the length of giving them days of grace. Evertson v. National Bank of Newport [66 N. Y. 14]. It may be necessary to resort to the bonds to which they were originally attached, to prove the execution of the coupons; but this does not deprive them of their negotiable character. Payment or cancellation of the bond will not defeat the rights of a prior holder of the coupons.

The motion for a new trial is denied, and judgment is ordered for plaintiff upon the verdict.

COOPER (UNITED STATES v.). See Cases Nos. 14,861–14,865.

COOPER (WEBSTER v.). See Case No. 17,333.

COOPER, The HELEN R. See Cases Nos. 6,333–6,335.

COOSA, The (CONNER v.). See Case No. 3,113.

Case No. 3,203.

COOTE et al. v. BANK OF THE UNITED STATES.

[3 Cranch, C. C. 50.][1]

Circuit Court, District of Columbia. Dec. Term, 1826.

PAYMENT OF PARTNERSHIP FUNDS ON INDIVIDUAL CHECK — EVIDENCE — PRODUCTION OF BOOKS — INTERESTED WITNESS.

1. Money deposited in a bank in the name of a firm, cannot be drawn out by the individual check of one of the firm in his own name only, and if the bank pay such a check out of the joint

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

funds, it can only justify itself by showing that the money thus drawn was applied to the use of the firm.

2. If the defendant call for the books of the plaintiff, and, upon their being produced, inspect them, the plaintiff may read them in evidence.

3. It is no excuse for the bank in paying out the joint funds upon the individual check, that the individual partner, who drew the check, told the bank-officer that it was drawn on the joint account, and drawn in his individual name by mistake, and directed him to pay it and any others of the like kind which he might draw, out of the joint funds.

4. The partner thus drawing, and who is one of the plaintiffs, is not a competent witness for the defendants.

Action for money had and received by the defendants for the use of the plaintiffs, who were joint partners under the name of Clement T. Coote & Co.

The bank had paid out the funds of the firm upon the individual check of C. T. Coote, who had an account open in the bank in his own name, but had no funds.

The firm also had an account and funds to their credit in the defendants' bank.

Mr. Jones, for the plaintiffs, offered evidence to prove that the money was thus drawn out by Mr. Coote, for his individual use, and not for partnership purposes.

Mr. Key, for the defendants, objected; and contended that every partner has a right to draw out the funds of the firm in his own name; and that it is immaterial to the bank to what purpose he applies them.

THE COURT, (THRUSTON, Circuit Judge, absent,) admitted the evidence; and CRANCH, Circuit Judge, said the bank could only justify themselves in paying out the joint funds on the individual check, by showing that the funds, thus drawn, were applied to the use of the firm.

Mr. Jones offered to read in evidence for the plaintiffs the books of the plaintiffs, which had been called for and inspected by the defendants.

Mr. Key, for the defendants, objected; but, on recurring to Phillips's Law of Evidence, p. 338, &c., he waived his objection. The ledger only had been inspected by the defendants' counsel, and that only was read by the plaintiffs' counsel. The other books called for by the defendants and produced by the plaintiffs, but not inspected by the defendants, were not read. Mr. Jones cited Kenny v. Clarkson, 1 Johns. 385.

Mr. Key, for the defendants, prayed the court to instruct the jury, in effect, that if they should believe from the evidence that C. T. Coote had no funds in the bank when he drew the check, and that he informed the bank-officer that he drew the check and might thereafter draw others, on account of the partnership, in his own name, and directed him to pay the same out of the funds standing in the bank to the credit of the company as in such cases he should draw them on the partnership account, then the plaintiffs are not entitled to recover, unless they can satisfy the jury that the said Coote did draw the said check on his own account, and that the defendants or their officers knew or had sufficient cause to know that he so drew it.

But THE COURT refused to give the instruction, because the check, on its face purports to be for the private concern, and the bank is, prima facie, to be presumed to have had notice that it was for his private use; which presumption is not rebutted by the fact that Mr. Coote told the officer that he might thereafter draw checks in his own name which would be on joint concern; for the jury were, by the prayer, still left to infer, or not, that the check was for a joint purpose; or that the bank, at the time of paying the check, believed it was for the joint concern; and unless the jury should infer one or the other, the presumption would remain that the bank, at the time of paying the check, had notice that it was drawn for the individual use of Mr. Coote.

The defendants' counsel then offered to examine Mr. Coote himself, one of the plaintiffs, as a witness. The partnership was dissolved and all the funds transferred to Mr. Jones; mutual releases given of all demands, containing a covenant on the part of Mr. Coote to indemnify Mr. Jones from "all debts, sums of money, and agreements" entered into by Coote on his own account, for which the firm might, in any manner, stand pledged.

THE COURT, however, rejected him as a witness because, if he sustained the issue on the part of the defendants, he relieved himself from their action against him, for the amount of his individual checks, which had been by the defendants charged to the joint account; while he is protected by the release, from the action of Jones.

At May term, 1827, there was a verdict for the plaintiffs, $500. Bills of exception were taken, but no writ of error.

[NOTE. The defendant moved for a new trial, and the motion was denied. Case No. 3,204.]

Case No. 3,204.

COOTE et al. v. BANK OF THE UNITED STATES.

[3 Cranch, C. C. 95.][1]

Circuit Court, District of Columbia. May Term, 1827.

RIGHTS OF PARTNERS INTER SE — PRODUCTION OF BOOKS AND DOCUMENTS.

1. It is not a good ground for a new trial, that the defendants (a banking company,) had in their possession documents of which they did not avail themselves, because they were not known to one of the officers of the defendants at the time of trial.

2. Prima facie the bank had no right to charge up to the account of a firm, the indi-

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

vidual note of one of the partners; and the burden of proof lies on the bank, to show the assent of the other partner.

3. One partner has no right to draw the joint funds in his own name; nor can he lawfully appropriate them to his own use. He has only a right to use the joint name, and to act as and for the firm.

4. When books have been called for by the opposite party, and produced, it is competent for the party producing them to show, by the testimony of a witness, that he has examined the books, and that they do not contain any entries upon or relating to the matter in controversy; the books themselves being in court for the inspection of the opposite party.

In this cause, at the last term, the plaintiffs obtained a verdict for $500 [Case No. 3,203], and the defendants moved for a new trial: (1) Because the verdict was contrary to evidence; (2) because new evidence had been discovered; and (3) because the court erred in refusing the instructions moved for by the defendants' counsel.

Upon the third ground Mr. Lear, for defendant, cited Swan v. Steele, 7 East, 210; Ridley v. Taylor, 13 East, 175; Wood v. Braddick, 1 Taunt. 104; 1 Mont. 31; Gow. 59, 67; Dob v. Halsey, 16 Johns. 38; Henderson v. Wild, 2 Camp. 561.

Mr. Jones, contra, cited Mont. 134; Evans v. Drummond, 4 Esp. 89; Reed v. White, 5 Esp. 122; Gow, 59.

Mr. Key, in reply, contended that one partner has a right to draw the joint funds, even for his own use, unless there be collusion between him and the party drawn upon.

CRANCH, Chief Judge. This is a motion for a new trial, in an action for money paid, laid out, and expended by the plaintiffs for the defendants; and for money had and received by the defendants for the use of the plaintiffs. The reasons alleged for a new trial are: (1) because the verdict is against evidence; (2) because new evidence has been discovered since the verdict; (3) misdirection of the jury by the court in matter of law. (1) The first reason has not been relied upon by the defendants' counsel. (2) The supposed newly-discovered evidence is this, that on the defendants' scratch-book, which is the original book of entry of deposits made in the bank, three sums, amounting to about $1,000, were, at three several times in January, September, and October, 1818, entered in the name of Clement T. Coote, and were posted in the ledger to the credit of Clement T. Coote & Co. This evidence was in the power of the defendants at the trial; and the ignorance of one of the officers of the bank, who was not the bookkeeper, is not sufficient ground for a new trial. If it were, there could never be an end of new trials. The bank could obtain them whenever they should desire; for it is hardly probable that there should not be found, some one of the numerous officers of that bank who was, at the time of the trial, ignorant of some fact which might be material in the cause. But the evidence itself seems to be wholly unimportant; for the posting it to the credit of Coote & Co. is evidence that the officers of the bank understood it as being originally deposited to the credit of that company. (3) The principal ground relied upon by the defendants, in support of their motion for a new trial, is, that the court refused to instruct the jury as prayed by their counsel.

It appeared in the evidence that the bank held a deposit to the credit of the firm of Clement T. Coote & Co., to the amount of $500, which was money had and received by the bank for the use of the plaintiffs, and which they have a right to recover in this action, unless the bank have a right to charge them with the individual note of C. T. Coote, one of the plaintiffs, dated 21st September, 1818, for $200, payable 23d of November, 1818, and his individual check for $300, dated 29th September, 1818. The entries of these debits in the bank-book of Clement T. Coote & Co., kept at the bank, appear to be post-entries, interpolated and crowded in between other entries previously made. The check for $300 appears to have been given to take up C. T. Coote's individual note for that amount, previously discounted at the bank for his accommodation. The individual note of C. T. Coote, for $200, was charged up in the joint account of Coote & Co. Prima facie, the bank had no right to charge the note and check to that account, any more than they would have had to offset them against the joint demand of Coote & Co., if they had brought suit against the bank. The burden of proof was on the bank, to show the assent of the other partner, or that the transaction was for joint account and benefit. One partner has no right to draw the joint funds in his own name; he cannot lawfully appropriate the joint funds to his own use; he has only the right to use the joint name, and to act as and for the firm. When he receives joint goods, he receives them in the name of the firm. If he gives a receipt for them, he signs the name of the firm; if he verbally direct a payment to be made out of the joint funds, he does it in the name of the firm, and as representing the firm. His right, as a partner, is only to represent the firm, and to act in the name of the firm; as an individual, he has no authority over the partnership effects. If he act avowedly in his individual character, everybody knows that he cannot bind the firm; and every person who deals with him, ostensibly in his individual character, if he would charge the firm with his acts, must take upon himself the burden of proving that, notwithstanding appearances to the contrary, he was acting for and on behalf of the firm, and for their account and benefit.

In the present case, the bank did undertake the burden of that proof; and, for that pur-

pose, introduced Mr. Weightman, an officer of the bank, who testified that during the partnership, and while the joint funds were in the bank, to the credit of the firm, a note signed by C. T. Coote, in his own name only, fell due at the bank, and as Coote had no funds nor account there, then, nor at the time when the entries of September 29, 1818, and November 23, 1818, were made in the bank-book of C. T. Coote & Co., the witness called on Mr. Coote, to know how the note was to be paid; who said it was a partnership transaction, and that he intended the note to be paid out of the joint funds in the bank, and directed the witness so to do. That he had intended to put the partnership name to the note, but had, by mistake, put his own name only. That he might draw notes or checks in the same way again, that is, on partnership account, but in his own name only, by mistake, instead of that of the firm; but that if he should have no funds in the bank in his own name, as he should in all such cases draw such checks or notes on partnership account, and intending them to be paid out of the partnership funds, he would thank the witness and the gentlemen of the bank to pay them out of the funds of the concern; as they might, in such cases, take it for granted that they were drawn on partnership account. Upon which evidence the defendants prayed the court to instruct the jury, in substance, that if they believed, from the said evidence, that Mr. Coote, at the time or before the said note and check were drawn, informed Mr. Weightman as above stated, then the plaintiffs are not entitled to recover, unless they can satisfy the jury that Mr. Coote drew the said note and check on his own account, and not on partnership account, and that the defendants or their officers knew, or had sufficient cause to know, that he so drew them; which instruction the court refused to give.

The question is, whether this testimony of Mr. Weightman shifted the burden of proof from the defendants to the plaintiffs. We think it did not. The presumption arising from that testimony, that it was really and bona fide a joint transaction, is not, in our opinion, as strong as the presumption arising from the signature, and other circumstances stated in the evidence, that it was the individual transaction of Mr. Coote. And the instruction which the court ought to have given, if they had given any, should have been, that, upon that evidence, the plaintiffs had a right to recover, unless the jury should be satisfied by the evidence, that the note and check were really drawn for the joint account. All the cases cited are where the joint name was used, or where it was equivocal whether it was used or not. That circumstance throws the burden of proof on the party who wishes to show it to be the individual transaction of the partner who used the joint name. If the note and check, in the present case, had been drawn in the name of Clement T. Coote & Co., all these cases would have been applicable. Each partner has a right to use the name of the firm; and if he does, it is an act within the scope of his authority, and the transaction is prima facie joint; and it is probable that a mere knowledge, that it is used for the individual benefit of one of the partners, is not sufficient, without collusion, to prevent it from binding the other partner. But when the name of the firm is not used, it will require strong evidence to rebut the presumption that it is an individual transaction.

In the present case, the evidence is that the partner, whose individual note was taken up by this check, informed an officer of the bank, in conversation respecting another note, at some time, whether before or after the payment of this check does not appear, but perhaps before, that that note was a partnership transaction, although signed, by mistake, with his own name only, and was to be paid out of the joint funds in the bank; and that as he might again, by mistake, draw similar notes or checks in his own name only, he would thank the officers of the bank to pay them out of the joint funds, if he should then have no funds in the bank in his own name; as they might, in such cases, take it for granted that they were drawn on partnership account. The question is not, whether the bank had confidence in the representations of the party who was seeking to pay what appeared prima facie to be his individual debt out of the joint fund; for we take it that, in order to justify the bank in charging the other partner with this check, it must have been in fact drawn for a partnership purpose; and the bank, in the face of the written evidence of its being an individual transaction, takes upon itself the risk of proving it to be so, in a contest with the other partner, by other evidence than the declaration of the party to be benefited by the payment of the check. Partners run risk enough, by the authority of each to use the name of the firm, without charging them, except upon decisive evidence, in cases where the name of the firm is not used. In this case, the evidence is of the slightest kind. It is only the declaration of the individual partner, who drew the check, that he might, by mistake, draw a check or note in his own name, instead of that of the firm; and that in such case, that is, where it was so drawn by mistake, the bank might presume it was a joint transaction. And from this evidence the jury was to be asked to presume that this check was drawn, by mistake, in the name of C. T. Coote only; and that it was, in fact, a joint transaction, in spite of the presumption arising from the facts, that it appeared upon its face to be an individual transaction; that it was given to take up a note drawn in the individual name of Mr. Coote, and discounted by the defendants, and the proceeds of the discount never carried to the

credit of C. T. Coote & Co. in the books of the defendants.

We think the court did right in refusing the instruction prayed by the defendants. The court gave no instruction to the jury on that point. The jury were left to draw their own inferences. In the case of Swan v. Steele, 7 East, 210, the name of the firm was used. So, also, in the case of Ridley v. Taylor, 13 East, 175. In Wood v. Braddick, 1 Taunt. 104, the letter of Cox, one of the partners, written after the dissolution was admitted in evidence, in an action against Braddick, the other partner, merely to prove the receipt of the goods by Cox, and the amount of the debt. The fact that it was a partnership transaction seems to have been proved by other evidence. Whatever, therefore, was said by the judges in that case, (which does not seem to have been very solemnly considered,) so far as relates to the question whether the declarations of Cox could be given in evidence against Braddick to prove that the goods were consigned to Cox, or received by him on the joint account, is a mere dictum; and that, directly contrary to the opinion of Lord Alvanley in the case of Petherick v. Turner, cited by the defendant's counsel; contrary, also, to the decision of the supreme court of New York, in the case of Walden v. Sherbourne, 15 Johns. 409; and in the case of Hackley v. Patrick, 3 Johns. 536. And in all the other cases cited from Mont. 31, and Gow, 59 and 67, the name of the firm was used; and it is in such cases only that it is necessary for the contending partner to prove collusion in the creditor. In page 60, Gow says, "In the hands of a person aware of, and collusively partaking in the fraud committed upon the partnership by the individual partner pledging the firm in a separate transaction without their consent, the joint security would not be available. In such a case it would be the same as if the debtor had pledged the fund of a stranger for his own debt, on his own assertion that he had authority so to do; if he had such authority the pledge would be good; but the creditor would take it at the peril of proving that authority, if it were afterwards denied. The power possessed by one partner, of binding his co-partners in joint transactions without their knowledge or consent, bears, in many instances, sufficiently hard upon partners; but it would be carrying their liability for each other's acts to a most unjust extent, if it were suffered that in a separate transaction one partner could pledge the credit of the firm."

It has been suggested, that Coote was the agent of the firm, and that his acts, as agent, bind the firm. But an agent can only bind his principal when acting within the scope of his authority, and his authority, in this case, cannot exceed his authority as partner; for it is only because he is said to be the acting partner that he is averred to be the agent of the firm. If he had any greater power it has not been shown. One partner has no authority to bind the firm for his own debt, even by the use of the joint name; and a fortiori, by the use of his own name; and his own declaration that it was a joint transaction, if such declaration had been sufficiently proved, is not evidence of that fact against the other partner. But it is said that the books of the copartnership were made evidence by being called for and examined by the defendants, and it is objected that the court suffered a witness to testify that he had examined the books, then in court, and lying before him, and that he could find no entry in them respecting the note and check which were the subject of controversy. The testimony of that witness is said to have been improper, and that the admission of it is ground for a new trial. But if the testimony were immaterial, or only in corroboration of other evidence to the same point which the court should deem to have been sufficiently established without that testimony, the court ought not to grant a new trial on that ground. As the books themselves were given in evidence and were then in court, it was sufficient for the plaintiffs to have averred that no such entry could be found in them; and the jury must, and, no doubt, would have presumed that fact, which, if not true, it was in the power of the defendants to show to be false by the books themselves. The averment made by a disinterested witness surely should not be of less avail than the averment made by a plaintiff himself. The testimony therefore was unimportant.

New trial refused by THE COURT (nem. con.), but THRUSTON, Circuit Judge, doubting.

COOTE (PATRIOTIC BANK v.). See Case No. 10,807.

Case No. 3,205.

COOTS v. MORTON.

[5 Cranch, C. C. 409.][1]

Circuit Court, District of Columbia. March Term, 1838.

SLAVERY—MANUMISSION ON CONDITION.

The petitioner claimed freedom under the following clause of the testatrix's will: "I will that George, if he behaves well until the year 1837, and continues to hire for good wages, shall, at the end of that year, be free." *Held*, that it was competent for the defendant to show, that the petitioner did not behave well, &c., but ran away.

[An action by George Coots, a negro, against the executor of Mary Morton.]

Petition for freedom under the following clause of Mary Morton's will: "I will that

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

George, if he behaves well until the year 1837, and continues to hire for good wages, shall, at the end of that year, be free."

Mr. Marbury, for defendant, offered evidence to prove that the petitioner ran away, and that the defendant had to expend two hundred dollars to get him back again.

Mr. Dandridge and Mr. Bradley, for petitioner, contended that the condition was only in terrorem, and objected to the evidence.

But THE COURT (nem. con.) overruled the objection, considering the good behaviour as a condition precedent.
Verdict for the petitioner.

Case No. 3,206.

COPE v. HUNTT.

[4 Cranch, C. C. 293.][1]

Circuit Court, District of Columbia. March Term, 1833.

EXTENSION TO MAKER OF PROMISSORY NOTE—DISCHARGE OF INDORSER.

The indorser of a promissory note is discharged by the plaintiff's giving the maker time to pay by instalments.

Assumpsit, against the indorser of Houston's note for $500, due July 7, 1829.

R. S. Coxe, for the defendant, offered evidence of a subsequent agreement between the plaintiff and the maker of the note, that the latter should assign ten dollars a month of his pay as a clerk in the treasury department in payment of the note; and that the plaintiff should wait for payment in that manner. That Houston continued to make such payments according to the agreement until April, 1831; and that this agreement was made without the knowledge of Huntt, the indorser. Bank of U. S. v. Hatch, 6 Pet. [31 U. S.] 250; 5 Vin. Abr. 527, pl. 17; Bridg. Dig.

J. Dunlop, contra.
There was no new consideration. It was a mere promise to wait. McLemore v. Powell, 12 Wheat. [25 U. S.] 554, 556.

Whereupon, THE COURT (MORSELL, Circuit Judge, contra) instructed the jury, at the prayer of the defendant's counsel, that such an agreement, if proved, discharged the indorser, (the defendant,) from his liability.
Verdict for the plaintiff; but, THE COURT being of opinion that the verdict was against the evidence, or the law, granted a new trial. (MORSELL, Circuit Judge, contra.)

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

COPE (JUDSON v.). See Case No. 7,565.

Case No. 3,207.

COPE et al. v. ROMEYNE et al.

[4 McLean, 384.][1]

Circuit Court, D. Michigan. June Term, 1848.

FIXTURES—MORTGAGOR AND MORTGAGEE.

The mortgagee may remove that which is not a fixture, and which was placed or constructed on the ground, after the mortgage was executed. This is especially the case where the purchaser had no notice, and acted bona fide.

Mr. Emmons, for plaintiffs.
Mr. Romeyn, for defendants.

OPINION OF THE COURT. This is an action of trover. A mortgage was given to the Bank of the United States on the 8th of April, 1840, to secure the payment of the sum of ten thousand six hundred forty-one dollars and fifty-seven cents on lots fifteen, sixteen, and seventeen, in Port Sheldon, a town on paper only, by the Port Sheldon Land Company. An association was formed, called the "Port Sheldon Land Company," in Michigan, to lay out a town, build a steam mill, and to make other improvements. The assignees of the bank bring this suit. Before action was commenced on the mortgage, the trustees of the land company released the equity of redemption to the plaintiffs. The loan was made to the company by the Bank of the United States, the 18th of April, 1838, which was negotiated by Mr. Jaudon, who was cashier of the bank, and was one of the land company. When the release of the equity of redemption was given, it was stipulated that the proceeds of the property should be applied in payment of the mortgage debt. Mr. Jaudon being sworn, stated that he acted as agent for the land company, and in that character purchased an engine to put into a saw mill, which they had constructed on one of the lots mortgaged. That being in possession in 1843, as agent, and one of the land owners, he took down the engine and shipped it, with its apparatus, to Detroit, accompanied by a bill of lading, which was indorsed to Romeyn, and which he indorsed to the "Bank of Sinclair." Romeyn was authorized to sell the engine, and he did sell it to the Bank of Sinclair, and indorsed to it the bill of lading. Pitts purchased it for the bank, in good faith, without notice from Romeyn, the bank having made advances on the engine. A bill was filed to foreclose the mortgage—defense withdrawn. No steps have been since taken on it. Mr. Jaudon says the release of the equity of the mortgage was released only on the condition that

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

it should be in full payment of the mortgage, and the assignors so understood at the time of the assignment. The plaintiffs admitted, by a letter to Jaudon, 11th March, 1847, that the mortgage was limited to the lots expressed.

The counsel for the plaintiffs insist that the mortgagee, after forfeiture, may sue in trover for any part of the freehold, severed before or after the mortgage became due, though out of possession. 17 E. C. L. 272. Mortgager is less than a tenant. The personal property, when severed, still belongs to the mortgagee. Admits that if the mortgager had sold the property, including the engine, the title would have been good. But he insists that, the engine being severed, a sale by the mortgager does not give a good title. Recording acts have nothing to do with the present question. 3 Wend. 104; 8 Wend. 584; Pow. Mortg. note 165; 2 Greenl. 387; 33 E. C. L. 115; 1 Doug. 21, 256; 15 E. C. L. 486.

The only question which is raised by the pleadings is, whether the engine could properly be claimed by the mortgagees. At the time the mortgage was executed, there were no improvements on the lots. A saw mill was subsequently constructed. Now, it is admitted that all improvements, such as a saw mill, essentially connected with the freehold, could not be removed by the mortgagers. But was the engine so connected as to make it the property of the mortgagees? It was necessary to the operation of the mill, but was it so attached to the soil, as a fixture, that the mortgagees could not remove it? The mortgagees, after building their mill, were not bound to keep it in operation, or to repair it. They, having erected it, had a right to abandon it. Had the improvements been on the premises at the time the mortgage was executed, the mortgagees, by an action, might have turned them out of possession, or restrained them from committing waste. The mortgage debt was due at the time the mortgage was given. But, if it be admitted that the engine was a fixture, and could not be severed from the freehold, that could not affect the right of the Bank of Sinclair. Pitts, the agent of the bank, purchased it, without notice, bona fide, and the bill of lading was indorsed to him by Romeyn, to whom the engine was consigned. The bill of lading, in regard to the transfer of the property, like a bill of exchange, is good, unless affected by notice. And it is not pretended that there was bad faith on the part of the Bank of Sinclair, or that its agent had notice. We think, therefore, that as a matter of law, the above facts being admitted, the jury must find the defendants not guilty. On this intimation, a non-suit was suffered, and a motion was afterward made to set it aside, which THE COURT overruled.

Case No. 3,208.

COPELAND v. BURTIS et al.

[13 Pittsb. Leg. J. 244.]

Circuit Court, W. D. Pennsylvania. Nov. Term, 1865.

ANNULMENT OF CONVEYANCE PROCURED BY FRAUD.

Deed declared void because procured by fraud practised upon the grantor.

Bill in equity to obtain the surrender and cancellation of a deed.

Purviance, Lucas & Linn, for complainant.
Foster, Corbett & Kerr, for respondent.

McCANDLESS, District Judge. The complainant in January, 1865, was the owner of a tract of land on Piehole creek, Venango county, Pennsylvania. It adjoined a tract called the "Hohnden Farm," on which a well had been sunk called the "United States Well," which on the ninth of January commenced to flow with oil to a large amount. Its value was estimated not in thousands, but in millions.

Previous to this twice the enormous wealth which had been suddenly accumulated by those who by good fortune or by good judgment had become the owners of the best oil producing lands, had caused a fever of speculation to spread through the country and among all classes of society. The rich desired to become richer and the poor to become suddenly rich. Of course there was no want of persons willing to turn the mania to their own profit and speculation of the credulity or folly of others. Every tract of land whose surface was worthless was presumed to contain hidden treasures beneath it, and was seized for the purpose of an oil stock company boasting of a capital of hundreds of thousands, divided into infinitesimal shares, to tempt even the poor to waste their hard earnings in these new schemes to obtain sudden wealth.

Nine-tenths of these stock companies were mere bubbles, supported for a time by reports from agents, who were daily expecting to strike oil. But the stockholders finding themselves only called on to pay assessments on their stocks instead of receiving dividends from profits, began at last to open their eyes. Consequently there was a sudden collapse in the market of such commodities. The good and the bad suffered equally in the public estimation, while the real value of each remained the same. The success of the United States well demonstrated the great value of the lands on Piehole creek. There was every reason to calculate that the Copeland tract would yield as great profits as the Hohnden tract, which it adjoined. The value of it therefore was not merely speculative or uncertain, depending on the panics of the stock market. It had not been converted into stock to be tossed up by bulls or trampled down by bears.

In the first stage of this transaction Copeland acted with discretion and with judgment. If he had continued to do so we should not have heard of this controversy. Instead of attempting to manage the sale of his farm himself, he put it into the hands of Mr. Bell, who was a sort of broker or agent in conducting the sales of oil lands. He offered him two per cent. on the sum he should obtain for the tract, which was very judicious. Mr. Bell contracted with the defendant Burtis, for the sale of the land for the sum of $300,000.

Previous to the execution by Copeland and wife of the agreement with Burtis on the twenty-first of January, one Rugg had obtained an interest in the tract of one-eighth, which Copeland was instructed by his agent to have released or adjusted.

Rugg, who had before promised to release for the sum of $8,000, demanded $40,000 after the success of the United States well was known, and Copeland in order to get rid of his claim was compelled to give him his judgment notes for the sum of $40,000, which would be a valuation of the whole $320,000.

By the terms of the article of agreement Burtis, besides the $10,000 paid in cash, covenanted to pay $30,000 on the first of March and $60,000 on the first of April, $100,000 in three months after that date and $100,000 in six months. These payments he had expected to make by the assistance of capitalists in New York, or the formation of another stock company. His negotiations there for this purpose failed, owing to the panic in the stock market, which soon after commenced, and the consequent distrust of all schemes of speculation in such investments by which so many had suffered.

He was therefore unable to make the payments which became due on his contract. In order to get clear of his covenants and to save his $10,000, he, with the assistance of a friend, Albert G. Morey, obtained from the complainant the deed on the third of April to Morey for the one-third of the consideration which he (Burtis) was bound by his covenant to pay. This deed of the third of April, 1865, forms the subject matter of this controversy.

The complainant alleges that it was obtained from him by false and fraudulent representations made by the respondents.

According to the new rule of evidence supposed to have been made by congress in a proviso to a section in a revenue bill, the parties were each examined as witnesses—Copeland and wife for complainants and Burtis and Morey for respondents. The only third and disinterested witness present was Odell, whose testimony confirms that of complainants.

It is unnecessary to refer to books or cases as to the principle of equity which should govern this case. The only question will be, was the complainant, who had sold his land for three hundred thousand dollars, induced to execute this deed for the same to one of the defendants by false and fraudulent representations? If such be found to be the fact, there can be no doubt as to the duty of the court.

Without noticing the discrepancies between the testimony and sworn answers of the respondents or those of the numerous witnesses examined in the case, we shall proceed to state the facts as we find them.

1. The complainant Copeland though perfectly competent to manage his little farm to sell and buy his cattle and other like transactions of persons in his situation of life, was a man of dull capacity, ignorant, incapable of apprehending the importance or effect of formal legal instruments when read over to him. He was wholly unfit to transact business of such magnitude without the assistance and advice of friends of capacity much superior to his own. His character and capacity for such business are correctly stated by the respondents. When Burtis was in New York trying to negotiate a sale of the property for $400,000 he stated to a witness who inquired of his success, "Not so well as I expected." They had the meeting, the result of which was not satisfactory; but he said they had come to the conclusion to carry out the programme, which he thought would work. The programme was this: Burtis and Mason, and his other friends, were going to Titusville. He there would meet a friend of his whom he wanted to connect with him. His friend was west somewhere—he was not in New York. That they were going to take $75,000, and go to the party from whom he had bought for $300,000, and spread it out before him and induce him to accept of the $75,000 for the purchase money, in payment of the property. That if he would not accept of the $75,000, they would go as high as $100,000—that would be the outside figure.

Then the witness remarked that he did not think it could be done. He replied, "he could for this reason: that the parties he was dealing with were old, unacquainted with doing business, unused to handling money only in small quantities, and that $75,000 spread out before them, would be a great temptation for them to accept, and that he was confident that they would not let the money go away." Witness replied that he might succeed, but they were different from any people he had ever met on the creek if he did. Burtis said that they would sign any paper that he wanted—that he was in their confidence to that extent that they would do anything he said.

Afterwards when the respondents were endeavoring to persuade or frighten Rugg with a compromise of his judgment of $30,000 which they threatened to contest—they stated that they did not consider Copeland a man capable of doing such business as Rugg's claim related to. They thought that he could be got to sign one paper as well as another—that it would be an easy matter to

defraud him. We have thus from the respondents' own mouths, a true statement of the business capacity of the party they were about to deal with.

When Burtis returns from New York his friend Morey is there, and had been examining the oil country; he agrees to advance money if they could get the farm for $100,000. Accordingly without any previous consultation, or consent of Copeland and his wife (who is rather the shrewder of the two), without any application to their agent Bell, who has acted for them in the sale of January twenty-first, they proceed to draw up writings which the complainant and wife were to be persuaded to execute on the terms dictated by the purchasers.

The article of agreement made with Copeland in January is assigned by Burtis to Morey. Copeland is asked to cancel it, but the deed to Morey is drawn for the consideration of $300,000. A mortgage is drawn to Copeland for $50,000, payable in five years, with interest payable yearly. But this mortgage is unaccompanied with any bond, or personal security, for either principal or interest. The condition of the mortgage is that "If Morey should pay the sum of $50,000 and interest thereon as aforesaid, within five years from this date."

It is not expected that the oil is inexhaustible or will run forever. If it should fail within the six years, the vendee might surrender the farm, dug into holes and worthless, after receiving millions of dollars for the oil, taken from it.

As might be expected when the terms are prepared by one party, without consulting the others, Burtis who was bound to pay sixty thousand dollars on the first of April, and who had failed to pay thirty thousand in March, was not only to be released from his contract, but was to get back his ten thousand dollars paid to bind the first bargain. The judgment of Rugg, for which Copeland was personally liable, and which would have been paid except for the default of Burtis, was wholly unprovided for. Respondents verbally promised to pay it, if with the assistance of Copeland, they could not get clear of it, and if so, they were to give Copeland something "handsome."

The deed prepared is drawn with general warranty, without any mention of the previous leases made by the vender of small portions, so that the letter of the warranty was broken as soon as it was signed.

Now without adverting to the scheme entertained by defendants of using this judgment of Rugg to compel a judicial sale of the land for the purpose of defeating the mortgage given complainants, let us examine the means used to persuade or compel him to sign this deed, for the inadequate compensation thus offered.

On the third of April, Burtis goes to the house of complainant, and tells him of the great fall of fancy oil stock in the stock market of New York, and that consequently the lands on Piehole creek would be unsaleable and had lost their value; that Morey was ready to give him $100,000; that unless this sum was accepted immediately Morey would return the next day to Chicago; that Rugg had declared his intention to sell the land on his judgment immediately, and unless Copeland would accept his terms he would be ruined. The complainant and his wife are carried off to Burtis's office at one o'clock in the day, where the papers were prepared for their signatures. Morey brings $14,500 and spreads it on the table. Copeland wishes to consult counsel. He is told the papers are all right, had been copied from legal precedents, and that a lawyer would charge $10 for his advice. Copeland asks then to see Rugg, and see if he would not give time for the payment. Burtis said there was no time to wait—Morey would leave in the morning. Mrs. Copeland withdrew, saying she would like to see Rugg before these papers were signed; and then started out into the alley. Burtis followed, and clapped his hand on her shoulder and said for God's sake to call Mr. Copeland and have these papers signed or you will lose all your land.

Having thus got the signatures of Copeland and wife to this deed, they were told that the vendor had to pay the necessary stamps, and as the consideration stated in the deed was $300,000, $300 were taken from his money to pay for them.

Thus the complainants, instead of $290,000 which they were entitled to receive on their sale of January before the execution of a deed, were prevailed on to sign a conveyance to Morey for the sum of $10,000 and a mortgage for $50,000, payable in five years, for property worth at least half a million. In a few days after the transaction the complainant's dull perceptions began to perceive that he had been imposed upon and been defrauded. His friends advised him to refuse possession and to consult counsel. But he was forcibly put out of possession and his bill was then immediately filed.

It is sufficient to say that the statements with regard to Rugg were utterly false, and that the representations as to the fall of fancy oil stocks in the New York market, though true, were used to deceive an ignorant man, by leading him to infer that the good oil lands on Piehole had depreciated in value. There were no written contracts entered into by the respondents as to the share Burtis was to have in the speculation. To a remark made by a witness to Burtis on the same day "that he had made eighty thousand dollars," he replied, "If I don't make double that I will wonder."

A few days afterwards the respondents say it was understood that Burtis was to have half for $50,000, and some days after that Burtis was to pay his $50,000 by a transfer of one-fourth of his half to Morey

for the same amount. Thus Burtis was to have three-eights for his ten thousand paid to Copeland, and Morey five-eighths for his advance of the same sum, thus valuing the speculation at $100,000 though subject to the Rugg judgment and the mortgage. Rugg has neither been paid nor as yet defrauded out of his claim.

It is not worth while to characterize by any epithets this transaction, by which a debt of $290,000 has been paid by $10,000, and a verbal promise to pay the judgment for which Copeland is still liable, and a mortgage on land which in five or six years may be utterly worthless, after it is exhausted of mineral wealth worth millions.

Suffice to say the deed of the third of April has been procured by gross fraud, and ought to be set aside and annulled.

The complainants are entitled to a decree according to the prayer of the bill.

COPELAND (CLARK PATENT STEAM & FIRE REGULATOR CO. v.). See Case No. 2,866.

Case No. 3,209.

COPELAND v. MEMPHIS & C. R. CO.

[3 Woods, 651.][1]

Circuit Court, N. D. Alabama. Oct. Term, 1878.

REMOVAL—CITIZENSHIP OF CORPORATION—CONSTRUCTION OF STATUTES.

1. Several states may, by competent legislation, unite in creating the same corporation, or in combining several pre-existing corporations into one; and one state may, without thereby creating a new corporation, authorize a corporation of another state to carry on business within its territory.

[Cited in Blackburn v. Selma, M. & M. R. Co., Case No. 1,467; Colglazier v. Louisville, N. A. & C. Ry. Co., 22 Fed. 568.]

2. A suit against a corporation was removed from a state to the federal court, on the ground that there was in it a controversy between citizens of different states, the plaintiff being a citizen of the state where the suit was brought. On a motion made by the plaintiff to remand the suit, because both parties were citizens of the same state: *Held*, that the burden of proof was on the corporation to show that it was not a citizen of the same state with the plaintiff.

3. The preamble of a statute is no more than a guide to the intention of the law-maker, and may be resorted to in the construction of the enacting clause, where any controversy exists as to its meaning.

4. The title of an act has generally but little weight in its construction, but in doubtful cases may be resorted to to explain the general purport of the act.

5. It is incumbent on suitors who invoke the jurisdiction of the courts of the United States to bring themselves clearly within that jurisdiction.

6. The act of the legislature of Alabama, approved January 7, 1850, entitled "An act to incorporate the Memphis & Charleston Railroad Company," makes said company, within the state of Alabama, an Alabama corporation.

[Cited in Memphis & C. R. Co. v. Alabama, 107 U. S. 581, 2 Sup. Ct. 432.]

Heard on motion of plaintiff [Lizzie Copeland] to remand the cause to the state court. On March 28, 1877, the plaintiff, a citizen of Alabama, brought her action against the defendant in the circuit court of the state of Alabama, in and for Lawrence county, to recover damages sustained by the death of her intestate, which she alleged was caused by the carelessness and negligence of the defendant. The cause was, on the petition of the defendant, removed to this court, by virtue of the provisions of the act of March 3, 1875 (18 Stat. 470), and the record brought here by writ of certiorari, dated October 2, 1877. At the first term of the court following the filing of the record, the plaintiff moved to remand the cause to the state court in which it was commenced, on the ground that this court was without jurisdiction to entertain the cause. The alleged want of jurisdiction was based on the claim of plaintiff, that the defendant corporation was, for all the purposes of this suit, a body corporate, created by the laws of Alabama, and therefore a citizen of Alabama, and was not, as claimed by defendant in its petition for removal, a foreign corporation.

The question was, therefore, presented, whether the Memphis & Charleston Railroad Company was or was not an Alabama corporation. The facts upon which the case turned were as follows: On February 2, 1846, the legislature of Tennessee passed an act "to incorporate the Memphis and Charleston Railroad Company." The act declared that, for the purpose of establishing a communication by railroad between Memphis, Tennessee, and Charleston, South Carolina, the formation of a company was thereby authorized, which, when formed, should be a body corporate, by the name and style of the "Memphis & Charleston Railroad Company." The usual powers of such a corporation were conferred by the act on the body corporate thereby created. The act named a large number of persons to receive subscriptions of stock, and appointed eight persons to act as a board of commissioners or corporators. Under this act books were opened for the subscription of stock, and subscriptions of stock were made.

On the 7th of January, 1850, an act was passed by the legislature of Alabama, entitled "An act to incorporate the Memphis & Charleston Railroad Company," of which the following is a copy:

"Whereas, an act was passed by the state of Tennessee, bearing date the 2d of February, 1846, and the same was amended by an act of the same state, dated February 4, 1848, for the formation of a company under the name and style of the 'Memphis & Charleston Railroad Company,' for the purpose of establishing a communication by rail-

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

road between Memphis, Tennessee, and Charleston, South Carolina; and, whereas, it is believed that the most eligible route for said road is through a portion of this state; and, whereas, it is also believed that great and lasting benefits will accrue to the inhabitants of this state from said improvement; therefore,

"Section 1. Be it enacted by the senate and house of representatives of the state of Alabama, in general assembly convened: That the said company shall have the right of way, through the territory of this state, to construct their road along the valley of the Tennessee river to the town of Huntsville, and thence to some point on the Nashville & Chattanooga Railroad, or to some point on the Georgia or other railroad leading eastwardly, so as to communicate with Charleston and other Atlantic ports; and that said company shall have the right of way over the bed or bank of the Muscle Shoals canal, provided it can be found necessary in the construction of said road, and shall also have the right of way through any lands belonging to the state of Alabama, or to the Bank of the State of Alabama, or to any of the branch banks of said state, together with the right to use any stone, timber or other materials on said lands, necessary in the construction of said road; and said company shall have and enjoy all the rights, powers and privileges granted to them by the acts of incorporation above mentioned, and shall be subject to all the liabilities and restrictions imposed by the same, together with the following requirements:

"Sec. 2. That in the event said road shall be located through Tuscumbia, it shall be the duty of the company to construct a branch to Florence; and in the event that said road should pass on the north side of the Tennessee river, near Florence, it shall be the duty of said company to construct a branch to Tuscumbia, provided that the subscription in the town or county applying for such branch shall be fully sufficient to pay the costs of the same.

"Sec. 3. That said company shall be authorized and required to open books for the subscription of stock in the capital stock of said corporation, in the state of Alabama, so as to afford the citizens thereof an opportunity to take stock to the amount of fifteen hundred thousand dollars of the capital of said company; provided, that if said fifteen hundred thousand dollars be not subscribed in Alabama within ninety days after the books are open, then it may be taken elsewhere.

"Sec. 4. That the said company shall, at the first meeting of stockholders, designate a time when, and a place or places where, for the convenience of the citizens of the state who may be stockholders, the subsequent elections for directors shall be held, and give notice thereof in one or more newspapers published in north Alabama, and said elections shall be held at the same time, both in this state and in Tennessee.

"Sec. 5. That the moneys subscribed by the citizens of Alabama, whether by the state, counties, corporations or individuals, shall first be applied to the construction of the road within the limits of the state of Alabama, and said moneys shall be placed in some safe depository in north Alabama until required for use; provided, that nothing in this section shall be so construed as to prevent the company from putting under contract the whole road whenever, in their estimation, a sufficient amount of funds shall have been obtained.

"Sec. 6. That said company shall not charge for the transportation of persons or property any higher rates on one part than on another of said road, but the toll shall be equal and uniform on every part of said road for articles of the same description, whether passing in one direction or the other.

"Sec. 7. That the company hereby incorporated shall not locate their road on the track of the Tennessee Valley Railroad, nor of any other railroad which has heretofore been chartered by this state, provided companies have been organized under the same, without first procuring the assent by agreement with said companies, but it shall be lawful for the company hereby incorporated to acquire by purchase, gift, release or otherwise, from any other company, all the rights, privileges and immunities of said company and persons, and enjoy the same as fully as they were or could be possessed or enjoyed by the company making the transfer.

"Sec. 8. That any railroad company now chartered, or hereafter to be chartered, in this state, shall have the right to connect their road with the road authorized by this act.

"Sec. 9. That nothing in this act contained shall prevent the state of Alabama from levying and collecting such taxes on the property of said company, within this state, as shall be, by the general assembly of this state, assessed on the property of other railroads in this state, nor shall anything therein be construed so as to prevent the chartering and building of other railroads in this state, coming within any distance whatever of said road, anything in the said law of Tennessee to the contrary notwithstanding."

At a subsequent day of the same session, to wit, on February 12, 1850, the legislature of Alabama passed an act to amend the said act of January 7, 1850. The first section of this amendatory act provided as follows: "That the subscribers to the capital stock of the Memphis & Charleston Railroad Company, in the state of Alabama, from a failure to obtain the necessary legislation from the states of Tennessee and Mississippi, or from any other cause, deem it expedient to form a separate and independent organization, then, and in that event, they are hereby vested with full power and authority to do the same,

and said company so organized shall be known by the name and style of the Mississippi & Atlantic Railroad Company, and shall have and enjoy all the rights, privileges and powers heretofore granted, imposed, or intended to be imposed, in the several acts incorporating the Memphis & Charleston Railroad Company." The second section of this act, in order to perfect the organization authorized by the first section, named certain persons to act as corporators, with all the powers of the corporation named in the original act. The third section provided for a consolidation of the company authorized by the amendatory act with any company or companies which had been, or might be formed, under the authority of either the legislature of Tennessee or Mississippi.

Under the provisions of the above mentioned act of the legislature of Tennessee, to incorporate the Memphis & Charleston Railroad Company, and of the said first mentioned act of the legislature of Alabama, bearing the same title, the stockholders of the Memphis & Charleston Railroad Company met in Tuscumbia, Alabama, on April 29, 1850, and proceeded to the election of nine directors of the company, and on May 1, 1850, the said directors organized by the election of a president, treasurer and other officers. Afterwards, on January 15, 1851, at a meeting of the board of directors, held on that day in Huntsville, Alabama, it was resolved that the branch from Tuscumbia to Florence be located and constructed upon the terms and conditions of the charter. The Memphis & Charleston Railroad Company has but one president and board of directors, and but one set of corporate officers, and never had but one. The offices of the president, superintendent and treasurer are all located in Memphis, Tennessee, and the chief officers in all branches of the business of the company have always kept their offices there. The stock of the Memphis & Charleston Railroad Company represented and covered all the property of the company, including its line of road from Memphis, Tennessee, its western terminus, to Stevenson, Alabama, its eastern terminus.

D. P. Lewis and J. B. Moore, for the motion to remand.

Wm. Cooper, Milton Humes, W. Y. C. Humes, and George S. Gordon, contra.

WOODS, Circuit Judge. The contention of counsel who move to remand is, that the act of the legislature of Alabama of January 7, 1850, entitled "An act to incorporate the Memphis & Charleston Railroad Company," created a body corporate, separate and distinct from the corporation of the same name created by the legislature of Tennessee, February 2, 1846, and that such body corporate was, of course, a citizen of the state of Alabama, by which it was created. On the other side, it is claimed that the purpose and effect of the legislation of Alabama was, either simply to confer new powers and privileges, within the state of Alabama, on a Tennessee corporation; in other words, that the act of January 7, 1850, was merely an enabling act, or that it was to confer a charter on the Tennessee company without creating a new corporation. There is no principle of public law which prohibits a state from authorizing a foreign corporation to extend a railroad into its own territory, and for that purpose to buy or take land, and after its construction, to maintain and use its road. The corporation still remains one corporation—a domestic corporation, in the state which created, and a foreign corporation in the other, enjoying the franchises conferred by the charter in the one, and the powers derived from the enabling act in the other. There is certainly no reason for treating it as two corporations. Railroad Co. v. Harris, 12 Wall. [79 U. S.] 65. The question is not so simple when two states, by common legislation, create the same corporation. In such a case, it is not merely the corporation of one state, with enlarged powers derived from the other, but it is as much the corporation of one state as of the other, and is a citizen of both. If, however, the legislatures of both states were to make one corporation only, there is no legal or constitutional necessity for treating it as two corporations in any suits or proceedings by or against it. It was, at one time, held by the supreme court of the United States, that a railroad corporation created by the legislature of two states, with the same capacities and powers, and for the same objects, and referred to in the laws of the states as one corporate body, although composed of the same persons and represented by one name, was nevertheless, on a legal and constitutional necessity, two distinct and separate corporations, upon the ground that the corporation was the creation of the sovereignty which brought it into being, and could have no legal existence beyond its jurisdiction. Ohio & M. R. Co. v. Wheeler, 1 Black [66 U. S.] 286. This, however, is no longer the holding of the supreme court of the United States. According to the recent and better view, as it seems to me, of that court, the question, whether there is a unity in the corporation, and in the proprietorship of the corporate property, is one of legislative intent, and not of legislative power. Several states may, by competent legislation, unite in creating the same corporation, or in combining several pre-existing corporations into a single one. One state may make a corporation of another state, as then organized and conducted, a corporation of its own, as to any property within its territorial jurisdiction. A state may, by an enabling act, authorize a corporation created in another state to build and use a railroad within its own limits without creating a new corporation. Railroad Co. v. Harris, supra. See, also,

Bishop v. Brainerd, 28 Conn. 289; County of Allegheny v. Cleveland & P. R. Co., 51 Pa. St. 228.

The question to be decided, therefore, is resolved into this: Did the legislature of Alabama, by the act of January 7, 1850, intend to create a new corporate body to be known as the Memphis & Charleston Railroad Company, to be a corporation and citizen of Alabama, or merely to recognize the existence of a Tennessee corporation of the same name, and confer upon it the certain powers and privileges, and subject it to certain conditions and restrictions in the state of Alabama? I have had much difficulty in arriving at the object of the legislature in the passage of this act. I have, however, finally reached a conclusion, satisfactory to my own mind, that the design of the law was to create a body corporate in the state of Alabama, having the same powers and franchises as the Memphis & Charleston Railroad Company, incorporated by the legislature of Tennessee. The burden of proof is upon the defendant, to show that the Memphis & Charleston Railroad Company, defendant in this case, is not a citizen of the state of Alabama, but a citizen of Tennessee. The defendant, on this hearing, affirms the jurisdiction of this court, and the plaintiff denies it. In a suit brought by or against a corporation, it is necessary that it be made to appear that the artificial being was brought into existence by the law of some state other than that of which the adverse party is a citizen. Muller v. Dows, 94 U. S. 444.

The facts necessary to jurisdiction of the courts of the United States must be affirmatively averred, and if denied, proved. The defendant must, on this hearing, satisfy the court of its jurisdiction, and this can be done only by showing that the corpo.a.e body sued in this case is not a citizen of the state of Alabama. If this proposition is not made reasonably clear, the court ought not to take jurisdiction, but the motion to remand the cause to the state court should prevail. The controversy turns, mainly, on the construction of the act of January 7, 1850, to incorporate the Memphis & Charleston Railroad Company. The proper construction of a statute requires an examination of the body of the act, the preamble, where there is one, and in certain cases, and for certain purposes, the title may be considered. The true meaning of a statute is generally to be sought in the purview, enacting part, or body of the act. Sedg. Const. 45.

It is an established rule in the exposition of statutes, that the intention of the lawgiver is to be deduced from a view of the whole and of every pa t of the statute, taken and compared together. 1 Kent, Comm. 462; Dwar. St. 194. The preamble to a statute usually contains the motives and inducements to the making of it, but it has been held to be no pari of it, or rather it is not an essential part, and is frequently omitted. The preamble is properly referred to when doubts and ambiguities arise upon the words of the enacting part. The preamble can never enlarge it, can not confer any powers per se. Its true office is to expound powers conferred, not substantially to create them. A preamble is not only not essential, and is often omitted, but it is, strictly speaking, without force in a legislative sense, being but a guide to and not the intent of the statute. And to what is it properly a guide? To the meaning of the enactment? No, but the intentions of the framer, which is only the first stage on the road in the construction of statutes. Dwar. St. 107, citing King v. Athos, 8 Mod. 144; Mills v. Wilkins, 6 Mod. 62; Story, Com. Rules Interp. Const. The preamble of an act may be resorted to to aid in the construction of the enacting clause when any ambiguity exists. Beard v. Rowan, 9 Pet. [34 U. S.] 301.

The use of a title in expounding a statute is shown by the following citations: By the English decisions, the title of a statute has been frequently held to be no part of a statute, for it has usually been framed only by the clerk of the house in which the bill first passes, and is seldom read more than once. In Mills v. Wilkins, 6 Mod. 62, Chief Justice Holt said: "It is true, that the title of an act of parliament is no part of the law or enacting part, no more than the title of a book is a part of a book, for the title is not the law, but the name or description given to it by the makers. Being, then, no part of the act, the title is seen to afford no legislative import. Dwarris, 103." But even in England this rule has been modified, and it now seems that when the meaning of the body of the act is doubtful, the title may be relied on as an assumption in arriving at a conclusion. The King v. Cartwright, 4 Term R. 490. The title is worthy of more consideration, in the case of American statutes, when the legislature passes on the whole statute title, preamble, if any, and the body of the statute. In many American legislatures the title of the act is agreed to by a distinct vote of the body. But even in this country, though the title of an act cannot control plain words in the body of the statute, yet, taken with other parts, it may assist in removing ambiguities. Where the intent is plain nothing is left to construction, but when the mind labors to discover the design of the law-making power, everything which can aid this object may be resorted to, and even the title of the act may receive a due share of consideration. U. S. v. Fisher, 2 Cranch [6 U. S.] 358; U. S. v. Palmer, 3 Wheat. [16 U. S.] 610; Com. v. Slifer, 53 Pa. St. 71. In doubtful cases the title of an act may serve to explain the general purport, but even then it has little weight. Hadden v. Collector, 5 Wall. [72 U. S.] 107.

In the light of these principles the act of January 7, 1850, is to be construed and its meaning ascertained. The question to be decided is, is the act a mere enabling act to confer certain powers on a Tennessee corporation within the state of Alabama, or did it create a new body corporate, having the same franchises as the Tennessee corporation, but still being a distinct and separate artificial person. In resolving this question the preamble affords no assistance, for it is just as applicable to one theory as the other. It refers to the act of Tennessee, incorporating a company for the purpose of establishing a communication between Memphis and Charleston, recites that the most eligible route for said road is believed to be through a portion of this state, and that great and lasting benefits will accrue to the inhabitants of this state from said improvement. These are the reasons given by the preamble which induced the passage of the act. These reasons are just as strong for the passage of an act to create a new Alabama corporation to assist in the enterprise, as for the passage of an enabling act for the benefit of a Tennessee corporation. The end in view, namely, the establishing of a railroad communication between Memphis and Charleston, and the consequent benefits to the inhabitants of Alabama, could be just as well secured by one enactment as the other. We derive no light from the preamble, and must, therefore, look first to the body of the act to ascertain its meaning. The first section of the act, standing alone, gives strong warrant to the idea that the act is only an enabling act. If the act consisted of the first section only, and its title were "An act to confirm an act passed by the legislature of Tennessee to incorporate the Memphis & Charleston Railroad Company," the controversy would fall directly under the authority of the case of Railroad Co. v. Harris, 12 Wall. [79 U. S.] 65, where it was held that such a law did not create a new corporation, but granted permission to a corporation of another state to exercise its functions within the boundaries of the state by which the act was passed. The conclusion of the supreme court in that case, in the construction of the law of Virginia, was reached only after re-argument, and after much difference of opinion upon the question, whether the law of Virginia created a new and distinct corporation, or was only an enabling act in respect to the corporation known as the Baltimore & Ohio Railroad Company, as originally created by Maryland. And it is worthy of remark, that the same enactment of the Virginia legislature had been construed by the supreme court of that state as creating a Virginia corporation—a new and distinct corporate body. The case of Williams v. Missouri, K. & T. Ry. Co. [Case No. 17,728] would also be an authority to support the view of the defendant, if the Alabama act consisted of the first section, only with the title changed as above suggested. But the act under consideration does not stop with the first section; several sections are added. It is, to my mind, very significant, that in the first section the company is called "the said company." The section begins, "that said company shall be authorized and required to open books," etc. The fourth section declares "that said company shall, at the first meeting of stockholders," etc.; and throughout this act until we reach the seventh section, the company is referred to as "the said company." But, in the seventh section, however, this phrase is abandoned, as if designedly, and the company is twice designated as "the company hereby incorporated." Why this change? It was more natural to continue the use of the phrase, "the said company," which had been employed seven times in the preceding sections of the act. But the legislature, with the apparent design of giving a construction to what had been done by the first section, declares, in the seventh, that "the company hereby incorporated shall not locate their road," etc.; "and it shall be lawful for the company hereby incorporated to acquire by purchase," etc. These words, used under these circumstances, mean something. They ought to have effect if possible. We are not authorized to reject them. They are not inconsistent with the first section. They are only explanatory of it. They are a declaration by the legislature, that the effect of the act was to incorporate a company. They remove the doubt which, for a long time, troubled the supreme court of the United States in construing the Virginia act in the case of Railroad Co. v. Harris, supra.

The question might be left here, but considering that the true meaning of the act is still open to some doubt, the case has arisen for resort to the title—and a case in which the title ought to have more than ordinary weight. There is no dispute as to the purpose which the legislature had in view, for that is indicated by the preamble; it was to aid in establishing communication between Memphis and Charleston by a railroad passing over a portion of the territory of Alabama, and it was to afford that aid by an act either creating an Alabama railroad corporation, or by an act conferring upon a Tennessee railroad corporation franchises to be enjoyed within the territory of Alabama. The only question is, which of these two things was done by the act under consideration? The title is explicit, and so far as it deserves consideration, its weight is altogether in favor of the hypothesis that a new body corporate was created. It declares the purpose of the act to be "to incorporate the Memphis & Charleston Railroad Company." There is no ambiguity here. To incorporate means "to form into a legal body, or body politic—to constitute

into a corporation recognized by law as persons with special functions, rights and duties, as to incorporate a bank, a railroad company, or the like." Webst. Dict. This seems to remove the doubt, if any existed. The title declares the purpose of the act to be to incorporate a certain railroad company, and the seventh section declares that by the act such a company was incorporated. But conceding that, after giving the title all the weight it deserves, the true construction of the act is still in doubt, nevertheless, it may be finally claimed that the doubt is of such strength as to preclude the jurisdiction of the courts of the United States. It is the duty of suitors who invoke that jurisdiction, to bring themselves clearly within it, as we have already seen. I am of opinion, therefore, that the defendant has not met the requirements of the law by showing that this court has jurisdiction of the case.

It was urged, in the argument, that the requirements of the fourth section are inconsistent with the view here taken. The requirement referred to is, that "the said company shall designate a time and place in north Alabama where, for the convenience of Alabama stockholders, elections of directors shall be held," etc. It is urged that it would be absurd for the law to require the directors of a Tennessee corporation to fix the time and place for the election of the directors of an Alabama corporation. The obvious answer to this is, that it was the plain intent of the law that while there were to be two corporate bodies of the same name—one in Tennessee and one in Alabama—yet they were to have the same board of directors and the same officers, in a word, the same organization. That this could be done, is held in the case of Ohio & M. R. Co. v. Wheeler, supra. If the two corporations were to be governed by the same board of directors, there was great propriety in the enactment that the Alabama stockholders should have notice of the time and place fixed for their election, and that a poll for the election of directors should be opened in north Alabama.

The act of February 12, 1850, to amend the above recited act to incorporate the Memphis & Charleston Railroad Company, is not inconsistent with the view above taken. As it was the purpose of the original act that both the Tennessee and Alabama corporations should have but one organization and board of officers, the amendatory act provided that in a certain contingency the subscribers to the capital stock of the Memphis & Charleston Railroad Company, in Alabama, might, if they deemed it expedient, form a separate and independent organization. In other words, that being already a body corporate, they might withdraw from their connection with the Memphis & Charleston Railroad Company of Tennessee, and take a new name, and for this purpose commissioners, or corporators, were named, and were authorized to change the western terminus of their road. In fact, this amendatory act seems entirely inconsistent with the theory that there was no Alabama corporation known as the Memphis & Charleston Railroad Company. The subsequent legislation of the state, although not decisive, seems to proceed on the idea that it is dealing with a domestic corporation. In an act approved February 7, 1856, the act of January 7, 1850, is referred to as the "charter granted to said company by the general assembly of this state," and four different acts have been passed by the legislature of Alabama to authorize the Memphis & Charleston Railroad Company to borrow money and secure its payment by mortgage on its road, without any hint that this power was conferred on a foreign corporation. In the case of Memphis & C. R. Co. v. Bibb, 37 Ala. 699, the said company is designated as a corporation chartered by an act of the legislature of this state. This is, to be sure, merely obiter dictum, but it tends to show how the railroad company has been regarded by the highest judicial tribunal of the state. But it is claimed by counsel for the railroad company, that even admitting that the act of January 7, 1850, was a charter, yet it was a charter conferred on a corporation of the state of Tennessee, without creating a new corporate body. It is true, that two states may unite in creating one and the same corporate body, and it was so held in Railroad Co. v. Harris, supra. But when two states unite to create the same body corporate, it is a citizen in each of the states by whose legislature it is created. Railroad Co. v. Whitton, 13 Wall. [80 U. S.] 270; Ohio & M. R. Co. v. Wheeler, 1 Black [66 U. S.] 286.

After an attentive consideration of the arguments of counsel, and on examination of the authorities cited by them, I am of opinion that the act of January 7, 1850, of the general assembly of this state, created the Memphis & Charleston Railroad Company as an Alabama corporation. The consequence of this view is, that this court has not jurisdiction of this case, and that the motion to remand it to the state court from which it was removed must prevail.

Case No. 3,210.

COPELAND v. PHOENIX INS. CO.

SAME v. SECURITY INS. CO.

[1 Woolw. 278;[1] 2 West. Jur. 341.]

Circuit Court, D. Missouri. Oct. Term, 1868.[2]

WHEN ABANDONMENT OF ASSURED PROPERTY IS JUSTIFIED—OBLIGATIONS OF ASSURED IN CASE OF LOSS TO MAKE LOSS LIGHT—LIABLE FOR MASTER'S NEGLECT—OWNER'S NEGLIGENCE—WHAT IS NOT ABANDONMENT—EQUIVOCAL WORDS—OF REPAIRING AND TENDERING THE INSURED VESSEL—UNJUSTIFIABLE DELAY—CONDITION OF VESSELS—GROSS DEFECTS IN REPAIRS.

1. A policy of insurance on a steamboat provided that the assured should have no right of abandonment, unless the damage should amount to half the value of the vessel, as stated in the policy, which was $45,000. She was, in fact, worth only $25,000. To justify abandonment, only $2,500 could, after the injury, have remained in her.

2. The assured are required to exercise all reasonable care, skill, and diligence, to make the loss as light as possible.

3. The owner is not excused, though he give proper directions, if the master of the vessel does not observe them, and through such neglect the damages are increased. This is on the principle that the master is the owner's agent, and the latter is liable for the neglect of the former.

4. If the master does not remain in the vessel a reasonable time, to repair the injury; and constructs an imperfect bulkhead, which is not fastened to the hull, so as to exclude the water when once pumped out; and shortly afterwards, another officer raises her in a short time, by supplying the defects, the owner is held to be guilty of negligence, and has no right to abandon her to the underwriters.

5. The owner, when he heard of the accident, notified his underwriters, and said that he had telegraphed the master that if he could not raise the vessel, he should wreck her, and the underwriters answered, "All right." *Held*, not to be an abandonment by the owner, nor an acceptance of abandonment by the underwriter. Argu. The direction of the owner to the master was an assertion of his right to control the vessel. The defendants might well infer that the owner would claim the wreck, and call for indemnity after its value should be deducted from the loss.

6. After the defendants had notice of the loss, and before they took possession to raise and repair her, fifteen days elapsed, during which time, as they knew, the machinery, &c., were being removed, all which, if she were to be repaired, would have to be replaced. *Held*, that this delay was unjustifiable.

7. When the vessel is tendered by the underwriter to the assured, she must be in such condition that the latter, when receiving her, would have full indemnity for all the injury covered by the policy.

[Cited in Northwestern Transp. Co. v. Continental Ins. Co., 24 Fed. 176.]

8. When the deficiencies are obvious, so that, to be seen, they do not need to be pointed out, and are very great as compared with the repairs actually made, it is not incumbent on the assured to point them out, in order to justify his refusal of the vessel, and to maintain his action on the policy.

[1] [Reported by James M. Woolworth, Esq., and here reprinted by permission.]

[2] [Affirmed in Phoenix Ins. Co. v. Copelin, 9 Wall. (76 U. S.) 461.]

These were actions upon policies of insurance [by John G. Copeland or Copelin]. They were, upon the stipulation of the parties, tried and determined by the court without the intervention of a jury, under section 4 of the act of March 3, 1865 (13 Stat. 501). [The actions were originally brought in the St. Louis circuit court, but were removed to this court on motion of defendants.]

The facts appear in the opinion. But in order to enable the learned reader to apprehend the questions involved in the case, before entering upon the reading of the opinion, the following brief statement is made.

The risks were upon the steamboat "Benton," engaged in trade of the Upper Missouri, running from St. Louis to Fort Benton. The policies provided that the assured should have no right to abandon her, unless the damage sustained was one half her value as stated in the policy, which was $45,000; so that, to justify an abandonment, she must have sustained damage to the amount of $22,500. She was at the time of the accident worth but $25,000.

On the 3d day of November, 1865, about sixty miles above Omaha, she was snagged and sunk. Three days afterwards, and as soon as he heard of the accident, the plaintiff notified the agents of the defendants thereof, and that he had ordered the master to wreck her, unless he could raise her, to which their only answer was, "All right." The master made an imperfect bulkhead, and did not fit it securely to the hull, so as to exclude the water when it had once been pumped out. Without much further effort to raise her, he proceeded to wreck the vessel.

On the 23d day of November, the defendants, under the terms of the policy, took possession for the purpose of raising, repairing, and tendering her to the plaintiff, In three days they had raised her. But afterwards they proceeded very slowly with the work of repairs, and did not make a tender of her to the plaintiff until May 9, 1866, too late to allow her to make a trip up the river that season. Nor was she then placed in such condition as to furnish indemnity to the plaintiff. To put her in order, $5,000 of further expenditures were necessary.

MILLER, Circuit Justice. These cases were tried to the court without a jury, and we now proceed to render our judgment.

The "Benton," the boat insured by these companies, was sunk in the Missouri river, November 3, 1865, about sixty miles above Omaha, in consequence of being struck by a snag, which made a large opening in the side of her hull. It is not controverted that the injury is one covered by the policies of the defendants.

The plaintiff claims that he notified the defendants that he abandoned the vessel there, that he had a right to do so under the

policies, and that they accepted the abandonment. The defendants deny each of these positions. They say that they took possession of the boat as she lay sunk, under the provision of the policies which authorized them to do so, for the purpose of raising and repairing her, and returning her to the plaintiff after she had been repaired. They did raise, repair, and tender her to the plaintiff, who refused to receive her.

The grounds alleged by the plaintiff for his refusal are: 1. That he having rightfully abandoned the vessel, nothing remained but for the defendant to pay the amount of the insurance. 2. That there was an unreasonable delay in repairing and returning the vessel. 3. That the repairs were insufficient.

In regard to the first of these grounds, we are of opinion that the plaintiff has established no right to abandon the vessel. The most conclusive reason for this opinion is found in the provision of the policies, that the assured shall have no right of abandonment unless the damage or injury shall amount to one half the value of the vessel as stated in the policies. The value therein stated was $45,000. In order, therefore, to authorize the plaintiff to abandon, the amount of injury sustained must be at least $22,500. The testimony is uncontradicted that the boat, when she received the injury, was worth $25,000, and no more. [The testimony of the witnesses on both sides concur in that proposition, Mr. Brown for the plaintiff, Mr. Roe for the plaintiff, and the agent or officer of the insurance company, whose business it was to inspect vessels, Capt. Atkins, who produced the record that he had overhauled her and estimated her at $25,000 a few weeks before the injury.] [3] To justify an abandonment, the damage must have been such that no more than $2,500 of value was left in her. We cannot doubt that the furniture in the cabin, the boilers, engines, and other machinery capable of removal, together with the dismantled hull, were worth three times that sum.

But we should fail to do our duty as a court, if we did not say that, independently of that provision of the policy, we have come to the conclusion that there was no right of abandonment in this case. We are satisfied that Captain Yore, who had charge of the vessel, in his hurry to escape from her before navigation became impeded by ice, did not exercise that energy, diligence, and skill in his efforts to raise her, which the principle of law governing such cases requires. The testimony on the part of the plaintiff shows that he gave all proper directions to Captain Yore; and that he exercised such faithfulness and frankness as became his position towards the defendants. But the law justly regards the principal as responsible for the acts of the agent. Every principle and every analogy constitutes the master the agent of the owner under such circumstances. It is well settled that in cases of necessity happening during the voyage, the master is by law created the agent for the benefit of all concerned, and his acts done under such circumstances, in the exercise of good faith and a sound discretion, are binding upon all parties in interest. The Sarah Ann [Case No. 12, 342]; New England Ins. Co. v. The Sarah Ann, 13 Pet. [38 U. S.] 387. And when the injury is so great as to justify a sale, he from necessity becomes the agent of the underwriters, as well as of the owner, to effect the sale for their benefit. Patapsco Ins. Co. v. Southgate, 5 Pet. [30 U. S.] 604. If his agency extends to a disposition of the vessel when she is injured but not destroyed, it must extend to all acts which he may do to save her from destruction. And this is the more certain when it is considered that such is his duty. He cannot abandon his vessel in time of danger so long as it is practicable for human exertion, skill, and prudence to save her from the impending peril. Even after she is stranded there is an obligation upon him to take all possible care of the cargo. The Niagara v. Cordes, 21 How. [65 U. S.] 7. Even in case of capture, the master of a neutral vessel is bound to remain with the ship until she is condemned or a recovery is hopeless. Willard v. Dorr [Case No. 17,680]. And in a proper case, after the loss or sale of the ship, he is agent to tranship the freight for the merchant. Shipton v. Thornton, 9 Adol. & E. 314; Jordan v. Warren Ins. Co. [Case No. 7,524]; Hunter v. Prinsep, 10 East, 378.

The owner of this vessel dispatched her on this long, and, as the event proved, hazardous voyage, in charge of a master of his own selection, who was vested with this large authority over her and her cargo, and who was subject to these obligations. The bare statement is enough to show an agency here which subjected the owner to a responsibility for all of the acts and negligences of the master. For the purpose of doing all that the owner ought to do to save the vessel from total loss, the master was his agent.

In an agreement of this kind, the plaintiff contracts for indemnity for, and security against, loss by any of the perils insured against. The defendant contracts to give that security, upon the condition that all practicable means be employed on the part of the insured to make such loss as light as possible. It is a contract which, by its nature, requires a faithful observance of all the obligations imposed by it upon either party.

We are satisfied that the bulkhead which was designed to cover the injured place in the hull and to exclude the water, was not constructed with the skill which Captain Yore is known to have possessed. If more time had been taken, and more care exer-

[3] [From 2 West. Jur. 341.]

cised in its construction, a bulkhead could have been made which, when once the water was all pumped out of the hold, would have kept it out. It is clearly shown that the one made here was not fitted to the bottom and side of the boat with the skill which prudent officers would, in such an emergency, have exercised. All this is conclusively established by the fact that, without difficulty or material change in her situation, the vessel was in a short time raised by Captain Mann, the agent of the defendants, and that he exercised only such energy and skill, and employed only such means, as had been within Captain Yore's control.

We are therefore of opinion that, for want of due care, diligence, and skill in the effort to raise the vessel, the plaintiff had not entitled himself to abandon her.

We are also of the opinion that the defendants did not accept the abandonment. The evidence upon this point consists of certain conversations between the plaintiff and the agents of the defendants residing at St. Louis. When the former heard of the accident, he immediately communicated with these agents, and in one of several conversations about that time, he said to them, "I have telegraphed to Captain Yore, if he cannot raise the boat, to wreck her." To this they responded, "All right." The plaintiff claims that this was a proposition of abandonment on his part, and an acceptance on theirs. We are not able to accede to this view.

In order to constitute a valid abandonment, no particular form of words, and no writing, is necessary. But in whatever manner it is made, it ought to be explicit, and not left open as matter of inference from some equivocal acts. The abandonment, when properly made, operates as a transfer of the property to the underwriter, and gives him a title to it or what remains of it, as far as it was covered by the policy. No deed is necessary to pass the title. Columbian Ins. Co. v. Ashby, 4 Pet. [29 U. S.] 139; Patapsco Ins. Co. v. Southgate, 5 Pet. [30 U. S.] 604; Chesapeake Ins. Co. v. Stark, 6 Cranch [10 U. S.] 268. The law gives to this act in pais all the effects which the most accurately drawn assignment would accomplish. Comegys v. Vasse, 1 Pet. [26 U. S.] 193. And if the abandonment, when once made, is good, the rights of the parties are definitely fixed by it, and it is irrevocable by either party without the consent of the other. Peele v. Merchants' Co. [Case No. 10,905]. These considerations make manifest the necessity that the act operating as an abandonment should be decisive.

In this case, so far from offering to abandon even, the plaintiff asserted his right to control the vessel; and he went on to state the manner in which he proposed to do so. The defendants might well have supposed that, even if Captain Yore should wreck the vessel, the plaintiff would still claim to own the wreck, and call for indemnity for a total loss, less the value of the wreck. The course proposed by him was the only proper one for him to pursue, if he did not intend to abandon the vessel. The defendants' assent to his proposal cannot be construed into an acceptance of the abandonment, which he might or might not afterwards make.

The mere fact of submersion of the vessel does not amount to a total loss. On the high seas it affords strong prima facie evidence, but in the shallow waters of the Missouri it does not afford even a presumption. Emerig. Ins. c. 12, §§ 12, 13; Goss v. Withers, 2 Burrows, 697; Anderson v. Royal Exchange Assur. Co., 7 East, 38; Sewall v. U. S. Ins. Co., 11 Pick. 90.

The abandonment, then, by the act of the insured must therefore appear. If, when Captain Yore left the vessel, and refused to make any further effort to save her, the defendants had not interfered, but had stood upon their rights as the case then was, we should now have to ascertain the amount of injury for which the defendants, under all the circumstances, are liable. But such is not the present position of the parties. On the 20th day of the then month of November, which was about seventeen days after the accident occurred, the defendants notified the plaintiff that they should exercise the option authorized by one of the provisions of the policies, and undertake to raise and repair the boat. Accordingly, without any instructions or interference on the part of the plaintiff, they did raise, repair, and tender her to him.

We are of opinion that this is no sufficient defence to the present action, because, first, there was unjustifiable delay in repairing and tendering the vessel; secondly, the repairs were insufficient.

From the time the defendants had notice of the sinking of the boat, until they notified the plaintiff of their intention to raise her, fifteen days elapsed. During this time, as they well knew, the machinery, boilers, and engines were being removed from the vessel as a wreck, all of which, if she were to be raised, would have to be replaced at considerable expense and loss of time. Their determination should have been taken sooner.

This is, however, a minor consideration. A very few days after they had determined to raise the vessel, Captain Mann was on the spot, and had her afloat. If the energy and diligence which characterized his proceedings in raising had been exhibited also in repairing her, there would have been no cause of complaint. But he seems to have supposed that when she was once afloat, his employers were safe. The most unaccountable delays occurred in replacing the machinery; no workmen were put upon her until some time in December. But two were employed upon her before she was brought to St. Louis. It was not until May 9, 1866, that she was tendered to the plaintiff at St. Louis. The actual

repairs cost only $1764.70, a sum so small as to show clearly that there was no reason for the length of time consumed in making them.

It is to be considered here that the vessel was employed by the plaintiff in the trade of the extreme upper Missouri. Unless a vessel in that trade leaves St. Louis very early in the spring, she will encounter low water. The 9th of May is too late in the season to set out upon such an enterprise. One witness says she would have been worth $5,000 more if she had been tendered so as to make a trip that year.

The general rule is, that the repairs must be made as expeditiously as possible, in order that the voyage, if it be not completed, may not be broken up. Peele v. Suffolk Ins. Co., 7 Pick. 254; Reynolds v. Ocean Ins. Co., 22 Pick. 191, 1 Metc. [Mass.] 160. And even when, by the terms of the policy, this rule is waived by the assured, still such dispatch in the prosecution of the repairs is demanded of the insurer as would restore the vessel ready for another adventure in season profitably to engage in the same. And if the insurer is guilty of unreasonable delay, he must bear the consequences.

But we attach more importance to the fact that the repairs were insufficient. The overwhelming preponderance of testimony is, that the vessel lacked $5,000 in value of the repairs necessary to indemnify the plaintiff for the injury sustained by the accident. The deficiencies in repairs, as made, are set forth in the finding of facts at the end of this opinion.

The actual repairs made upon the vessel, cost, as I have already stated, $1,764.70. The expenses of repairing and of raising her were $12,132.82. When tendered to plaintiff, she was worth $12,000. When the injury was sustained, she was worth $25,000. Under these circumstances, there can be no doubt that the repairs were insufficient to meet the obligations which the defendants had assumed under the policies. Without going into an examination of the authorities, I may state that the conditions of these policies, supported by the law, require that the vessel, when tendered, should have been in such a condition that the plaintiff, when receiving her, should have full indemnity for all the injury which was covered by the policy.

It is claimed for the defendants, however, that, conceding the insufficiency of the repairs, inasmuch as the plaintiff did not point out to them the defects, he was bound to receive the boat, make the necessary repairs, and look to a future action at law to reimburse him the expenses; at all events, that he could not recover the full value of the vessel by refusing to receive her, until he did point out the deficiencies of which he complains, and give the defendants an opportunity to supply them.

There are decisions which go so far as to say that where the defects are not great, where they are of little importance in comparison with the whole injury to the vessel, where they might have escaped the attention of the insurers while attempting in good faith to comply with the requirements of the contract, they shall not be compelled to pay as for a total loss, unless the particulars to which objection is made are pointed out to them. We have serious doubt whether the principle by the supreme court of Massachusetts (Reynolds v. Ocean Ins. Co., 22 Pick. 191, 1 Metc. [Mass.] 160; Norton v. Lexington Ins. Co., 16 Ill. 235) asserted to this extent in the cases cited to us, can be sustained as the law. But it is not necessary to overrule these decisions, for there are manifest distinctions between them and the present case. In the first place, the deficiencies here were so obvious, so necessarily within the sight and knowledge of the defendants, that they did not need to be pointed out. Secondly, the deficiencies were so very great in proportion to the repairs actually made, the former being estimated at $5000, and the latter only a little exceeding $1700, that it is absurd to say that there was any fair and honest effort to indemnify the plaintiff for his loss.

I have already stated the views of the court upon the fidelity required of both parties in these contracts of insurance, and have commented, as I thought it deserved, upon Captain Yore's failure to do all that he could to raise the vessel. And I think that, after getting her afloat, there was a like determination on the part of the defendants to do just as little as was possible, and escape the liability imposed upon them under their contract by the law. In this effort they have failed to escape that liability. We find that the plaintiff was justified in refusing to receive the vessel, and as the policies are valued policies, he is entitled to the full amount insured by each, to wit, $5000, with interest from the time the loss was fixed.

To enable the parties to have a review of this judgment in the supreme court we make the following special finding of facts:

1. There was a due execution and delivery of the policy offered in evidence by the plaintiff in evidence.

2. The boat was struck by a snag, and sunk in the Missouri river, about sixty miles above Omaha, November 3, 1865; which injury was one of the perils against which defendants insured plaintiff in said policy.

3. Under the circumstances, the plaintiff had no right to abandon the vessel as a total loss, even though he gave notice that he did so.

4. There was no acceptance by defendants of such abandonment.

5. The defendants, under the provisions of the policy, took possession of the vessel for the purpose of raising, repairing, and tendering her to the plaintiff.

6. They did raise her, proceeded to repair, and tendered her to the plaintiff at her home port, May 9, 1866.

7. The vessel was used mainly for the trade of the upper Missouri river, making trips from St. Louis to Fort Benton. She would have been worth $5000 more to her owner if tendered to him so that she could have put out on her voyage earlier in the spring. The actual tender was not made in reasonable time.

8. The repairs made were insufficient to constitute indemnity for the injury. To remedy this, additional repairs, to the value of $5,000, were requisite. There was not proper canvas or covering for the hurricane deck, nor rigging, nor ropes. The injury to and destruction of furniture were not made good. There were left in the sides of the hull, above light water-mark, cracks through which, when the vessel was loaded and sunk down to them, the hold would have filled with water. Smaller cracks were left in the deck floor. She was not painted. A cargo would have suffered injury from these defects. The repairs in all these respects, except the paint, and even a part of that, were made necessary by the accident, and were covered by the policy.

9. The plaintiff did not point out these defects to the defendants, and refused generally to receive the boat.

On these facts as found, the court renders judgment for the plaintiff for the amount insured in the policy.

Judgment for plaintiff.

Affirmed in supreme court, Dec. term, 1869. 9 Wall. [76 U. S.] 461.

[NOTE. The grounds of affirmance, as stated by Mr. Justice Strong, were that the action of the defendant amounted to a substantial recognition and acceptance of the abandonment of which it had been notified, and that by its failure to return the boat within a reasonable time the company made itself liable to pay the full amount of the policy. Phoenix Ins. Co. v. Copelin, supra.]

COPELAND v. SECURITY INS. CO. See Case No. 3,210.

COPELIN (DORRIS v.). See Case No. 4,011.

Case No. 3,211.

COPEN v. FLESHER et al.

[1 Bond, 440.] [1]

Circuit Court, S. D. Ohio. June Term, 1861.

STALE CLAIMS IN EQUITY — PLEADING — MULTIFARIOUSNESS—AMENDMENT.

1. A demurrer to a bill in equity will be sustained on the ground of the staleness of the claim of title set up to land, when it appears by the averments of the bill that the complainants have slept upon their rights from the year 1810 until the year 1859.

2. Where such complainants file an amended bill, alleging that for a long time after their rights accrued they were minors residing in different parts of the state of Virginia, and had no knowledge of their rights nor the location of the land until about the year 1841, and were unable until some time after that year to take any steps in the assertion of their rights, such allegations are sufficient to relieve the claim of title of staleness, and to put the complainants on proof of their allegations in that regard.

3. A bill in equity praying that the equitable title to land may be adjudged to be in the complainant, and that he is entitled to a patent, and also that a certain person may be made a defendant to the bill and may be compelled to disclose the nature of his claim to the land, and by what authority he is in possession, and to account for rents and profits, is liable to the objection of multifariousness in seeking to obtain two distinct objects by the same decree.

4. In chancery no material fact which has accrued since filing the original bill can be introduced in an amended bill, and a party can only avail himself of such fact by filing a supplemental bill.

5. Where such new matter is introduced in an amended bill, it is a cause of demurrer.

[This was a bill in equity by Joshua Copen against Solomon Flesher and others.]

Henry Stanbery and Mr. French, for complainant.

J. B. Stallo and Mr. McCook, for defendants.

OPINION OF THE COURT. The original bill in chancery, filed by the complainant in this case, averred in substance, that he is a citizen of the state of Virginia, and one of the heirs of John Copen, deceased; that on September 20, 1806, a warrant, numbered 5,114, issued from the land-office, at Richmond, to the representatives of said John Copen, in consideration of his services in the Virginia continental line, for two hundred acres of land in the Virginia military land district in the state of Ohio; that after the death of said John Copen, the said warrant was assigned by some person, assuming to act as the administrator of said Copen, to one Henry Flesher, who, in the year 1810, caused said warrant to be located in his name as assignee; and a survey was made and duly returned to the land-office at Chillicothe, numbered 5,190; that the assignment to said Flesher was a nullity, and there never was an administrator of the said John Copen, and the said assignment was wholly without consideration; that said Flesher, not being able to obtain a patent for said land, long since abandoned all claim thereto; and that the warrant, while in his possession, was destroyed by fire. A copy of this warrant, obtained from the records of the land-office at Richmond, is offered as an exhibit in the bill. The bill also avers, that John Copen left several heirs besides the complainant, and that they have released to him all their rights under said warrant, and that he is now the sole owner thereof; also, that said Henry Flesher died leaving several heirs, all of whom are non-residents of the state of Ohio, who are made defendants, and are required to answer the allegations of the bill under oath, and disclose their interest under said warrant. Service has been made on one only of the

[1] [Reported by Lewis H. Bond, Esq., and here reprinted by permission.]

heirs of Henry Flesher, namely, Solomon Flesher, who has appeared and filed his answer, admitting substantially all the allegations of the bill, and disclaiming any interest under the said warrant. The bill prays for a decree, adjudging the equitable interest in the land located and surveyed under said warrant to be in the complainant, and that he is entitled to a patent therefor from the United States. After the filing of the bill, upon application to the court for that purpose, and on sufficient cause shown, one Edward Fitzgerald, claiming title to the land, was permitted to be made a defendant; and by consent of the complainant's counsel, he filed a demurrer to the bill, which was sustained by the court on the ground of the staleness of the claim of title set up by the complainant, and the absence of any sufficient reason for the great delay which had occurred in asserting the rights of the heirs of said John Copen to the land in controversy. But for the purpose of affording the complainant an opportunity of setting forth the reasons for this delay, the complainant was allowed to amend his bill. And he has filed an amended bill, to which the said Fitzgerald has interposed a demurrer, in support of which it is urged, first, that there is nothing in the amended bill accounting for the great lapse of time which has occurred, and that this objection lies to the amended bill with the same force as to the original bill; secondly, that the amended bill is multifarious, in that it charges the said Fitzgerald with having obtained, and continued in possession of the land covered by said warrant, by deceptive and fraudulent means, and asks a decree setting aside his claim and decreeing the title in the complainant; third, that in the amended bill the complainant alleges that the quitclaim or release from the other heirs of John Copen to the complainant, set up and relied upon by him in the original bill as proof of his title, is invalid and void, and that after the commencement of this suit, namely, in June, 1860, he obtained from said heirs a sufficient and valid quitclaim or release from said heirs, vesting in him a perfect equitable title to the land in controversy.

As to the first objection urged to the amended bill, that nothing is averred in it which relieves the claim of the complainant from the charge of staleness, a remark or two will suffice. That the demurrer to the original bill was properly sustained on this ground, I can see no reason to doubt. It appeared, from the averments of the bill, that the heirs of Copen had slept upon their rights from the death of their ancestor, which occurred prior to the year 1810, until the commencement of this suit in the year 1859. Unexplained, this lapse of time would be fatal in a court of equity to the claim of the complainant, and being apparent on the face of the bill, was a sufficient ground for sustaining the demurrer. But the amended bill avers, that for a long time after the issuing of said warrant, and after the assignment to Henry Flesher, the heirs of John Copen, the warrantee, were minors, residing in different parts of the state of Virginia, and had no knowledge of their rights until about the year 1841, and were not apprised until about that time of the location of the land on which said warrant was placed, and were unable, until some time after that year, to take steps in the assertion of their rights. While it must be admitted that the facts stated in explanation of the delay, are somewhat vague and unsatisfactory, they are sufficient to relieve the amended bill from the objection taken to the original bill on the ground of staleness, and to put the complainant on proof of his allegations in that regard. But I do not see how the objection that the amended bill is substantially liable to the charge of multifariousness, can be ignored as a cause of demurrer. As has been before noticed, the original bill prayed merely that the equitable title to the land might be adjudged to be in the complainant, and that he is entitled to a patent. The amended bill contains substantially the same prayer. But, in addition to this, the complainant prays that the said Fitzgerald may be made a party defendant to the bill, and may be compelled to disclose the nature of his claim to the land, and by what authority he is in possession. It is also charged that his possession is unlawful, and without any claim of right, and that he has by fraudulent and deceptive means retained possession for a long time, and by such means has prevented the complainant from sooner attempting to enforce his claim. And it is moreover assumed, that the possession of the said Fitzgerald is to be viewed as a possession for the rightful owners of said land, and that, as their trustee, he is accountable for the rents and profits during the time he has used and occupied it.

There would seem to be no reason to doubt, that the amended bill is liable to the objection of multifariousness. It seeks to attain two distinct objects by the same decree. In one aspect, it is simply a bill asking the court to decree, that the complainant has the equitable title to the land in question, and is entitled to a patent therefor from the government. In this aspect, it is in the nature of a preliminary proceeding, designed to afford a basis for the favorable action of the government. Its object is in this way to vest in the complainant the legal title to the land on which the warrant was laid. In the other aspect, the amended bill asks for an investigation of the claim of title, which the complainant anticipates will be set up by Fitzgerald; and if his claim shall be adjudged untenable or void, that he shall be held to account for rents and profits. It is very plain that these two objects are wholly distinct in their character, and necessarily involve

separate and independent inquiries. This constitutes multifariousness in a bill in equity. Judge Story in his Commentary on Equity Pleading (page 244), says, "By multifariousness, in a bill, is meant the improperly joining in one bill distinct and independent matters, and thereby confounding them; as for example, the uniting in one bill of several matters, perfectly distinct and unconnected against one defendant, or the demand of several matters of a distinct and independent nature against several defendants, in the same bill." The bill to which the demurrer is filed in this case, comes clearly within this definition. This is apparent from the statement alone of the double aspect of the bill.

It is urged, however, that Fitzgerald has been admitted to come into this case as a defendant, at his own request, and by leave of the court, and can not, therefore, object to the structure of the amended bill, on the ground that the matter charged against him is distinct from that set up against the other defendants, the heirs of Flesher. Whether Fitzgerald was properly admitted as a defendant in this case is not now in question. The court, no doubt, in granting the leave to make him a defendant, acted on the supposition that he had an interest in the title to this land, which rendered it proper he should be permitted to file an answer to the allegations of the bill. In making his answer, he would of course be restricted to matters that were responsive to the bill, and could not introduce anything foreign to it, or which would lead to a mere collateral investigation. If, instead of demurring to the original bill, he had filed his answer, I suppose he would have been limited in his response to the facts alleged, and could not by introducing foreign matter, have presented an issue wholly distinct from that presented in the original bill. It would follow that the mere fact that he had been allowed by the court to stand as a defendant, would not permit the complainant, in his amended bill to introduce matters which, under other circumstances, would have been clearly multifarious in their nature.

The amended bill, therefore, for the reason indicated, is objectionable, and the demurrer must be sustained. Not only is this conclusion justified by the well-settled rules of chancery practice, but clearly does not violate the rights or equities of the complainant. If he is successful in obtaining a decree in accordance with the object of the original bill, which will result in vesting in him the legal title to the land, the way will be open for proceeding against Fitzgerald to test the validity of his title and possession, and to obtain such equitable or legal relief, as the facts may justify. On the other hand, if he fails in establishing his own title, it is clear he can have no claim against Fitzgerald, and there will be no ground of controversy as between these parties. In either event, it is most obvious that the claim first set up by the complainant must be disposed of before there can be any litigation between him and Fitzgerald.

The third ground of demurrer to the amended bill is also tenable. It is, that in the amended bill, the complainant sets up a title to the land, acquired since the commencement of this suit. This has been already referred to. In the original bill the complainant asserts a release or quitclaim from the other heirs of John Copen, which he repudiates in the amended bill, and relies on a conveyance or quitclaim from them, executed in June, 1860, which was long after this suit was brought. The law seems well settled, that in chancery no material fact which has occurred since filing the original bill can be introduced in an amended bill. The party can only avail himself of such fact by filing a supplemental bill. And when such new matter is introduced in an amended bill, it is a cause of demurrer.

For the reasons indicated, I feel bound to sustain the demurrer to the amended bill.

COPERTHWAITE v. GILL. See Case No. 3,298.

Case No. 3,212.

COPLAND v. BOSQUET.

[4 Wash. C. C. 588.][1]

Circuit Court, E. D. Pennsylvania. April Term, 1826.

CONDITIONAL SALES.

1. General principles of law applicable to sales of personal property, and to the change of property in the thing sold from vendor to vendee.

2. Sale of wine by A. to C., the agent of B. & Co., on the following terms. "Sold C. twenty pipes of wine at one dollar per gallon, at six months, payable in Philadelphia, or if his principal prefers cash, three per cent. discount, acceptance to be perfectly satisfactory; principal B. & C." Upon the importunity of C., the wine was delivered, upon this express condition, and the personal responsibility of C. pledged, that the contract should be complied with by B. & Co. The contract was not complied with, and B. & Co., sold and delivered the wine to the defendant, and were insolvent. C., who had pledged himself for the performance of the contract of B. & Co., paid to A. the sum due for the wine, and having taken a bill of sale of the same from A. brought replevin for the recovery of the wine. *Held*, that the sale was, by its terms, conditional; and no property in the wine passed from the vendor to the vendee, until payment or delivery of satisfactory paper. (2) The delivery was not absolute, but conditional, and did not, therefore, produce a change of property.

[Cited in D'Wolf v. Babbett, Case No. 4,220; The Marina, 19 Fed. 764; Harkness v. Russell, 118 U. S. 676, 7 Sup. Ct. 51.]

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

3. The defendant stands in no better situation than B. & Co., from whom he purchased. The general rule of law upon this subject.

[Cited in Homans v. Newton, 4 Fed. 886.]

This is an action of replevin for seventy-three casks of Teneriffe wine, of the value of $2168. 10 cents. The jury found a verdict (the verdict was so found under an agreement of the counsel; and under a further agreement, that the court might draw such inferences from the evidence as the jury might have done; and further, that if the opinion of the court should be in favour of the plaintiff, the judgment should be entered for $2168. 10 cents, with interest from the 9th of July, 1825, until paid) for the plaintiff, subject to the opinion of the court, upon the following case: On the 1st of June, 1825, Beylle & Co. merchants of Philadelphia, addressed a letter to the plaintiff, a merchant of Boston, requesting him to purchase for them in that city, seventy casks of Teneriffe wine, at one dollar and fifteen cents per gallon, or less, if he could do so, at six months, payable, if possible, in Philadelphia; to which place it was to be shipped. On the 4th, the plaintiff purchased for account of Beylle & Co. of Mr. Amory, of Boston, seventy-three casks of this wine, agreeably to the following memorandum made at the time of sale by C. Blanchard, a clerk of Mr. Amory: "Sold E. Copland, Jun. the residue of the Teneriffe wine at one dollar and ten cents, at six months, payable in Philadelphia; or, if his principal prefers, cash, three per cent. discount, acceptance to be perfectly satisfactory; principals, Joseph Beylle & Co." On the same day, the plaintiff wrote to Beylle & Co. and informed them that he had purchased the wine at one dollar and ten cents the gallon, "satisfactory paper, payable in Philadelphia; or cash, three per cent. discount, at your option." A few days after this, the plaintiff applied to Mr. Amory for the delivery of the wine, and was informed that it would be first necessary to be satisfied of the goodness of the paper, as those to whom he had referred had not given favourable information. The plaintiff requested that the inquiry might be made in Philadelphia; which it was promised should be done. The plaintiff again applied for the wine, which was delivered to him expressly on condition that the terms of sale should be complied with. On the 7th of the same month, the plaintiff wrote to Beylle & Co. and enclosed them a bill of lading for thirty-three casks of wine, bought for them as per his letter of the 4th. On the 11th, plaintiff wrote again to Beylle & Co. and inclosed them a bill of lading for the residue of the wine, and also an invoice for the whole. The letter then proceeds to state, that "Mr. Amory has written to Philadelphia to make inquiries about the paper, in case you prefer paying by a note. If you prefer to pay cash, he will discount the interest at six per cent. per annum." On the 15th, the plaintiff again wrote to Beylle & Co. stating, that Mr. Amory had informed him that he should not be satisfied with their single name, in payment for the wine, and that he should prefer the cash, three per cent. discount, and requesting to know what answer he should give. He adds, "my agreement was, satisfactory paper; or cash, three per cent. discount, at your option. When I made the purchase, I stated that the paper would be undoubted." On the 18th Beylle & Co. wrote to the plaintiff, expressing their astonishment at Mr. Amory's fears, and their indignation against the person who had endeavoured by false representations to injure their credit, requesting the plaintiff to discover the name of the person if he could. They then add "as to the settlement which Mr. Amory desires, tell him to make known to us his agent here, to whom we will give satisfaction." Amory having made inquiry in Philadelphia, he informed the plaintiff that the name of Beylle & Co. would not be sufficient, and their note must have a satisfactory indorser; or the alternative of the sale must be complied with. This demand the plaintiff requested might be forwarded to Philadelphia, which was done by Amory's letter of the 21st to Perit and Cabot of that place, in which he requests them to receive the note of Beylle & Co., provided they are perfectly satisfied with it, and if they are not, then to require such a note as can be cashed without any other names than those they may find on it; or otherwise to receive the money, deducting the interest, desiring them to show the letter to Beylle & Co. On the same day, the 21st, the plaintiff by letter informed Beylle & Co. that Amory had authorized Perit and Cabot to settle for the wine. Mr. Perit, in compliance with the request of Mr. Amory, called upon Beylle & Co. and communicated the contents of Mr. Amory's letter to one of the partners, who expressed his surprise, stating that they had purchased the wine at six months' credit, and exhibited the invoice, which was to that effect. He said they had no indorser to give, but that he was willing to give a note indorsed by his partner, or pay the money, five per cent. off, or return the wine, if more agreeable; all which was immediately communicated by Perit and Cabot to Amory by letter, dated on the 24th. This letter was communicated by Amory to the plaintiff, who said, "my bargain was satisfactory paper, or three per cent. discount for cash, which I communicated to Beylle & Co.; and if they will not ratify this contract, I must do it myself, and for myself." On the 27th Amory again wrote to Perit and Cabot, and requested them to call on Beylle & Co. for a compliance with their contract, and, in reply to this demand made by Perit and Cabot, Beylle & Co. offered to pay cash, five per cent. off, on the 12th of July, which was communicated to Amory on the 1st of July. On the 2d of July, Beylle & Co. being then

largely indebted to the defendant, the son in law of Beylle, borrowed of him an additional sum of $5000; and in discharge of their entire debt to him, they sold to him, on the same day, to the amount thereof, a quantity of goods, and amongst them the wine in question, which was delivered on the 4th. On the 5th the paper of Beylle & Co. was protested, and on the 7th they made a general assignment of all their estate and effects, in trust for their creditors. On the 9th Amory received information of the failure of Beylle & Co. and he immediately called on the plaintiff to comply with his engagement, which he did by buying the wine for himself, upon the terms of the sale to Beylle & Co., and receiving a bill of sale for the same; of which transaction Amory, on the 11th, gave notice to Perit and Cabot. On the 9th the plaintiff authorized his agent, Degrand, to receive the wine from Beylle & Co., or any other person.

On the 13th Degrand called on the defendant and demanded the wine, which was refused, whereupon this action was commenced.

This claim was resisted by the defendant's counsel upon the following grounds: that the sale and delivery by Amory to Copland were absolute, and so was the delivery by Copland to the defendant; that the offer of Beylle & Co. to return the wine not having been accepted, did not amount to a rescinding of the contract; and lastly, that however the question might be as between the plaintiff and Beylle & Co. the defendant, as a bona fide purchaser of the wine, without notice of the terms of the sale, or of the circumstances of the delivery, acquired a right to the property, which is to be protected. Cases cited, Long, Sales, 146; 3 P. Wms. 185; Brown, Sale, 8, 21, 22, 344, 390, 442, 507; Dyer v. Pearson, 3 Barn. & C. 38; Chit. Comm. Law, 128.

The plaintiff's counsel controverted all these points and cited the following cases: Leedom v. Philips, 1 Yeates, 528; Clemson v. Davidson, 5 Bin. 401; Harris v. Smith, 3 Serg. & R. 20; 2 Gall. 294, 296; Bruce v. Pearson, 3 Johns. 534; Bailey v. Ogden, 3 Johns. 399; Hussey v. Thornton, 4 Mass. 405; Hanson v. Meyer, 6 East, 625; Haggerty v. Palmer, 6 Johns. Ch. 437; Wheelwright v. Depeyster, 1 Johns. 471; Palmer v. Hand, 13 Johns. 434; Spring v. Coffin, 10 Mass. 31.

Dunlop & Biddle, for plaintiff.
Mr. Chauncey, for defendant.

WASHINGTON, Circuit Justice. The first question in this cause is, whether the sale by Amory to the plaintiff, as the agent of Beylle & Co. was absolute, or conditional? If the former, then the right of property was immediately changed, and became vested in Beylle & Co.; if the latter, it was not divested out of Amory until the terms of the contract were complied with; unless those terms were afterwards waived by Amory, by an unconditional delivery of the property. Some of the general principles of law applicable to sales of personal property, may be briefly stated as follows. Upon the completion of the contract of sale, and before delivery, the property of the thing sold is changed, and passes to the vendee. But if the sale be for money to be immediately paid, or to be paid upon delivery, payment of the price is a precedent condition of the sale, which suspends the completion of the contract until the condition is performed, and prevents the right of property from passing to the vendee, unless the vendor chooses to trust to the personal credit of the vendee. If credit be not given, this bargain is considered nothing more than a communication. This principle however is available to the vendor only where the goods remain in his possession after the sale, and are not delivered; for if they be delivered unconditionally, that fact is evidence of the agreement of the vendor to trust to the personal responsibility of the vendee, and operates in the same manner as if the sale had been on credit. If credit be given, the property immediately changes, and the vendee may bring trover for it, without paying, or tendering the price.

The memorandum made of the contract in this case, though very short, is very significant of the intention of the parties to it. It admits, we think, but of this construction, that the wine was to be paid for in one of two ways, at the option of the vendee, viz. with cash at the stipulated discount, or by paper to be perfectly satisfactory to the vendor. It is most apparent from the correspondence, as well as from the testimony of Mr. Blanchard; who, as clerk of Mr. Amory, made the contract; that it was so construed and understood by all the parties concerned in it. Although the names of the principals, from whom the purchase was made, were disclosed to Mr. Amory; he was nevertheless an entire stranger to them, as well as to their standing and solidity; as appears from the inquiries which he caused to be made in Boston, and in Philadelphia. It is highly improbable, therefore, that he would have agreed to sell them on any other terms than cash, or approved paper. If we have rightly construed the contract, it would seem to follow conclusively, that the sale was conditional, that is, for cash, or approved paper, and that this condition, whichever of the alternatives was elected by the vendee, was precedent of the sale. For if a sale for cash does, from the nature of the contract, imply a condition precedent, so as to prevent a change of the property until the money is paid, it is very difficult to perceive upon what ground a sale for approved paper should not equally imply a precedent condition.

There are not many cases to be found directly upon this particular subject; although the following seem to have a strong bearing

upon it. In the case of Payne v. Shadbolt, 1 Camp. 427, the defendant sold a parcel of wood to the plaintiff, to be paid for on delivery, by a bill at two months. The defendant permitted part of the wood to be removed without receiving any bill, but refused to part with the remainder until the terms of the contract should be complied with. In an action of assumpsit against the vendor for the non-delivery of the remainder of the wood, Lord Ellenborough held, that the delivery of a part of the wood was only a dispensation with the terms of the contract pro tanto, and that the vendor was entitled, at any time to stand on his rights, as they were originally established by the contract of sale. This is certainly a strong case. For what were the rights of the vendor on which he was entitled to stand, and which this decision maintained? To retain the thing sold till the terms of sale were complied with, by the vendee's delivering a bill at two months. But if this were a credit sale, and the stipulation to deliver such a bill did not amount to a condition precedent, the vendor had no right to retain possession of the wood, or of any part of it, but the vendee would have been entitled, as soon as the contract was made, to bring trover. So, in the case of Harris v. Smith, 3 Serg. & R. 20, which was replevin for goods sold at auction and purchased by the defendant, the terms of the sale being "approved indorsed notes at sixty days." After the sale the defendant offered to give a person whom he named, as his indorser, and promised to send immediately a note so indorsed to the auctioneer, upon which the goods were delivered. It was decided the delivery did not change the property. If, say the court, the vendor rely on the promise of the vendee to comply with the terms of the sale, and deliver the goods absolutely, the property is changed, though the condition be not performed. But where performance and delivery are understood to be simultaneous, possession obtained by artifice will not avail. Now here the contract for approved notes was considered to imply a condition precedent for the reason above mentioned. For if it did not, then it was a credit sale, and the property was changed by the sale without delivery. But the court call it a conditional sale, in so many words. The cases of Hussey v. Thornton, 4 Mass. 405, and Haggerty v. Palmer, 6 Johns. Ch. 437, have also a strong application to this part of the subject. We conclude, therefore, upon this point, that the sale was conditional. But although the sale was of that character, still it was competent to the vendor to dispense with the condition; and if the subsequent delivery of the wine was unconditional, that circumstance is evidence of such dispensation, and that the vendor looked not to the wine, but to the personal security of the vendee. It becomes necessary, therefore, to inquire,

2. Whether the delivery to the vendee's agent was absolute or conditional? Blanchard, who made the contract on the part of Amory, and who delivered the wine, swears that upon the plaintiff's first application for the delivery, it was refused, and that he was told that it would be first necessary for Mr. Amory to be satisfied of the goodness of the paper, as he had not received satisfactory information from those to whom application had been made. That, becoming impatient, the plaintiff again applied for the wine, when it was delivered, expressly on condition that he should cause to be produced a satisfactory acceptance, or cash interest off, agreeably to the terms of sale; and that he pledged his personal responsibility to this effect, which was considered a sufficient guarantee for the fulfilment of the terms of the sale. Here then was a delivery to the agent upon his promise, which, in the view of the law, was the promise of his principal, to fulfil the terms of the contract, as the express condition of the delivery; and to which was added the personal responsibility of the agent, by way of collateral security, and not with a view to a dispensation with the conditions of the sale; as was contended for by the defendant's counsel. Such a construction of the language of the witness would be in direct hostility with the terms of the engagement, as he has related them. If presumptive evidence was required to fortify the testimony of the witness, the cautious conduct of Amory throughout the whole of this transaction, and his previous refusal to deliver the wine until the terms of the contract were complied with, most abundantly furnishes it. These forbid the belief for one moment that Amory would, so soon after, make an absolute delivery. The cases of Leedom v. Philips, Hussey v. Thornton, Haggerty v. Palmer, before referred to, and Palmer v. Hand, are, particularly the three first, stronger cases than the present in favour of the vendor.

3. The only remaining question is, whether the defendant stands in any better situation than Beylle & Co., from whom he purchased? The general rule of law is, that a purchaser of chattels from a person in possession, who has no title, can acquire none against the real owner, unless he bought in market overt, notwithstanding he bought bona fide, and without notice of the manner in which the vendor became possessed of the property. I have met with no English case, in which, at common law, a contrary doctrine has been held. Nor were any American cases, at common law, cited, which seem to look that way, except such as were decided in those states, where, for the want of a court of chancery, a kind of mixed jurisdiction of law and equity is exercised by the courts of common law. The case of Haggerty v. Palmer was in chancery. If the possession be delivered by the real owner, together with the usual indicia of property, or under circumstances which may enable the vendor to impose him-

self upon the world as the real owner; this might be a case of constructive fraud, which would postpone, even at law, the right of the real owner in favour of a fair purchaser, without notice, and for a valuable consideration.

It was contended by the defendant's counsel that that is the present case, the delivery by the plaintiff to Beylle & Co. being unconditional, and the invoice stating on the face of it no other term of sale but six months credit. We are of a different opinion. In the first place, it is to be remarked, that there is no evidence to prove the defendant was a purchaser without notice of the terms upon which this wine was purchased and delivered. For as to the testimony of the partner of Beylle, that the defendant knew nothing of those circumstances, he manifestly spoke in regard to his belief; it is very difficult indeed to perceive how this fact can be got at at law, and yet, forming a part of the defendant's case, it behooves him to prove it. The defendant, being the son-in-law of Beylle, and his anxiety to remove the wine, at an unusually high price payed to the draymen in consequence of the day being the 4th of July, when it was difficult to employ labourers, presents some grounds of suspicion, unfavourable to this defence. But we do not form our opinion upon those circumstances; because the conclusive answer to the whole of the argument of the defendant's counsel upon this part of the case is, that the plaintiff acted throughout, until, by the conduct of Beylle & Co. he was compelled to take the wine to himself and pay for it, as the authorised agent of Beylle & Co. The plaintiff might, no doubt, on account of his personal guarantee, have made a conditional delivery to Beylle & Co. so as to retain a lien on the property, or in some other way have provided for his own security. But if he chose not to do so, it does not render that an absolute delivery to Beylle & Co. by the vendor, which was most clearly a conditional one. Upon the whole, we are of opinion, that the judgment must be entered in favour of the plaintiff for the sum of $2168.10 cents, with interest from the 9th of July, 1825.

Case No. 3,213.

COPLEY v. GROVER & BAKER SEWING-MACH. CO.

[2 Woods, 494.][1]

Circuit Court, S. D. Alabama. June Term, 1875.

MALICIOUS PROSECUTION BY CORPORATION.

A private corporation is liable in an action for malicious prosecution.

[Cited in Lewis v. Meier, 14 Fed. 313; Salt Lake City v. Hollister, 118 U. S. 262, 6 Sup. Ct. 1055.]

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

This was a suit brought by the plaintiff against the defendant corporation to recover fifty thousand dollars damages for a malicious prosecution. The allegations of the complaint were: First, that the defendant maliciously, and without proper cause therefor, caused an affidavit to be made before G. M. Parker, mayor of Mobile, and ex officio justice of the peace, charging plaintiff with the crime of embezzlement, and causing a warrant to be issued by said G. M. Parker for the arrest of said plaintiff, and upon which warrant he was arrested and imprisoned for one day, viz: on the 1st day of October, 1872, and which said charge, and the prosecution thereof, by indictment of plaintiff before the city court of Mobile, was fully determined and ended on the 15th day of April, 1874, by the acquittal of plaintiff upon the trial of said charge and indictment before the city court of Mobile; and second, that the defendant maliciously, and without probable cause therefor, caused an indictment to be found by the grand jurors of the county of Mobile, impaneled by the city court of Mobile, at the February term, 1873, of said court, which indictment charged plaintiff with the crime of embezzlement, and said prosecution by indictment was ended on the 15th day of April, 1874, by the acquittal of plaintiff on the trial of said indictment in the city court of Mobile, and the plaintiff was thereupon discharged from said indictment and prosecution. A demurrer was interposed by the defendant to the complaint, the main ground of which was that the defendant, being a corporation, was not liable to be sued in an action for malicious prosecution.

E. H. Grandin and J. P. Southworth, for plaintiff.

D. C. Anderson and Thos. H. Herndon, for defendant.

BRUCE, District Judge. The authorities are very clear that in an action for malicious prosecution, two things are essential to be established by the plaintiff: (1) The absence of all probable cause for such a prosecution on the part of the defendant; and (2) that the prosecution was malicious. See 2 Greenl. Ev. § 453; 1 Hill. Torts, 420; Ewing v. Sandford, 21 Ala. 157.

The position of the defendant's counsel upon the demurrer is: That the action being for a malicious prosecution, into which malice enters as an essential element and ingredient, cannot be maintained, because the defendant is a corporation—an artificial person—a mere legal entity and creature of the law, and incapable of malice. In other words, there is no liability in an action like this, in which malice is the essential and distinguishing characteristic. In support of this position, a number of authorities were cited, chief among which is the case of Owsley v. Montgomery & W. P. R. Co., 37 Ala. 560. I have

examined this case with some care, and deem it proper in announcing the conclusion to which I have arrived, to make some comments in regard to it.

The judge, R. W. Walker, in delivering the opinion of the court in the case, says: "It was supposed at one time that an action for a tort would not lie against a corporation, but this idea was long since exploded, and the tendency of the law in our day is to extend the application of all legal remedies to corporations, and to assimilate them as far as possible in their legal duties and responsibilities to individuals." Accordingly, the justice proceeds to say: "The modern authorities have established the doctrine that trover, trespass quare clausum fregit, and trespass for an assault and battery, will lie against a corporation." Many authorities are cited in support of this doctrine, and the concluding sentence of the paragraph is: "And upon the same reasoning a corporation may be sued on trespass for false imprisonment." Now this shows the advance that has been made upon the old doctrine that an action for a tort would not lie against a corporation.

It seems now to be well settled that an action in trover, trespass, or for false imprisonment, will lie against a corporation, though it may not be settled, so well at least, that an action on the case for malicious prosecution will lie against a corporation. Malice is an ingredient in both kinds of actions, but the distinction is, that in the former, legal malice, as contradistinguished from express malice only, is necessary to maintain the action, while in the latter, express or actual malice must be alleged and proven. In the decision under consideration it is thus stated: "The distinction seems to be between acts injurious in their effects, and for which the actor is liable without regard to the motive which prompted them; and conduct, the character of which depends upon the motive, and which apart from such motive cannot be made the ground of legal responsibility." And the justice continues thus: "If this distinction is well taken, it would follow that since a corporation as such is incapable of malice, it is not liable to be sued for a malicious prosecution." The justice concludes his opinion in the following words, which seem to me to indicate some doubt in his mind as to the correctness of the conclusion to which he arrived (page 564): "And such appears to us to be the better opinion, although we are aware that there are authorities which seem to sustain the idea that an action for a malicious prosecution may be maintained against a corporation." And he cites authorities which he says seem to support this view, to which I have not had access, except one case, to which I shall presently refer. In a state court, I might feel bound by this decision, for though, as before intimated, it seems there is some doubt fairly inferable from the language of the judge as to his own convictions on the subject, and another view is expressly recognized by him. Still the decision is made, and the counsel have cited it and other authorities from Alabama and elsewhere, which sustain the doctrine of that case, some of which, especially of the earlier decisions, do not go so far as the one now under consideration. This question involves the construction of no state statute or constitutional provision, but is a general principle of law, in the solution of which we are not bound by the decisions of the supreme court of our state, however able they may be

I now refer to the case of Philadelphia, W. & B. R. Co. v. Quigley, 21 How. [62 U. S.] 202, as holding a different doctrine from that claimed by the defendant's counsel in this case; and a different doctrine from the case of Owsley v. Montgomery & W. P. R. Co. [supra], and which is one of the references of Justice Walker, in the opinion in that case, which he says, "seems to sustain the idea that an action for a malicious prosecution may be maintained against a corporation." This was in the court below an action brought by Quigley, defendant in error, against the railroad company, for the publication of a libel. The opinion of the court in this case was delivered by Justice Campbell. In discussing the subject the justice says: "The powers of the corporation are placed in the hands of a governing body selected by the members, who manage its affairs, and who appoint the agents that exercise its faculties for the accomplishment of the object of its being. But these agents may infringe the rights of persons who are unconnected with the corporation, or who are brought into relations of business or intercourse with it. As a necessary correlative to the principle of corporate powers and faculties, by legal representatives, is the recognition of a corporate responsibility for the acts of those representatives." Again, he continues: "The result of the cases is, that for acts done by the agents of a corporation either ex contractu or in delicto, in the course of its business, and of their employment, the corporation is responsible as an individual is responsible under similar circumstances." This is not the same case as the one at bar. It is for the publication of a libel. This action is for a malicious prosecution; but, is not the principle the same? It will not be denied that malice enters into and is an element in slander or libel. Slander or libel is an injury inflicted with a wicked and malevolent motive, and malice seems to be as much an essential ingredient in an action for slander and libel, as is an action for malicious prosecution. If this is correct, then it follows that a corporation, being by this decision capable of malice to such an extent, as that a suit for the publication of libel can be maintained against it, then by parity of reasoning, a corporation is capable of malice to such an extent as that a suit for a ma-

licious prosecution can be maintained against it. It is proper to say that in this case, Justice Daniel dissents from the opinion of the court delivered by Justice Campbell, and the view of the subject which he presents is very much the same as that held by the defendant's counsel in this case. This doctrine is, I think, supported in the opinion of the court, in the case of State v. Morris & E. R. Co., 3 Zab. [23 N. J. Law] 360.

The case at bar, however, does not fall strictly within the principle decided in that case, which was that an indictment would lie against a corporation aggregate for a misfeasance or nonfeasance of duty. But when the justice, in delivering the opinion of the court, goes on to say, as he does, "that the result of the modern cases is that a corporation is liable civiliter for torts committed by its servants or agents precisely as a natural person," I think he may be justly regarded as supporting the view of the supreme court of the United States in 21 How. [62 U. S.]. In 2 Hill. Torts, 322, I find the same doctrine: "It may be added, as a rule perfectly established and applicable alike to all wrongs and forms of action, that corporations are liable for injury caused by unlawful acts and neglects of their servants and agents done in the course and in the scope of their employment, or where under like circumstances an individual would be liable, subject however to the following limitations: 'To render a corporation liable for the wrongful acts of its officers, it must appear that they were expressly authorized to do the act, and that it was bona fide done in pursuance of a general authority, in relation to the subject of it, or adopted or ratified by the corporation.'" With such examination of this subject as I have been able to give it, I think it is clear that the modern authorities have made a decided departure from the line of decisions in the earlier cases. The late decisions all recognize that an advance has been made from the old doctrine that corporations were not liable for torts.

It seems to be well settled that corporations are liable to indictment for nonfeasance and misfeasance of duty; also that they are liable to be sued in trespass in a civil action for false imprisonment, and to this point the decisions in Alabama and in other states have gone. But I am not content to rest here. The case cited from 21 How., and other authorities cited above, seem to me to go a step beyond, and to have reached the point that corporations are held for the wrongful and tortious conduct of their agents and employés, to the same measure of responsibility as natural persons. It is true a corporation is an intangible, impersonal thing. It has no hands of its own with which to commit crime, and no personal identity by which it can be arrested and taken into custody and punished. It can not, as a natural person, be guilty of the higher grades of crime, such as treason, murder, perjury, but we have seen that it can be indicted for nuisance, misfeasances and nonfeasances of duty, and also that civil suits in trover, trespass on the case for false imprisonment, may be maintained against it even under the decisions in Alabama. Now can any good reason be given why it should not be held liable in an action on the case for a vexatious suit or malicious prosecution? The answer is, that a corporation is incapable of malice, and technically that may be true; but is it really and practically so? There must be a controlling and governing power in every corporation. This is usually found in a board of directors who are chosen by the members or stockholders, and this board in some way selects the officers and employés of the corporation. It is not true that a corporation has no mind. Its mind is the joint product of the minds of its officers and directory in a united organization, and in point of fact corporations bring into their service the highest order of ability and the best executive talent in the country. In one sense, it is true, they have no body, no tongue and no hands; but with able management and immense profits on business, they find tongues and hands swift to do their bidding. Does the fact of the aggregation of many persons together in a common enterprise, employing large capital, furnish us with any reason to believe that the persons who control and manage these great engines of power in society and government will not or may not sometimes use their power for improper or even malicious purposes? I think no one will say so, but rather the contrary. On this question there is, as we have seen in this brief review, some conflict of authority, but the tendency of judicial opinion is clearly marked, and even if it may not be admitted to be the settled law of the country, to my mind it is the better opinion; that actions for malicious prosecutions will lie against corporations aggregate.

The demurrer is overruled.

Case No. 3,214.

COPLEY v. RIDDLE.

[2 Wash. C. C. 354.][1]

Circuit Court, D. Pennsylvania. Oct. Term, 1809.

EJECTMENT—TITLE TO SUPPORT.

A warrant and survey, and consideration money paid, is sufficient title to maintain ejectment in this court; but no proof of payment appearing, the plaintiff was nonsuited.

[Cited in Cawley v. Johnson, 21 Fed. 495; Herron v. Dater, 120 U. S. 472, 7 Sup. Ct. 620.]

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

The plaintiff deduced his title in the following manner. Settlement and improvement by Clark and Brauner, in 1762, who, in that or the next year, sold to Samuel Fenton, who sold to Samuel Perry. In 1777, Perry sold to Rea, who conveyed to James Bogle, who sold to Andrew Bogle. The latter, in 1784, conveyed to Robert Simple, who, in 1789, conveyed to John Copley. The lessors of the plaintiff, are the heirs of William Copley, who purchased this land at a sheriff's sale, under an execution against John Copley. No patent was ever granted for this land, nor did it appear that the consideration money had ever been paid to the proprietor, or to the commonwealth. It appeared that an application was made for this land in 1766, in the name of John Mease, junior, and it was surveyed, upon that application, in 1768. The name of Mease was made use of by the real person, who located the land, and the dispute respecting the title, depended upon a question of fact, whether this survey was made for Perry, under whom the plaintiff claims, or for Samuel Buchanan, to whom John Mease, junior, assigned. There were other points of difference about the title, but the court decided, that the lessor of the plaintiff had not a legal title sufficient to maintain an ejectment in this court. The case of Sims v. Irvin [3 Dall. (3 U. S.) 425] goes no farther than to determine that a warrant and survey, and payment of the consideration, gives a legal right of entry, sufficient to maintain an ejectment; and in that case, the compact between Virginia and Pennsylvania was not overlooked by the court, as influencing the doctrine laid down in that case.

The plaintiff suffered a nonsuit.

NOTE. In this case, the doctrine of prior possession, giving a right to recover in ejectment, was mentioned, but though not decided, was discountenanced by what fell from the court. In support of the doctrine, Vaughan, Cro. Eliz.; 2 Saund. 111; 1 Hawk. P. C. 64, 154; 16 Vin. Abr. 457, pl. 3,—were cited.

Case No. 3,215.

COPP v. DE CASTRO & DONNER SUGAR-REFINING CO.

[8 Ben. 321.][1]

District Court, E. D. New York. Dec. Term, 1875.

INTERPLEADER IN ADMIRALTY—FREIGHT—CHARTER PARTY AND BILL OF LADING—INJUNCTION—JURISDICTION—POWER OF THE COURT.

1. C., the master of a brig, filed a libel in personam against the D. & D. S. F. Co. to recover freight on a cargo of sugar brought in the brig from Bahia to New York under a charter party and bill of lading. Before answering, the company presented a petition to the court, in which they set forth that they had entered into the charter party with one B., who had the disposition and control of the brig at Bahia, under which the sugar was shipped and the bill of lading signed; that the sugar was brought to New York and delivered to them, and they were willing to pay the freight, as to the amount of which there was no dispute; that a suit was threatened against them by L. & Co., as assignees of B., to recover the same amount; and they prayed that they might be allowed to pay the money into court; that C. might be enjoined from further proceedings in this suit against them, and that L. & Co. might be enjoined from commencing any suit against them, and that they might have their costs out of the fund. L. & Co. appeared and consented to the prayer of the petition, but C. opposed it. It appeared that C. had chartered the brig in New York to B., for a voyage to Bahia and back, and that the charter referred to in the bill of lading was a subcharter, made by B., in Bahia, to which C. was not a party; that the freight due the vessel under the original charter to B. had been paid, but that there was a controversy between B. and C., as to a claim for the detention of the vessel in Bahia, arising out of the terms of the original charter, and that C. sought to collect this freight to secure such claim. *Held*, that a court of admiralty not only has the power but is charged with the duty of devising methods, whereby all questions, of which it can take cognizance, may be adjudicated speedily and justly.

2. The court had jurisdiction of the parties, two of them being before the court and the other consenting to appear.

3. The court had power to restrain the parties, as prayed for.

4. The rights of all parties could only be adjusted in the way requested, and would be as well protected so as in any way.

5. The fact, that the result would be to turn the proceeding from a proceeding in personam to a proceeding against the freight in rem, was no objection.

6. The prayer of the petition should be granted.

This was a hearing upon an order to show cause why the prayer of the petitioners, the De Castro & Donner Sugar Refining Company should not be granted, on the facts stated in the opinion of the court.

Beebe, Wilcox & Hobbs, for libellant.
Martin & Smith, for petitioners.
Coudert Bros., for intervenors.

BENEDICT, District Judge. The libel in this cause is filed by the master of the brig Afton. It sets forth a shipment of 5,660 bags of sugar on board that vessel, in Bahia, to be transported therein to the port of New York, and there "delivered unto order or assigns, he or they paying freight for the said goods, 35 shillings, British sterling, per ton, and all other conditions as per charter party dated Bahia, 30th April, 1875." It also sets forth the execution of bills of lading, in which said shipment is set forth, and a transportation of said cargo in accordance therewith, and a delivery thereof to the defendants, by whom the bills of lading were held, whereby the defendants became liable to the libellant, as he claims, for the freight stated in the bill of lading. Process in personam having been issued and served upon the defendants, an appearance was entered.

Thereafter before answer a petition is filed on the part of the defendants, setting forth

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

the following facts: On the 30th day of April, 1875, the defendants at Bahia entered into a charter party with Theodore E. Bondt, who had the disposition and control of the brig Afton, whereby said brig was chartered to them to take in a full cargo of sugar in bags, and deliver the same at a port in the United States, to be designated, on being paid freight at 35 shillings sterling per ton. A shipment of the sugar in the libel mentioned, in pursuance of said charter party, was made, and the same was transported to New York, and there delivered to the defendants, whereby, it is admitted, the defendants became liable for the freight agreed to be paid in and by said charter party, being the sum demanded in the libel, to wit $2,832.15.

The petition further sets forth that said freight has been demanded of them, not only by James A. Copp, the master of said brig, but also by the firm of C. Ludmann & Co., who claim the same as assignees of Theodore E. Bondt, the charterer of said brig; and not only has this suit been brought therefor by the master of said brig, but also a suit against them is threatened by C. Ludmann & Co., to recover the same sum, and they have been notified that they will be held responsible therefor, by C. Ludmann & Co. The defendants do not claim any interest in said sum, and are uncertain and do not know to which of said parties they can safely pay the same, but are ready and offer to pay the same into the registry of this court, in order that said several parties may have their respective claims thereto adjudicated by this court. Wherefore the defendants pray, that they may be permitted to pay said freight money remaining in their hands into this court, and that upon such payment they may be released and discharged from any claim of or liability to said Copp, or the said Ludmann & Co., and that said Copp may be restrained from further proceedings against the defendants, or either of them, to recover said freight; that said Ludmann & Co. may also be restrained from taking any proceedings to recover said freight from the petitioners, and that the expenses of this application be paid out of said money, when so paid into court as aforesaid.

Notice of the filing of this petition having been given to C. Ludmann & Co., they presented themselves before the court, and by affidavit showed the nature of their claim to the freight in question, and tendered an appearance in the cause as claimants of the freight, in case the same should be paid into court, and consented that the same be so paid in and that an injunction issue as prayed for in the petition of the De Castro & Donner Sugar Refining Co. An affidavit showing absence of collusion was also filed. The libellant objects to the granting of the prayer of the petition, and insists upon his right to proceed in his action against the defendants alone.

Upon these papers the question arises, whether a court of admiralty can in this summary way attain the end accomplished in a court of equity by a bill of interpleader. I have not been referred to any adjudged case where such a question has been determined, nor am I aware of such a case. The only allusion to such a proceeding that I know of, is to be found in the case of The Argentina, 16 Law T. (N. S.) 746.

But I see no reason to prevent such a proceeding in a proper case. A court of admiralty is a court of equity. Extreme powers of a peculiar character have been conferred upon it, to enable it to determine speedily and with the least possible expense, by means of simple methods, all questions which may arise in respect to affairs of the sea. Not only has it the power but it is charged with the duty of devising methods by which all questions, of which it can take cognizance, can be adjudicated speedily and justly.

A marked illustration of the flexibility of its proceedings and the extent of its powers is to be found in the action of the supreme court of the United States, sitting as a court of admiralty, when called upon to carry into effect the statute limiting the liability of ship owners. See The City of Norwich, 13 Wall. [80 U. S.] 122, and the rules of the supreme court, upon the same subject. The case just referred to furnishes authority not elsewhere to be found, I think, for the issuing of an injunction by a court of admiralty; and also shows that in cases other than in rem persons not originally parties, and who cannot be served with process within the territorial jurisdiction of the court, may in some instances be compelled to submit their rights to its determination, when such a course is necessary for the proper administration of the law.

In the present case, however, no question can arise in respect to jurisdiction over the parties, for two of them are already before the court and the third consents to appear, and asks to be allowed to submit its rights to the determination of the court. Nor is there any room to doubt the power of the court to restrain the parties, as requested, for all parties consent to the restraint except the libellant Copp; and as to him, asking as he does the decree of this court, it is of course competent for this court to control his proceeding here, and I doubt not to prevent him from taking proceedings elsewhere, in case the freight be paid into court.

The power to permit the real party in interest to become a party to the suit, when his interests are involved, and to permit a fund claimed by different persons to be paid into court, seems to be a necessary power for a court of admiralty; for by the exercise of such power alone can the conflicting rights which sometimes arise in maritime affairs be determined in one action. This consideration always carries weight in a court created

for the purpose of dispatch and simplicity, which "sits from tide to tide" in order that the ships be not delayed in their business, and their owners detained from their homes, to await opportunity for a determination of their rights.

Furthermore, in this way only can the rights of the parties be adjudged according to the principles and rules of maritime law, as administered by a court of admiralty, the forum in this instance desired by all; for if the relief here prayed for cannot be granted, resort must be had to a court of equity, to which tribunal the litigation will be transferred.

It is true that in some cases—and the present is one—the exercise of the power to permit money to be paid into court will in effect transform an action in personam to an action in rem. But such transformations are not unusual in the admiralty. So Shepherd v. Taylor [5 Pet. (30 U. S.) 675], an action commenced in 1810, as a simple action in personam, was determined by the supreme court of the United States in 1831 as an action in rem, notwithstanding that it was then argued in opposition to the decree, that the original proceeding pursued a purely personal remedy, while a decree in rem was asked; and it was said, "These claims are at war with each other; the latter cannot be incident to the former." Shepherd v. Taylor, 5 Pet. [30 U. S.] 701.

I am unable, therefore, to see any good ground for denying to a court of admiralty the power to grant the relief here prayed for, in a proper case. In determining whether the present be such a case, the considerations relied on in courts of equity are of equal force here. If the demand of the libellant be simply a debt due him from the De Castro & Donner Sugar Refining Company, a demand which he has become legally entitled to make against defendants by reason of the receipt by the defendants of the cargo which he has transported and delivered, the prayer of the petition cannot be granted. To grant it would be to introduce parties having no real interest in the issue. It becomes necessary, therefore, to examine into the nature of the libellant's demand, as exhibited in the papers before me.

It appears that on the 15th of September, 1875, the libellant, Copp, chartered the brig Afton to Theodore E. Bondt, for a voyage from New York to Bahia and back to the United States; that the vessel proceeded to Bahia, where a sub-charter home was made on the 30th of April, 1875, by Bondt as disponent of the vessel, to Schramer, Wylie & Co., to which contract the master was not a party. In pursuance of this latter agreement a homeward cargo was furnished by Schramer, Wylie & Co.; and the bill of lading referred to in the libel is a bill of lading given for the cargo so shipped. It appears, also, that all the freight due the vessel, according to the charter party made in New York, has been paid, but that a contention exists between Bondt, the original charterer, and the vessel, as to a claim for detention in Bahia. This claim is based upon the terms of the charter party made by Bondt in New York.

The existence of this claim shows the object of the present action to be the securing of a fund in the hand of the master, that the same may be credited to Bondt against a claim for demurrage. This object is legitimate, but whether it is attainable or not depends upon the extent of the master's right to collect the freight. If the master can collect this freight only in the capacity of an agent of Bondt, or of his assigns the petitioners, it is plain that no objection to the disposal of the money, asked for by them, can be made by the master. His right to collect the freight at all in that capacity under the circumstances would be open to dispute. But the master claims to act for the ship, and maintains that he has an absolute right to collect the freight, because of a clause in the charter party made with Bondt, wherein the freight is declared bound to the ship for the performance of the contract. But I do not conceive that such a clause confers an absolute right as against all the world to collect and receive all freight money which may be earned by the ship during the voyage, whether anything be due upon the charter to the ship or not. The right conferred by such a clause is a right of lien and nothing more. Whether there be a balance due upon the charter made with Bondt, for which, if it exists, the master has a lien upon the freight in question, is not now to be determined.

But it is plain that such a question lies between the master and Bondt or his assigns, and not between the master and the present defendants. In that question the defendants have no interest whatever. It depends upon the terms of a contract to which they are not parties. They are simply holders of a fund upon which the master may have and claims to have a lien, and which, if there be no lien, belongs to Ludmann & Co. Justice to them requires that they have an opportunity to dispute the lien, and justice to the defendants demands that they be allowed to discharge themselves from the custody of the fund in which they have no interest, provided it can be done without impairing the rights of the parties.

The proceedings sought here will accomplish that end. No new burden will be cast upon the master. The contingency that he might be compelled to sustain his lien against the objection of Bondt, results from the nature of his claim and could not be escaped. For him the only question is, whether he shall have his contest in this court or elsewhere; and having himself chosen this forum, it does not lie in his mouth to object to it; nor will his claim be impaired, but rather made more secure, for instead of the

claim against the defendants, who by possibility may not be able to respond to his decree when obtained, he will acquire security for his demand by the money itself deposited in court.

I am therefore clear in the opinion that the prayer of the petitioners should be granted.

Case No. 3,215a.

COPPENBUSEN v. FOLKE et al.

[Betts' Scr. Bk. 681.]

Circuit Court, S. D. New York. Feb. 24, 1862.

PATENTS FOR INVENTIONS—"TIN FOIL"—OIL PATENTS—VALIDITY.

[In equity. Bill by Conrad Coppenbusen to restrain the infringement of certain patents by the defendants, Oscar Folke, Eberhard Faber, Edward Simon, and others.]

Charles M. Keller, E. W. Stoughton, and George D. Sargeant, for complainant.
John Ashmead and W. J. A. Fuller, for defendants.

Before NELSON, Circuit Justice, and SHIPMAN, District Judge.

PER CURIAM. Both patents of L. Otto P. Meyer, known as the "tin foil" and the "oil" patents, for improved methods of vulcanizing hard rubber compound, embossed and plain surfaces, are valid; the re-issued patent covers no more than the original invention. It is also adjudged that the respondents have infringed both patents; that an injunction be issued, and an order of reference to account.

COPPER SILL (UNITED STATES v.). See Case No. 14,866.

Case No. 3,216.

COPPERTHWAIT et al. v. McCORD.

[2 McLean, 143.][1]

Circuit Court, D. Ohio. July Term, 1840.

PRACTICE—CONTINUANCE.

[The Ohio statute allowing service of a notice by defendant, requiring service of copies of all writings upon which the declaration is founded, comprehends actions on contract only, and not an action of ejectment; consequently the failure to respond to a notice given in such an action is no ground for a continuance.]

The defendant [Samuel McCord] served a notice on the plaintiff's attorney, to furnish him with copies of all deeds, records of judgments, and decrees in equity, and all other evidence of title intended to be used as evidence on the part of the lessor of the plaintiff. The statute, under which this notice was served, requires "the plaintiff, or his attorney, to deliver to the defendant, or his attorney, if demanded, a copy of the account, or bill of particulars, of the demand, or a copy of the bill, bond, deed, bargain, contract, note, instrument, or other writing, whereon the declaration is founded, or which he intends to offer in evidence at the trial." And, in the succeeding section, it is provided, that if the plaintiff, or defendant, shall refuse to furnish the copy or copies required, the party so refusing shall not be permitted to give in evidence at the trial, the original, of which a copy has been refused. Under this act it seems it has not been the practice, in the state courts, to give the notice in the action of ejectment. But whether the act embraces the action of ejectment, has not been decided by the supreme or circuit courts of the state. The uniform course of practice, under an act, goes strongly to establish the construction of it, without any express decision of the court. As the papers required by the notice in this case have not been produced, a continuance is asked on that ground; and this, for the first time, it is believed, brings up for decision, whether the statute embraces an action of ejectment. The language of the statute is general, and no action is excepted, but the provision would seem to apply to actions founded upon contracts, and this construction has generally, if not uniformly, been given to the act. And, we think, the intention of the legislature is effectuated by this view of the statute. The notice, under the statute, applies as well to the defendant as to the plaintiff; and can it be supposed, that the lessor of the plaintiff, in the action of ejectment, by serving a notice on the defendant, can compel him to exhibit his title papers before the plaintiff has proved his title?

Upon the whole, we think the refusal or neglect to furnish the copies called for by the notice affords no ground for a continuance of the cause, as the statute does not authorize such a notice in an action of ejectment.

Mr. Chase, for plaintiff.
Moses B. Corwin, for defendant.

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

COQUILLARD (DENNISTON v.). See Case No. 3,801.

CORA, The (BOND v.). See Cases Nos. 1,620 and 1,621.

Case No. 3,217.

The CORA NELLIE.

[2 Adm. Rec. 332.]

Superior Court, S. D. Florida. June 30, 1840.

SALVAGE COMPENSATION.

[On cargo saved, of the value of $29,153, 47 per cent. was awarded as salvage.]

[Cited in Baker v. Cargo, etc., 35 Fed. 542; The Maryland, Case No. 9,218.]

[In admiralty. Libel for salvage (William Clare, claimant).]

Adam Gordon, for libelants.

S. R. Mallory, for respondent.

[Before MARVIN, Judge.]

[NOTE. Nowhere reported; no opinion can be found in the records of the court.]

Case No. 3,218.

CORBET et al. v. JOHNSON et al.

[1 Brock. 77.] [1]

Circuit Court, D. Virginia. May Term, 1805.

COLLECTION OF DEBT OF DECEDENT.

At law, a bond creditor has his election to proceed either against the heir or executor, but if he comes into equity, and proceeds against the heir or devisee, he must join the executor in the suit, and he must exhaust the personal estate of the debtor in the hands of his legal personal representative, before the lands will be subjected. But if the personal fund has passed into other hands than those of such legal personal representative, he is not bound to pursue it further, and the court will proceed to decree directly against the land. Therefore, when a bond debtor died, having appointed two executors, both of whom qualified, and one of them died, having a portion of his testator's estate in his hands, and his co-executor afterwards died, whose executor became the executor of the first testator, and a bill in equity was filed by the bond creditors, against the heirs and devisees, and the executor of the surviving executor of the debtor, the court refused to compel the plaintiffs to join the representative of the executor who first died, in the suit (although that executor was responsible for a portion of the personal estate of the bond debtor), and decreed a sale of the land derived from him; it appearing, that the personal assets in the hands of the legal personal representative were exhausted.

[Explained and followed in Murdock v. Hunter, Case No. 9,941. Cited in McLaughlin v. Bank of Potomac, 7 How. (48 U. S.) 231; Hefner v. Northwestern Mut. Life Ins. Co., 123 U. S. 747, 8 Sup. Ct. 341.]

The bill in this case was filed by Cunningham Corbet and others, assignees of Ninian Minzies, against the heirs and devisees of Edward Johnson, deceased, and also against William Wiseham, executor of Andrew Ronald, who was the surviving executor of Edward Johnson, to compel the payment of two bonds, executed by the said Johnson, in his life time, to Minzies, which bonds were assigned by Minzies to the plaintiffs, for the benefit of his creditors. Edward Johnson, by his will, appointed William Ronald and Andrew Ronald his executors. Both of the executors appointed by the will of Edward Johnson qualified and acted as such. The report of the commissioner appointed to settle the administration account of Andrew and William Ronald, showed a balance due by William Ronald to the estate of his testator of £3179 1s. 4d., and that the estate of Edward Johnson owed the estate of Andrew Ronald £64 15s. 10d. William Ronald died intestate, before his co-executor, and afterwards Andrew Ronald also died, having appointed the defendant Wiseham his executor, who, as such, was the executor of Edward Johnson. Both William and Andrew Ronald were dead before the institution of this suit, and the representatives of William Ronald were not made parties thereto. The heirs and devisees of Edward Johnson, who were also his children, in their joint answer, referred to the copy of the bond of the co-executors of Edward Johnson, and to the report of a commissioner on their administration account, showing that a balance more than sufficient for the discharge of the plaintiff's debt was due from them to Edward Johnson's estate, and insisted that the plaintiff's debt, which was of the first dignity, should be satisfied out of the personal estate of their ancestor, and to this end that the personal representatives of William Ronald, and the sureties in the executorial bond, should be made parties defendants, and be subjected to the payment of this debt, claiming exemption for the real estate derived from Edward Johnson, until recourse was had to his personal estate into whatever hands it had passed. On the question raised in the answer, as to the proper parties to this bill, the following opinion of the court was delivered by

Before MARSHALL, Circuit Justice, and GRIFFIN, District Judge.

MARSHALL, Circuit Justice. The material question in this case is, how far a bond creditor, coming into a court of equity to subject lands to his debt, will be compelled to pursue the personal estate, before the lands shall be applied to the satisfaction of his claim. At law, he has his option to resort to either fund. Originally, it appears to have been deemed necessary first to exhaust the personal estate; but from the time of Edward IV., it has been held, that the creditor may elect to sue either the heir or the executor. The cases on this subject are reviewed by Powell; [2] and since that period, it has been uniformly decided, that "assets in the hands of the executor at the time the writ was sued out" is no plea in bar to an action of debt against the heir. But although the creditor has this election, if he chooses to proceed at law, yet if he comes into a court of equity, he must conform to its rules. One of these is, that the executor shall be joined in the suit. For this rule, two reasons are assigned:—1st. That he may contest the claim. 2dly. That the personal fund out of which a reimbursement would be decreed to the heir, may be applied in the first instance to the payment of the debt. That the legal, personal representative of the first testator must, therefore, be joined in a suit brought on the chancery side in this court by a creditor against the heirs, seems to be universally conceded. So far as the ques-

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

[2] 2 Pow. Mortg. 777, 778, and Mr. Coventry's note E.

tion, whether the personal estate must be pursued into other hands than those of the legal representative, depends upon principle, it is urged that one of the reasons on which the rule was adopted, applies with equal force to its extension so far as to require that the personal fund should be exhausted before recourse is had to the real.

In a court of equity the effects of the testator may be pursued into the hands of every person whatever; and all those who hold any portion of his estate may be brought before the court in the same suit. If the executor must be brought into court because, among other reasons, he would be responsible to the heir, so any person possessing the personal fund, who would be responsible to the heir, and who can be brought into court, ought, for the same reason, to be associated with him in the suit. It is equitable and convenient, that the person who must ultimately pay 'the debt, should be decreed to pay it in the first instance.

For the plaintiff, it is contended that the creditor, having a legal right to pursue the heir, equity will respect that right, and will only impose upon him, when he comes into this court, such conditions as are reasonable, and as will not injure his rights.

The legal representative may be brought before the court without much delay or inconvenience; but if the plaintiff is compelled to go beyond the legal representative, if the various, intricate, and multiplied questions which must be settled in determining by whom and in what proportions the debt is ultimately to be paid, are all to be discussed before he receives a debt acknowledged to be due, and to pay which adequate funds are acknowledged to be in the hands of the debtors, he will experience delays which are incalculable; and thus the rule of equity will work a real wrong to a person possessing a plain title both in law and equity.

These arguments on both sides are entitled to great respect, and a course of decisions, the one way or the other, might be defended by reasons perfectly satisfactory. In whichever way the principle may have been settled, there are no inducements for shaking the decisions which have been made. The case from 3 Atk. (Madox v. Jackson, page 406) lays down the general rule as it has been stated. But that case contemplates the general rule under its usual circumstances only, not when it comes in conflict with other principles which are also regarded. Lord Hardwicke contemplated merely the legal, personal representative of the deceased, and the case of both an heir and executor legally accountable to the creditor. The personal fund, under such circumstances, must be first exhausted. But what the opinion of Lord Hardwicke would have been when the personal fund was not in the hands of the legal, personal representative, cannot be asserted from the case from Atkyns. The case cited from 3 P. Wms. (Knight v. Knight, pages 331–334, and note A) is of the same character with that from 3 Atk. It lays down the general principle, so far as respects the heir and executor. The reason given for the principle would certainly favour strongly the argument on the part of the heirs. A court of equity, said the chancellor, delights to do complete justice, and not by halves; as, first to decree against the heir, and then to put the heir upon another bill against the executor to reimburse himself out of the personal assets. Where the executor and heir are both brought before the court, complete justice may be done by decreeing against the executor, so far as the personal assets extend; the rest to be made good by the heir out of the real assets. These expressions are, it is true, precisely applicable to the case at bar. But the counsel who produced this case has very correctly observed, that general principles declared in a particular case, must be taken with some reference to the case in which they are declared. The mind of the judge is fixed upon the circumstances of the case before him, and the abstract principles he lays down, must receive some limitation from these circumstances. The words of the chancellor, which follow those which have been quoted, seem to give this argument a peculiar application to the case from Peere Williams. "And here," says Lord Talbot, "appears no difficulty or inconvenience in bringing the executor before the court." This observation seems to warrant the opinion, that Lord Talbot would have allowed weight to arguments drawn from the difficulty or inconvenience of pursuing the personal fund.

The principles laid down in the books of practice respecting the necessary parties to a bill, are drawn from particular decisions which are referred to. It is laid down in those books, that all persons materially interested in the subject of a suit, ought to be parties to it; and an instance put in illustration of this rule, is that of a bill against the heir alone, where the personal estate is first liable for the demand. The case from 3 Peere Williams is referred to as authority for this rule, and that case relates to the legal representative.

But how are the real or personal estate of William Ronald interested in the subject of this suit? They are neither concerned in the demand, or interested in the relief prayed. Their responsibility can neither be increased nor diminished by any decree which is rendered in it. In the common case of the heir and executor, the claim of the heir on the personal estate may depend on the establishment of the claim against the real estate. In such a case as this, the representatives of William Ronald owe a certain sum for which they are liable, whether this claim be established or not. Upon the ground of interest, then, there can be no

necessity for making them parties; it is only on the principle that they must ultimately account to the heir; and, therefore, ought to be brought, in the first instance, before the court. This restores the original question, how far and into what hands the creditor is obliged to pursue the personal estate.

It appears to have been frequently decided, that he must exhaust it in the hands of the legal, personal representative; but never, that he is compelled to pursue it into the hands of others. Yet in the infinite variety of situations into which personal assets are thrown, it is scarcely conceivable that cases have not occurred where the heir was sued, and the personal estate was not exhausted in a legal course of administration, though nothing should remain in the hands of its legal representative. The reasoning, however, for extending the principles laid down respecting the personal fund, to the case of its being found in the hands of a person who may be considered as the equitable, though not the legal representative, is very strong; and the court would have been relieved by finding, that authorities relied on against so extending it, were decisive.

The case from Equity Cases Abridged,[3] which is reported in Viner, is an express case of a decree against lands in the first instance, leaving the heir to pursue the personal estate. It is said that the decree being given without its circumstances, it must be supposed that the personal estate was absolutely exhausted. This may have been the fact, but, certainly, it cannot be assumed as a fact. If the presumption was absolutely necessary to account for the decree, it would be made; but to pronounce it absolutely necessary, presupposes what is to be proved,—that the law is with the defendants. But this case was decided twenty years before that reported by Peere Williams, and four years before that reported by Atkyns. The probability therefore is, that it was decided before the principle, that the personal estate should be first applied in case of the real, and that the creditor should not be at liberty to resort directly to the heir, leaving him to take his remedy against the executor, was firmly established. This consideration certainly deducts from the authority of that case. The case from 3 Ves. Jr. (Manning v. Spooner, page 114) is a question respecting the order in which the real fund shall be applied by a court of equity, without containing any instructions as to the necessity of pursuing the personal fund into the hands of other than those of the personal representative, before the creditor can resort to the real. The sentiment with which the case closes, relates to the absolute final rights of parties, not to the necessity of proceeding against all persons who may be made liable, or to the right of electing to confine the suit to those who are immediately liable, without joining those who may be afterwards accountable. The case from 2 Ves. Jr. (Hamilton v. Worley, page 62) is a mere question of intention in the construction of a will. In deciding that question, the chancellor says: "The court affords an equity to a person entitled to a real estate by devise, to have the incumbrances upon it discharged as a debt out of the personal estate. That can go no further than this; as between the heir or devisee, and the residuary legatee. It cannot interfere with the disposition of other parts, as specific or general legatees, much less with the interests of creditors."

The counsel for the plaintiff understands this declaration as relating to the right of the creditor to pursue one fund or the other singly, at his election. The court does not so understand it. The question there, was whether the devisee of a mortgaged estate might resort to the personal estate for its exoneration. The court declares this right to be limited to the case of a residuary legatee, and not to extend to cases of specific or general legacies, much less to the case of a creditor: that is, where the personal fund is necessary for the payment of debts. No case, then, has been cited from the English books which is an express authority for this case. It has already been suggested, that the very circumstance of there being no case in which it has been decided, that the personal fund must be pursued into other hands than those of the legal representative, is a strong argument against its being necessary. The court of equity has introduced a principle which limits the legal right of the creditor to elect the fund to which he will resort. That principle has only been carried to a certain extent, and if extending it further would impair complete and perfect rights, there is reason to believe that those courts will not extend it further. With respect to the creditor, unless it be for his advantage, the personal estate may be said to be exhausted, when there are no longer assets in the hands of the executor. Although the English authorities do not reach the case, the decision of this court in the case of Main v. Murray [Case No. 8,975] is supposed to comprehend it. On inspecting the demurrer in that case, it appears not perfectly clear, whether this question was fully before the court or not. The devisees allege themselves not to be responsible for the malversation of the executor of James Murray, the devisor. And this would seem to involve the point. Gentlemen who were concerned in it can best say how far this question was brought before the court.[4] The court, at present, inclines to consider this case as an authority,

[3] This is the case of Duncombe v. Hanstey, reported in note A, 3 P. Wms. 333, above cited; 2 Eq. Cas. Abr. tit. "Bills," § 25, note d.

[4] In the case of Main v. Murray, in this court (Nov. term, 1799), Judge Washington presiding, the devisees demurred, and the demurrer was overruled.

but if, on a more minute investigation, it should not be so, still the court is not inclined, in a case where the controversy between those into whose hands the personal estate has passed, is so intricate, diversified and complicated, to extend the principle further than it ever has been extended, and to postpone the creditors till their disputes shall be settled.

Decree: Sale of the real estate in the hands of the heirs and devisees decreed.

Case No. 3,219.

In re CORBETT.

[9 Ben. 274.][1]

District Court, E. D. New York. Dec. Term, 1877.

HABEAS CORPUS—CONSTRUCTION OF ARTICLES OF WAR.

Article 70 of the articles of war [which provides that "no officer or soldier shall be continued in confinement more than eight days, or until such time as a court-martial can be assembled"] was not intended to apply to the confinement of soldiers during trial and awaiting judgment. The article applies solely to confinement preliminary to trial.

W. F. Severance, for petitioner.
Childs & Hull, for the officer.

BENEDICT, District Judge. John J. Corbett, having made application in due form for a writ of habeas corpus, directed to the commanding officer of the U. S. army at Fort Wadsworth for the purpose of an enquiry into the cause of the petitioner's detention in confinement by said officer, and that officer having brought the petitioner before me and certified the cause of his detention in confinement, the petitioner now excepts to the sufficiency of the return, and moves for his discharge upon the ground that the return shows no legal cause of restraint.

The facts certified in the return are as follows: The petitioner is an enlisted soldier, attached to Battery E, third artillery, U. S. army, stationed at Fort Wadsworth, of which fort the respondent is the commanding officer. On the 16th day of December, 1877, the petitioner was arrested, by direction of the respondent, charged with conduct to the prejudice of good order and military discipline, under the provisions of article of war No. 62. On the 22d day of December a general court-martial was convened, before which tribunal the petitioner was placed for trial for such offence, and his trial was then had. He is now detained in confinement by the commanding officer at the fort, awaiting the promulgation of the determination of the said court-martial upon the charge so preferred against him.

The objection to this return is, as I understand it, based upon article of war No. 70, which provides that "no officer or soldier shall be continued in confinement more than eight days, or until such time as a court-martial can be assembled." The present confinement of the petitioner is supposed to be unlawful, because more than eight days have elapsed since he was placed in confinement, notwithstanding the fact that he has been tried by a court-martial under the charge on which he was arrested, and is now held awaiting the determination of the court as to his guilt or innocence.

The foundation of this objection is a misconception of the legal effect of article of war No. 70. It seems to be supposed that by that article the period of eight days is fixed as an absolute limit to the term of confinement prior to conviction, of a soldier charged with a military offence. Such is not the effect of the article. The language used shows that this article was not intended to apply to the confinement of soldiers during trial and awaiting judgment. The words of limitation are, "eight days, or until a court-martial can be assembled." Certainly it was not intended that the assembling of a court-martial for the trial of an offender should entitle such offender to his release. On the contrary the implication is that the soldier is not to be released if a court-martial be duly assembled, and it is plain that the article was intended to apply solely to confinement preliminary to trial.

Article 70 affords therefore no ground for holding the present confinement of the petitioner to be unlawful, inasmuch as the return shows that the petitioner has been tried by court-martial, and is now held awaiting the judgment of the court. The right to confine a soldier during a trial and while awaiting sentence is conferred by article of war 66, which provides that "soldiers charged with crimes shall be confined until trial unless released by proper authority." The effect of article 66 upon confinement preliminary to trial is limited by the subsequent article No. 70. But, as before stated, article 70 has no application to confinement during a trial and pending the judgment. The right to detain in custody awaiting judgment of a court-martial is recognized elsewhere in the articles of war. Thus article 60 provides that a person dismissed the service "shall continue to be liable to be arrested and held for trial and sentence by a court-martial." Article 90 confers upon courts-martial the power to grant continuances, with the proviso, "that if the prisoner be in close confinement the trial shall not be delayed for a period longer than sixty days." Authorities on military law are to the same effect. Says De Harte (page 76): "Private soldiers continue confined until the announcement of the proceedings of the court by which they have been tried."

But it is said no new arrest was made upon the assembling of the court-martial, and as

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

the petitioner's confinement had then become unlawful, because more than eight days had then elapsed since the confinement commenced, his continued confinement is unlawful.

Whether the confinement during the time that elapsed between the expiration of the eight days and the assembling of the court-martial was lawful or not, need not now be decided, as the question here relates solely to the present confinement. The petitioner, whether lawfully or unlawfully confined prior to the assembling of the court-martial, became lawfully confined when a duly authorized court-martial took cognizance of the charge preferred against him. No new arrest was necessary, for there was to be no change of custody. When the court-martial took cognizance of the charge preferred against the petitioner, it became the duty of the commanding officer thereafter to have the accused at all times at hand to receive the judgment of the court when it should be promulgated, and to that end he was authorized by article 66 to keep him in confinement. "The custody of the prisoner's person belongs to the commanding officer as a part of his command." De Harte, Courts-Martial, p. 80.

The provisions of the articles of war above referred to being found to justify the detention of the prisoner in confinement until the decision of the court-martial in his case shall be promulgated, it becomes unnecessary to consider the other question that in the absence of these statutory provisions might be presented, whether it be competent for this court, by a writ of habeas corpus, to take from another tribunal of competent jurisdiction a prisoner on trial before such tribunal, and subject to be held or discharged as that tribunal may direct.

I speak of the court-martial as a tribunal of competent jurisdiction, because no point has here been made as to the jurisdiction of that court over the person of the petitioner, and the offence with which he stands charged.

To the intimation in the brief that the petitioner desires to be heard to contend that the acts done by him do not constitute a violation of the articles of war, the reply must be that the return sets forth a charge framed in the language of article of war No. 62. Whether the facts support this charge is a question not presented to this court by the present proceeding. The merits cannot be looked into here. Whether the petitioner be guilty or innocent of the charge preferred, must be left to be determined by the military court, to the jurisdiction of which the petitioner submitted himself when he enlisted as a soldier. In re Bogart [Case No. 1,596]; Dynes v. Hoover, 20 How. [61 U. S.] 77; Ex parte Parks, 93 U. S. 18.

My decision upon the objections made to this return, therefore, is that the objections are not well taken, and that upon the facts stated in the return the petitioner must be remanded to the custody whence he was taken by the writ.

If, as suggested on the hearing, the petitioner shall desire to deny the facts stated in the return he may do so, and a time will then be fixed for taking proof as to such disputed facts. If no such denial be made the writ will be discharged, and the prisoner remanded.

Case No. 3,220.

In re CORBETT.

[5 Sawy. 206.][1]

District Court, D. Nevada. July Term, 1878.

EXEMPTIONS—PARTNERSHIP PROPERTY.

1. The individual members of a bankrupt partnership are not entitled to exemptions of household and kitchen furniture out of the partnership property.

[See note at end of case.]

2. The partnership property in the hands of the assignee is a trust fund for the payment of the joint creditors, and the interest of the members of the firm, as individuals, is an interest in the surplus only.

This is an order obtained by the assignee requiring the bankrupts to show cause why certain personal property should not be ordered to be delivered by them to the assignee. The contest is in reference to certain articles of furniture which before the bankruptcy belonged to the "Corbett Brothers" as partners, and were used in a hotel kept by them, as hotel furniture. The bankrupts claim that they each have a right to an exemption of necessary household and kitchen furniture out of the partnership property. This right the assignee denies. Section 5045 of the Revised Statutes excepts from the operation of the conveyance to the assignee exempt articles, they being the "property of the bankrupt," and the property exempt from execution by the law of Nevada, is property "belonging to the judgment-debtor."

Lewis & Deal, for assignee.
Jonas Seely, opposed.

HILLYER, District Judge. The one consideration which, it seems to me, must lead to a decision of this case against the claim of exemptions made by the debtors is, that the property which they seek to hold as exempt is not property which, in the sense of the law, belongs to either of them. It is joint property in which neither has any other interest than his share of what remains after the partnership debts are paid, which in case of an insolvent firm is, of course, nothing.

In case of a dissolution, says Story, each partner holds the joint property clothed with a trust to apply it to the payment of the joint debts. Story, Partn. § 360. The in-

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

terest of each partner in the partnership property, as stated by Kent, is his share in the surplus after the partnership accounts are settled and all just claims satisfied. 3 Kent, Comm. 37. One partner cannot pledge or sell partnership property for his own separate debt without the consent of his copartner. Rogers v. Batchelor, 12 Pet. [37 U. S.] 221.

The property of an insolvent firm must first be applied to the payment of the joint debts; only the surplus can be reached by the separate creditors. Murill v. Neill, 8 How. [49 U. S.] 414.

A purchaser under an execution against one partner has no claim until the partnership debts are paid, except on the separate interest of the individual partner in the residue. Gilmore v. Land Co. [Case No. 5,448]; U. S. v. Williams [Id. 16,719]. If the partnership is insolvent, no interest passes by such sale, for the partner himself is then entitled to nothing. Lyndon v. Gorham [Id. 8,640]. Since an execution against one partner secures no interest in the property of a bankrupt partnership, it must follow that one partner cannot have that property exempted from execution, which an execution cannot reach because others have a prior claim upon it.

There is no question in this case as to the right of partners, during the existence of the partnership, and while the business is going on, to convert partnership property into separate property, out of which each partner claims his individual exemption. This, when done in good faith, may perhaps be lawful. Allen v. Center Valley Co., 21 Conn. 130. But here the exemption is claimed out of the joint effects after the partnership has been adjudicated bankrupt. By the bankruptcy the status of the property has become fixed, and it is no longer in the power of either partner, or both, to change it. Upon the bankruptcy an equitable lien attached in favor of the partnership creditors on the joint effects in the hands of the assignee. Tillinghast v. Champlin, 4 R. I. 173; Story, Partn. § 361. The result of this doctrine, that the partnership effects in the hands of the assignee are charged with a trust or equitable lien in favor of joint creditors, must be that the individual members have no separate interest whatever in the partnership property, because there is no possibility of any surplus. And whether we say that the joint creditors have an equitable lien or a quasi lien, worked out through the equities of the partners, the result is the same; for the jurisdiction of a court of equity to enforce the lien or trust may be invoked by the joint creditors, independently of the wishes or assent of the partners. Ketchum v. Durkee, 1 Barb. Ch. 480. By whatever name called, it is a right of the joint creditors to have the joint property of the bankrupt firm devoted to the payment of their debts before any is taken by the individual partners as separate estate, or by individual creditors. The conclusion must follow that the individuals can claim no exemption out of the partnership estate. Neither member of this insolvent firm has any such interest in any particular article of partnership property that he can claim it as exempt, or that it can be set apart to him as property belonging to him.

There is, in my opinion, a very decided distinction between a case like this and one where the party claiming the exemption owns a definite share in a particular article of property as a tenant in common. In this latter case the claimant has something of which he is the owner, in the former he has not. The partner having only his separate interest in the surplus cannot sell or mortgage an undivided interest in a specific part. Morrison v. Blodgett, 8 N. H. 238. The tenant in common being the owner of a definite portion of the thing can sell or mortgage it, and can deal with it as owner.

The conclusion reached in this case is sustained by great weight of authority. The cases examined by which it is supported are: In re Hafer [Case No. 5,896]; In re Price [Id. 11,410]; In re Blodgett [Id. 1,555]; In re Handlin [Id. 6,018]; In re Tonne [Id. 14,095]; In re Stewart [Id. 13,420]; In re Boothroyd [Id. 1,652]; In re Sauthoff [Id. 12,380]; In re Croft [Id. 3,404]; In re Melvin [Id. 9,406]; Wright v. Pratt, 31 Wis. 99; Russell v. Lennon, 39 Wis. 579; Pond v. Kimball, 101 Mass. 105; Guptil v. McFee, 9 Kan. 35; and Kingsley v. Kingsley, 39 Cal. 665. In Burns v. Harris, 67 N. C. 140, it was held that a partner may have an exemption out of the joint estate, if the other partners consent, but not without.

The cases which are cited as sanctioning the exemption are Anon., 1 Bankr. Reg. (Quarto) 187;[2] In re Rupp [Case No. 12,141]; In re Young [Id. 18,148]; In re McKercher, 8 Bankr. Reg. (Quarto) 409; In re Richardson [Case No. 11,776]; Radcliff v. Woods, 25 Barb. 52; Stewart v. Brown, 37 N. Y. 350. Of these authorities the first is a statement that Judge Hill of Mississippi district has written to a register that such exemption may be allowed.[2] In re Rupp has been since overruled by the case of In re Tonne, supra. In re Young and In re Richardson are both decisions of the district court of Missouri; decisions of an able judge, but as is seen he stands almost alone in this matter. In Radcliff v. Woods, the horse, a half interest in which was claimed and allowed as exempt, is spoken of by the court

[2] [NOTE. The memorandum cited in 1 Bankr. Reg. (Quarto) 187, is as follows: "Judge Hill, of the U. S. district court for Mississippi, in a letter to Captain George Pennington, assignee in bankruptcy, has given the opinion that, in the case of firm being adjudged bankrupt, each member of the firm is entitled to the full benefits of the exemption out of partnership assets, unless said member has received exemption upon individual schedule."]

as owned in common, and the claimant as part owner. If the horse was owned by the claimant and another, as tenants in common, the case is not in point.

Rule absolute.

CORBETT (COMMERCIAL BANK v.). See Cases Nos. 3,057 and 3,058.

Case No. 3,221.

CORBETT v. GIBSON.

[16 Blatchf. 334.][1]

District Court, E. D. New York. May Term, 1879.

SUBPŒNA DUCES TECUM—PUBLIC DOCUMENTS.

The major general commanding the department of the east, in the army of the United States, was served with a subpoena duces tecum, in this suit, requiring him to produce in court official papers on file in the office of the headquarters of such department. A motion was made that such subpoena be set aside. It appearing that copies of such papers could be read in evidence, and it not appearing that the originals would serve a different purpose from the copies, or that the copies could not be procured, *held*, that the motion must be granted.

[This was an action by John J. Corbett against Horatio G. Gibson.]

W. Frank Severance, for plaintiff.

Herbert G. Hull, for defendant.

BENEDICT, District Judge. In this action, the plaintiff has served upon Major General Hancock, commanding the department of the east, in the army of the United States, a subpoena duces tecum, requiring him to produce "all books, papers, documents, memoranda, letters or writings, in the office of the headquarters of the department of the east, relating in any way to the plaintiff, sometimes called Patrick Corbett, formerly a private in Battery E, third artillery, U. S. army, and his arrest, trial and imprisonment in Fort Wadsworth, by the defendant, from November 28, 1877, up to date, now in your custody, and all other deeds, evidences and writings which you have in your custody or power, relating to the premises." A motion in behalf of Major General Hancock, to set aside this subpoena, is now made by the judge advocate of the army. The writ exhibits gross irregularities upon its face, such as, that it is issued in the name of the people of the state of New York; that it requires the production of the papers before a judge, instead of before the court; that it is not tested in the name of the chief justice of the United States; and the like. But, passing these, to consider the question as to which my opinion is desired, namely whether Major General Hancock can properly be compelled, by a subpoena duces tecum, to produce in court official papers such as are described in this subpoena, and on file in the office of the headquarters of the department of the east, I remark, that such papers are to be deemed public documents on file in a public office, and that the right to require the removal thereof from the official place of deposit, for production in the various courts, would cause great and unnecessary inconvenience, without any corresponding advantage. The general rule in regard to public documents is, therefore, applicable to such papers, and they may be proved by an authentic copy. The rule referred to is thus stated in 1 Greenl. Ev. § 484: "Every document of a public nature, which there would be inconvenience in removing, and which the party has a right to inspect, may be proved by a duly authenticated copy." In U. S. v. Percheman, 7 Pet. [32 U. S.] 51, 85, it was held, that a copy of a public document, furnished by an officer whose duty it is to keep the original, may be read in evidence.

The only reason that has been suggested in this case, for requiring the original papers in question, is, that their production is necessary, because copies could not be read in evidence. But, as already stated, copies may be read, and the production of the original is, therefore, unnecessary. Such being the case, no reason exists for the subpoena duces tecum, and it should be set aside. If it appeared that the original papers, when produced, would serve a different purpose from the copies, or that the copies of the papers could not be procured, a different case would be presented. An order will be entered setting aside the subpoena in question, and, also, the subpoena issued to the inspector general, to which the above remarks are also applicable.

[NOTE. For denial of a motion to compel the plaintiff's attorney to furnish a sworn statement of the residence, occupation, and address of the plaintiff, see Case No. 3,222.]

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

Case No. 3,222.

CORBETT v. GIBSON.

[16 Blatchf. 336.][1]

District Court, E. D. New York. May Term, 1879.

PRACTICE.

After this cause had been set down for trial at the present term, the defendant moved for an order to compel the plaintiff's attorney to furnish a sworn statement of the residence, occupation and present address of the plaintiff: *Held*, that the motion must be denied, without prejudice to other proceedings to secure the presence of the plaintiff at the trial.

[This was an action by John J. Corbett against Horatio G. Gibson.]

[For decision of a motion to strike out a subpoena duces tecum, see Case No. 3,221.]

W. Frank Severance, for plaintiff.

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

Herbert G. Hull, for defendant.

BENEDICT, District Judge. This case having been set down to be tried at the present term, the defendant now moves for an order compelling the plaintiff's attorney to furnish a sworn statement of the residence, occupation and present address of the plaintiff. It is not to be doubted, that the plaintiff in whose name the action is brought is a real person, whose identity is known to the defendant. That the suit is authorized by the plaintiff is proved by the fact that the complaint is sworn to by the plaintiff personally. The moving papers contain no facts leading to the supposition that the plaintiff has died since the commencement of the suit, and such death is not suggested. The order sought is not, therefore, required for the purpose of enabling the plaintiff to be identified, or to ascertain the fact of his present existence. Neither is there any reason for the order, on the main ground upon which it is urged here, namely, to enable the defendant to examine the plaintiff previous to the trial, in accordance with the practice in the courts of the state, because no such right exists in suits in the courts of the United States. Beardsley v. Littell [Case No. 1,185]. Nor does the desire to apply for security for costs from the plaintiff, if he prove to have become a non-resident, afford ground for the order, because, the application to compel security for costs would not now be granted, a near day having been fixed for the trial of the cause, by consent of the defendant, without any intimation that security for costs was desired, although it appears that all the facts leading to a supposition that the plaintiff has become a non-resident have been known to the defendant for several months. It must, therefore, be held, that, in the present case, no sufficient ground for the order sought has been made to appear, and the motion must be denied.

In denying the motion, I do not intend to be understood to deny the right of the defendant to have the plaintiff in court at the trial. While, in most cases, no reason exists for the presence of the opposite party on the trial, in the present case it may well be that justice cannot be done without the attendance of the plaintiff, in order, among other things, that he may be examined as a witness upon the question of damages, and also in regard to his interest in the action. The present motion, although the prayer is for such other relief as may be required, can hardly be treated as an application to postpone the trial until the whereabouts of the plaintiff can be ascertained and his presence on the trial secured. That relief, if it be desired, would properly be made the subject of an application by itself, and upon different papers.

For these reasons the present motion is denied.

Case No. 3,223.

CORBETT v. WOODWARD.

[5 Sawy. 403; 11 Chi. Leg. News, 246.][1]

Circuit Court, D. Oregon. Feb. Term, 1879.

ASSIGNMENT OF MORTGAGE—CORPORATION—MEETING OF—INDORSER, LIABILITY AND PREFERENCE—BOND, LIABILITY OF SURETY ON—MORTGAGE FOR LOAN WITH INTENT TO PREFER MORTGAGEE—DIRECTORS OF CORPORATION ARE TRUSTEES—ILLEGAL CONSIDERATION.

1. A mortgage is a mere chose in action, and is not negotiable under the law-merchant, and therefore the assignee of such an instrument takes it subject to the equities between the mortgagor and mortgagee, and with the same and no other rights than his assignor had.

2. Where the by-laws of a corporation authorized the president thereof to call special meetings of the directors upon giving notice of the time and place thereof, and such place was not prescribed by the by-laws, the president may call such meeting at a place other than the principal place of business of the corporation.

3. G. indorsed the note of S., and upon its maturity waived demand and notice; at the same time O., who was indebted to S., with the knowledge and assent of G. guaranteed the payment of the note to the holder in sixty days, and afterwards, being insolvent, paid it: *Held*, 1. That G. was not under any liability for O., and that therefore the payment of said note by O. was not a payment for the benefit of G. within the purview of section 35 of the bankrupt act; 2. That the liability of G. upon said note after the waiver of demand and notice became fixed, and was not discharged by the agreement between S. and O; 3. That an indorser or surety is not discharged from his liability by an extension of time to the principal before maturity of the note, if made without consideration to the holder of the note from the principal, or with the assent of the surety or indorser.

4. A surety on a bond for the construction of a revenue cutter, is not, prior to the forfeiture of such bond, under a liability for his principal within the meaning of section 35, of the bankrupt act.

5. A mortgage by an insolvent corporation to secure a loan, obtained with the intent to give the mortgagee an unlawful preference, is not affected by that fact, if such intent was not carried out, and the money was otherwise applied.

6. The directors of a corporation are trustees for the stockholders and creditors; and where a director by means of his power, as such, secures to himself any advantage over other stockholders, or creditors, equity will treat the transaction as void, or charge him as trustee for the benefit of the injured parties; nor can such director, as to such parties, claim to have acted in ignorance of what it was his duty to know concerning the conduct and condition of the affairs of the corporation.

[Cited in Lippincott v. Shaw Carriage Co., 25 Fed. 586; Adams v. Kehlor Milling Co., 35 Fed. 435.]

7. Where a mortgage is given partly upon a legal and partly upon an illegal consideration, and the one is clearly separable from the other, it will be held valid as to the former and void as to the residue.

Suit [by Elijah Corbett against George Woodward, assignee in bankruptcy of the

[1] [Reported by L. S. B. Sawyer, Esq., and here reprinted by permission. Syllabus only in 11 Chi. Leg. News, 246.]

Oregon Iron Works, and others] to enforce the lien of a mortgage.

W. Lair Hill, H. Y. Thompson, and George H. Durham, for complainant.

Joseph N. Dolph and M. W. Fechheimer, for defendant.

DEADY, District Judge. This suit is brought to enforce the lien of a mortgage upon the works, tools and machinery of the Oregon Iron Works, a corporation doing business at Albina. The case was heard upon the bill, answer, replication, exhibits, and the testimony of witnesses.

The material facts of the case are as follows: On December 3, 1874, the Oregon Iron Works was duly incorporated under the laws of Oregon, for the purpose of "establishing a foundry and manufacturing agricultural implements and all kinds of machinery, boilers, locomotives and iron, with power to borrow and loan money, as well as to purchase and dispose of real and personal property, and all other business pertaining to a foundry," at Albina, Oregon, with a capital stock of fifty thousand dollars, divided into shares of one hundred dollars each. The stock was subscribed as follows: Edwin Russell, two hundred and forty-eight shares; Mrs. M. A. H. Berry, by her attorney, Edwin Russell, two hundred and fifty shares; Bernard Goldsmith one share and John McCracken one share—the shares of Goldsmith and McCracken being in fact given to them by said Russell to enable them to serve as directors, with the understanding that he would pay all assessments thereon. At a meeting of the stockholders, held on December 5, 1874, said Russell, Goldsmith and McCracken were duly elected directors of said corporation; and remained such directors until said corporation was adjudged a bankrupt, as hereinafter stated. At the same meeting by-laws were adopted, by which, among other things, it was provided that the officers of the corporation should consist of a president, secretary, and three directors; that a regular meeting of the directors should be held at the principal office of the company, at Albina, on the first Saturday in December; that special meetings might "be called at any time by the president, by giving written notice of the time and place of such meeting to every director;" and that the president should have the "general care and superintendence of the business of the company," and be authorized to borrow money for its use not exceeding fifty thousand dollars, and to deposit and check for the same.

On May 28, 1875, the Oregon Iron Works, by Edwin Russell, its president, entered into a contract with the United States to build and "deliver afloat and complete in all respects * * * at the port of Albina, opposite to Portland, Oregon, a steam propeller of about two hundred and twenty-seven tons burden," for a revenue steamer, for which it was to receive ninety-two thousand dollars, in five installments of eighteen thousand four hundred dollars each, as the work progressed, upon the certificate of the superintendent of construction—the last of said installments to be paid upon the final completion of the vessel, and "a successful trial trip at sea of not less than twenty-four hours;" and on the same day executed a bond to the United States for the faithful performance of said contract in the penal sum of forty-six thousand dollars, with said Goldsmith and Philip Wasserman as sureties. See The Revenue Cutter [Case No. 11,714].

On March 18, 1876, John F. Steffen, a subcontractor under said corporation for the construction of the hull of said vessel, made his promissory note for the sum of two thousand dollars, payable three months after date to the order of said Goldsmith, who then and there indorsed the same for the accommodation of said Steffen, which note said Steffen then and there negotiated to William Druck without discount; that when said note became due it was not paid, and Goldsmith, on June 19, indorsed thereon a waiver of notice of demand and protest, and said corporation being then indebted to said Steffen upon the sub-contract aforesaid, at the request of said Steffen and with the consent of said Goldsmith and Druck, guaranteed in writing the payment of the same within sixty days thereafter, and paid it in on September 23, with interest, amounting to the sum of two thousand one hundred and forty-six dollars and eight cents—but not until after an action was commenced thereon, to wit, on September 18, against said Steffen and Goldsmith.

On and before September 21, 1876, the Oregon Iron Works was hopelessly insolvent, and thereafter, on November 18, it was duly adjudged a bankrupt, and the defendant, Woodward, chosen assignee of its estate.

No assessment was ever made upon the shares of the stockholders, except one of forty per centum, on April 30, 1875, which was paid by Russell by a sale to the corporation of the river blocks in Albina, numbered 16, 17 and 18, upon which its works are erected, for four thousand dollars, and his note for six thousand dollars. The nominal paid up capital of the corporation was therefore twenty thousand dollars, which, on January 1, 1875, as appears by its books, had been reduced to thirteen thousand four hundred and thirty-five dollars and twenty-seven cents. When it was adjudged a bankrupt, its liabilities, as appears from its schedules, exclusive of interest on bills payable, amounted to ninety-three thousand one hundred and forty dollars and ninety cents, and its assets to fifty-five thousand two hundred and forty-six dollars and two cents; but of this latter sum, eighteen thousand seven hundred and ninety-one dollars and ninety-three cents consists of a claim against Steffen for damages for non-performance of his

contract, which is of doubtful validity, and certainly of no value; seventeen thousand seven hundred and ninety-five dollars and seven cents of indebtedness due from Russell, which has no value—six thousand dollars upon his note given in payment of the assessment aforesaid, and the balance—eleven thousand seven hundred and ninety-five dollars and seven cents upon an open account; and four thousand and seventy-seven dollars and ninety-four cents due upon sundry open accounts, and five hundred and forty-eight dollars and seventy-seven cents upon bills receivable, out of which the assignee, up to February 8, 1878, had only been able to collect about three thousand dollars, the remainder being probably worthless. The remainder of the assets are material on hand, two thousand eight hundred and eighty-three dollars and sixty-six cents, and portable and other engines complete and incomplete, eleven thousand one hundred and forty-eight dollars and sixty-six cents, which were sold for less than eight thousand dollars; the blocks 16, 17 and 18 aforesaid, and the works not valued in the schedules, but charged in the books at four thousand dollars, and twenty-nine thousand seven hundred and ten dollars and eighty-five cents respectively, and worth, taken together, according to the evidence, not exceeding twenty thousand dollars; so that the indebtedness exceeded the available assets at least sixty-three thousand dollars, or more than threefold.

Early in September, 1876, Russell went to San Francisco to obtain aid for the iron works, and while he was absent the workmen employed upon the vessel refused to continue, unless provision was made for the payment of their wages, the corporation being unable to meet its engagements with them, whereupon Goldsmith guaranteed such payment until Russell's return, telling the secretary to keep only such hands in the meantime as were absolutely necessary. Upon the return of Russell, between the eighteenth and twenty-first of September, he informed Goldsmith that the corporation needed at least twenty thousand dollars to complete the construction of the revenue vessel and other business on hand, and induced him on September 21, 1876, to sign the note of the corporation for the sum of twenty thousand dollars as surety, payable to the First National Bank of Portland one day after date, in consideration that said corporation would give him a mortgage upon its works, machinery and tools, to secure said Goldsmith against loss, by reason of such signing, and would also pay him a commission of one thousand dollars or five per centum of the amount of such note; and with the further understanding between said Goldsmith and Russell, that said corporation would immediately pay the note aforesaid, held by Druck, upon which an action was then pending against Goldsmith and Steffen, and, also, as soon as they became due, two notes amounting to six thousand dollars, made by Russell in his individual capacity and indorsed by Goldsmith for his accommodation, and payable to Ladd and Tilton within a short time. In pursuance of this arrangement Russell, on September 21, made the note of the corporation for twenty thousand dollars with Goldsmith as surety, and payable as aforesaid, and with the proceeds thereof paid the Steffen note with interest, two thousand one hundred and forty-nine dollars and eight cents, and the one thousand dollars commission to Goldsmith, but did not pay the notes due Ladd and Tilton as aforesaid, but the same were afterwards paid by Goldsmith; and on September 22, said Russell mortgaged the property of the corporation to Goldsmith to secure him against loss as aforesaid.

The authority for executing the mortgage was as follows: At a special meeting of the directors called by the president and held on September 21, 1876, in the office of Goldsmith, at Portland, about a mile distant from Albina, and but a short distance from the place of business of John McCracken, a resolution was passed, authorizing Russell to obtain the loan and execute the mortgage to Goldsmith, as president, as aforesaid; but only the directors, Goldsmith and Russell, were present at such meeting; McCracken being confined to his house by a serious illness, and unable to attend, although Russell left a written notice for him of the time and place of meeting at his place of business on the same day, and but a short time before the meeting was held, which McCracken did not receive, and could not have complied with if he had.

There was no desire or intention upon the part of Russell or Goldsmith to hold this meeting without the presence of McCracken, for it was understood and expected that both he and Goldsmith would act in all matters, if otherwise lawful, as desired by Russell, to whom as between them the enterprise in fact belonged, and by whom it was expected it should be controlled. At the date of this loan and mortgage the first four payments on the contract to construct the vessel had been received by the corporation, and the fifth and last one had been hypothecated to the national bank aforesaid, to secure seventeen thousand and thirty-one dollars and sixty-three cents of a prior indebtedness to such bank of eighteen thousand three hundred and ninety-nine dollars and ninety-six cents; and the corporation was also indebted to Ladd & Tilton, bankers, on its notes sixteen thousand dollars, nearly all of which was over due eighteen months, and twelve thousand one hundred and one dollars on overdraft.

The corporation having failed to pay said note of twenty thousand dollars, and Goldsmith being unable to do so when demanded, the latter procured Elijah Corbett to take up the same on January 3, 1877, by giving

his note for the sum then due thereon, twenty thousand six hundred and eighty-six dollars and sixty-seven cents, payable one day after date to the said bank, in consideration of which said Goldsmith duly assigned to him said mortgage, and together with Philip Wasserman aforesaid, made and delivered to him a writing, by which they undertook and agreed to make up and pay any loss which said Corbett might sustain by reason of taking up said note, he using due diligence to enforce said mortgage.

The defendant maintains that the mortgage is void, and therefore the complainant is not entitled to the relief sought, because (1) the execution of the note and mortgage was unauthorized; (2) the transaction constituted an unlawful preference to Goldsmith, contrary to section 35 of the bankrupt act [of 1867 (14 Stat. 534)]—section 5128, Rev. St.; and (3) in taking such preference, Goldsmith violated his trust as a director of the corporation.

This mortgage was given to Goldsmith to indemnify him against loss as surety upon the note of the corporation to the bank, and as a contract it included only himself and his principal. And although the mortgage and note are a part of the same transaction, yet the former was not given to the bank to secure the payment of the latter, and therefore it is not an incident of it, and does not, in equity, pass with it, as such, to a third person. Neither is it a negotiable instrument, which would, under the law-merchant, pass into the hands of a third person, by indorsement or delivery, freed from any equities or defects which might attach to it as between the original parties to it. It is a mere chose in action, and passes by assignment subject to the equities existing between the mortgagor and the mortgagee. Therefore, in this suit, the complainant, Corbett, stands in the place of his assignor, Goldsmith, with the same, and no other, rights in the premises. In re Kansas City, etc. [Case No. 7,610]; U. S. v. Sturges [Id. 16,414]; Fales v. Mayberry [Id. 4,622].

The question arises then, was this note and mortgage authorized by the corporation? The power conferred upon the president by the by-laws to borrow money when the necessity of the corporation might require it, has been invoked by the complainant to sustain the loan, but as the limit of this authority, fifty thousand dollars, had already been exceeded by the president, no support to the transaction can be derived from this source. It is also contended by the defendant that the use of the money obtained by the loan in the affairs of the corporation was a ratification of the act of the president in making it. The authorities cited in support of this proposition are all cases where there was a formal ratification of an informal or unauthorized act by the directors or governors of the corporation assembled in a formal meeting. But in this case, there never was any meeting of the directors after the making of the note and mortgage, and therefore there could be no ratification by them. A corporation acts by its directors; and to do so, they or a majority of them must meet together as a board, and that fact, and their action thereat, must appear from its records. In re St. Helen Mill Co. [Case No. 12,222].

Failing upon these points, the complainant maintains that the note and mortgage were duly authorized at the meeting of the directors on September 21. The defendant objects to the authority of this meeting, that it was not duly called, and the directors not being all present, it had no authority to act. It is claimed that the meeting was not duly called, because not called at the place where the corporation had its principal place of business, and because McCracken was not duly notified of it. There is nothing in the corporation act of this state which requires the directors of a corporation to hold their meetings at the place where it has its principal office or place of business, or elsewhere. The statute is silent upon the subject. The matter is left where it properly belongs, to be regulated by the by-laws of each corporation to suit its own convenience. The by-laws of this corporation provided for the holding of one regular meeting a year, of the directors, at its principal office or place of business, Albina, and gave the president unqualified authority to call special meetings at any time by giving written notice of the time and place thereof. The plain inference from this is, that the president was authorized to name the place as well as the time of a special meeting, and therefore he might exercise his judgment in the premises, and name some other place than Albina, Portland, for instance, the place where the other two directors lived, and carried on business, and could most conveniently attend such meeting.

The notice to McCracken was a written one. It was left by the president at his place of business, and was doubtless sufficient to have secured his attendance if he had not been confined to his house by illness. His indisposition appears to have been well known, and the notice to him was naturally regarded somewhat as a matter of form. The corporation act (section 11, Code Oregon, p. 527) provides that the powers vested in the directors may be exercised by a majority of them. True, the by-laws of this corporation provided that all the directors should have notice of the time and place of a special meeting. But no particular notice is prescribed, and I think, under the circumstances, this was sufficient. Indeed, it is not certain that in this case it was absolutely necessary to give notice to McCracken at all. The business of the corporation could not nor need not be delayed to await his recovery; and if he was clearly too ill to attend, notice to him would have been

a useless act. But, be this as it may, such notice was left for him at his place of business as gave him an opportunity, if he had been able, to be present at the meeting.

The note and mortgage having been fully authorized by the directors, and duly executed by the president and secretary, was the transaction an unlawful preference to Goldsmith under the bankrupt law?

As counsel for the defendant admits, to bring this transaction within section 35 of the bankrupt act (section 5128, Rev. St.), it is necessary to show (1) that the corporation was insolvent at the date of the mortgage; (2) that Goldsmith was then a creditor of the corporation or under a liability for it; (3) that the mortgage was made with a view to give Goldsmith a preference; and (4) that the latter had reasonable cause to believe that the corporation was insolvent, and that he knew the mortgage was made in fraud of the law. About the insolvency of the corporation there can be no doubt; and if Goldsmith was a creditor of the corporation or under a liability for it, and the money obtained upon the transaction was applied upon his claim, or to discharge such liability, then he received a preference, and the reasonable inference is, that the mortgage was made with that view—for that purpose. Toof v. Martin, 13 Wall. [80 U. S.] 48; In re Sutherland [Case No. 13,638]. But upon the facts it does not appear that Goldsmith was a creditor of the corporation, or under any liability for it.

The claim of the defendant is, that Goldsmith was under a liability for the corporation upon the Steffen note. But certainly this is not well founded. Goldsmith's relation to this note was simply that of an accommodation indorser for Steffen. He thereby came under a liability for Steffen, but for no one else. Nor was his relation thereto changed by the fact that the corporation subsequently guaranteed its payment. The only effect of this was to put the corporation under some sort of liability for Goldsmith. Neither did the transaction make Goldsmith a creditor of the corporation, although that was probably the effect of it as to Druck. The plain fact is, that the corporation agreed to pay this note to Druck for Steffen, because it was indebted to Steffen and unable to pay him, and the subsequent payment of it out of the money obtained on this note and mortgage, if it operated as a preference at all, operated as a preference in favor of Druck and Steffen, and not Goldsmith.

It is also claimed by the defendant that Goldsmith, being on the bond of the corporation for the construction of the vessel, was to that extent "under a liability" for it; that this money was procured for the purpose, and applied to the discharge of such liability by paying the debts incurred in its construction, and purchasing labor and material for its completion.

It is difficult to say upon the evidence what disposition was made of all this twenty thousand dollars, but it appears probable that the greater portion of it was applied as suggested.

But the bond was not forfeited—at least no claim to that effect was or is made, and the reserved or last payment was largely in excess of what was necessary to complete the vessel. Goldsmith's liability on the bond was yet contingent and not absolute. In my judgment, the liability contemplated by the statute, is an absolute, and not a contingent one. No authorities on this point have been cited by counsel for either party. In Bean v. Laflin [Case No. 1,172], it was held that when the principal on a note, though insolvent, paid it at maturity and was adjudged a bankrupt, that the assignee could not recover it from a co-maker who was a surety in fact, because his liability up to the maturity and payment of the note was contingent, and never became absolute, and therefore was not "benefited" by such payment in the legal sense of the term. This ruling is in consonance with the provisions of section 19 of the bankrupt act, and the decisions thereunder, to the effect that contingent liabilities, including that of an indorser prior to demand and notice, are not debts provable in bankruptcy. See Bankrupt Act, § 19 (Rev. St. § 5067 et seq.); In re Loder [Case No. 8,457]; In re Nickodemus [Id. 10,254].

The case of Bartholow v. Bean, 18 Wall. [85 U. S.] 635, cited by the defendant, which arose out of the same bankruptcy as Bean v. Laflin, supra, does not differ from this; for there, although the payment by the insolvent debtor and principal of the note was held to be a preference to his indorser, the liability of such indorser had already become fixed and absolute.

This mortgage is also claimed to be void on the further ground that the transaction was had with a view to procure money to pay the individual notes of Russell, amounting to six thousand dollars, due Ladd & Tilton, upon which Goldsmith was an indorser. But there are three answers to this claim, either of which are sufficient: (1) The individual debt of Russell to Ladd & Tilton was not the debt of the corporation, and whatever liability Goldsmith might have been under on account of it, it was for Russell and not the corporation which is alleged to have made this mortgage with intent to give a preference; (2) so far as appears, Goldsmith's liability upon those notes was yet contingent and not fixed—they were not yet due; (3) the purpose to pay these notes with this money was never carried out, and the amount was otherwise applied by the corporation, without in any way benefiting Goldsmith. Indeed, Russell failed to pay the notes at all, and Goldsmith was compelled to pay them himself. An intention to prefer or to make any unlawful use of this money did not affect the legality of the transac-

tion, if it was never carried into action.

But admitting that this mortgage is valid, notwithstanding the bankrupt law, the defendant insists that it is void in equity, because the corporation being insolvent, Goldsmith, as a director, by means of this transaction, secured an advantage to himself at the expense of the creditors of the corporation, in plain violation of his trust. In support of this, it is claimed that Goldsmith, being liable to pay the Steffen note and the two individual notes of Russell, as a director, authorized and procured this loan and mortgage with the understanding and for the purpose of obtaining funds, by mortgaging the principal property of the corporation, to pay off these notes, and thus free himself from such liability at the expense of the creditors. So far as the Russell notes are concerned, the transaction is valid. For, although the loan and mortgage was undoubtedly made with a view, among other things, of raising money to pay them with, yet the fact being that for some reason the money was not so applied, the creditors of the corporation suffered no inconvenience on that account. But as to the Steffen note, the circumstances are different. At the date of the mortgage, Goldsmith, although not a creditor of the corporation, was liable as a principal upon the Steffen note. This instrument was overdue, and he had waived demand and notice. The guaranty of the corporation did not affect him. That was merely a collateral security to the holder. It is even doubtful if there was any extension of time or payment as to Goldsmith and Steffen. The guaranty of the corporation was that the note should be paid in sixty days, but there was no agreement between Druck and Goldsmith and Steffen, or either of them, that they should have any further time to pay in. But assuming that the agreement between Druck and the corporation impliedly extended the time of payment sixty days, that did not discharge Goldsmith from his liability. In the first place, the note being overdue and demand and notice having been waived, Goldsmith's liability was no longer contingent, that of an indorser, but absolute, that of a maker or principal. But if the supposed extension had been given while he was yet only an indorser, he would not have been discharged thereby, because (1) the agreement or guarantee was not between the principal in the note, Steffen, and the indorsee, Druck, but between the latter and a third person, the corporation; (2) there was no consideration for the supposed agreement to extend the time, as between Druck and Steffen; and (3) if the facts were otherwise in these particulars, it is manifest that the agreement between Druck and the corporation, which it is claimed operated as an extension of time, as to Steffen, was made in the interest of Goldsmith and with his full knowledge and assent, and therefore he cannot claim to be discharged by it. Upon these points it is unnecessary to consume time in argument or citation of authorities. It is sufficient to refer to Daniel, Neg. Inst. § 1312 et seq.

It is also contended that Goldsmith was not aware of the insolvency of the corporation; Russell having told him at the time that it was "prosperous and perfectly solvent."

It is difficult to see how a director of this corporation could have been ignorant of its insolvency, except upon the theory that he was a director only in form, and knew nothing thereby of its internal arrangement or affairs, and this appears to have been the character of Goldsmith's directorship. It was probably accepted and held by him as a matter of form to accommodate Russell in an enterprise which substantially belonged to the latter, and in which he had nothing invested.

But, be this as it may, the law will not permit a person to become a director in a corporation, and neglect the duties and avoid the responsibilities thereof, as to third persons, with impunity. A voluntary ignorance of what it is his duty to know and understand is no excuse for him when the rights of others are in question. By becoming a director, which includes the taking an oath to "faithfully and honestly discharge" the duties of the office, he engages to take good care of the interests of the stockholders and creditors intrusted to his charge, and this necessarily implies that he will use due diligence to keep himself properly informed concerning the same.

An examination of the books of the corporation at any time for a considerable period of time prior to the date of the mortgage would have shown Mr. Goldsmith that it was insolvent; and that as far back as January 1, 1876, it had sunk nearly seven thousand dollars of its nominally paid up capital.

A director of an incorporation is a trustee of its property and assets for its stockholders and creditors, and it is contrary to the first principles of equity that he should deal with such property for his own advantage and to their injury. Koehler v. Black River Co., 2 Black [67 U. S.] 720; Drury v. Cross, 7 Wall. [74 U. S.] 302; Butts v. Wood, 38 Barb. 188; Curran v. Arkansas, 15 How. [56 U. S.] 304; Sawyer v. Hoag, 17 Wall. [84 U. S.] 620; Bradley v. Farwell [Case No. 1,779].

In Koehler v. Black River Co., supra, the corporation being in embarrassed circumstances, the directors secured debts due some of themselves to the prejudice of the other creditors. In delivering the opinion of the court Mr. Justice Davis says: "Directors cannot thus deal with the important interests entrusted to their management. They hold a place of trust, and are obliged by accepting that trust to execute it with fidelity; not for their own benefit, but for the common benefit of the stockholders of the corporation. In executing this mortgage, and thereby secur-

ing to themselves advantages that were not common to all the stockholders, they were guilty of an unauthorized act, and violated a plain principle of equity applicable to trustees."

In Drury v. Cross, supra, the directors of a corporation provided for the payment of debts upon which they were liable as indorsers, with the assets of the corporation. In delivering the opinion of the court, Mr. Justice Davis says: "The transaction which this case discloses cannot be sustained in a court of equity. The conduct of the directors of this railroad company was very discreditable and without authority of law. It was their duty to administer the important matters committed to their charge for the benefit of all parties interested, and in securing to themselves advantages not common to the others, they were guilty of a plain breach of trust."

In Bradley v. Farwell, supra, the directors of an insolvent corporation transferred its assets to a creditor composed of a partnership of which one of them was a member. The transaction was declared void, and the court, Shipley, J., says: "The fiduciary relation between the directors and the creditors being established, and the fact that the trustees in dealing with the trust fund have secured to themselves a benefit or advantage over the creditors, or a benefit or advantage to themselves as creditors over and above other creditors, taints the transaction and invokes the aid of a court of equity to see to the right execution of the trust. Not that the trustees cannot prefer one creditor to the others at common law, and outside the provisions of the bankrupt act, but that, in equity, a trustee cannot contract with himself as he may with a third party. If he exercises in his own favor the powers he may rightfully exercise in favor of another, the court does not stop to inquire whether he gained or lost. It is enough that the beneficiary is dissatisfied with the transaction for the court to set the transaction aside, without requiring the beneficiary to prove actual loss or fraud."

The one thousand dollars taken out of this loan by Goldsmith as a compensation for going on the corporation note, in my judgment comes within the spirit of the rule laid down in these authorities. The transaction was in fact a dealing with a trust fund by a trustee —a dealing with himself, that is liable to great abuse, and I think ought not to be tolerated. When Goldsmith went security for his corporation for a loan for the benefit of its business or creditors, it was so far proper and right that he should be indemnified by a mortgage of its property; but to take five per centum, or any other portion of the loan as a compensation for an act which was voluntary, and for which he was secured against loss, appears to me to have been an unlawful appropriation of the trust fund.

The great extent to which corporations have become the agency through which the business of the country is transacted, and its property is held and managed, makes it necessary that the salutary rules enforced by courts of equity in other cases of fiduciary relation should be rigidly applied to the numerous and important trusts held by the managers of these organizations. And in the case of insolvent corporations, like the Oregon Iron Works, there is every reason to exact the most scrupulous conduct at the hands of their directors when dealing with the trust property. As was well said in Bradley v. Farwell, supra: "Standing in a fiduciary relation, as it were at the bedside of a dying friend, if they are subsequently found in possession of a portion of his effects, they must show title by a conveyance, untainted by the exercise of that power which the trust relation gave them to influence the disposition made by the decedent of his property in their favor, to the prejudice of others having equal claims to the inheritance."

Goldsmith also admits that at the time of making the mortgage, he was under a liability for the corporation of one hundred and twenty-five dollars, due the workmen on the vessel, which he had guaranteed the payment of, and which was paid out of this loan, and expected to be. Standing by itself, the rule de minimis non curat lex, might have applied to so small a matter as this, compared with the magnitude of the transaction, but as it is, it must be added to the other circumstances of the transaction which the law pronounces unlawful.

Much has been said by counsel about the knowledge and purpose with which Goldsmith participated in this transaction. It is probable, as has been suggested, that he regarded his official relation to the subject as one of mere form, and did not stop to consider, or was unaware that in law he was a director, under the same obligation to the creditors of the corporation as if he had been actually engaged in the management of its affairs and familiar with its financial condition. So far as the payment of the Steffen note is concerned, the taking of the commission for signing the corporation note, and the payment of the sum guaranteed to the workmen, I find that the consideration for this mortgage is unlawful, because the transaction was so far contrary to equity and the rules prescribed for the conduct of trustees; but I do not find a conscious purpose or actual intention upon the part of Goldsmith to gain an advantage for himself at the expense of the creditors of the corporation, although such was the effect of his conduct, viewed in the light of all the circumstances including the final result.

It remains to be considered what is the effect of this illegality upon the mortgage. Does it avoid it wholly or pro tanto, only so far as the illegal consideration extends? The matter is not free from doubt, and was not noticed by counsel. But I think the better

rule is, that where the illegal consideration is clearly separable from the legal, that the contract is good for the latter, and only void as to the residue.

In Denny v. Dana, 56 Mass. [2 Cush.] 161, it was held that a mortgage of personal property, which, as to some of the debt thereby secured, was contrary to the solvent laws, is wholly void. But in Bucknam v. Goss [Case No. 2,097], the correctness of this rule is questioned, and Fox, J., expressed the opinion that where a certain part of a loan became part of the assets of the debtor's estate, that the assignee should not be allowed to avoid the security therefor; and in Re Stowe, etc. [Id. 13,513], the same judge held, that when a mortgage is given for a debt which was an unlawful preference, and another that was not, it was valid as to the latter though void as to the former.

In U. S. v. Bradley, 10 Pet. [35 U. S.] 343, it was held that a deed may in many cases be good in part, and void for the residue, where the residue is founded in the illegality, but not malum in se.

The illegal consideration in this case is the sum paid on the Steffen note, two thousand one hundred and forty-nine dollars, the sum paid to a director as commissions, one thousand dollars, and the wages guaranteed by him, and paid by the corporation out of this loan, one hundred and twenty-five dollars, making in all the sum of three thousand two hundred and seventy-four dollars; which deducted from twenty thousand dollars leaves sixteen thousand seven hundred and twenty-six dollars, which sum, with interest at one per centum per month from the date of the mortgage makes the amount nineteen thousand five hundred and sixty-nine dollars and forty-two cents, for which the complainant is entitled to a lien upon the premises from the date of the mortgage, and to a sale of them to satisfy the same, and there will be a decree accordingly.

Case No. 3,224.

In re CORBIN.

[1 MacA. Pat. Cas. 521.]

Circuit Court, District of Columbia. April Term, 1857.

PATENTS—NOVELTY AND USEFULNESS—COMPOSITIONS OF MATTER—EQUIVALENTS—ARTIFICIAL HONEY.

[1. An artificial honey, composed of specified ingredients in fixed proportions, constituting a new composition of matter, which closely resembles honey in all respects, is not deleterious, and can be made and supplied at half the cost of genuine honey, must be regarded as a "useful" article, in the sense of the patent law (Act 1836, c. 357), and a patent should not be denied on the ground that it would operate to aid in deceiving the public.]

[2. An artificial honey, which is new, in the arranged and ascertained proportions of its various ingredients, and which constitutes a useful product, cannot be denied patentability on the ground that it is a syrupy composition, and the same in principle as the great variety of syrups in common use.]

[3. Ingredients arranged in ascertained proportions, so as to form a composition closely resembling honey, cannot be considered as mere equivalents of the elements contained in genuine honey, although the latter have been separated by analysis so that they may be known by all; it not being shown that such analysis discloses any fixed proportions, as in the artificial article.]

Appeal from refusal to grant patent.

At the hearing before the judge, Examiner Gate was sworn and was asked a single question, as follows: Question. "Please examine the proportions of the ingredients as set forth in the specifications, and state whether or not the product thereof is cheaper than honey." Answer. "I have so examined, and the product would be cheaper, inasmuch as it is made up substantially of sugar, water, and honey; it would be cheaper in proportion as water and sugar are cheaper than honey."

The patent issued to Corbin and Martlett May 12th, 1857, No. 17,264.

Everett & Pollok, for appellants.

MORSELL, Circuit Judge. In their amended specification, the applicants say: "What we claim as our invention; and desire to secure by letters-patent as a new product or composition of matter, is our artificial honey, composed of the within-enumerated ingredients or their equivalents, combined with each other, substantially in the manner herein set forth." In the description of the ingredients they say: "Our artificial honey is composed of four pounds of sugar, one pint and a half of water, five grains of rosin or its equivalent antiseptic, two drams of butter (or other pure eatable oil), one and a half drams of cream of tartar, two drams gum arabic or gum senegal, one and a quarter pounds of honey, eight drops of essence of peppermint, and one dram isinglass. These ingredients are combined with each other in the following manner, viz: The sugar and water are incorporated with each other and raised to a boiling temperature; then the butter and rosin are melted together and thoroughly incorporated with the syrup formed by the union of the sugar and water; then boil the aforesaid mixture for the space of ten minutes or thereabouts; then add thereto the gum arabic and the isinglass in a mucilaginous state, and the cream of tartar, and boil the said increased mixture for the space of ten minutes or thereabouts; then add the honey to the mixture, and after boiling the same for the space of five minutes or thereabouts, remove from the fire, and when nearly cold, add the essence of peppermint and thoroughly incorporate it with the entire mass;—when the mixture will present the appearance of pure honey, and will have nearly the same flavor."

There appear to have been several actions by the office in relation to a decision upon

the subject of this claim previous to the last and final decision of the commissioner. The first appears to have taken place on the 30th of April, 1855, in the form of a letter addressed to the said Corbin and Martlett, which begins by saying, "your claim for a factitious honey, made of honey, sugar, water, rosin, cream of tartar, peppermint essence, and gum has been duly examined and refused. 1. The compound, as a composition of matter is admitted to be new. Is it, therefore, to be admitted as a principle that everything which is new is patentable? By no means. It must be useful as well as new. 2. What is the gist of the invention? It is the manufacture of an imitation honey —a composition which closely resembles the real article in thickness or consistency, in color, in taste, and in flavor, so that persons may not be able to distinguish the spurious from the genuine article. The resemblance is in fact so perfect that, judging from the appearance alone, it would be difficult to say which is genuine. It is argued, by way of objection, under such circumstances, that to grant a patent would be to make the patent law at once the source and protector of a system of deception that, carried out in all its bearings, would be productive of much evil, and do great injury to the commerce of the chemical dietetical arts, and destroy confidence in the various articles offered for public and private use." The commissioner proceeds, and says: "The ground which the office feels obliged to take is, that the factitious honey, although admitted to be a new composition of matter, so far as known to this office, is not useful in the patentable sense of the term, but absolutely hurtful to the progress of the useful arts and to the community, and cannot be serviceable to any but the patentee in case he should obtain a patent; for even when the patent should expire, nobody would think of using, as a diet, the mixture of the drugs, &c., instead of pure honey," &c. How, then, could there be any danger of deception, even if it could be supposed to be a deception, and not a useful article. The second is also in the form of a letter addressed to the same persons, dated the 13th June, 1855. And after referring them to a number of authorities on the subject of manufacturing syrups of various kinds, the commissioner says: "So long as these facts exist, and are recorded in books, there is no patentable novelty involved in merely selecting materials that have not been before mingled with sugar or honey in syrups. The office, therefore, arrives at the same conclusion as it did in the first examination, although by a different route, viz., that your syrup of honey presents nothing patentable; that while the first letter of rejection based its action mainly on the want of a proper consideration for the grant of letters-patent, from the fact that your invention, when thrown open to the public would be of no value, so now it shows, by reference to the various directions given herein for preparing all sorts of honeys and syrups—flavored, acidified, and essenced—that the mere adding of a new flavor, new essence, or new salt should not dignify such syrup by the grant of letters-patent. The claim is hence refused, as before."

For the purpose of a final action or decision, the subject was referred to two examiners—Mr. Foreman and Mr. Langdon—and they have made separate reports differing very essentially on the subject—the former sustaining the views of Doctor Gales, and which was accepted and affirmed by the commissioner in rejecting the application of the appellant. This decision is dated the 6th of August, 1855. In his report he says that "the decision of the chief examiner, as contained in the office letter of 13th of June, should be sustained, in which the composition is regarded as a syrupy mixture or an adulteration of honey. The composition of honey is well known, the elements having been separated by analysis, a knowledge of which is open to all. In reproducing the imitated article, the applicant uses, together with some real honey, various substances, which must be regarded as fully the equivalents of those composing the product of the bee. It is not claimed that any invention is used in determining or selecting his ingredients, nor any difficulty overcome in causing them to unite. If the applicant had used any substance in this composition having some property peculiarly fitted for it, and which he had been the first to discover, some merit might be recognized in the application; but all the articles employed are really or substantially found in honey." At the foot of this report the acting commissioner says: "The undersigned concurs in the above views, and affirms the action of the examiner rejecting the application." Mr. Langdon in his report says: "The directions of the acting commissioner are that the revision of the examiner's action shall be based entirely upon the record of the case. Looking at it, therefore, solely in this light, it seems that the main, and perhaps only, objections upon which the office now stands are two: First. That syrups have been made of various flavors and from various ingredients, and that a mere novelty in either of these respects, or, in other words, the making a new syrup, is not patentable. Second. That the ingredients described are, after all, the same or substantially the equivalents of those given by analysis of honey itself. To these it is replied: First. That honey itself is not a syrup, nor used for the general purposes of syrups; and it is admitted that the imitation is so excellent that few would detect it. Moreover, it does not appear that the compound of the applicant is intended for use as a syrup, but, on the contrary, as a substitute for honey itself. It is believed that syrups, as a general thing, are one and the same compound, differing

chiefly, if not entirely, in the flavoring added. But in this case the essence of peppermint, and not the honey, is the flavoring; and without the former the substantial character of the article would be in no respect changed. If the ingredients be changed beyond the mere substitution of equivalents, the article itself is a new compound. It does not, therefore, appear to me that the compound in question can be regarded as a syrup of a new flavor, but rather as an alleged improvement in another direction—an imitation of honey or a substitute for honey. And secondly. That if it were the exact ingredients of the genuine honey which are used in the substitute, and united in the same manner, or if they were equivalent ingredients, in the sense in which the word is employed in patent law, the resultant would not differ in any important respect from the real honey. If, on the other hand, while the appearance and palatable flavor of the honey is preserved, either the substitution of ingredients or a change in the process of compounding produces a cheaper or more healthy article of food, this article, or the composition of the article, would appear to me to be the legitimate subject of a patent. That it is cheaper, is manifest. Of its effect upon the stomach, I do not pretend to be able to judge; but it is believed that the assertions of the applicant upon this point are not denied, and from some months' use of such an article myself I am inclined to credit the position. If, therefore, the present action is to be based exclusively on the record of the case, it appears to me that liberal construction of the law would not only authorize, but constrain, the issue of a patent."

From the decision of the commissioner, as before said, the appeal has been taken; and the said Corbin and Martlett have filed five reasons of appeal. The first is founded on and in the words of the seventh section of the act of congress of 1836, c. 357 [5 Stat. 119]. The second is because satisfactory references were not given, and arguments and assertions were used void of foundation and not justified by the science of chemistry nor by the practical knowledge of men acquainted with the peculiar art. Third. Because of inconsistencies in the three actions of the office. Fourth. For error as to the utility of the invention and its liability to injure the health and well-being of society. Fifth is general, for error in concurring in the report of one of the examiners and not noticing the report of the one who was favorable to them. This appears to be the state of the case from the original papers and decision of the commissioner laid before me with the reasons of appeal. On the day and place appointed for the hearing of said appeal, the appellants appeared by their attorneys, and filed their argument in writing, and submitted said case.

The first reason substantially involves the consideration of all the material points in the case; that is, that part of the seventh section of the act of 1836 which points out and limits the power and duty of the commissioner and defines the rights of the applicants to which I refer. In the discussion of the objections, in order that they may be more clearly seen and distinctly understood, I shall separate what seems to be conceded from that which is contested. The prerequisites of the statute, such as petition, specification, oath of the party, specimen, &c., may be considered as all regularly complied with. So, as a whole, the composition is admitted to be new, and that nothing known to the office is analogous to or identical therewith. So, as to the proposed object of the invention, that it should be a substitute for the real honey. It is admitted that in thickness or consistency, in color, in taste, and in flavor it closely resembles the real article, so that persons may not be able to distinguish the spurious from the genuine article; that "the resemblance is in fact so perfect that, judging from the appearance alone, it would be difficult to say which is genuine."

Now, as the real, genuine honey is unquestionably esteemed a very useful article of diet and trade, and there is such a perfect resemblance between the factitious and the real, and also as the artificial can be made and supplied at all times for one-half the price less than the real, it is not easily to be conceived why it should not be deemed a new and useful manufacture of trade, and for that reason a patentable article; but, so far from that, the commissioner makes it a ground of objection; and the reason assigned is that granting a patent for it might give it a sanction and facility in imposing upon and deceiving the public by a factitious honey instead of the genuine article. This would seem to be a strange, unfounded fear, for in the specification, which would form a part of the description in the patent, the applicant has in the most solemn manner announced that their claim is for an invention of a factitious, not a real, honey, all the ingredients of which they have also set forth. In the latter part of the same report, want of consideration is stated as a further ground or reason, because it is alleged that after the expiration of the time for which the patent was granted nobody would think of using a diet or purchasing a drugged article of food—a mixture of the drugs, cream of tartar, rosin, &c. This seems to me to be at least a slight inconsistency; but I shall not rely on anything of that kind. The reply may be made as above stated, and also that the drugs used in the composition are of the most simple kind, and in very small proportions, without the least danger of a deleterious effect in the use of them in the combination. It is, therefore, improbable that there would be any such failure of consideration. It is further objected that

it is a syrupy composition; and I have been referred to a number of authorities to show the great variety of syrups as common, well-known things in constant use, and as being the same in principle with the invention of these applicants. It may be admitted that the simple syrup of sugar and water forms a part of the ingredients of this composition, but it by no means constitutes the principal part of the essential elements thereof. The invention claimed by the appellants as new and useful is their arranged, ascertained proportions of the ingredients with the product of the composition, and not any separate, particular parts.

In this connection may also be considered the additional objections raised in the last report, which purports to sustain the report of the chief examiner, and the one which the commissioner adopts as his final decision. The objection is because "the composition of honey is well known, the elements having been separated by analysis, a knowledge of which is open to all; that the substances used by the applicant, together with some real honey, must be regarded as fully the equivalents of those composing the product of the bee, and therefore no invention." I do not understand the commissioner as stating that in the analysis of honey alluded to any fixed proportions have been discovered as in this invention; nor have I been able to discover from the authorities furnished to me in this cause any one that has afforded me that information; and it must be admitted, I think, that, as the nature of honey depends upon the different kinds of flowers from which the bee extracts its substance, none such can be shown; but however that may be—that it is a knowledge open to all—honey is not the product of the invention of any man, and the truths and principles or laws, if known, are those of natural science, and have an existence antecedent to and independent of the operations of man; and therefore such knowledge can be no sufficient objection, because not embraced within the provisions of the section of law alluded to, which was intended only to act upon the embodiment of them when applied in a practical sense, and which with such clothing may become the subject of a patent, showing a useful purpose, and not having been before invented. The like objection, as in this case, might be raised to the imitation of iron, to a new application of steam, electricity, and the like instances, a number of which may be found mentioned in almost any book on patent law. It is, as before said, in the use of such principles, embodied for a useful, practical purpose, that the patent is asked for in this case.

I will now state one or two adjudged cases on patent law applicable to the points I have been discussing, and which, I think, will be sufficient to put at rest all the objections which have been made under the head of composition of matter. Curtis (section 104) states the law to be: "With regard to this class of subjects, it is sufficient to observe that the test of novelty must of course be, not whether the materials of which the composition is made are new, but whether the combination is new. Although the ingredients may have been in the most extensive and common use, for the purpose of producing a similar composition, if the composition made by the patentee is the result of different proportions of the same ingredients, or of the same and other ingredients, the patent will be good. The patentee is not confined to the use of the same precise ingredients in making his compound, provided all the different combinations of which he makes use are equally new." He refers to Ryan v. Goodwin [Case No. 12,186]. The opinion of the court in that case is better stated by the judge himself at page 514 in these words: "As to the first point, it is mainly a question of fact. It is certainly not necessary that every ingredient, or indeed that any one ingredient, used by the patentee in his invention should be new or unused before for the purpose of making matches. The true question is whether the combination of materials by the patentee is substantially new. Each of these ingredients may have been in the most extensive and common use, and some of them may have been used for matches or combined with other materials for other purposes; but if they have never been combined together in the manner stated in the patent, but the combination is new, then, I take it, the invention of the combination is patentable." In the case of Le Roy v. Tatham (decided by the supreme court of the United States) 14 How. [55 U. S.] 156, Judge McLean, in announcing the opinion of the court, says: "A principle in the abstract is a fundamental truth, an original cause, a motive. These cannot be patented, as no one can claim in either of them an exclusive right," &c. In another part of the opinion, speaking on the same particular subject, he says: "In all such cases the processes used to extract, modify, and concentrate natural agencies constitute the invention. The elements of the power exist. The invention is not in discovering them, but in applying them to the useful objects. Whether the machinery used be novel, or consist of a new combination of parts known, the right of the inventor is secured against all who use the same mechanical power, or one that shall be substantially the same."

In conclusion, I refer to the learned report of Mr. Langdon, one of the examiners appointed by the commissioner, on the matter of this case. The views he takes of the nature and principles of the invention are very strong, and not to be refuted. I would desire to notice it particularly for the experimental fact which he states, the truth of which no one dare deny; it is, that the composition produces a cheaper and more healthy

article of food. He says: "That it is cheaper, is manifest. Of its effects upon the stomach, I do not pretend to be able to judge; but it is believed that the assertions of the applicants upon this point are not denied; and from some months' use of such an article myself, I am inclined to credit the position." Here, then, is knowledge derived from a practical source, and fully corroborates what I have said on this particular point.

These views have brought me to the conclusion that the decision of the commissioner is erroneous, and ought to be reversed.

CORBIN (HOPKINS & D. MANUF'G CO. v.). See Case No. 6,695.

CORBIN (PARKER v.). See Case No. 10,731.

CORBIN (POST v.). See Case No. 11,299.

CORBIN (VAN BRUNT v.). See Case No. 16,832.

Case No. 3,225.

CORCLE v. MAXWELL.

[See Case No. 3,231.]

CORCORAN (BANK OF THE UNITED STATES v.). See Case No. 912.

Case No. 3,226.

CORCORAN v. BROWN et al.

[3 Cranch, C. C. 143.][1]

Circuit Court, District of Columbia. May Term, 1827.

SUBSEQUENTLY-ACQUIRED TITLE—ESTOPPEL OF GRANTOR.

If the vendor in a deed of land, has no title at the date of the deed, but acquires a good title afterward, the title thus acquired, enures to the benefit of the first vendee against a subsequent vendee who claims by a deed made after the title accrued to the vendor; and the vendor and all who claim under him, are estopped by his deed to deny that the vendor had title at the date of the first deed.

The facts of this case, were, that on the 9th of October, 1822, Robert Easter made his deed of bargain and sale to Henry Addison, purporting to convey a house and lot in Washington to the said H. Addison and his heirs, to have and to hold to the said "Henry Addison, his heirs and assigns, to and for the uses, trusts, and purposes following, and to and for no other use, intent, or purpose whatever," that is to say, to secure a debt of about $300 and interest due by Easter to Corcoran. This deed was duly acknowledged and recorded. That the plaintiff recovered judgment at law against Easter for the whole amount of the debt, no part of which has yet been paid. That at the time of the execution and delivery of the said deed, "Easter had no title whatever in the said premises;" which want of title was unknown to the plaintiff, but that Easter, afterwards, viz. on the 28th of March, 1823, acquired a legal title in fee-simple in and to the premises by a deed from one Larned. That Easter afterwards, viz. on the 8th of August, 1823, being indebted to Mr. J. Q. Adams in $3000, by a deed duly executed, acknowledged, and recorded, mortgaged the same premises to Mr. Adams for the payment of the said sum of $3000 and interest, by instalments, the last of which was to become payable on the 8th of August, 1827. That on the 21st of March, 1825, Easter applied to a judge for the benefit of the insolvent law, which was granted, and Robert Brown, the defendant, was duly appointed trustee under the insolvent act; and in pursuance of the order of the judge, sold, on the 28th of October, 1825, "all the right, title, and interest of Robert Easter to the following described property in the city of Washington, to wit, one house and lot, being the subdivision of lots numbered 2, 3, 4, in square number 380, subject to a mortgage of $3000, payable in three annual instalments of $1000 each, the first of which became due on the 9th of August last." These terms were contained in the printed advertisement of the sale; which contained no allusion to any other incumbrance. That the premises were struck off to Nathaniel Fry, Jun., bidding for Mr. Adams, at the sum of $900; and on the 7th of November 1825, Robert Brown, the trustee, made a deed of bargain and sale to Mr. Adams. duly acknowledged and recorded, reciting the proceedings under the insolvent law; the appointment of Brown as trustee; the sale by order of the judge and the payment of the purchase-money, and purporting to convey to Mr. Adams and his heirs and assigns, "all the right, title, interest, and estate whatsoever of him the said Robert Easter, in and to the above lot or piece of parcel of ground." At the foot of this deed was a certificate of the judge that the sale had been made according to his directions, and he ratified and confirmed it. Mr. Adams, in his answer, denies notice of Corcoran's claim and lien at any time before the sale by the trustee; and states that the deed from Larned to Easter was not recorded until after the deed from Easter to him was made; but was recorded before the latter, and all in due time. The answer of Brown, the trustee, states, that he himself did not know of Corcoran's claim until the day of the sale; and that, although the printed terms of sale do not contain the condition or proviso that the premises were sold subject to the complainant's claim, yet that condition or proviso, at the time of and before the sale, was proclaimed by the auctioneer, from his stand, in the hearing of the bidders there assembled, among whom was the said Nathaniel Fry, who heard and conversed about the same, before the sale. To these answers there was a general replication and subpoena to rejoin;

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

and the cause was set for hearing, by consent of the parties upon the bill, answers, replications, and exhibits.

Mr. Marbury, for complainant, contended that the title subsequently acquired by Easter enured to the benefit of the complainant; and that Easter and all claiming under him were estopped by Easter's deed to Addison from denying that Easter had a good title at the date of that deed. Trevivan v. Lawrence, 1 Salk. 276; 1 Johns. Ch. 90; Selby v. Magruder, 6 Har. & J. 459.

Mr. Lear, for defendant Brown and the general creditors, contended that as the property was sold subject to Corcoran's claims, he ought not to be paid out of this purchase-money, there being enough left in the hands of the purchaser to pay this claim. The general creditors are not estopped by Easter's deed. They do not claim under him, but under the insolvent law.

Mr. Hellen, for Mr. Adams. The answer of Brown is not evidence against Mr. Adams, his co-defendant. There is therefore no evidence that Mr. Adams had notice of the claim of Corcoran before the sale.

CRANCH, Chief Judge. The bill does not charge Mr. Adams with notice of the complainant's claim at the time of his taking the mortgage. The answer of Mr. Brown is not evidence against his co-defendant Mr. Adams, and therefore cannot charge him with notice of any terms of sale different from the printed terms; and if it were, yet evidence of verbal declarations of an auctioneer at the time of the sale ought not to be admitted to contradict the printed conditions. Gunnis v. Erhart, 1 H. Bl. 289. The fact, therefore, must be considered as established, that Mr. Adams purchased the property at the trustee's sale, subject only to his own incumbrance; and that, if any prior incumbrance existed the trust fund was bound to pay it off, or to vacate the sale and refund his purchase-money and expenditures.

The court is of opinion that the complainant has the first incumbrance; and that although Robert Easter, at the time of executing his deed to Henry Addison had no legal title, yet that when he subsequently acquired a legal title, it enured, (by means of the estoppel in his deed) to the benefit of the complainant, whose trustee, H. Addison, thereby acquired the legal estate as against all persons claiming by or through Robert Easter; and that the property of the insolvent, Robert Easter, not having been sold expressly subject to the complainant's claim, the purchase-money ought, in the first place, to be applied to the discharge of that incumbrance. Decree accordingly.

CORCORAN (BROWN v.). See Case No. 1,-999.

CORCORAN (DAWES v.). See Case No. 3,-664.

Case No. 3,227.

CORCORAN v. DOUGHERTY.

[4 Cranch, C. C. 205.][1]

Circuit Court, District of Columbia. May Term, 1832.

PAROL EVIDENCE TO VARY WRITTEN CONTRACT—CURE OF DEFECTIVE PLEADING BY VERDICT.

1. It is competent for the defendant in an action upon a special contract in writing not under seal, to prove a parol condition not stated in the written contract.

2. If there are mutual promises, not dependent on each other, the omission to state in the declaration, performance of that made by the plaintiff, is cured by the verdict.

Assumpsit upon the following special agreement in writing: "Georgetown, May 14th, 1830. I hereby agree to purchase of James Corcoran a part of his stock of dry goods; namely, all cotton, silks, and other goods, the cloths, cassimeres, flannels, baizes, and blankets excepted, at a discount of thirty-five per cent. from the original cost, and in payment of the same agree to substitute my paper in the Union Bank in lieu of his with such security as will be satisfactory to the said bank for the amount of such stock purchased. Wm. Dougherty."

Mr. Key and R. S. Coxe, for defendant, offered to prove by the testimony of witnesses, that, at the time the defendant signed the written contract, and delivered it to the plaintiff, the defendant said, "This purchase, you are to understand is made, and I am to comply with this agreement only in case of your getting the store for me," and that the plaintiff took the paper, saying, "Yes, I am to get you the store, otherwise not to hold you to the purchase;" and cited 4 Starkie, 1003, and Farewell v. Coker, 2 Mer. 353.

Mr. Swann and Mr. Marbury, for plaintiff, cited 4 Starkie, 1009, 1048, 1049, and note g, p. 1049.

THE COURT (nem. con.) permitted the evidence thus offered by the plaintiff's counsel, to be given to the jury. Verdict for the plaintiff, $405.71.

Mr. Coxe and Mr. Key, for the defendant, moved for a new trial, 1. Because the verdict is against evidence. 2. Because it is a verdict without evidence. They also moved in arrest of judgment, 1. Because the declaration is insufficient. 2. Because the two last counts are insufficient. 3. Because the verdict is general, and one of the counts is insufficient. They objected to the third count because it does not aver that the plaintiff had guarantied to the defendant the occupation of the store. Worsley v. Wood, 6 Term R. 719; 1 Chit. 313.

Mr. Marbury, contra, contended, that the promise of the plaintiff respecting the store, was an independent agreement subsequently to be performed; but if it is not, the want of the averment of it in the declaration is cured

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

by the verdict. Upon the first point he cited Bennet v. Pixley, 7 Johns. 250; Campbell v. Jones, 6 Term R. 570; Humble v. Bland, Id. 257; Walker v. Harris, 1 Anst. 245; Jones v. Barkley, Doug. 690; and Turner v. Goodwin, 10 Mod. 190. And upon the second point, namely, that the omission was cured by the verdict. Collins v. Gibbs, 2 Burrows, 900; Sellon, Pr. 499; 1 Chit. Pl. 319; Worsley v. Wood, 6 Term R. 715; 2 Saund. 228, note b; Rawson v. Johnson, 1 East, 203, 209.

THE COURT overruled both motions; being of opinion that the verdict was not against nor without evidence; and that the declaration was cured by the verdict. (CRANCH, Chief Judge, doubting as to this point.)

Case No. 3,228.

CORCORAN v. HODGES.

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

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

PROMISSORY NOTE—LIABILITY OF INDORSER—EVIDENCE—CONSIDERATION.

This was an action by William W. and Thomas Corcoran against Thomas Hodges.

If a promissory note be indorsed by the defendant without an intention of giving credit to the note, and without having received any value for it, and only to comply with the form required by the plaintiff in the course of his business as an auctioneer, and if it was so understood at the time by the plaintiff, who declared he so considered it, the plaintiff cannot recover.

So decided by THE COURT. Verdict for defendant.

Motion for new trial, on the ground of misdirection of the jury by the court, overruled. THE COURT said that between immediate parties parol evidence is admissible to show that there was no consideration, and that the defendant did not indorse the note to give it credit; and that this was in effect the substance of the instruction given. Judgment for defendant. The note was for $418.55.

CORCORAN (HOLMEAD v.). See Case No. 6,627.

Case No. 3,229.

CORCORAN v. JONES.

[5 Cranch, C. C. 607.][1]

Circuit Court, District of Columbia. Nov. Term, 1839.

SLAVERY—BREACH OF CONTRACT.

In consideration that the plaintiffs, at the defendant's request, would sell and deliver to the defendant, for the price of six hundred and sixty dollars, two negroes, of the value of two thousand dollars, as slaves for life, the defendant promised the plaintiffs that he would not sell them to any person south of the Potomac, out of the District of Columbia, and would not remove them out of the District of Columbia, south of the Potomac, and that on such removal the said slaves should be immediately entitled to their freedom. The plaintiffs, relying on the said defendant's said promise, and in consideration of six hundred and sixty dollars paid to them by the defendant, sold and delivered the said slaves to the said defendant for that price. The defendant sold them to persons south of the Potomac, out of the District of Columbia, and removed them out of the District of Columbia, south of the Potomac. *Held*, on demurrer, that the plaintiffs had no cause of action against the defendant.

Assumpsit by Thomas Corcoran's executors against Roger Jones. General demurrer to the declaration, which contained five counts.

1. The first count stated that the defendant, in consideration that at his request the plaintiffs would sell and deliver to him two negro girls, one named Eleanor, of the value of $1,000, and one named Julia Ann, of the value of $1,000, as slaves for life, the first for $350 and the other for $310; the defendant promised the plaintiffs that he would not sell the said negro girls, nor either of them, to any person south of the Potomac out of the District of Columbia, nor remove the said negro girls, or either of them, to any place out of the District of Columbia south of the Potomac, and that, on such removal, the slaves shall be immediately entitled to their freedom. And the said plaintiffs in fact say that they, relying on the said promise of the said defendant, did, in consideration of the said sums of money, sell and deliver to the said defendant the said two negro female slaves, Eleanor and Julia Ann, to be held by the said defendant as slaves for life, upon the condition aforesaid.

2. The second count stated a conversation between the plaintiffs and defendant respecting the sale and purchase of the said two female slaves of the value of $2,000, in which it was agreed that the plaintiffs should sell and deliver them to the defendant as slaves for life for the sum of $660, upon the express condition that they should not be sold to any person south of the Potomac out of the District of Columbia, nor removed out of the said District south of the Potomac, but on such removal the said slaves should be immediately entitled to their freedom. And the said defendant, in consideration that the plaintiffs agreed to sell and deliver the said slaves to the defendant, for the price and on the conditions aforesaid, promised the plaintiffs that he would keep and perform the said contract and the said condition, and would not sell the said negro female slaves, or either of them, to any person south of the Potomac out of the District of Columbia, nor remove them, or either of them, out of the said District south of the Potomac; and the plaintiffs, relying on the defendant's said promise,

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

did sell and deliver the said slaves to the defendant, as slaves for life, on the terms and conditions aforesaid.

3. The third count stated that the plaintiffs offered the said slaves, of the value of $2,000, for sale at public auction to the highest bidder; upon condition, however, that the said slaves, nor either of them, should be sold to any person south of the Potomac out of the District of Columbia, nor removed out of the said District south of the Potomac; but, in case of their being so removed, the said slaves should be immediately entitled to their freedom. That the defendant attended the said public sale, and bid for and purchased the said slaves, subject to the condition aforesaid, for the sum of $650, and received possession of the same, and in consideration thereof promised the plaintiffs that he would not sell the said slaves, or either of them, to any person south of the Potomac out of the District of Columbia, nor remove them, or either of them, nor suffer them, or either of them, to be removed out of the said District south of the Potomac.

4. The fourth count stated that the plaintiffs advertised and offered the said slaves for sale at public auction, as and upon the terms stated in the third count; that the defendant was present at the sale, and bought one of them, named Eleanor, of the value of $1,000, at and for the sum of $350; that she was delivered to, and accepted by the defendant, on the terms and conditions of the said sale, as set forth in the said advertisement; and the defendant, in consideration thereof, promised the plaintiffs that he would well and truly keep and perform the conditions of the said sale, and that the said slave should not be sold to any person south, &c., nor removed out of the District of Columbia south of the Potomac.

5. The fifth count related to the sale and purchase of the other of the two slaves, namely, Julia Ann, and was, in all other respects, exactly like the fourth count.

To these five counts there was this general conclusion: "Yet, the said defendant, not regarding his said several promises and undertakings so by him made in this behalf as aforesaid, but intending to injure and deceive the said plaintiffs in this respect, hath not kept and performed his said several promises and undertakings, but, on the contrary, hath knowingly sold the said several negro girls, hereinbefore mentioned, as slaves for life, to persons south of the Potomac out of the District of Columbia, and hath removed the said negro girls out of the District of Columbia, south of the Potomac, to places remote therefrom, and unknown to the said plaintiffs. Wherefore, the said plaintiffs say they are injured and have sustained damage to the value of two thousand dollars, and, therefore, they bring suit," &c.

To this declaration the defendant demurred.

R. J. Brent and Mr. Jones, for the defendant, contended that it did not appear by the declaration, that the plaintiffs had sustained any damage; the penalty for breach of the contract on the part of the defendant was the freedom of the slaves; the defendant is not liable for damages besides. There was no consideration for the defendant's supposed promise. It is not averred that the plaintiffs sold them for less than their full value, in consideration of the defendant's promise. It was nudum pactum.

Mr. Marbury, for the plaintiffs, cited Adams v. Anderson, 4 Har. & J. 558; Price v. Read, 2 Har. & G. 291; 5 Wheeler, Slav. 464. The defendant contracted with the plaintiffs. He has broken his contract, and the plaintiffs are entitled to recover damages. The freedom of the slaves is cumulative, and is no compensation for the plaintiffs' damage in selling the slaves so much below their value. Upon this demurrer, the facts are admitted that the slaves were worth $2,000, and that in consideration of the defendant's undertaking not to sell or remove them, as alleged in the declaration, the plaintiffs sold them to the defendant for $660; the difference is the consideration of the defendant's promise. The penalty is for the benefit of the slaves, but they can have no remedy upon this contract. They can only get relief by the plaintiffs' compelling the defendant to manumit them, or pay damages for his breach of contract. It was not necessary for the plaintiffs to aver fraud on the part of the defendant.

THE COURT (CRANCH, Chief Judge, not giving any opinion, as he had not had time to examine the declaration) immediately rendered judgment for the defendant on the demurrer.

CORCORAN (UNION BANK OF GEORGETOWN v.). See Case No. 14,353.

CORDERY (REYNOLDS v.). See Case No. 11,729.

Case No. 3,229a.

The CORDILLERA.

[5 Blatchf. 518.][1]

Circuit Court, S. D. New York. Nov. 19, 1867.

LIABILITY FOR NEGLIGENT SHIPPING OF CARGO.

Where the apparatus by which an article is being hoisted into a vessel from a lighter, and the horses that work it, belong to the vessel or to the stevedores who are engaged in the work, and are in the service of the vessel, the responsibility of the lighterman ceases, as a general rule, when the article is properly placed on the slings and hooked to the tackle,

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

and the duty of the vessel begins with the hoisting of the article.

[Cited in Gaerard v. The Lovspring, 42 Fed. 859.]

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

This was a libel in rem, filed in the district court, against the ship Cordillera, to recover damages for the loss of two tierces of lard, which fell from the slings while they were being hoisted into the ship, by a tackle, from a lighter. The district court decreed for the libellants [case unreported], and the claimants appealed to this court.

Charles Donohue and Oscar Frisbie, for libellants.

Robert D. Benedict, for claimants.

NELSON, Circuit Justice. The ship insists that the loss, in this case, occurred by the mismanagement of the lightermen, in putting the tierces into the slings, and, also, in starting the horses which worked the tackle, while they were thus imperfectly slung. The libellants insist, that the loss happened after the tierces had passed into the possession and control of the ship. The case resulted in a difference, both as to the facts and the usage, in hoisting a cargo from the lighter to the ship, between the lightermen and the stevedores, the lightermen insisting that their duty was performed when the tierces were properly placed on the slings and hooked to the tackle, and the stevedores insisting that it was performed only when the tierces reached the railing of the ship and were ready to be taken from the tackle to the deck. The stevedores are in the service of the vessel, which is responsible to the shipper for the damage done by them to his goods in putting them on board. In this case, the apparatus by which the tierces were hoisted from the lighter, including the horses, belonged either to the ship or to the stevedores, which, as I infer from the evidence, is according to the general usage. I am inclined to think, that when, under these circumstances, cargo is to be delivered from the lighter at the side of the ship, the responsibility of the lightermen ceases, as a general rule, when the cargo is properly placed on the slings and hooked to the tackle; and that the duty of the ship begins with the hoisting of it to the deck of the ship. It is then in the possession of the apparatus of the ship, or the stevedores, and under their control and direction.

It is, however, insisted, on the part of the claimants, that, in this particular case, the master of the lighter gave the order to the horses to move before the tierces were properly secured in the slings. But this is disputed, and the evidence is conflicting. The court below charged the ship, and, in my view, the proofs fairly warranted the finding. Decree affirmed.

Case No. 3,230.

CORFIELD v. CORYELL.

[4 Wash. C. C. 371.][1]

Circuit Court, E. D. Pennsylvania. April Term, 1823.

CONSTITUTIONAL LAW—REGULATION OF COMMERCE—STATE BOUNDARIES—DELAWARE BAY—STATE REGULATION OF FISHERIES—ADMIRALTY JURISDICTION.

1. Explanation of the eighth section of the first article of the constitution of the United States, granting to congress power to regulate commerce; of the second section of the fourth article, as to the privileges and immunities of citizens of one state in every other state; of the second section of the third article, extending the judicial power of the United States to all cases of admiralty and maritime jurisdiction.

[Cited in Atkinson v. Philadelphia & T. R. Co., Case No. 615; U. S. v. New Bedford Bridge, Id. 15,867; The Passenger Cases, 7 How. (48 U. S.) 556; Gilman v. Philadelphia, 3 Wall. (70 U. S.) 725; The Clinton Bridge, Case No. 2,900; U. S. v. Hall, Id. 15,282; U. S. v. Anthony, Case No. 14,459; McCready v. Com., 94 U. S. 395; U. S. v. Petersburg Judges of Election, Case No. 16,036; Hall v. De Cuir, 95 U. S. 513; Williams v. Bruffy, 96 U. S. 183; Ex parte Kinney, Case No. 7,825; The Civil Rights Cases, 109 U. S. 47, 3 Sup. Ct. 47; Butchers' Union, etc., Co. v. Crescent City, etc., Co., 111 U. S. 764, 4 Sup. Ct. 658; People v. Marx, 99 N. Y. 386; Ex parte Chin King, 35 Fed. 356; Marvin v. Maysville St. R. & T. Co., 49 Fed. 437. Quoted in the Slaughter-House Cases, 16 Wall. (83 U. S.) 75, 97, 116, 117, 127.]

2. The oyster law of New Jersey of the 9th of June 1820, is not repugnant to any of the provisions of the constitution of the United States.

[Approved in Bennett v. Boggs, Case No. 1,319. Cited in brief in Smith v. Maryland, 18 How. (59 U. S.) 75; McCready v. Com., 94 U. S. 395.]

3. What are the boundaries of New Jersey on the Delaware bay and river under the grants of Charles II. to the Duke of York, and the grant of Charles II. to the proprietaries of Pennsylvania; and what are those boundaries in consequence of the Revolution, and the treaty of peace.

[Cited in Bennett v. Boggs, Case No. 1,319; Case of the Pea Patch Island, Id. 10,872.]

4. What are the boundaries of Cumberland county in New Jersey, on the Delaware bay.

[Cited in Manchester v. Com., 139 U. S. 262, 11 Sup. Ct. 564.]

5. To enable a plaintiff to maintain trespass or trover for an injury to personal property, the plaintiff must have had, at the time the injury was done, either actual or constructive possession of the thing, as well as a general or constructive property therein.

6. The power of a state to regulate the fisheries within its territorial limits, as to its own citizens and the citizens of other states.

7. Jurisdiction of courts of admiralty as to misdemeanors committed on the seas.

[Cited in U. S. v. New Bedford Bridge, Case No. 15,867; Waring v. Clarke, 5 How. (46 U. S.) 481.]

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

This was an action of trespass for seizing, taking and carrying away, and converting to the defendant's use, a certain vessel, the property of the plaintiff, called the Hiram. Plea not guilty, with leave to justify.

The case, as proved at the trial, was as follows: The plaintiff purchased the Hiram from one De Silver, in February 1819, and obtained a bill of sale of her, which, with her coasting license, was on board at the time of the alleged trespass. The plaintiff hired the Hiram to one Hand, but for how long a time, or upon what terms, did not appear. Hand hired her to John Keene for $10 a month, but he expected to keep her during the season. John Keene, being thus possessed of this vessel, left Philadelphia with one Courtney, on board, to assist him in navigating her, and in taking oysters. On the 15th of May 1821 she was conducted to the oyster beds in Maurice river cove, New Jersey, where Keene and Courtney engaged in raking and collecting oysters by means of a dredge, and were found so employed on that day by a New Jersey vessel called the Independence, having on board forty or fifty persons, amongst whom were some of the magistrates and constables of Cumberland county, and the collector of the port. There were on board the Independence a few fire-arms and a small unmounted swivel. When the Independence neared the Hiram, the latter was ordered to come to, which order being complied with, she was boarded by three or four of the persons from the Independence, amongst whom was the defendant, who acted in the character of prize master, and conducted the Hiram to Leesburg, a small town up Maurice river, where she was secured and put under a guard. The next day process was served upon Courtney (Keene having escaped under an apprehension of being sued by a person living at Leesburg, to whom he was indebted), who appeared before a court assembled for the occasion at Leesburg, consisting of two magistrates. After an examination of witnesses, and of the papers of the Hiram, she was, with her tackle, &c. condemned, and ordered to be sold. This sentence was afterwards carried into execution, by a sale of the vessel for the price of $10.

From the point of Cape May to that opposite Egg island, there is a deep indentation or curve, which, or a part of which, is called Maurice river cove or bay. The distance from one of these points to the other is about twenty-two miles. Maurice river falls into this cove about ten miles upon a straight line from Egg island to Elder point, the upper point of Maurice river. Dividing creek lies about midway between the mouth of Maurice river and Egg island. The plaintiff's witnesses stated that when the Hiram was seized, she was five or six miles above, or north of the mouth of Maurice river, and from two to three miles south by east from Dividing creek and from the land, in about four feet water at low tide. Sometimes there is not more than two feet water at or about that place, but it is never bare. That the flat ground extends about five miles out from the shore; the oyster beds about four miles.

It was stated by the defendant's witnesses, one of whom had made a particular survey of about seventeen miles of the coast of this cove, that the flats extend five or six miles out from Maurice river before the cove deepens, but that the whole cove is flat and shallow; at low tide the water on the flats being from three to three and a half feet; and that the tide in general rises six feet; the depth of the cove, that is, a line from a cord of the cove from Cape May point to Egg island, extended to the shore, would be about fourteen miles, and that from the shore over to the Delaware shore is about forty miles; the main oyster bed lies about four and a half miles from the mouth of Maurice river. That when the Hiram was taken she was dredging about one, or one and a quarter miles from the east point of Maurice river, on about two feet water, and within a straight line extended from that point to Egg island, and also within an outer bed of oysters, which is sometimes bare at low water. One witness stated that he had seen persons wade out from Maurice river half a mile to some oyster beds, and another, that below the mouth of that river he had waded out two miles. It was further stated by one of the defendant's witnesses, that the whole coast of the cove is a losing one; that it has lost considerably in twenty years, and that he had heard from others that it had lost at least half a mile in the last fifty years.

The defendant justified under an act of assembly of the state of New Jersey, passed on the 9th of June 1820, which forbids any person to rake on any oyster bed in that state, or to gather any oysters or shells on any banks or beds within the same, from and after the 1st of May until the 1st of September, in every year, under a certain pecuniary penalty, to be recovered by action of debt. The second section declares "that if any person residing in or without this state shall, at any time hereafter, rake for or gather oysters in any of the rivers, bays, or waters of this state, with a dredge, or implement so called, or shall be on board of any canoe, boat or vessel employed in raking with such implement, such person so offending shall forfeit and pay the sum of $50, to be recovered," &c. The third section makes it the duty of every magistrate, upon his own view, or the information of others upon oath, to issue his warrant to an officer of his county, commanding him to raise a force to assist him, if necessary, in apprehending every person offending against either of the above sections, in any of the bays, rivers, or waters of that state, and to carry them before the said magistrate. The fifth section prohibits any person from gathering oysters in any of the rivers, bays or

waters of the state, for the purpose of burning them for lime. The sixth section, which is the material one in this case, declares "that it shall not be lawful for any person who is not at the time an actual inhabitant and resident in this state, to rake or gather clams, oysters, or shells, in any of the rivers, bays, or waters in this state, on board of any canoe, flat, scow, boat, or other vessel, not wholly owned by some person, inhabitant of, and actually residing in this state; and every person offending herein, shall forfeit and pay $10, to be recovered, &c.; and shall also forfeit the canoe, flat, &c. employed in the commission of such offense, with all the clams, oysters, shells, rakes, tongs, tackle, furniture and apparel in and belonging to the same." The seventh section makes it the duty of all sheriffs and constables, and permits any other person, to seize and secure any such canoe, flat, &c. and immediately to give information thereof to two justices of the peace of the county where such seizure shall have been made, who are required to meet at such time and place as they should appoint for the trial thereof, and to hear and determine the same, and in case the same should be condemned, it should be sold by and under the order and direction of the said justice, who, after deducting the cost and charges, should pay one half the proceeds to the collector of the county in which such offence was committed, and the other half to the persons who seized and prosecuted the same.

The proceedings before the two justices of Cumberland county, sitting at Leesburg, in Maurice river township, were in due form, and conformable to the above act. The information states the seizure of the Hiram to have been made in the cove of Maurice river, in the county of Cumberland, in the waters of New Jersey, which said vessel was used and employed in the said offence of raking and gathering oysters, in the said cove, the said vessel not being wholly owned by any person an inhabitant of, or actually residing in the said state; on board of which vessel one , who is not at this time an actual inhabitant and resident of New Jersey, was engaged on the 15th of May in the business and occupation of raking and gathering oysters, in the said cove of Maurice river. The information then prays sentence of condemnation, sale, and distribution of the proceeds agreeably to the above act.

A notice, signed by the two magistrates, stating the time and place of trial, together with the information, was regularly served upon Courtney, who appeared before the justices. Then follows a regular sentence of condemnation and order of sale, reciting the evidence to prove the offence, &c.

The defendant offered in evidence the record of an indictment in the court of oyer and terminer, in the state of New Jersey, attested by the clerk of the court, under the seal of the court, but not authenticated by the presiding judge as required by the act of congress. This evidence was objected to, and the following cases were cited: Pet. C. C. 352 [Craig v. Brown, Case No. 3,328]; [Ferguson v. Harwood] 7 Cranch [11 U. S.] 408; [Drummond v. Magruder] 9 Cranch [13 U. S.] 122. It was contended, on the other side, that although this record wants the certificate of the presiding judge that the attestation is in due form, and it is not on that account conclusive evidence; it is nevertheless good prima facie evidence at common law, and as such ought to be received. Baker v. Field, 2 Yeates, 532; Pet. C. C. 74 [Green v. Sarmiento, Case No. 5,760]; Field v. Gibbs [Case No. 4,766.]

Charles J. Ingersoll and J. R. Ingersoll, for plaintiff.

M'Ilwaine & Condy, for defendant.

WASHINGTON, Circuit Justice. We know of no such distinction as conclusive and prima facie record evidence; the one under the act of congress, and the other at common law. Unless the record be authenticated in the manner prescribed by the act of congress, it cannot be read in evidence, for any purpose whatever.

The counsel for the plaintiff contended:

1. That the right of fishing in the bed of the public waters of the state is common to all the citizens of the state, and cannot be restrained, as it is by this act. Arnold v. Mundy, Hals. [6 N. J. Law] 68. Agreeably to this decision, it is unimportant how far the Hiram was found raking for oysters, since it is agreed she was below low water mark. In the case of Peck v. Lockwood [5 Day, 22] it was decided that the right of fishing on the land of another, where the sea or arm of the sea flows and ebbs, is a right common to all the citizens. 5 Barn. & Ald. 266.

2. Maurice river cove, as it is called, is in fact Delaware bay, an arm of the sea, over which, to low water mark, the state of Delaware has at least concurrent jurisdiction, and consequently the citizens of that state cannot be excluded by the state of New Jersey from the free use and enjoyment of any part of the beds or waters of the bay below low water mark. Besides, this use of the oyster beds has been common property ever since the settlement of the state, and it is now too late for New Jersey to assert an exclusive right to them. Vatt. 127. 2 Smith's Laws, 77

3. The territorial jurisdiction of New Jersey is bounded by the Delaware bay and river, or in other words, by the low water mark, by the terms of the grants by Charles II. to his brother the Duke of York, dated the 12th of March 1663–64, and by the duke to Lord Berkeley and Sir George Carteret, bearing date the 24th of June 1664. That the whole of the bay and river was granted to

William Penn by the Duke of York, by the two grants of the 24th of August 1682. The grants by the Duke of York do not include bays, except on the eastern section of the state, afterwards called East Jersey.

4. The act ought not to be so construed as to apply to oyster beds in the waters of the state, below low water mark, inasmuch as it would expose the legislature to the charge of an attempt to usurp a jurisdiction beyond the territorial limits of the state. Besides, the expressions in the sixth section, waters "in this state," varying the phrase "of the state," as used in the second section, where only a pecuniary penalty was imposed, strongly support this construction. Now, if it could be granted that Maurice river cove, below low water mark, belonged to New Jersey, still it cannot be said to be a water in the state; or rather, the change of the phrase from "of" to "in," shows that the law was cautiously worded, so as by the sixth section to exclude all waters from its operation but rivers and creeks running into the body of the state. But at all events, it is impossible to include any part of Maurice river cove below low water mark within the body of Cumberland county; the admiralty jurisdiction below that mark being exclusive. Bevan's Case, and the notes, 3 Wheat. [16 U. S.] 371; [Handly v. Anthony] 5 Wheat. [18 U. S.] 379; 2 Brown, Civ. & Adm. Law, 465, 475; Hall, Pr. 19.

5. The sixth section of this act is contrary to the second section of the fourth article of the constitution of the United States, by denying to the citizens of other states, rights and privileges enjoyed by those of New Jersey. It is also contrary to that part of the constitution which vests in congress the power to regulate trade and commerce between the states, and also to the second section of the third article, which extends the judicial authority to all cases of admiralty and maritime jurisdiction, the whole of which is assumed by the act of the 15th of May 1820. This was completely a maritime proceeding in form, as well as in substance, and was in fact an act of robbery or piracy.

Besides all these objections, the proceedings before the justices were contrary to the fourth article of the amendments to the constitution; the seizure having been made without a warrant granted on oath or affirmation.

On the part of the defendants, it was insisted:

1. That this being an action of trespass for seizing the plaintiff's vessel, it cannot be supported without showing an actual or constructive possession in the plaintiff at the time the trespass was committed, and also a general or qualified property in the thing, and a right in the owner to immediate possession. In this case, the plaintiff was the absolute owner, but Keene had the qualified property and the actual possession, which the plaintiff was not entitled to claim, the vessel having been hired to Keene for ten dollars a month. 1 Chit. Pl. 166, 67. So as to trover. 1 Chit. Pl. 150; 8 Johns. 435; 7 Johns. 9; 4 Term R. 489; 11 Johns. 385; 15 East, 607; 7 Johns. 535.

Upon the merits: It was insisted, that New Jersey is a sovereign state, and entitled to all the rights and prerogatives of a sovereign, except such as are ceded by the constitution. As a sovereign state, her territorial jurisdiction on the Delaware river extended to the middle of the river, and on the sea, to at least a marine league. This being her right to the waters adjacent to her coast, it includes all the fisheries to the same extent. That these fisheries are the common property of the citizens of that state, may be admitted; but clearly the state may regulate and control the exercise of this right for the common benefit; and the jurisdiction of the state over them is unquestionable. Mart. 157, 160, 162, 165, 168; Vattel, bk. 1, c. 22, §§ 276, 278, 266; Id. c. 20, §§ 234, 236, 246, 248, 253; Id. bk. 1, c. 23, §§ 287, 295, 205; Grotius, bk. 2, c. 2, § 5. As to the right of citizens of other states to this common property, were cited, U. S. v. Bevan, 3 Wheat. [16 U. S.] 386; Livingston v. Van Ingen, 9 Johns. 507; Ogden v. Gibbons, 4 Johns. Ch. 157.

The act in question of 1820 is but a re-enactment of similar laws passed in 1719, and in 1798, (Pat. Laws, 262.)

The place where this offence was committed was within the body of the county of Cumberland. Harg. Law Tracts; Rev. Laws, 19, 245. See, also, Owens, 122; 4 Inst. 137; Harg. Law Tracts, 47, 88.

As to the second section of the fourth article of the constitution, it applies only to the privileges and immunities of citizenship, not to rights in the common property of the state. 9 Johns. 521, 560; 3 Har. & McH. 12; Serg. Const. Law, 385; 2 Munf. 393.

As to the alleged boundaries of New Jersey on the Delaware, Chalmers' Opinion of Eminent Lawyers, page 59, was referred to, where it is laid down, that the river Delaware belonged to the crown. If the bay was not granted by the Duke of York to Lord Berkeley and Sir George Curtis, then it remained in the grantor, and became vested in him as king, upon his accession to the crown, and by the Revolution, one half, or at least to the extent of a league from the coast, became vested in New Jersey.

The plaintiff's counsel, in answer to the objection to the remedy, cited 5 Com. Dig. "Trespass;" 6 Bac. 565, "Trespass C." They further contended that, as the hiring of the Hiram to Hand, and by him to Keene, was by parol, the act of congress rendered the change of property invalid.

WASHINGTON, Circuit Justice, after stating to the jury the great importance of many of the questions involved in this cause, recommended to them to find for the plaintiff, and assess the damages; subject

to the opinion of the court upon the law argument of the facts in the cause. Verdict for $560, subject, &c.

This case was argued, on the points of law agreed by the counsel to arise on the facts, at the October term 1824, and was taken under advisement until April term 1825, when the following opinion was delivered:

WASHINGTON, Circuit Justice. The points reserved present for the consideration of the court, many interesting and difficult questions, which will be examined in the shape of objections made by the plaintiff's counsel to the seizure of the Hiram, and the proceedings of the magistrates of Cumberland county, upon whose sentence the defendant rests his justification of the alleged trespass. These objections are,—

First. That the act of the legislature of New Jersey of the 9th of June 1820, under which this vessel, found engaged in taking oysters in Maurice river cove by means of dredges, was seized, condemned, and sold, is repugnant to the constitution of the United States in the following particulars: 1. To the eighth section of the first article, which grants to congress the power to regulate commerce with foreign nations, and among the several states, and with the Indian tribes. 2. To the second section of the fourth article, which declares, that the citizens of each state shall be entitled to all privileges and immunities of citizens in the several states. 3. To the second section of the third article, which declares, that the judicial power of the United States should extend to all cases of admiralty and maritime jurisdiction.

In case the act should be considered as not being exposed to these constitutional objections, it is then insisted,

Secondly. That the locus in quo was not within the territorial limits of New Jersey. But if it was, then

Thirdly. It was not within the jurisdiction of the magistrates of Cumberland county.

Fourthly. We have to consider the objection made by the defendant's counsel to the form of this action.

The first section of the act of New Jersey declares, that, from and after the 1st of May, till the 1st of September in every year, no person shall rake on any oyster bed in this state, or gather any oysters on any banks or beds within the same, under a penalty of $10. Second section: No person residing in, or out of this state, shall, at any time, dredge for oysters in any of the rivers, bays, or waters of the state, under the penalty of $50. The third section prescribes the manner of proceeding, in cases of violations of the preceding sections. The two next sections have nothing to do with the present case. The sixth section enacts, that it shall not be lawful for any person, who is not, at the time, an actual inhabitant and resident of this state, to gather oysters in any of the rivers, bays, or waters in this state, on board of any vessel, not wholly owned by some person, inhabitant of, or actually residing in this state; and every person so offending, shall forfeit $10, and shall also forfeit the vessel employed in the commission of such offence, with all the oysters, rakes, &c. belonging to the same. The seventh section provides, that it shall be lawful for any person to seize and secure such vessel, and to give information to two justices of the county where such seizure shall be made, who are required to meet for the trial of the said case, and to determine the same; and in case of condemnation, to order the said vessel, &c. to be sold.

The first question then is, whether this act, or either section of it, is repugnant to the power granted to congress to regulate commerce? Commerce with foreign nations, and among the several states, can mean nothing more than intercourse with those nations, and among those states, for purposes of trade, be the object of the trade what it may; and this intercourse must include all the means by which it can be carried on, whether by the free navigation of the waters of the several states, or by a passage over land through the states, where such passage becomes necessary to the commercial intercourse between the states. It is this intercourse which congress is invested with the power of regulating, and with which no state has a right to interfere. But this power, which comprehends the use of, and passage over the navigable waters of the several states, does by no means impair the right of the state government to legislate upon all subjects of internal police within their territorial limits, which is not forbidden by the constitution of the United States, even although such legislation may indirectly and remotely affect commerce, provided it do not interfere with the regulations of congress upon the same subject. Such are inspection, quarantine, and health laws; laws regulating the internal commerce of the state; laws establishing and regulating turnpike roads, ferries, canals, and the like.

In the case of Gibbons v. Ogden, 9 Wheat. [22 U. S.] 1, which we consider as full authority for the principles above stated, it is said, "that no direct power over these objects is granted to congress, and consequently they remain subject to state legislation. If the legislative power of the Union can reach them, it must be for national purposes; it must be when the power is expressly given for a specified purpose, or is clearly incident to some power which is expressly given." But if the power which congress possesses to regulate commerce does not interfere with that of the state to regulate its internal trade, although the latter may remotely affect external commerce, except

where the laws of the state may conflict with those of the general government; much less can that power impair the right of the state governments to legislate, in such manner as in their wisdom may seem best, over the public property of the state, and to regulate the use of the same, where such regulations do not interfere with the free navigation of the waters of the state, for purposes of commercial intercourse, nor with the trade within the state, which the laws of the United States permit to be carried on. The grant to congress to regulate commerce on the navigable waters belonging to the several states, renders those waters the public property of the United States, for all the purposes of navigation and commercial intercourse; subject only to congressional regulation. But this grant contains no cession, either express or implied, of territory, or of public or private property. The jus privatum which a state has in the soil covered by its waters, is totally distinct from the jus publicum with which it is clothed. The former, such as fisheries of all descriptions, remains common to all the citizens of the state to which it belongs, to be used by them according to their necessities, or according to the laws which regulate their use. "Over these," says Vattel (book 1, c. 20, §§ 235, 246), "sovereignty gives a right to the nation to make laws regulating the manner in which the common goods are to be used." "He may make such regulations respecting hunting and fishing, as to seasons, as he may think proper, prohibiting the use of certain nets and other destructive methods." Vattel, bk. 1, c. 20, § 248. The jus publicum consists in the right of all persons to use the navigable waters of the state for commerce, trade, and intercourse; subject, by the constitution of the United States, to the exclusive regulation of congress. If then the fisheries and oyster beds within the territorial limits of a state are the common property of the citizens of that state, and were not ceded to the United States by the power granted to congress to regulate commerce, it is difficult to perceive how a law of the state regulating the use of this common property, under such penalties and forfeitures as the state legislature may think proper to prescribe, can be said to interfere with the power so granted. The act under consideration forbids the taking of oysters by any persons, whether citizens or not, at unseasonable times, and with destructive instruments; and for breaches of the law, prescribes penalties in some cases, and forfeitures in others. But the free use of the waters of the state for purposes of navigation and commercial intercourse, is interdicted to no person; nor is the slightest restraint imposed upon any to buy and sell, or in any manner to trade within the limits of the state.

It was insisted by the plaintiff's counsel, that, as oysters constituted an article of trade, a law which abridges the right of the citizens of other states to take them, except in particular vessels, amounts to a regulation of the external commerce of the state. But it is a manifest mistake to denominate that a commercial regulation which merely regulates the common property of the citizens of the state, by forbidding it to be taken at improper seasons, or with destructive instruments. The law does not inhibit the buying and selling of oysters after they are lawfully gathered, and have become articles of trade; but it forbids the removal of them from the beds in which they grow, (in which situation they cannot be considered articles of trade,) unless under the regulations which the law prescribes. What are the state inspection laws, but internal restraints upon the buying and selling of certain articles of trade? And yet, the chief justice, speaking of those laws [Gibbons v. Ogden] 9 Wheat. [22 U. S.] 203, observes, that "their object is to improve the quality of articles produced by the labour of a country; to fit them for exportation, or, it may be, for domestic use. They act upon the subject before it becomes an article of foreign commerce, or of commerce among the states, and prepare it for that purpose." Is this not precisely the nature of those laws which prescribe the seasons when, and the manner in which, the taking of oysters is permitted? Paving stones, sand, and many other things, are as clearly articles of trade as oysters; but can it be contended, that the laws of a state, which treat as tort feasors those who shall take them away without the permission of the owner of them, are commercial regulations? We deem it superfluous to pursue this subject further, and close it by stating our opinion to be, that no part of the act under consideration amounts to a regulation of commerce, within the meaning of the eighth section of the first article of the constitution.

2. The next question is, whether this act infringes that section of the constitution which declares that "the citizens of each state shall be entitled to all the privileges and immunities of citizens in the several states?" The inquiry is, what are the privileges and immunities of citizens in the several states? We feel no hesitation in confining these expressions to those privileges and immunities which are, in their nature, fundamental; which belong, of right, to the citizens of all free governments; and which have, at all times, been enjoyed by the citizens of the several states which compose this Union, from the time of their becoming free, independent, and sovereign. What these fundamental principles are, it would perhaps be more tedious than difficult to enumerate. They may, however, be all comprehended under the following general heads: Protection by the government; the enjoyment of life and liberty, with the right to acquire and possess property of every kind,

and to pursue and obtain happiness and safety; subject nevertheless to such restraints as the government may justly prescribe for the general good of the whole. The right of a citizen of one state to pass through, or to reside in any other state, for purposes of trade, agriculture, professional pursuits, or otherwise; to claim the benefit of the writ of habeas corpus; to institute and maintain actions of any kind in the courts of the state; to take, hold and dispose of property, either real or personal; and an exemption from higher taxes or impositions than are paid by the other citizens of the state; may be mentioned as some of the particular privileges and immunities of citizens, which are clearly embraced by the general description of privileges deemed to be fundamental: to which may be added, the elective franchise, as regulated and established by the laws or constitution of the state in which it is to be exercised. These, and many others which might be mentioned, are, strictly speaking, privileges and immunities, and the enjoyment of them by the citizens of each state, in every other state, was manifestly calculated (to use the expressions of the preamble of the corresponding provision in the old articles of confederation) "the better to secure and perpetuate mutual friendship and intercourse among the people of the different states of the Union." But we cannot accede to the proposition which was insisted on by the counsel, that, under this provision of the constitution, the citizens of the several states are permitted to participate in all the rights which belong exclusively to the citizens of any other particular state, merely upon the ground that they are enjoyed by those citizens; much less, that in regulating the use of the common property of the citizens of such state, the legislature is bound to extend to the citizens of all the other states the same advantages as are secured to their own citizens. A several fishery, either as the right to it respects running fish, or such as are stationary, such as oysters, clams, and the like, is as much the property of the individual to whom it belongs, as dry land, or land covered by water; and is equally protected by the laws of the state against the aggressions of others, whether citizens or strangers. Where those private rights do not exist to the exclusion of the common right, that of fishing belongs to all the citizens or subjects of the state. It is the property of all; to be enjoyed by them in subordination to the laws which regulate its use. They may be considered as tenants in common of this property; and they are so exclusively entitled to the use of it, that it cannot be enjoyed by others without the tacit consent, or the express permission of the sovereign who has the power to regulate its use.

This power in the legislature of New Jersey to exclude the citizens of the other states from a participation in the right of taking oysters within the waters of that state, was denied by the plaintiff's counsel, upon principles of public law, independent of the provision of the constitution which we are considering, upon the ground, that they are incapable of being appropriated until they are caught. This argument is unsupported, we think, by authority. Rutherfoth, bk. 1, c. 5, §§ 4, 5, who quotes Grotius as his authority, lays it down, that, although wild beasts, birds, and fishes, which have not been caught, have never in fact been appropriated, so as to separate them from the common stock to which all men are equally entitled, yet where the exclusive right in the water and soil which a person has occasion to use in taking them is vested in others, no other persons can claim the liberty of hunting, fishing, or fowling, on lands, or waters, which are so appropriated. "The sovereign," says Grotius (book 2, c. 2, § 5), "who has dominion over the land, or waters, in which the fish are, may prohibit foreigners (by which expression we understand him to mean others than subjects or citizens of the state) from taking them." That this exclusive right of taking oysters in the waters of New Jersey has never been ceded by that state, in express terms, to the United States, is admitted by the counsel for the plaintiff; and having shown, as we think we have, that this right is a right of property, vested either in certain individuals, or in the state, for the use of the citizens thereof, it would, in our opinion, be going quite too far to construe the grant of privileges and immunities of citizens, as amounting to a grant of a cotenancy in the common property of the state, to the citizens of all the other states. Such a construction would, in many instances, be productive of the most serious public inconvenience and injury, particularly, in regard to those kinds of fish, which, by being exposed to too general use, may be exhausted. The oyster beds belonging to a state may be abundantly sufficient for the use of the citizens of that state, but might be totally exhausted and destroyed if the legislature could not so regulate the use of them as to exclude the citizens of the other states from taking them, except under such limitations and restrictions as the laws may prescribe.

3. It is lastly objected, that this act violates that part of the constitution which extends the judicial power of the United States to all cases of admiralty and maritime jurisdiction. The taking of oysters out of season, and with destructive instruments, such as dredges, is said to be an offence against the ancient ordinances and statutes of the admiralty, and that it is punishable by the admiralty as a misdemeanour. The authority relied upon to establish this doctrine is one of Sir L. Jenkins' charges, to be found in 2 Brown, Civ. & Adm. Law, 475. The amount of the argument is, that, since offences of this kind are cases of admiralty and mari-

time jurisdiction, the laws of a state upon the same subject, vesting in the state tribunals jurisdiction over them, are repugnant to this grant of jurisdiction to the judiciary of the United States. This argument, we think, cannot be maintained. For although the various misdemeanours enumerated by Sir L. Jenkins in his charges, may have been considered as admiralty offences at that period, either under the common law, or the ancient ordinances and statutes of the admiralty, it remains yet to be shown that they became such, and were cognizable by the judiciary of the United States, independent of some act of the national legislature to render them so. Many of those offences are already incorporated into the Criminal Code of the United States, and no person, it is presumed, will question the power of congress, by further legislation, to include many other offences to which the jurisdiction of the admiralty in England extended at the period above alluded to. But it is by no means to be conceded that, because offences of the nature we are now considering may rightfully belong to the jurisdiction of the English admiralty, the power of that government to regulate her fisheries being unquestionable, congress has a like power to declare similar acts, or any acts at all, done by individuals in relation to the fisheries within the limits of the respective states, offences against the United States. There are doubtless acts which may be done upon the navigable waters of a state which the government of the United States, and that of the state, have a concurrent power to prohibit, and to punish as offences; such for example as throwing ballast into them, or in any other way impeding the free use and navigation of such rivers. But we hold that the power to regulate the fisheries belonging to the several states, and to punish those who should transgress those regulations, was exclusively vested in the states, respectively, at the time when the present constitution was adopted, and that it was not surrendered to the United States, by the mere grant of admiralty and maritime jurisdiction to the judicial branch of the government. Indeed, this power in the states to regulate the fisheries in their navigable rivers and waters, was not, in direct terms, questioned by the plaintiff's counsel; and yet their argument upon this point, when followed out to its necessary consequences, amounts to a denial of that power.

As to the ancient criminal jurisdiction of the admiralty in cases of misdemeanours generally, committed on the sea, or on waters out of the body of any county; we have very respectable authority for believing that it was not exercised, even if it existed, at the period when the constitution of the United States was formed, and, if so, it would seem to follow that, to the exercise of jurisdiction over such offences, some act of the national legislature to punish them as offences against the United States is necessary. We find from the opinions of learned and eminent counsel who were consulted on the subject, that misdemeanours committed upon the sea had never been construed as being embraced by the statute of 28 Hen. VIII. c. 15, and that the criminal jurisdiction of the admiralty, except as exercised under that statute, had become obsolete, so that, without an act of parliament, they could not be prosecuted at all. 2 Brown, Civ. & Adm. Law, Append. 519–521. If then it could be admitted that congress might legislate upon the subject of fisheries within the limits of the several states, upon the ground of the admiralty and maritime jurisdiction, it would seem to be a conclusive answer to the whole of the argument on this point, that no such legislation has taken place; and consequently the power of the state governments to pass laws to regulate the fisheries within their respective limits remains as it stood before the constitution was adopted.

Secondly. The next general question to be considered is, whether the boundaries of the state of New Jersey include the place where the Hiram was seized whilst engaged in dredging for oysters? The grant from Charles II. to his brother, the Duke of York, of the territory of which the present state of New Jersey was a part, dated the 12th of March 1663–4, was of all that territory lying between the rivers St. Croix adjoining Nova Scotia, and extending along the sea coast southerly to the east side of Delaware bay, together with all islands, soils, rivers, harbours, marshes, waters, lakes, fishings, huntings and fowlings, and all other royalties, profits, commodities, hereditaments and appurtenances to the same belonging and appertaining, with full power to govern the same. The grant of the Duke of York dated the 24th of June 1664, to Lord Berkeley, and Sir George Carteret, after reciting the above grant, conveys to them all that tract of land lying to the westward of Long Island and Manhattan's Island, bounded on the east, part by the main sea, and part by Hudson's river, "and hath upon the west Delaware bay or river, and extendeth southward," &c. with all rivers, fishings, and all other royalties to the said premises belonging, &c. There is no material difference between these grants as to the boundaries of New Jersey on the westward; and we are of opinion that, although the rule of the law of nations is, that where a nation takes possession of a country separated by a river from another nation, and it does not appear which had the prior possession of the river, they shall each extend to the middle of it; yet, that when the claim to the country is founded, not on discovery and occupancy, but on grant, the boundary on the river must depend upon the just construction of the grant, and the intention of the parties to be discovered from its face. Taking this as the rule, we think the

claim of New Jersey under these grants to any part of the bay or river Delaware below low water mark cannot be maintained. The principle here suggested is, we conceive, fully recognized and adopted by the supreme court in the case of Handly's Lessee v. Anthony, 5 Wheat. [18 U. S.] 374. Neither do we conceive that the limits of the state can, by construction, be enlarged in virtue of the grant of all rivers, fishings, and other royalties; which expressions ought, we think, to be confined to rivers, fishings and royalties within the boundaries of the granted premises. This appears to have been the opinion of the crown lawyers, who were consulted more than a century ago respecting the boundaries of New Jersey and Pennsylvania, and this too after hearing counsel upon the question. Their opinion was, that the right to the river Delaware, and the islands therein, still remained in the crown. See Chalmers' Opinions. Notwithstanding this objection to the title of New Jersey, whilst a proprietary government, to any part of the bay and river Delaware, it seems that the proprietaries of West Jersey claimed, if not the whole of the river, a part of it at least below low water mark, as far back as the year 1683, as appears by a resolution of the assembly of that province in that year, "that the proprietary of the province of Pennsylvania should be treated with in reference to the rights and privileges of this province to, or in the river Delaware." By certain concessions of the proprietaries, free holders, and inhabitants of west New Jersey, some time about the year 1767, they granted that all the inhabitants of the province should have liberty of fishing in Delaware river, or on the sea coast. In 1693 a law passed in that province which enacted that all persons not residing within that province, or within the province of Pennsylvania, who should kill, or bring on shore, any whale in Delaware bay, or elsewhere within the boundaries of that government, should be liable to a certain penalty. In the year 1771 another act was passed for improving the navigation of the Delaware river, and in 1783 another act was passed which annexed all islands, islets, and dry land in the river Delaware belonging to the state, as low down as the state of Delaware, to such counties as they lay nearest to. And in the same year, the compact was made between the states of New Jersey and Pennsylvania, by which the legislatures of the respective states were authorized to pass laws for regulating and guarding the fisheries in the river Delaware, annexed to their respective shores, and providing that each state should exercise a concurrent jurisdiction on the said river. These acts prove, beyond a doubt, that the proprietaries of west New Jersey, from a very early period, asserted a right to the river Delaware, or to some part thereof, below low water mark, and along its whole length; and since the western boundary of the province, under the grant to the Duke of York, was precisely the same on the bay as on the river, it may fairly be presumed, independent of his grant to the proprietaries in 1680, and the concessions made by them in the year 1676, that this claim was extended to the bay, for the purposes of navigation, fishing, and fowling.

In this state of things the Revolution was commenced, and conducted to a successful issue; when his Britannic majesty, by the treaty of peace, acknowledged the several states to be sovereign and independent, and relinquished all claims, not only to the government, but to the propriety and territorial right of the same. The right of the crown to the bay and river Delaware being thus extinguished, it would seem to follow, that the right claimed by New Jersey in those waters, was thereby confirmed; unless a better title to the same should be found to exist in some other states. Whether the claim of New Jersey extended to the middle of the bay, as we see by the compact with Pennsylvania it did to the middle of the river, is a question which we have no means of solving: but that the proprietors and inhabitants of west New Jersey made use of the bay, both for navigation and fishing, under a claim of title, from a period nearly coeval with the grants of the province, can hardly admit of a doubt. This right, indeed, is expressly granted by the Duke of York to William Penn, and the other proprietaries of west New Jersey by his grant, bearing date the 6th of August 1680. It contains a grant, not only of all bays and rivers to the granted premises belonging, but also the free use of all bays and rivers leading into, or lying between the granted premises, for navigation, fishing, or otherwise. The only objection which could have been opposed to the exercise of those acts of ownership under this grant was, that the duke had himself no title to the bay and river Delaware, under the royal grant to him. But the presumption is, nevertheless, irresistible, that the benefits intended to be bestowed by this grant, and which were confirmed by the other acts of the provincial government before noticed, were considered by the inhabitants of the province as being too valuable not to be enjoyed by them. This use of the bay and river amounted to an appropriation of the water so used (Vattel, bk. 1, c. 22, § 266); and this title became, as has before been observed, indefeasible, by the treaty of peace, except as against some other state having an equally good, or a better title. How far this title in New Jersey may be affected by the grants of the Duke of York to William Penn in 1682, of the tract of country which now forms the state of Delaware, it would be improper, in this case to decide. But that the use of the bay for navigation and fishing was claimed and enjoyed by the inhabitants of that province under those grants, is as fairly to be presumed, as that it was so claimed, and used by the inhabitants of New Jersey.

And we are strongly inclined to think that, if the right of the former of these states to the bay of Delaware, was founded on no other title than that of appropriation, by having used it for purposes of navigation and fishing, the effect of the Revolution, and of the treaty of peace, was to extend the limits of those states to the middle of the bay, from its mouth upwards. But be the title of the state of Delaware what it may, we are clearly of opinion, that, as between the plaintiff, who asserts, and has certainly shown, no conflicting title in the state of Delaware to the bay, and the state of New Jersey, or those acting under the sanction of her laws, the court is bound to consider that law as a sufficient justification of the proceedings under it, provided the locus in quo was within the body of the county of Cumberland, which is next to be considered.

Thirdly. The third general question then, is, whether admitting the locus in quo to be within the territorial limits of New Jersey, it is within the limits of the county of Cumberland, in which the proceedings complained of took place? The boundaries of this county towards the bay are thus described in the act which created it: "Then bounded by Cape May county to Delaware bay, and then up Delaware bay to the place of beginning." If the opinion of the court upon the last preceding question as to the construction of the original grant from Charles II. to the Duke of York be correct, it would seem to follow that the western boundary of this county extends only to low water mark on Delaware bay; the expressions "to Delaware bay," implying nothing more than to the east side of that bay, which the law extends to low water mark. We mean not, however, to give any decided opinion on this point, because, in the first place, if there be any weight in the above suggestion, (and nothing more is intended,) the legislature of that state can, at any time, should it be deemed necessary, define with greater precision the limits of the county bordering on the bay; and secondly, because we think it unnecessary to decide that point in the present case; being clearly of opinion,

Fourthly. That the objections to this form of action are fatal. It is an action of trespass, brought by the owner of the Hiram, for illegally seizing, taking, and carrying away the said vessel. It appears by the evidence, that, at the time of the alleged trespass, the vessel was in the possession of John Keene, in virtue of a hiring of her to him for a month, by Hand, who had previously hired her of the plaintiff, and that the time for which Keene had hired her, had not expired when the seizure was made. The question is, can the plaintiff, under these circumstances, maintain this action? We hold the law to be clearly settled, that, to enable a person to maintain trespass, or trover, for an injury done to a personal chattel, the plaintiff must have had, at the time the injury was done, either actual, or constructive possession of the thing; as well as the general or qualified property therein. The merely being out of the actual possession is not sufficient to defeat the action, provided he has a right to demand it, because the general property, prima facie, draws to it the possession. But, if the general owner part with the possession to another person, under a contract which entitles such person to an interest in the thing, though for a limited time, the owner cannot be considered as having a constructive possession during that time, and consequently, he cannot maintain an action of trespass for an injury done to it during such possession of the bailee. His only remedy is an action on the case for consequential damages. See 1 Chit. Pl. 166, 167, 150, and the cases there cited. Also, 8 Johns. 337; 7 Johns. 9, 535; 11 Johns. 385. The Hiram then, having been lawfully in possession of Keene, under a contract of hiring for a month, which had not expired at the time the alleged trespass was committed, the action cannot be supported.

Let judgment be entered for the defendant.

CORINGA, The. See Case No. 1,736.

CORIOLANUS, The (JOHNSON v.). See Case No. 7,380.

Case No. 3,231.

CORKLE v. MAXWELL.

[3 Blatchf. 413.][1]

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

VOLUNTARY PAYMENT—EXACTION OF IMPORTER—STORAGE OF GOODS.

1. A payment voluntarily made cannot be recovered back, even though it could not have been enforced by law.

2. When a payment has been obtained by fraud, oppression or extortion, or when it has been made to secure a right which the party paying was entitled to without such payment, and which right was withheld by the party receiving the payment until such payment was made, such payment was not voluntary, and may be recovered back.

3. It may also be recovered back when it was made upon a wrongful demand, to save the party paying from some great or irreparable mischief or damage, from which he could not be saved but by the payment of the sum wrongfully demanded.

4. A person who has his private warehouse designated by the secretary of the treasury as a place for the storage of dutiable merchandise, under the act of August 6, 1846 (9 Stat. 53), and who, on being required by the government, before the depositing of any goods in his store, to elect to pay to the collector either the salary of an inspector, or one-half of the accruing storage at public store rates, elects the former, and makes payments thereunder, which are paid into the treasury, cannot recover them back. And this is so, even though the government had no legal right to demand the payments.

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

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

5. Under the said act of August 6, 1846, no person has any right to keep a warehouse for the storage of dutiable goods, unless appointed by the secretary of the treasury; and such appointment can be revoked at pleasure.

6. Under the said act of August 6, 1846, the government has a right to require the person whose warehouse is designated as a place for the storage of dutiable merchandise, to pay the salary of an inspector to superintend the receipt and delivery of goods from the warehouse.

This was an action at law against [Hugh Maxwell] the collector of the port of New York, to recover back certain sums of money paid by the plaintiff [John Corkle] and one Jackson jointly, to the defendant as such collector. The suit was originally brought in the supreme court of New York, and was removed into this court by the defendant. Before the commencement of the suit, Jackson assigned all his interest in the claim to the plaintiff, and the suit was, under the laws of New York, brought in the name of the plaintiff, without joining Jackson as a party.

John S. McCulloh for plaintiff.

J. Prescott Hall, for defendant.

INGERSOLL, District Judge. Early in the year 1849, the plaintiff and Jackson, being desirous to engage in the business of storing dutiable merchandise, under the warehouse act of August 6th, 1846 (9 Stat. 53), made application to the secretary of the treasury to have the store No. 71 Greenwich street, in the city of New York, occupied by them, designated for that purpose. Upon such application, it was so designated, and, on the 14th of March, 1849, the plaintiff and Jackson entered into a bond to indemnify the government, the collector of the port, and all other officers of the customs, for any loss or damage which might happen to any goods which might be stored in such warehouse under the act. The secretary of the treasury, by his circular of February 17th, 1849, gave his instructions to all collectors, and other officers of the customs, by which the occupants or owners of all warehouses of a kind with that at No. 71 Greenwich street, were required to pay monthly to the collector a sum equivalent to the salary of an inspector, or, at their option, to pay monthly to the collector one half storage, at the rates charged in stores owned by the United States, or leased by them; and this election was to be determined before any goods were placed in the store. On the 14th of March, 1849, Jackson & Corkle were required, by the warehouse superintendent, to notify the collector, in writing, whether they would pay, for the use of the inspector required at their warehouse, the sum of $1,095 per annum, payable monthly, or one half of the amount of storage accruing on goods in their warehouse, at public store rates. On the same day, Jackson replied thus to the letter of the warehouse superintendent: "I beg to inform you that, having the option of choosing, I adopt that mode of paying the inspector's salary, of three dollars per day."

During the collectorship of Cornelius W. Lawrence, to wit, up to the 1st of July, 1849, Jackson & Corkle paid to him, for the use of the United States, three dollars a day, monthly, towards an inspector's salary, for his services at their warehouse; and, during the collectorship of the defendant, to wit, from the 1st of July, 1849, to the 1st of May, 1852, they paid to him, for the like services, the like sum of three dollars a day, at the end of each month. These several payments were handed over to the treasury of the United States. When the payment for September, 1849, was made, it was made under protest, the plaintiff claiming, in the protest, that the services of an inspector were of no value to him, by reason of an order prohibiting the receipt of bonded goods at his warehouse, and also that the demand was contrary to the act of August 6th, 1846. When the payment for November, 1851, was made, it was made under the following protest, dated December 1st, 1851, addressed to the defendant: "You are hereby requested to take notice that we make the payment of this month's half storage (as inspector's salary) for the use of our private bonded warehouse, number 71 Greenwich street, under protest, claiming that you and the government have no right to collect said exactions; that they are not a proper demand against us, under any law of the United States; that the rent and labor of said warehouse is paid by us alone; that inspector's salaries are properly and solely chargeable on the general revenue, and not on us, the owners of private bonded warehouses; and that our agreement heretofore made with you, to pay half storage or inspector's salary, was compulsorily and illegally exacted from and imposed on us by you, under color of your office, as a condition of our enjoying the rights secured to us under the warehousing laws of the United States. We extend this protest to the present and all past and future similar exactions from us, and shall hold you and the government responsible for them in damages, and submit to such exactions temporarily, only to continue in the use of said warehouse. Jackson & Corkle." This suit is brought to recover back the several sums so paid.

The plaintiff grounds his right of recovery upon his establishing two propositions—First, that there was no law authorizing the government, through its agent, the defendant, to demand the payments which Jackson & Corkle made to the defendant; and, second, that such payments were not voluntary, but were made under such coercion that they can be recovered back. It is admitted by the plaintiff, that if he fails in establishing either of these propositions, he must fail in this suit. I will consider these two propositions in their reversed order.

Jackson & Corkle had no right to keep a

warehouse for the receipt and storage of dutiable goods, by any of the provisions of the act of August 6th, 1846, or by any provision of any other act of congress. Whatever right they had to keep a warehouse, was by virtue of an appointment from the secretary of the treasury. That appointment was subject to the will of the secretary. It is for no determinate time. The appointment could be revoked at pleasure, without violating any of their rights. It was subject to the will of the secretary. They had no right to continue to act as warehouse-keepers for the United States for any definite period of time. What they had was only a privilege conferred upon them by the secretary of the treasury, and which was to continue so long as he willed it should continue.

In considering the question, whether the payments made by Jackson & Corkle to the defendant were voluntary or not, or whether they were made under such coercion that they can be recovered back, it will be assumed, for the purposes of the argument, that neither the government nor the defendant had any legal right to demand the sums which were paid. But it is not every payment upon a demand which could not be enforced by law, that can be recovered back. If it was freely and voluntarily made, there can be no recovery back. But, when the payment has been obtained by fraud, or by oppression or extortion, or when it has been made to secure a right which the party paying was entitled to without such payment, and which right was withheld by the party receiving the payment until such payment was made, such payment was not voluntary, and the money can be recovered back. And it may be said, that where the money was paid upon a wrongful demand, to save the party paying from some great or irreparable mischief or damage, from which he could not be saved but by the payment of the sum wrongfully demanded, it can be recovered back. In the case in question, there was no fraud practised by the defendant upon the plaintiff, or upon Jackson. The defendant received the money honestly, and in obedience to instructions from the secretary of the treasury, and paid the same over to the treasury. No fraud can be imputed to the defendant.

But it is said by the plaintiff, that the payments were made by him and Jackson for the purpose of protecting themselves in the right which they had to use, at a time future to the payments, the store No. 71 Greenwich street, as a warehouse for dutiable goods; that they had such right without such payments; and that they made them in order that they might continue in the use of said warehouse. It has already been shown that Jackson & Corkle, at the time the payments were made, had no right to the future use of their store as a warehouse, and that they had only a privilege so to use it, so long as the secretary of the treasury willed that they should so use it. The payments were not made to secure them in a right which by law they were entitled to. This case is different from the cases which have been referred to, where an importer has been held to have a right to recover back from the collector an excess of duties which the collector has exacted. In such a case, the importer has a right (not merely a privilege) to have his goods imported upon the payment of the duties which the law imposes. And, if the collector demands a greater duty than is imposed by law, and refuses to give up the goods to the importer upon the payment of the legal duties, and will give them up only upon the payment, not only of the legal duties, but of the illegal excess, and the importer, in order to secure his right to the possession of the goods, pays the illegal excess, he can recover back such illegal excess, when a proper protest is made. Such a payment is not a voluntary payment. It is made to protect himself in his right to the goods, which he was entitled to, by law, without the payment of such excess. But Jackson & Corkle had no right, by law, to the future use of their store as a warehouse for dutiable goods. The payments made by them were, therefore, not obtained by fraud or oppression or extortion, nor were they made to secure themselves in a right that was unjustly withheld from them. Therefore, they cannot be recovered back, even though the government, through its agent, the defendant, had no legal right to demand them. The payments were, in contemplation of law, voluntary, and not made under coercion.

But I am of opinion, that the claim which the defendant, as the agent of the government, made upon Jackson & Corkle, and which they paid, was a claim authorized by law. The intent of the act of August 6th, 1846, was, that the duties on all imported goods should be paid in cash, at the time of the importation. It provided, however, that if the duties were not so paid, the goods should be taken possession of by the collector, and be deposited in a public store or other store for receiving dutiable goods, and that they might there be kept, without the p yment of duties, for the space of one year, at the charge and risk of the importer, and not at the charge or risk of the United States. No expense or charge was to accrue to the United States, in consequence of the neglect of the importer to pay the duties and take the goods at the time of the importation. If they remained in store beyond one year, without the payment of the duties and charges thereon, they could be sold by the collector, and the proceeds of the sale, after deducting "the usual rate of storage," "with all other charges and expenses, including duties," were to be paid over to the importer. If, at any time within the year, the goods should be entered for re-exportation, the collector was required, upon the payment of the appropri-

ate expenses, to permit the goods to be shipped without the payment of any duties. In no event were the United States to be at any charge or expense for storing.

The store of Jackson & Corkle was authorized by the secretary of the treasury to be used by them as a private warehouse for the storage of dutiable goods. They were to receive the prices of storage for all goods stored in their warehouse. In this way they were to be benefited. They were to be at all the expenses and charges of having their store placed in a proper condition to be used as a warehouse for the storage of dutiable goods. To be placed in such proper condition, it was not only necessary that the building should be of a proper construction, with proper fixtures, but, also, that it should have attendants, to keep the goods safely for the purposes for which they should be stored. It would not be in a proper condition for a warehouse without an inspector, to guard and watch the goods while deposited in the building, and to superintend their receipt into and delivery from it. As, therefore, it was necessary there should be an inspector, to make the building a proper warehouse, and, as Jackson & Corkle were, at their own expense, to do everything to have the building in a proper condition to be used as a warehouse for dutiable goods, it was right they should bear the expense of such inspector. That would be carrying out the intent of the act of August 6th, 1846, which was, that no expense should accrue to the United States in consequence of the neglect of the importer to pay the duties and take the goods at the time of the importation. If the goods had been stored in a public warehouse, the United States would have been reimbursed for that expense, by proper charges against the goods for storage. And the arrangement made between the secretary of the treasury and Jackson & Corkle, was a proper one to free the United States from the charges of storing the goods in a private warehouse.

It is said by the plaintiff, that the whole amount paid for the inspector's salary was not, in fact, paid over to the inspector, and that, at all events, for the amount thus not paid over, a recovery can be had. However the fact may be, for the reasons suggested upon the point first considered, no recovery can be had.

Judgment for defendant.

Case No. 3,231a.

CORKS v. The BELLE.

[8 Betts, D. C. MS. 63.]

District Court, S. D. New York. Nov. 5, 1846.

COLLISION—STEAM AND SAIL—EVIDENCE—BURDEN OF PROOF—COSTS.

[1. The burden is on the libellant to prove the fault of the vessel charged with causing a collision, and also to prove that his vessel was free from blame.]

[2. The general veracity of witnesses to a collision should not be impeached because of their different statements of attendant incidents, as the confusion and disturbance consequent on the occurrence would naturally tend to prevent such distinct observation as would enable the eyewitnesses to give concurrent descriptions.]

[3. Where, by a preponderance of evidence, it does not appear that a collision between a sloop and steamboat charged as the cause thereof was due to any want of skill or care on the part of the latter, it is unnecessary to inquire into the conduct of the sloop, as failure to prove the fault of the steamboat necessitates a dismissal of the libel.]

[4. There having been strong probable cause for the action, and the sloop having sustained the principal injury, no costs should be awarded against her.]

[In admiralty. Libel by Isaac Corks, owner of the sloop Hoaxer, against the steamboat Belle, for damages sustained by collision.]

PER CURIAM. The owner of the sloop Hoaxer brings this action of collision for damages received from the steamer. The two vessels came together in the nighttime, last May, on the North river, and nearly opposite to Cold Spring. The points of collision were the starboard bow of the sloop and the larboard part of the steamboat, aft her wheel house.

The testimony presents the usual discordance in the statements given of the relative positions of the two vessels, and of the causes leading to the accident. The libellant, of course, has the burthen on himself of making out, by preponderance of evidence, that the steamboat was in fault, and that the collision was not induced by any conduct blamable on the part of the sloop, and that she could not, under the circumstances, have avoided it. The captain of the sloop, and his two men on board, agree in fixing her position, just preceding the collision, east of the middle of the river, heading directly up the river, on a S. E. wind. The two men also state that the Belle was running down west of the middle of the river, and one of them says on the west shore. They assign, as the cause of the collision, a sudden change of course by the Belle, veering nearly eastwardly, and running directly across the bows of the sloop, and east of the middle of the river. The general veracity of these witnesses is not to be affected by the different relations they give of the incidents attending the collision. The alarm necessarily accompanying such an occurrence, at the time and place, would naturally occasion confusion and disturbance on both sides; and it is not to be expected that witnesses will preserve such self-possession or distinctness of observation or recollection as to enable them to exactly concur in their descriptions of what they saw. The two men (Atkins and Lost), it would appear, were both engaged steering the sloop. Atkins says, when he saw the steamboat close to him, she was coming, bow on, to the sloop's larboard side, and about

midships. That he kept the sloop away, which changed her bow from larboard to starboard towards the stern, and brought the bowsprit under her wheel guards. The steamer crossed the sloop's bows, and, by the blow, turned her head down the river. Lost, the other pilot, says that when the Belle was 50 yards off, the sloop was ordered to keep away, and he obeyed the order, which brought her head about west; the Belle was steering directly east, across the bows of the sloop. It is manifest that, if the idea of this last witness was accurate, the two vessels, running in opposite directions, on the same, or parallel lines, must either strike directly head and head, or come together side by side; and he must, accordingly, have misapprehended the effect of his own manoeuver, or the course the Belle was making. But the evidence on the part of the steamboat, reverses the relative position given the vessels by those for the libellant, and shows the sloop was west of the middle of the river, and the Belle in the middle, or nearly so, and east of the sloop, so as to have the course she was running leave the sloop a clear berth to the west. Brett, Adams and Germain, swear the sloop was west of the Belle. Foster, Ensign and Ostrom (the latter called by the libellants) corroborate their statement that the Belle was in the middle of the river, keeping her due course down.

Those of the witnesses who observed the course of the sloop speak of her as bearing off westwardly, or immediately up the river, but not in the way of the steamer till she jibed. When that manoeuver was made, her head was brought round eastwardly, and she continued off about N. E., and directly towards the steamer. Brett, one of the pilots of the steamboat, says the sloop jibed at a distance of 150 yards or less from the Belle: Adams a deck hand, thinks she was within ¼ of a mile or more, at jibing: Germain, 2d engineer, saw her jibe, and immediately the bell rang to stop the boat, and the engine was instantly stopped. Atkins thinks the sloop jibed about a mile from the Belle, and that the collision was 20 minutes after. Lost says it was 20 minutes after he had been ordered to keep away, and had turned the head of the sloop west, that she struck, and was 150 yards off when she jibed. Witnesses must not be held with positiveness in respect to time and distance and circumstances such as existed in this case. The combined velocity of the two vessels was computed at 18 miles the hour, and it is therefore most palpable that twenty minutes, as supposed by Atkins, could not have been occupied in passing a mile; nor that Lost kept away 20 minutes after the collision became threatening, or that he was 20 minutes passing 150 yards. Instead of a few yards, the boats would have run five miles in twenty minutes. The estimates made by the pilot of the Belle is much more rational, and is probably as correct as might be expected or required. He supposes the vessels 150 to 200 yards apart, when the sloop jibed; and, as Atkins says the effort to keep away by the sloop was when the vessels were nearly in the act of striking, it would seem rational to conclude the movement of the sloop northeasterly, as the effect of jibing, would throw her nearly on the track of the Belle. The distance of 150 to 200 yards would not exceed ⅛ of a mile, and, if the speed of the two boats was a mile in four minutes, less than a minute would bring them together after the jibing of the sloop. Such undoubtedly was the fact, and whether stopping the steamboat, or attempting to keep away the sloop before the wind, were the best possible modes of avoiding the danger, or lessening it, or some other proceeding would have availed better than either, the court will not now decide or inquire. Each vessel did what, under the exigencies, seemed, on board, best adapted to meet the peril; and courts are very cautious in substituting their own judgment, founded upon after views of the facts, as decisive of what was a reasonable and proper course of navigation or effect, at the instant, and under the circumstances in which a danger is presented to those navigating vessels. It is not necessary to go further then to inquire whether fault or want of due skill and care have been established against the steamboat, as the cause of the injury, and the propriety or good judgment of the conduct on board the sloop can be of no moment until the evidence fixes blame upon the Belle, and shows the injury to have resulted from her misconduct. And I think, most clearly, the libellant fails making that proof by a preponderance of evidence.

The weight of testimony is against the allegations of the libel. The steamboat was navigating in about the middle of the river, and it is disproved that she was east of the sloop, and it is certain that, whatever her deviation was from a direct course down the river, it was made more eastwardly for the purpose of avoiding the sloop. The collision was on the starboard side of the steamer, and of course, the sloop being, by the weight of evidence, shown to have been west of her, far enough off to be secured a full berth, it must have been occasioned by the jibing of the sloop, and then heading off rapidly into the track of the Belle. On the proofs as they stand, I accordingly find that the steamboat was not in fault, and that the libel must be dismissed. But as there was very strong probable cause for the action, and the injury was chiefly sustained by the sloop, I shall not order costs.

Case No. 3,232.

In re CORLIES.

[1 Betts, C. C. MS. 10.]

Circuit Court, S. D. New York. April Term, 1841.

BAIL—FORFEITURE OF RECOGNIZANCES—SUMMARY JURISDICTION—OFFICERS—MARSHAL—NOMINAL SURETY—EQUITY.

[1. Money paid to a marshal in satisfaction of forfeited recognizances, upon mere notice of forfeiture, and without process or coercion, is a part of the fund for the payment of jurors and witnesses, and is received by the marshal as an agent of the treasury department. It can be recovered from him by an action at law if wrongfully paid, but is not within the custody or summary jurisdiction of the court.]

[2. Where a person accused of crime furnishes money to a nominal surety to indemnify him for giving bail, and thereafter flees the country, any claim by the nominal surety to have the money paid by him on the forfeited recognizances refunded is without sufficient equity to warrant the exercise of the court's summary jurisdiction to that end.]

[In the matter of Joseph W. Corlies' bail for James Bottomly, Jr. Heard on motion to vacate an order forfeiting the recognizances, to have the recognizances delivered up and cancelled, and to compel Mr. Waddell, ex marshal, to refund the amount of the recognizances.]

BETTS, District Judge. A motion was made in this case at the close of the last November term, and was argued by the counsel for the applicant and by the U. S. attorney on behalf of the U. S., and by counsel for the late marshal. The judges having no opportunity to confer upon the case, it was necessarily laid over to the present term. The motion is founded upon an affidavit and notice, and seeks to have vacated two orders of the court entered the 6th of August, 1838, forfeiting two several recognizances before that entered into by the applicant, and to have the two recognizances delivered up and cancelled; and also that the late marshal, Mr. Waddell, repay $4,000, the amount of said recognizances paid him by the applicant on the 10th of August, 1838. The notice also indicates that such other relief will be asked for as the nature of the case may require.

On the 23rd day of April, 1838, James Bottomly, Jr., was arrested on two warrants,—one on a charge of perjury, and the other of bribery, committed in entering goods at the custom house of this port. He was brought before a police magistrate, and the examination at his instance was deferred until the next day, and the magistrate signed his commitment on the charges, for examination. The prisoner was then brought to the marshal's office, and, at his instance and by mutual assent of the district attorney and the counsel for the prisoner (the applicant Corlies being also present), it was arranged that the prisoner should give bail to appear before the district judge the next morning, and the two recognizances in question were therefore executed before L. Rapelje, U. S. commissioner, &c., and the prisoner was discharged. He immediately fled the country. The next day, Corlies requested the deputy marshal to have no costs made on the recognizances, as he would pay the money on notice to him that it must be paid. He also declined the offer of the marshal to be supplied with officers and assistants to pursue and apprehend the prisoner. The collector deposes that he was informed and believes Corlies was indemnified for becoming bail. On the day the deputy marshal informed Corlies that the recognizances had been forfeited, he paid to him the money in question. No process was taken out; no demand was made upon him; and no coercion or threat employed. The applicant has never brought his action in a state court against the late marshal to recover back the money.

We do not deem it necessary to decide or discuss the various points brought forward on the argument, respecting the regularity of the proceedings in taking or forfeiting the recognizances, or whether the applicant has lost his right to relief on motion, from his long laches. It appears to us there are two insuperable objections to any order being now given by the court, touching the disposition of the money: First, that the marshal is out of office, and is not holding the money under any process or authority of the court. To certain purposes a marshal may remain an officer of the court, and be subject to its authority, at least whilst he is yet acting under or executing its process, although his term of office has expired; but we are not aware of any principle which subjects him to the summary jurisdiction of this court, after his commission has terminated, for his official acts not connected with the execution or return of process. But, second, we had occasion to observe soon after this money was paid the marshal, on deciding a motion or petition in behalf of the marshal that he had the instructions or directions of the court whether to pay it over to the collector or to the United States, that the money, after it was collected, in no way came under the authority of the court. It is not to be paid into court, nor is the marshal a depository, subject to the orders and control of the court in respect to such monies.

By the act of March 3, 1791, congress appropriated a sum arising from fines and forfeitures to the United States, and equal to the amount thereof, for the payment of jurors' and witnesses' fees, &c. 2 [Bior. & D.] Laws, 226, § 1 [1 Stat. 216]. The act containing this appropriation clause was repealed May 8, 1792. 2 [Bior. & D.] Laws, 302, § 8 [1 Stat. 278]. But the clause itself is recognized as in force by every appropriation bill passed since that period,—the appropriation to those objects being invariably "in aid of the fund arising from fines, penalties and forfeitures," &c. Act March 3, 1841 [5

Stat. 427]. The practice in this court has always been in conformity to that allotment of such monies; the proceeds of all fines and penalties being paid directly to the marshal, except in cases of forfeitures on seizures under the revenue laws, or others, which are collected by means of the process of the court. In such cases the money comes first into the court, and is thereafter paid out to the collector, &c., and doubtless whilst the marshal holds the process or the money made by it he may be amenable to the court in respect to such collection to the same degree as in other suits pending. But often in the one case the money goes into the hands of the collector, and in the other to those of the marshal, to be disbursed pursuant to the provisions of law or to be accounted for with the treasury department, and the matter no longer belongs to the cognizance of the court.

We think the principle applies directly to the present motion. This money must necessarily enter into the accounts of the late marshal with the treasury department, as a disbursing agent of that department, and not as an officer of the court. It was never deposited in court, or placed with the marshal by its order or authority. The marshal is by statute to pay the contingent expenses of the court, including jurors' and witnesses' fees and those of the district attorney and clerk in criminal cases. Yet, although the fees accrue from services rendered in court in aid or execution of its powers and functions, the court will never exercise a summary jurisdiction over the marshal to enforce such payments, for the plain reason that the money is not committed to him by the court or obtained by him through its process or powers.

We do not say the court would not interfere in respect to this money had it been made by execution or the forfeiture of the recognizances or had it been collected by other coercion from the bail by the marshal colore officii; but the facts of this case do not bring it within the reason or equity of such jurisdiction admitting the court might rightfully exercise it. Again, it is palpable, upon the depositions before us, that this was the money of the criminal, and not of the bail, and all the concomitant circumstances render the transaction equivalent to a deposit of the money by the accused with the marshal as a pledge for his appearance. This was a favor accorded him at his urgent instance, and with the assent of his counsel and the district attorney. There can be no ground, therefore, to impute or surmise extortion or oppression by the officer in the act. When the accused instantly availed himself of the indulgence to abscond from justice and flee the country, there is wanting every ingredient of conscience and equity in the demand of his nominal surety to have the pledge refunded him; and it is only in cases of urgent and impressive equity that the summary relief now invoked will be granted a party. If he has relief at law, that resource is open to him, and we shall leave him to the action he has instituted, without intimating any opinion upon the legal validity of the proceedings under which the money came into the marshal's hands. The court in which the action is pending is the proper tribunal to which those points should be submitted. Motion denied, with costs.

Case No. 3,233.

CORLISS v. WHEELER & WILSON MANUF'G CO.

[2 Fish. Pat. Cas. 199;[1] 9 Pittsb. Leg. J. 89.]

District Court, D. Connecticut. Oct. Term, 1861.

PATENTS—"VALVES OF STEAM ENGINES"—CONSTRUCTION OF CLAIM.

A claim for "the method, substantially as described, of regulating the velocity of steam engines by combining a regulator with a liberating valve gear," covers not only the specific arrangement and combination described in the specifications, but any arrangement and combination, for the purposes mentioned, which embody the ideas, principle, and mode of operation of the patentee.

This was a bill in equity filed to restrain the infringement of letters patent for "improvement in cut-off and working the valves of steam engines," granted to the complainant [George H. Corliss] March 10, 1849, and reissued May 13, 1851, and again, in six divisions, July 12, 1859; and, also, of letters patent for "improved cut-off gear," granted to him July 29, 1851, and reissued July 26, 1859. The claims of the original patents are given below; those of the reissues will be found in the opinion of the court.

Patent of March 10, 1849: "What I claim as my invention, and desire to secure by letters patent, is, First. The method, substantially as described, of operating the slide valves of steam engines, by connecting the valves, that govern the ports at opposite ends of the cylinder, with separate arms of the rock shaft, or the mechanical equivalents thereof, so that, from the motion thereof, the valve that keeps its port or ports closed shall move over a less space, while its port or ports are closed, than the one that is opening or closing its port or ports, and vice versa, while, at the same time, the two arms by which they are operated have the same range of motion, as described, whereby I am enabled to save much of the power heretofore required to work the slide valves of steam engines, and by which, also, I am enabled to give a greater range of motion to the valves at the periods of opening and closing the ports to facilitate the induction and eduction of steam, as specified. And lastly, I claim the method of regulating the motion of steam engines by means of the centrifugal regu-

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

lator, by combining the said regulator with the catches that liberate the steam valves, by means of movable cams or stops, substantially as described."

Patent of July 29, 1851: "I claim the arrangement of the lifting rods, and the method of operating them by the disc plate, as represented in the accompanying drawings, is peculiarly suited to this method of effecting the disengagement of the valves from the mechanism by which they are opened, for the disc plate imparts a transverse motion to the connecting rods, which causes them to rock upon the stops, and thus slide off their respective toes on the rock-shaft arms. But while I prefer this arrangement of eccentric gear, I wish it to be understood that I do not restrict myself to its employment, as my improvement may be applied to many other systems of mechanism by which valves are opened. As such systems may not possess the peculiar rocking motion I have mentioned, it will be necessary, in some cases, to disengage the lifting rods by some moving member of the engine, through the combination of any convenient and suitable mechanical device. In combination with the reciprocating motions communicated to the lifting rods by the eccentric gear, I claim imparting a lateral movement to the free extremities of said lifting rods, to disconnect them from the valves and permit the latter to close, to cut off the steam or other expansible fluid by which the engine may be driven, whereby these rods are made to perform their usual duty of opening the valves, and, in addition, that of catches or latches in alternately connecting the valves with, and disconnecting them from, the mechanism by which they are opened, thus greatly simplifying the construction of the valve gear, rendering the same more durable and less liable to get out of order."

R. S. Baldwin, E. W. Stoughton, and B. R. Curtis, for complainant.

B. F. Thurston, R. J. Ingersoll, E. M. Dickerson, and C. M. Keller, for defendants.

NELSON, Circuit Justice. 1. The patent issued to Corliss, dated July 12, 1859, numbered 763, and which is a reissue, in part, of the original patent [No. 6,162], dated March 10, 1849, claims as follows: "The method, substantially as described, of regulating the velocity of steam engines, by combining a regulator with a liberating valve gear." We are of opinion that the claim covers, not only the specific arrangement and combination described in the specification, but any arrangement and combination, for the purposes mentioned, which embody the ideas, principle, and mode of operation of the patentee; and that, within this interpretation of the claim, in connection with the specification, the defendants' machine complained of, infringes the complainant's patent. We are also of opinion that the arrangement and combination were new and patentable.

2. The patent issued to Corliss, dated July 12, 1859, numbered 759, and which is also a reissue, in part, of the original patent of March 10, 1849, claims as follows: "The combination of liberating valve gear with valves which are moved parallel to their seats, and continue their closing motion after their ports are closed, and commence their opening motion before their ports open." Another patent issued to Corliss, dated at the same time, numbered 760, and which was also a reissue, in part, of the patent of March 10, 1849, claims as follows: "The combination, substantially as described, of an air cushion with the liberating valve gear of steam engines." We are of opinion that both the above improvements are new and patentable, and that the defendants' machine infringes the patents.

3. The patent issued to Corliss, July 26, 1859, numbered 780, and which is a reissue of the original patent [No. 8,253] of July 29, 1851, claims as follows: "(1) Combining with the rocking levers or their equivalents, for operating the valves, the shoulders on the spring bars or their equivalents, substantially as described and for the purpose specified. (2) And I also claim, in combination with the shoulders on the spring bars that operate the rocking levers, substantially as described, the employment of the gauge bars or an equivalent therefor, to regulate the periods of closing the valves, whether the said gauge bars be regulated by a governor, or by other means as set forth."

We are of opinion the above improvement is new and patentable, and that the defendants' machine infringes the patent.

Case No. 3,234.

The CORNELIA AMSDEN.

[5 Ben. 315.][1]

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

SEAMAN'S WAGES—MATE—DISOBEDIENCE TO UNREASONABLE ORDER—WRONGFUL DISCHARGE.

The mate of a schooner had been on duty while the vessel was in port, from 5 a. m. on Saturday to nearly 2 a. m. on Sunday. Having then got the vessel ready to be towed out of port in the morning, he went to bed. About half past 3 the master called him to turn out, to help take the vessel out of port. The mate refused, and the master himself cast the schooner off from the dock, and a tug towed her out of port, and the vessel sailed, the mate doing duty, without further disobedience, till she arrived in the port for which she was bound, when the master discharged him, offering to pay his wages up to the time of his discharge if he would give a receipt in full. The mate obtained some employment after his discharge, but for short periods and at a less rate of wages, and filed a libel against the vessel to recover wages up to the end of the month during which he was discharged. His disobedience was set up as a defence. *Held,* that the mate

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

was disobedient, but his offence was a very slight and venial one, not justifying his discharge, and that he was entitled to some indemnity, to be fixed by the discretion of the court; that he must be allowed full wages up to the end of one half month after his discharge, and wages at one-third of the agreed rate up till the end of the month in which he was discharged, and his expenses of travel from the port where he was discharged to the port where he was shipped.

[Cited in The Superior, 22 Fed. 928.]

HALL, District Judge. This is a suit for seaman's wages. The libellant, Arnold G. Harris, was shipped as first mate, for the season of navigation of 1871, at the wages of $60 per month, on the 3d of April, 1871, at the city of Buffalo, N. Y.; and was discharged by the master of the Amsden on the 9th of May, at Erie, Pennsylvania. This suit was brought to recover the balance alleged to be due him for two months' wages up to the 3d June, 1871; and the libel alleges that the libellant was discharged without just cause.

The answer alleges, "that on or about the 7th day of May, 1871, and while said schooner was in the harbor of Toledo, and was about to leave said port of Toledo for the port of Erie, in the state of Pennsylvania, with a cargo of oats on board, the said libellant, being then on board in the capacity of first mate, then and there refused to perform service as first mate on board of said vessel, and then and there refused to obey the lawful command of the master of said schooner, and was then and there guilty of disobedient, mutinous and improper conduct on board of said schooner; that in consequence of such disobedient, mutinous and improper conduct on the part of said libellant, the master of said vessel was compelled to discharge said libellant from the service of said vessel, and did, for the reason aforesaid, on or about the 9th day of May, 1871, at the next port the said vessel reached after leaving Toledo aforesaid, to wit, at Erie aforesaid, discharge said libellant from the service of the vessel, and at the same time offered to pay him for all services he had, up to the time of such discharge, rendered on board of said vessel; and also offered to pay the fare of said libellant from Erie to Buffalo." It also alleges the libellant's refusal to accept what was so offered. The allegations of the answer are, perhaps, too general, indefinite and uncertain, to entitle the claimant to show the libellant's disobedience and misconduct as a justification for his discharge—Macomber v. Thompson [Case No. 8,919]—but, as no objection to the answer was taken before or at the hearing, the question of the sufficiency of the answer will not be discussed, and the case will be considered upon its merits under the proofs of the respective parties.

The evidence shows that the libellant, a resident of Buffalo, after being thus hired for the season as first mate, faithfully served in that capacity until the 7th of May, 1871; that on Saturday, the 6th of May, while the vessel was lying at anchor in the harbor of Toledo, and about 5 o'clock in the morning, the libellant called the men and turned to and kept the crew at work until about 5 in the evening—the master being absent from the vessel much of the time during the day; that then a tug came alongside with orders from the master to get up anchor and lay the Amsden alongside an elevator; that they got alongside the elevator and made the vessel fast, but the elevator not being ready to receive the vessel's cargo, the work on the vessel was resumed and continued until about 8 o'clock in the evening; that about 8 o'clock the elevator commenced receiving the vessel's cargo of grain, and the libellant, as first mate, then went into the elevator and remained there, tallying the grain, until half past 1 o'clock on Sunday morning, when the last of the cargo was delivered,—the libellant and the crew having been kept on duty until that time; that they then cleared up the decks of the vessel, hoisted in the boat, put the hatches down, and about 2 o'clock at night got the tow-line on board, ready for moving in the morning; that the libellant then told the crew they might turn in, and went to his berth; that the vessel was safely moored and was exposed to no danger where she lay; that the libellant had been asleep but a short time when the master of the tug rapped at the cabin door and woke him up; that he told the master of the tug to go away and not trouble him until daylight; that the master of the tug said the day was breaking then, but went away; that the master of the Amsden soon after, and about 20 minutes to 4 o'clock, got up and told the libellant to call the men; that the libellant replied that he had worked them all night, and could not get up until daylight; that the master of the vessel again told the libellant he wanted him to get up and get the vessel under way, and the libellant again declined; that the master of the vessel soon after cast the lines off the dock, and the tug then straightened up on the tow-line, and started the vessel for Erie, when the libellant came out and resumed his duties, going into the forecastle and turning out such of the men as had not turned out on the call of the master; that he continued to do duty as first mate without any farther difference with the master, or any neglect of duty, until they reached Erie,—which they did about noon on Monday,—and there discharged the cargo, under the libellant's supervision and direction. On Tuesday morning, after the cargo had been discharged, and while they were washing up the deck, the master of the Amsden told the libellant there were no freights for them at Sandusky, and the vessel would probably lay up; that he did not want him any longer because they could not agree, and that he would settle with the libellant there, at Erie; and he then

discharged him from the vessel. After this discharge the master of the Amsden offered to pay the libellant his wages up to the time of the discharge, if the libellant would sign a receipt in full, written by the master, which the libellant refused to do; and the master then declined to pay him. The libellant left the vessel, stating to the master where he could be found, and his willingness to go on board at any time. The vessel did not lay up, but continued her usual employment; and the libellant did not get other employment as mate, though he made some efforts for that purpose. He, however, got other employment at different times, for very short periods and less pay. The master of the Amsden has since employed a first mate in the place of the libellant, at less than $50 per month. There is some evidence that there was a demand for first mates at Buffalo at prices varying from $40 to $60 per month, and it is believed the libellant might have obtained employment at the former wages.

There can be no doubt that there was a single act of disobedience of orders on the part of the libellant; but there is scarcely any doubt that the requirement of the master which led to such disobedience was unusual and apparently unreasonable, if not unjustifiable and oppressive. There is nothing in the case to show that any extraordinary emergency existed which would fully justify the master of the Amsden in requiring his mate, who had been kept constantly on duty from 5 o'clock on Saturday morning to nearly 2 o'clock on Sunday morning, to turn out at half past 3 o'clock on Sunday morning, and before he had more than an hour and a half of rest, in order to take the vessel out of a port where she was safely moored. At most the offence was a very slight and venial one, —even if it be conceded that the master had a strict right to require his crew to take the vessel from port at that early hour of the Sabbath,—and no other act of disobedience or misconduct being imputed to the libellant, either in the pleadings or by proof, his discharge was clearly unlawful. See 1 Pars. Mar. Law, 461, note 3, and cases cited; Smith v. Treat [Case No. 13,117].

The opinion of the late Judge Ware, in the case last cited, expresses, in the most appropriate and exact terms, the general doctrines of the courts of admiralty bearing upon the question under discussion; and it states very clearly and succinctly the principal reasons which have influenced their judgments. The views expressed in the following extract from his opinion must meet with general concurrence. He says: "Generally speaking, the causes which justify the master in discharging a seaman before the termination of the voyage, and especially in a foreign port, are such as amount to a disqualification, and show him to be unfit for the service he has engaged for, or unfit to be trusted in the vessel. They are: Mutinous and rebellious conduct, persevered in; gross dishonesty or embezzlement, or theft, or habitual drunkenness; or where the seaman is habitually a stirrer-up of quarrels, to the destruction of the order of the vessel and the discipline of the crew. 1 Pet. Adm. 168, 175 [Thorne v. White, Case No. 13,989]; 2 Pet. Adm. 268 [Black v. The Louisiana, Case No. 1,461]; Bee, 148, 184 [Drysdale v. The Ranger, Case No. 4,097; Sprague v. Kain, Id. 13,250]; Orne v. Townsend [Id. 10,583]; The Lady Campbell, 2 Hagg. Adm. 5; The Vibilia, Id. 228. Ordinarily the law will not justify the master in dismissing a seaman for a single offence, unless it be of a very high and aggravated character, implying a deep degree of moral turpitude—or a dangerous and ungovernable temper or disposition. It looks on occasional offences and outbreaks of passion, not so frequent as to become habits, with indulgence, and by maritime courts it is administered with lenity and a due regard to the character and habits of the subjects to whom it applies. They are a race of men proverbially enterprising and brave, exposed by the nature of their employment to great personal dangers and hardships, contending with the elements in their most violent and tempestuous agitations, and encountering these dangers and hardships with the most persevering courage. But with all this they are of a temperament hasty and choleric, quick to take offence, and ready on the excitement of the moment to avenge any supposed wrong or indignity. The law looks on the fairer traits of their character with kindness, and as making some compensation for defects and faults which are perhaps not unnaturally, or at least are very frequently, associated with those qualities which render them so valuable to their country in peace as well as in war. And when these show themselves occasionally, and are not habitual, it will not visit them with severity, but imposes its penalties with a sparing hand. From considerations of this kind, the court will seldom punish a single offence with the forfeiture of all the wages antecedently earned, much less will it be held as a justification of a discharge of a seaman from the vessel."

It must, however, be remembered that the language of Judge Ware, just cited, was used in a case where the libellant was a common seaman only, and that courts of admiralty would be less indulgent and much more exacting in the case of the first or second officer of a vessel. His higher position, greater compensation, and imperative duty to abstain from setting a bad example to the crew, as well as his presumed superiority in every quality which enables one to understand and appreciate the necessity of a strict discipline and due subordination and obedience on ship-board, and to be temperate and discreet in language and conduct, under circumstances likely to excite the angry or evil passions of an ordinary seaman, would properly be considered as a just

foundation for exacting a strict performance of duty, and for punishing with due severity, by deduction of wages or otherwise, every act of disobedience or misconduct.

The question in regard to the amount which the libellant is entitled to recover in this case is a more difficult one. It was not insisted that the suit was prematurely brought, and the question is therefore one of amount of wages, compensation, or damages. The libellant has not obtained other employment as a first mate, or as a mariner, and it would seem that if he was a competent first mate, he was not probably bound to seek employment in the capacity of a seaman before the mast—Sheffield v. Page [Case No. 12,743]—in order to reduce his claim to full indemnity for the loss of his stipulated wages.

In all cases of unlawful discharge, the seaman has a right to full indemnity, and, in some instances, the discharged seaman has been allowed wages for the full voyage, though he was discharged long before its close. I am inclined to think that in ordinary cases a full indemnity for his loss (deducting his wages earned in other employment during the period of his engagement) should be held sufficient. And the reasons which have induced courts or admiralty to allow seamen shipped for a voyage to distant foreign ports and back, full wages for the whole voyage when discharged without cause in a foreign port where it would be very difficult for them to secure employment, do not apply with the same force to engagements for the season upon our inland waters, with their numerous ports in easy communication with each other, and at which it is not ordinarily difficult to secure employment. And when, as in this case, the libellant was actually disobedient, and, perhaps, technically in fault,—when he might properly, perhaps successfully, have appealed to the reason and humanity of the master in the first instance, instead of bluntly refusing obedience,—a court proceeding according to the course of the civil law, and therefore entitled to exercise a liberal discretion in fixing the amount of the libellant's recovery, can properly limit itself to what will probably, if not certainly, be a just indemnity to the libellant. Fland. Mar. Law, 377, 378, note 1, and 400; Emerson v. Howland [Case No. 4,441]; 1 Pars. Mar. Law, 462, note 5, and cases cited.

In view of all the circumstances, I shall allow the libellant full wages up to the end of one half month after his discharge, and $3.75 for his fare and expenses in travelling from Erie to Buffalo; and at the rate of $20 per month for the residue of the time up to the 3d of June, the end of the second month of his engagement. Such an allowance as will afford no encouragement to either master or seaman to violate his engagement should be made, and I have endeavored to do so in the present case. And, in cases where it is proper, I shall not hesitate to punish disobedience or misconduct by a deduction from the wages earned, or to discourage and discountenance the bringing of suits on frivolous grounds, by the exercise of a suitable discretion in respect to costs.

There will be a decree for the libellant for $36.75, with costs.

CORNELIUS (HENRY v.). See Case No. 6,380.

Case No. 3,235.

The CORNELIUS C. VANDERBILT.

[Abb. Adm. 361.][1]

District Court, S. D. New York. Dec. Term, 1848.

COLLISION—STEAM AND SAIL—DEPARTURE FROM RULE—NEW YORK HARBOR.

1. Where a steamer and sailing vessel are approaching each other in dangerous proximity, it is not, in ordinary circumstances, the duty of the sailing vessel to give way to the steamer; but it is her right and her duty to maintain her course.

[Cited in The Sunnyside, Case No. 13,620.]

2. But if there are special circumstances from which it clearly appears that the sailing vessel can prevent a collision otherwise inevitable, by a departure from her course, she is bound to make it.

[Cited in The Nacoochee, 22 Fed. 859.]

3. A sailing vessel on the wind, meeting or converging towards a common point with a steamer, has no right to persist in her course in such a manner as to make a collision probable, or so as to drive the steamboat into danger or exposure in order to avoid her, particularly after being hailed to change her course.

[Cited in McWilliams v. The Vim, 12 Fed. 914; The Garden City, 19 Fed. 535.]

4. This principle is especially applicable to sailing vessels and steamers meeting in the harbor of New York.

This was a libel in rem, by Elias S. Bloomfield, owner of the sloop Grocers, against the steamboat Cornelius C. Vanderbilt, to recover damages for a collision between the two vessels.

Bloomfield, for libellant.
H. B. Cowles, for claimants.

BETTS, District Judge. On the afternoon of the 25th of July last, the steamboat Cornelius C. Vanderbilt, and the sloop Grocers, owned by the libellant, came into collision off the Battery, in the harbor of New York. The sloop sustained damages, as is alleged, to the amount of about $400.

The collision occurred in the following manner:—The steamboat left pier No. 1, on the North river side, at her stated time, 5 p. m., for Stonington. Her wheel, as usual, was put hard-a-starboard on starting, in order to bring her round on a curve to her true course, in the shortest space practicable. The wind was southwest, blowing free, and the tide flood. As the steamer was in the act of leaving the dock, and under way, the

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

sloop Grocers was seen out in the river, about a quarter of a mile distant. The sloop was on the wind, upon her starboard tack, heading southeasterly, with the wind free about two or three points. The sloop was bound into the East river and up the Sound. In the direction the two vessels were pursuing, their tracks would necessarily cross, and in such manner as to render a collision inevitable. They struck within a minute or two, the steamer being still on her turn, so that the bows of the two vessels came together obliquely side by side; as some of the witnesses expressed it, they "sagged up against each other." The engine of the steamer had been stopped and reversed, and the wheels were working backward when the vessels struck. When they were several rods apart, the sloop was hailed earnestly from the steamer to luff, or to put her helm down. The master of the sloop replied, "he would be d——d if he would do it." The master of the steamboat Knickerbocker, whose boat was close alongside of the Vanderbilt, and crowded in shore by the latter boat in making her turn or sweep, testifies to the hail and reply, and says that there was sufficient room between the sloop and steamer for the sloop to have luffed and avoided the steamer, and that there was nothing in the way to prevent her so doing, or turning about if necessary. This statement, as to the ability of the sloop to make either movement, is fully supported by the testimony of two passengers on board of the Vanderbilt,—one of them an experienced boatman. The position of the sloop and other vessels in the vicinity prevented the steamer bearing up to the starboard.

Laying out of view the evidence of the master and two pilots of the steamer, and that of the master and two hands of the sloop, whose statements as to the relative positions and acts of the two vessels are in direct conflict, there is opposed to the testimony of the two passengers the evidence of Midshipman Mulligan, who observed the transaction from the frigate Cumberland, at anchor a few rods off from the point of collision. His examination was taken by deposition, out of court, and in applying his statements to the case, it must be remarked, that upon the whole evidence, it is clear he misapprehended the facts in several particulars, or has stated them imperfectly. He says that the steamer Empire State, at the same time, passed the sloop on her starboard side, and also simultaneously passed on that side of a French bark then there; that the collision took place astern of the Cumberland; that the sloop lowered her peak before the collision, and could not have luffed and gone clear of the steamer. These are circumstances of no great moment of themselves, but the proofs, which show beyond question that the witness was mistaken in every one of those particulars, indicate that the young gentleman was not so clear and accurate an observer of the occurrence as to justify giving his version higher credit than that of Captain Van Pelt, of the Knickerbocker, who differs from him in each particular, and was so placed with his boat in relation to the transaction as to have a better opportunity to observe the exigency of the situation of the two vessels, and their relative means to avoid it. Messrs. Pomeroy and Richmond, the passengers on board of the Cornelius Vanderbilt, were also placed nearer the scene of action, and were more concerned in noticing and marking what transpired than Mr. Mulligan; and all these testify to his misconception of those facts. Upon the evidence of these three witnesses, then, it is satisfactorily proved to have been within the power of the schooner to have avoided the collision, without hazard to herself, or other inconvenience than that of luffing into the wind, and the few moments' delay which might arise from that manoeuvre. But it is contended by the libellant that he was not bound to take that step, or do any thing other than hold the course upon the wind which the sloop was under at the time.

The court has too often stated and enforced the rule, to be now called upon to reason out its obligation and utility, that in ordinary circumstances the sailing vessel so placed is not required to give way to a steamer; and also, that it is her duty and right to maintain her course, unless something special in the existing facts makes it plain that the steamer cannot avoid a collision, and that the vessel under canvas can prevent it, without endangering her own safety by changing her course. The Narragansett [Case No. 10,019]; The Neptune [Id. 10,120]. See, also, on the relative rights and duties of steamers and sailing vessels in respect to collisions, The New Champion [Case No. 10,146]; The Bay State [Id. 1,148]; The Washington Irving [Id. 17,243]. Then a law higher than any general maritime usage comes in force, and requires every man so to conduct his vessel as to save her and others from the peril of a collision, if he can probably effect it. And more especially will all privilege to a particular tack or course or method of passing, not essential to her own safety, be withdrawn from a vessel, when she has notice that adhering to it will place another in jeopardy. She must then contribute to the common safety in such manner as a sound judgment on the facts and circumstances shall decide to have been necessary and proper. Accordingly, a sailing vessel on the wind, meeting or converging towards a common point with a steamer, has no right to persist in that course as a privileged one, in such manner as to make a collision probable, or to drive the steamboat into certain danger to herself or other vessels in order to avoid her. The Hope, 1 W. Rob. Adm. 157. In the harbor of New York, crowded as it is with craft of all de-

scriptions, so that but a limited space is allowed for the management of large vessels, and where baffling eddies and tides are to be encountered, it is more necessary than on broader pathways, for vessels of every class to forego special privileges, and render in their own movements relief to the navigation of others with which there is danger of being brought in conflict, particularly if apprised what is necessary to be done to that end.

The case in question affords an illustration of the necessity and application of this principle. Three steamers of the largest class left adjacent piers at the head of the Battery, at precisely 5 o'clock each afternoon, to make their passages up the Sound. The time and manner of their departure was notorious to everybody sailing in the harbor. It is also well known that they come out of these berths, heading directly west, and must describe a complete circle amongst the shipping in the harbor in making a distance only the length of the Battery, in order to get their course east into the mouth of the river. Whilst moving over that curve, their means of ready self-control are considerably diminished; that is, they cannot sheer quickly to starboard, and generally can only sheer to larboard or stop and back. They are, undoubtedly, bound to use every reasonable foresight and precaution while coming into and working out of this practically crippled state. They must exercise a watchful attention, place competent and sufficient help at every post on board, and proceed so slowly as to secure the most immediate command of their movements which is practicable. Being prepared with and ready to use these precautions, these steamers cannot be compelled to lie in their dock till the harbor is clear of every object that might fall in their way. They are entitled to claim the co-operation of other vessels, when hazard of collision occurs, to take measures on their part to prevent it; and the vessel which shall refuse to yield such aid when conscious of its necessity, and hold doggedly to a supposed right to throw the whole risk upon the steamer, must, in case of accident and injury so caused to her, expect but slender sympathy in her appeal to the equity of courts of justice for recompense.

I hold in this case, that it was a fault in the sloop not to have luffed up into the wind, when so urgently called to do it from the steamer, and where the necessity for her to do so was so strongly probable. The decided weight of evidence is that she could have complied without detriment or exposure to herself, and thus have opened a safe passage for the steamer. The master of the sloop testifies, that when hailed to put his helm down, he answered, "G——d d——n you, stop the steamboat;" and it is evident that he was influenced by the persuasion that the steamer had taken all the responsibility of the hazard in which the two vessels were placed, and had no right to claim his aid. I do not deem of great account the minute estimates of yards or rods, or moments of time, given by the various witnesses in respect to the transaction, nor whether the collision occurred more or less fathoms from the frigate Cumberland. The essential facts are substantially agreed to by the witnesses, and the opinions of those on board of the sloop, and of Midshipman Mulligan, that her conduct was unexceptionable, and that of the steamer faulty, are overbalanced, in my judgment, by the clear proofs in the case.

I shall accordingly order that the libel be dismissed, but without costs. I do not accede to the impressions of one of the witnesses that the master of the sloop intended to run her against the light works of the steamer. I am satisfied he acted upon the belief that he was entitled to hold his course, and that the steamer, if she approached him or crossed his path, must do so wholly at her own peril. In that he committed an error, which undoubtedly rendered the collision unavoidable by the steamer, and he cannot therefore recover damages for the injury thus brought upon herself, although he may have acted with no purpose or wish to prejudice the steamer. On the other hand, the steamer could have stopped her way on coming out of the slip and discerning the sloop, before becoming surrounded by other vessels, and thus losing the power to extricate herself, and she thus might have gone ahead without interference with the sloop. She was excusable in proceeding and relying upon the concurrence of the sloop, if it should become necessary, to help in opening a way for both; but the disregard of that confidence, and the indisposition of the master of the sloop to do what was reasonable and proper on his part, does not impose an obligation upon him to fulfil it so as to lay a foundation for a demand by the claimant for costs against him therefor. There was some risk in running the steamer into the bay when a sailing vessel was approaching her necessary course, in such manner that it might not be in her power, by her own exertions, to avoid becoming embarrassed by her, and that degree of imprudence, although not culpable, takes away the equity of a claim to costs. Decree accordingly.

CORNELIUS GRINNELL, The (WINSO v.). See Case No. 17,883.

CORNELL v. AMERICAN BUSH CO. See Case No. 3,236.

Case No. 3,236.

CORNELL v. DOWNER & BEMIS BREWING CO. et al.

SAME v. AMERICAN BUSH CO. et al.

[7 Biss. 346;[1] 2 Ban. & A. 514; 11 O. G. 331; 9 Chi. Leg. News, 142.]

Circuit Court, N. D. Illinois. Jan. Term, 1877.

PATENT — WHAT WILL BE CONSIDERED AN INFRINGEMENT—EXTENT OF PATENTS.

1. Where it is stated in a patent, "We do not wish to confine ourselves exclusively to the V shaped projection, as any form that will prevent the core from turning, independent of the bush, will produce the same result," the patentees are not to be confined to the mere form, but any other form substantially like that, although there may be a change, would be within the terms of the patent.

2. Where there is a slight change in a machine, by which a new result is brought about, and which might be the subject of a patent, the invention should not be extended beyond the mere change, although the patent may be sustained, but where something elementary is discovered, and constitutes fairly a part of the invention of the patentee, no other inventor or manufacturer ought to be permitted to use that elementary part without paying tribute to the first inventor or originator.

In equity. The bill in these cases was filed [by George B. Cornell against the Downer & Bemis Brewing Company and others, and against the American Bush Company and others] upon the re-issues A and B, dated August 6th, 1872, of the original patent of Lacy & [G. B.] Cornell, of August 29th, 1871 [No. 118,617], for an improvement in bushes, and wrenches for their insertion in beer barrels. The claim of division A, No. 5,026, is, "The wrench herein described, consisting of a shank A, plate B, projection D, and core E, the said core adapted to fit the opening through the bushing whereby the same is prevented from assuming an oblique position when being turned into place, substantially as described." The claim of division B, No. 5,027, is, "The screw-threaded metallic bung-bushing, made tapering upon both its outer and inner sides, and protected with the flange B, having the V shaped notch d, by and for the purpose described." A motion for a preliminary injunction was made on the first bill and affidavits in support, and opposed, and after full argument an order was entered February 4th, 1875, granting such injunction, nisi, etc., and the causes were brought to argument on pleadings and proofs in May, 1876.

Goodwin, Offield & Towle and J. W. Merriam, for complainant.

L. L. Coburn, for defendants.

DRUMMOND, Circuit Judge. In this case, everything must depend on the construction which shall be given to the patents which have been re-issued to the plaintiff. If the true construction is that contended for by the defendants, then it can hardly be said that the defendants have infringed. I do not propose to consider these patents separate from each other, but, really, as constituting together substantially one patent, to accomplish a particular purpose. To be sure, there are two patents issued, and two claims made by Lacy and Cornell, but they were issued at the same time (the re-issues), and they refer to the same common object. If this were a suit upon the bung bush alone, without reference to the wrench, the court might possibly be disposed to take a different view of the matter; but looking at both together as in a certain sense one conjoint patent consisting of several parts, the question is, What is the true construction of the re-issued patent? Is it so narrow as that contended for by the defendants? I hardly think that it is. It seems to me that the object was to make a bush of a particular kind, possessing certain attributes; and secondly, at the same time, to make a wrench which could be applied to the bush in a particular way, so as to insert it in the cask or barrel. The qualities of the bush were, that it was to be metallic, with a screw on the outside, smooth on the inside, tapering both outside and in, and with a flange to press on the stave of the cask, and a device for the "engagement" of the wrench with it, by means of which it was to be inserted in the barrel. The wrench had a handle, its other end being expanded or flattened out, and a device was attached to it by which it could be engaged in the bush, and it was to possess a core which was to be inserted in the hole of the bush, and into which, when the bush was screwed in the barrel or cask, a wooden plug or bung could be driven. Now, the question is, whether or not this was a patentable invention, and how far the invention extends. There can be no doubt, I think, that it was a patentable invention. If it be true that there were bung bushes manufactured of metal and with a screw outside, and a flange, which was to rest upon the stave of the barrel, there does not seem to have been a bush constructed like that of the plaintiff's, and which was to be inserted into the barrel by the same device or apparatus as his, viz: by a wrench with a shank, and a device to engage with the bush, and with a core constituting a part of the wrench which was to fit into the hole of the bush, and so, by the operation of revolving the bush in the barrel, to be inserted firmly, so as to make it tight, and in such a way that the operator could have complete control of the bush by means of the wrench, and pressing equally on all sides of the bush, one of the objects being to remove the core and insert a different sized one, when necessary, corresponding to the size of the bung bush.

I think, therefore, it was a patentable invention. As I understand, there never had been, before it was discovered by these parties, a bung bush with a wrench, such as are

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

described in these patents. The core, taking it altogether, seems to be an essential element of the device, and is one of the principal objects, and I should think, also, one of the principal excellencies of the whole device, because it enables the operator in inserting the bush into the cask, to command completely the act of insertion. I agree with the counsel of the defendants, that the V shaped device in the bush, and the corresponding device in the wrench, are essential parts of the invention of the plaintiff and Lacy; but while that is so, the question is whether or not the plaintiff is restricted to the precise form in which the patent has set forth the device.

There is a V shaped device in the bush, and there is a corresponding one in the wrench, where the bush is to be inserted—so that they engage together, and in this way the bush is inserted in the cask. While this is an essential part of the device, is the plaintiff limited to that precise form? If he is, then I suppose it may be admitted that the defendants do not in that particular infringe; because that identical form is not used by the defendants. A change is made, but the bush is used substantially, as well as the wrench and the core, and another method is adopted by which the engagement takes place between the wrench and the bush, so as to hold the bush fast while it is being inserted in the barrel. The main difficulty of this part of the case has been in reference to the particular device of the plaintiff. It is said in the patent, "We do not wish to confine ourselves exclusively to the V shaped projection, as any form that will prevent the core from turning, independent of the bush, will produce the same result." They are not to be confined to the mere form, but any other form substantially like that, although there may be a change, would be within the terms of the patent. I have come to the conclusion, after some hesitation, that considering the core was a very essential part of the mode of inserting the bush, and one of the objects which the inventor had in view was to enable the wrench, and the core, as a part of it, to engage with the bush so as to firmly turn the bush in the act of insertion—that the mere change in this method of engagement, although varied in different ways, does not prevent the infringement of the substantial part of the plaintiff's device. It is often very difficult in patent cases to determine the extent of the invention. Where there is a slight change in a machine, by which a new result is brought about, and which might be the subject of a patent, courts do not feel inclined to extend the invention beyond the mere change, although they may be inclined to sustain the patent; but where something elementary, so to speak, is discovered, and constitutes fairly a part of the invention of the patentee, then I do not think that any other inventor or manufacturer ought to be permitted to use that elementary part without paying tribute to the first inventor or originator. Such I regard the core in this case. I think that belongs to the plaintiff, and that it is not right or just for any one to use it without his consent. What I mean is, that the defendants are prevented from using such an arrangement with the core in it, so as to engage it with the bush of the plaintiff, and by which, if done, there is an infringement of the plaintiff's patents.

Decree entered for plaintiff for perpetual injunction, with reference to the master to assess damages.

[NOTE. For other cases involving this patent, see Cornell v. Littlejohn, Case No. 3,238; also, Schumacher v. Cornell, 96 U. S. 549.]

CORNELL (FITCH v.). See Case No. 4,834.
CORNELL (GAY v.). See Case No. 5,280.

Case No. 3,237.

CORNELL v. HYATT.

[1 Mac. A. Pat. Cas. 423.]

Circuit Court, District of Columbia. Feb. Term, 1856.

POSITIVE AND NEGATIVE EVIDENCE—PATENTS—INTERFERENCE PROCEEDINGS—EVIDENCE OF PRIORITY.

1. The rule that where witnesses are equally credible, the testimony of one that he saw or heard a fact, is of no more weight than the testimony of another that he did not see or hear it, must be taken with the qualification that the positive can be reconciled with the negative without violence or constraint: and this depends on whether, under the particular circumstances, the negative testimony can be attributed to inattention, error, or defect of memory.

2. Priority of invention will not be adjudged on testimony which is vague and wanting in precision in respect to the essential features of the device for which priority is claimed.

[Appeal from the commisioner of patents.]

Z. C. Robbins, for appellant.
Chas. M. Keller, for appellee.

MORSELL, Circuit Judge. The commissioner states in his decision that Cornell does not attempt to carry back the date of his invention to an earlier period than February, 1855; that Hyatt attempts to fix the date of his invention in September, 1854, and the commissioner thinks he has sufficiently established that proposition; that he shows that he had at that time made a drawing of his invention and given directions to his foreman to have a pattern made, and that the pattern was made accordingly; that as to the objection that no complete tile was made for Hyatt previous to those which were completed for Cornell, that is not material. The pattern for his tile was composed of hexagonal pieces all made alike, and intended to be put together, as occasion should require, so as to make a larger or smaller tile at pleasure. The parts were invented and

the manner of putting them together. That was the whole of the invention.

The commissioner says: "An argument is also attempted, to the effect that Hyatt did not contemplate placing the glass flush with the iron framework. The proof is that the first pattern made was condemned, because the glass would have been below the level of the frame. It is true the witness states that he does not think that Hyatt, in giving directions for the making of the model, spoke particularly in regard to the glass being set level with the iron frame. This is not material. He had given general directions to his foreman; the foreman had caused the model to be constructed, and it was constructed in this manner. As between the foreman and his employer, no question is raised. The invention was made by the one or the other of these persons, and made prior to the date of Cornell's invention." That, he says, is sufficient in this case. And priority was awarded to the said Hyatt, in accordance with the views above expressed. The decision was dated May 31st, 1855. From this decision Mr. Cornell hath appealed, and assigned as his reason of appeal, in substance, that the decision is against the evidence in the cause. No question in this case was raised as to the patentability of the invention. It is alleged on the side of the appellee that they are the same in substance, both that of the appellant and of the appellee.

Cornell claims as his invention "the flat-faced panes of glass, secured in positions that bring their exposed surfaces flush or a little above the upper faces of the bars of the metallic frame, where the said bars have grooves between their said upper faces, which form gutters around the panes of glass for the purposes as set forth in the specification." There is no proof to show that his invention was discovered earlier than 1855 (February). The appellee claims to have made his in September, 1854. His application for a patent appears to have been filed on the 29th of March, 1855, and that of Cornell's on the 9th of March in the same year. Cornell having offered prima-facie proof of his being the original inventor of said improvement, which it is admitted is patentable, the question must be decided from the weight of the evidence whether his proof has been satisfactorily rebutted by proving that Hyatt was the original inventor of substantially the same improvement in the year 1854, or prior to the period proved by Cornell. In order to show from the proof the specific essential differences between that shown by Hyatt and the one by Cornell, it is contended that Hyatt has invariably made his illuminating vault covers with the glasses set below the upper surface of the frame; or if the frames of glass have been flush with the upper surface of the frame, they have not been surrounded by grooves. On the other hand, that Cornell's invention consists in placing the glass flush with the upper surface of the frame at the same time that grooves lower than the level of the glass are made to surround each pane of glass; that supposing the surface of the glasses were placed lower than the upper edge of the frame which receives them, the water and dirt would accumulate upon the face of the glasses, and the grooves or channels outside of them would do no good in the way of preventing the accumulation of dirt or water upon the surface of the glasses, or in preventing the standing water from destroying the joints between the glasses and the iron frame, and thereby producing leakage. On the other side it is insisted that the direction is proven to have been given by Hyatt in 1854 to his foreman, James E. Cornell, for making a pattern of grooved tiles, with a drawing of it, and with the explanation given to him that the object was to have the upper surface of the glass on a level with the surface of the iron around it, and with grooves around to catch the dirt and conduct the water; that the pattern was a single piece to make castings from for making gratings of any size, which pattern was made by Corey; that the first being defective, because the ring of iron would extend above the surface of the glass, instead of being on the same level, another was made about the same time, and castings made from it by Davis, and delivered on the 5th of October, 1854. With the corroboration of the pattern-maker, with his explanations and identification of the exhibit, all this ought to be considered as establishing beyond doubt that Mr. Hyatt is the original and first inventor of the improvement at issue; and that as to the negative testimony on the part of the appellant, it can have no possible weight.

It will be perceived that in order to do justice to the parties in this case a critical review of the testimony must be taken, and it is thought it will be better to give, without gloss, a simple condensed view of it. James E. Cornell, the first witness on the part of Hyatt, says he was Hyatt's foreman; that in the year 1854 (September) Hyatt gave him directions for making a pattern for making grooved tiles; that he gave him a drawing directing him to have a pattern turned to have castings from, so that when they were set in a wood pattern they would form grooved or water courses, to be again cast from, and that the tile could be set level and still have an inclination in the gutters; that he stated to him at the time that that was the object in getting it up, and another object that it would be less trouble to make the patterns, as they could be made of any size by imposing them like type. He was asked how Hyatt proposed to make tiles of different sizes by means of those castings. He answered: "By taking a piece of wood and boring the holes out the size of the castings, and then by setting the castings in, so that the glass would be protected by a

ring of iron, and the other part would go in to form a groove between the glasses; also by setting them on a level surface and casting them together without setting them in the wood." As to the position of the glasses with reference to the iron frame, "they are level with the surface of the ring of iron; as to the design, they would present a handsomer tile." He was asked, on cross-examination, whether any of the tiles he speaks of had been made for use. He answered: "There has never been any of them laid or sold." He testifies that the casting A was made from the first pattern that was made right and used; that the reason why the first pattern was not used was because the iron ring was above the glass. He was again asked, on the cross-examination, whether the first pattern was made in accordance with Mr. Hyatt's directions. He answered: "I do not think he spoke in regard to the glass being set level." In answer to question of appellant, he said: "Mr. Hyatt generally has his glass set level—glass of that size or larger—that is, flush up with the iron."

Mr. Hyatt's next witness was Corey, the turner. He was asked if any person on behalf of Hyatt applied to him to make a pattern similar to Exhibit "A." To which he answered: "Yes; I was applied to by James E. Cornell." He came to him with a small drawing, and stated that Hyatt wished him to turn a pattern similar to that. Upon which he asked him what it was for. He does not remember what he replied, but he did not give him any satisfaction what it was for. He turned it, however, according to the drawing, and Cornell came and got it after it was done. Cornell afterwards brought it back, and said it was not exactly as Mr. Hyatt wanted it. Witness then said: "If you had told me what it was for, I should have known better how to do it." Witness is under the impression that he made another one; thinks the first conversation was in the month of September, 1854, and that the alteration was made immediately, within an hour. In answer to the question why it did not suit, he says he thinks it was too deep; he thinks it was in the same form as Exhibit "A." Exhibit "B" was shown to him; he thinks that was the pattern; that the kind of glass which they make use of for this purpose was generally made flush with the tile. In answer to the question whether anything was said at that time about channels between the glass, he answers: "Yes; about the time he made that pattern, and previous to that time, Hyatt had used the glass flush with the top of the tile." Thinks, also, he had formed channels between the glass. He thinks they were lower than the face of the glass. Of course the iron around it protected it. This witness declines to answer a question put to him on his cross-examination which it appears to me was a legitimate question, and which ought to have been answered. He is asked to refer to some tile in use where the channels are lower than the face of the glass. Says he does not know that he can. To the question why tiles having grooves lower than the face of the glass have not been introduced into use by Mr. Hyatt, he answers: "At the time this thing was got up we were very busy."

To oppose the effect of the aforegoing testimony, the appellant examined Ingalls, a witness who had been Hyatt's superintendent for three years prior to the middle of April, 1855. He says that he was in the employ of Hyatt (as just stated) something over three years as his superintendent, in which employ he continued until the middle of April, 1855. He is requested to state whether he was familiar with Mr. Hyatt's views as to the best location of the glasses in illuminating vault covers during the time that he was in the employ of Hyatt; and if so, to state what they were. He answers: "I know the glasses were generally put below the level of the iron surface. It was a general direction of Hyatt to keep the edge surface—exterior surface—below the surface of the iron. The surface was usually convex; so that, while the edge would be below the iron, the middle might be flush or even above." He is desired to state whether grooves or water-channels were placed in the illuminating covers to carry the water from the glass; to which he answers: "I have never seen a vault-light of his (Hyatt's) where a series of glasses were arranged in that manner." He is asked if he frequently heard Mr. Hyatt speak of the pattern which he termed the type pattern. Answer: "I have heard him speak of it, but don't know that I could say frequently." Question: "Can you state how the glass was to be placed in that pattern?" Answer: "I never heard any contemplated exception to the general rule, as I have stated, as to keeping the edges of the glass below the surface of the iron." Question: "Did Mr. Hyatt ever state to you that he intended to have his type patterns arranged in a cover in such a manner as to form channels or grooves for preventing the water and mud from standing on the face of the glass?" Answer: "I have no recollection of his having done so." Question: "Were you in Mr. Hyatt's employ at the time the vault covers Nos. 17 and 19 Maiden Lane were constructed and put down?" Answer: "I was." Question: "State whether patterns were got up for those covers." Answer: "I think there were." Question: "State the relative position of the glass and the position and arrangement of the grooves, if any, in said covers." Answer: "The glass was depressed below the surface of the iron, and there were no grooves between the glasses."

The testimony of this last witness, if not outweighed by that of the preceding witnesses, must be allowed, I think, to prove that

the invention, according to the pattern and directions gotten up in September, 1854, by Mr. Hyatt, was an essentially different thing from that claimed by the appellant. With respect to the glass and its position, the glass was convex, not flat, thick glass; and although as to its position the middle part might be flush or even somewhat above, the edges were below the surface of the iron, and the grooves or channels to carry off the water and mud were above, instead of being below, the edges of the glass. The general rule of keeping the edges of the glass depressed or below the surface of the iron was directed by Hyatt, and pursued in all instances. The objection to the efficient weight of this testimony is that it is negative evidence, "and that it can have no possible weight." The rule of law on the subject certainly is, that if one witness were positively to swear that he saw or heard a fact, and another were merely to swear that he was present but did not see or hear it, and the witnesses were equally faithworthy, the general principle would in ordinary cases create a preponderance in favor of the affirmative. But this rule is to be understood as consistent with this explanation: That the principle supposes that the positive can be reconciled with the negative without violence and constraint. Evidence of a negative nature may, under particular circumstances, not only be equal, but superior, to positive evidence. This may always depend upon the question whether, under the particular circumstances, the negative testimony can be attributed to inattention, error, or defect of memory. Supposing, then, the testimony just alluded to cannot be reconciled without violence and constraint, according to the rule, there is yet another difficulty to be overcome, and that is, that there are two witnesses on the one part to the facts and but one on the other; to decide which outweigh, the circumstances connected therewith must be considered. The witness Joshua K. Ingalls was the superintendent of Mr. Hyatt in the business of making illuminating vault covers for three years, and up to the middle of April, 1855, covering the period of time when Mr. Hyatt claims to have discovered his invention. In that situation, possessing (as it must be supposed) most of the confidence of his employer, and it being a matter directly connected with his duty, (which from its nature it is to be presumed required him to be a person of more intelligence than the other workmen in the shop,) if any improved invention of the manufacture had been discovered by Hyatt, is it not probable that he would have known it as well as the foreman, Cornell? There appears to be nothing in the course of his examination to impeach his entire fairness. The time within which the fact must have taken place, if at all, had been but very recent; so that inattention, error, or defect of memory cannot reasonably be attributed to his testimony.

With respect to the testimony of the other witnesses, if there was an improvement as claimed, the evidence is certainly very vague and wanting in precision. It does not appear that the directions to the witness Cornell were marked with anything special or peculiar, nor could the drawing indicate any such. Corey, the turner, says that although he asked Cornell what it was for, he gave him no satisfactory information, and he made the first pattern according to what he understood the drawing to indicate; that is, according to the old contrivance. It is true it was objected to by Hyatt as being too deep, and was carried back by Cornell to be altered; still there is no such information stated as to show the special peculiar purpose. The witness Cornell says: "I do not think Hyatt spoke in regard to the glass being set level." I must not overlook the evasive answers of this witness as to the question, have any of the tiles you speak of ever been made for use? His answer is: "There has never any of them been laid or sold." And so with respect to the witness Corey, who refused to answer a question on cross-examination which I think was material and proper, and which I think he was bound to do. This want of fairness on the part of the witnesses must be considered as affecting the credit of their testimony.

In conclusion, what did Mr. Hyatt himself think of it? On the 3d of April last was he not then of the opinion that the upper surface of the glass must be below the metallic frame? In his specification on which his patent was reissued for his original vault cover, (reissue patent No. 303, April 4th, 1855,) in speaking of vault covers that had been constructed prior to his invention, he makes use of the following language: "The great thickness of such glass obstructed the light, which evil was increased by the scratching of the entire surface necessarily exposed; but, notwithstanding the greatest practical thickness of glass adopted, they were still much exposed to breakage and its consequences." Again, although it is shown from the proof in the case that the improvement could be constructed fifty per cent. cheaper, with its other great and efficacious advantages, he has never used or laid one or made any for sale. The inference is that he never invented it. Upon the whole, my conclusion is, and I do so determine, that there is no sufficient proof in the case to show any substantial interference, and that there is error in the decision of the commissioner, and that it ought to be reversed, and it is accordingly hereby reversed.

[NOTE. For another case involving this patent, see Lake v. Fitzgerald, Case No. 7,993.]

Case No. 3,238.

CORNELL v. LITTLEJOHN.

[2 Ban. & A. 324;[1] 9 O. G. 837, 922.]

Circuit Court, S. D. New York. May Term, 1876.

PATENTS—"BUNG BUSHING"—INFRINGEMENT—INJUNCTION—DECISION IN OTHER CIRCUIT.

1. The complainant's patent was reissued in two parts. Division A was for the "screw-threaded metallic bung bushing, made tapering upon both its outer and inner sides, and provided with the flange B, having the V-shaped notch d, as and for the purposes described." In division B the patentee said, "We do not wish to confine ourselves exclusively to the V-shaped projection, as any form that will prevent the core from turning independently of the bush will produce the same result." The defendant used a wrench constructed in a manner different from that claimed in complainant's patent, it having no V-shaped projection, but so constructed that, by means of the friction caused by an eccentric boss pressed against the inner surface of the bush, the bush was turned into the barrel. Upon these facts the court denied a motion for a preliminary injunction.

2. A decision on a preliminary application for an injunction is not of controlling right in another circuit.

[This was a bill in equity by George B. Cornell against Lomax Littlejohn for infringement of patents.]

S. A. Goodwin and B. F. Lee, for complainant.

S. A. Duncan and Hiram Ketchum, for defendant.

JOHNSON, Circuit Judge. In my opinion, the bush and wrench used by the defendant are not infringements of the patents Nos. 5,026 and 5,027 of the plaintiff, or either of them. The obvious proof of this, consists in the facts, that the plaintiff's wrench cannot be used with the Littlejohn bush, and that the plaintiff's bush and wrench are adapted to each other, the bush by a V-shaped notch in its outer rim, and the wrench by a projection of a shape to fit into the notch in the bush. The turning force applied to the wrench operates upon the bush by the contact and engagement of the projection with the notch in the bush. At that point only is the force applied.

The plaintiff's patent, reissue No. 5,027, division B, says: "The object of this notch is to allow a suitable wrench adapted for the purpose to engage therewith, whereby the said bushing may be turned into place without the wrench slipping from its seat, as would be the case with a bushing having a smooth surface." It will be observed that it is the notch which prevents the wrench slipping from its seat, and that it is the notch which is contrasted with "the smooth surface," and which prevents this bushing from being subject to the difficulty a smooth surface would occasion; and accordingly the claim specifies—"The screw-threaded metallic bung-bushing, made tapering upon both its outer and inner sides, and provided with the flange B having the V-shaped notch d, as and for the purpose described."

In the plaintiff's reissue, No. 5,026, division A, the specification, after describing the wrench, with a V-shaped projection adapted to fit a corresponding notch formed in the bushing, whereby the same may be turned into place, and also preventing the wrench from slipping from its seat, goes on to say that—"In using the said invention the core is inserted into the opening through the bushing, and turned until projection D falls into a notch formed in the bushing, which is adapted to fit the same, and by the contact of the projection within the notch the wrench is prevented from slipping from its seat, thereby enabling the bushing to be readily turned into place." Then follows a clause, which, it is contended on the part of the plaintiff, prevents his being confined to the device specified. It says: "We do not wish to confine ourselves exclusively to the V-shaped projection, as any form that will prevent the core from turning independently of the bush will produce the same result."

Upon this language it seems to me impossible to say that the patentees had in view every method whereby the core or wrench could be mechanically prevented from turning independently of the bushing. It is not any form of wrench or core, but any form of projection, that is meant, suited to engage with any corresponding notch in the bushing. Therefore, in the claims which follow, the projection D is retained as a distinctive feature of the invention. The device, which the plaintiff's patents extend to, covers every sort of direct physical engagement of some part of the wrench against some part of the bush. If it has a greater extension than this it must cover every means whereby a bung-bush may be screwed into a barrel by the application of force through a wrench.

The Littlejohn wrench operates in a different way from the patented device. As has already been noticed, the plaintiff's wrench cannot engage with and turn the defendant's bush. The defendant's wrench does not carry a core which fits closely into the bush, nor engage with it by any projection and corresponding cavity. It carries an eccentric ribbed boss or bit of metal fitted upon a part of the surface of a loosely fitting core. Upon turning the wrench in the proper direction the eccentric boss is pressed against the inner surface of the bush, and the friction thus caused is sufficient to turn the bush into the barrel. If this can be regarded as a mechanical equivalent for the plaintiff's device, then I see no limit to the extent of the plaintiff's right, and upon a patent for a V-shaped projection and corresponding aperture, he will have secured to himself every mechanical means whereby motion can be given to a rimmed hollow screw to force it

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

into its place. I do not think this the proper construction of his claims, nor a case for the application of the doctrine of mechanical equivalents, to the extent claimed.

On the plaintiff's own statement as to a wrench made by him, like the Littlejohn wrench, in 1867, when he was experimenting upon wrenches, it is apparent that having found it practically a failure, for whatever reason, he abandoned it, and did not attempt to include it in his patent. His device was the interlocking V-shaped projection and cavity. With the two devices present to his mind, no man could have chosen words so exclusively applicable to one, intending to include the other also. So that I feel no doubt in the conclusion that the plaintiff's patent not only does not, but was not intended to, include the Littlejohn form of wrench.

The decision on final hearing in the eastern district of Wisconsin, against Schumacher and Johnson, does not touch the question upon which, in my judgment, this case turns. On the motion for a preliminary injunction, in the case against the Bemis Brewing Company, the same learned judge who decided the former case refused to grant an injunction, unless a bond was given. The wrench produced in that case seems to me, in principle, not distinguishable from that here in controversy, though the other circumstances of the case are not fully disclosed. But a decision on a preliminary application for an injunction is not of controlling right in another circuit, as was held in Sargent Manuf'g Co. v. Woodruff [Case No. 12,368], and I feel so strong a conviction that the plaintiff cannot maintain his claim to the wrench used by the defendant, as an infringement of the plaintiff's patent, that I must act upon my own judgment in the premises.

The motion for injunction must be denied.

[NOTE. For other cases involving this patent, see Cornell v. Downer & Bemis Brewing Co., Case No. 3,236; also note to Schumacher v. Cornell, 96 U. S. 549.]

Case No. 3,239.

CORNELL v. The MARGARETTA.

[29 Leg. Int. 213.][1]

District Court, S. D. New York. 1872.

COLLISION—VESSEL AT PIER.

[A propeller had crossed the entrance to a basin, passed in, and come to a dead stop alongside a pier, leaving substantially the usual space of clear water for other vessels to pass in. A schooner, in attempting to pass through this space, struck the propeller at a place where, had the latter not been in the way, the schooner would have hit the face of the pier. *Held*, that the schooner was in fault.]

Libel sustained [by Thomas Cornell] against a schooner for damages for running into a propeller lying at a wharf.

[1] [Reprinted by permission.]

R. D. Benedict, for libellant.
O. Frisbie, for claimants.

BLATCHFORD, District Judge. This libel is filed by the owner of the steam propeller H. P. Farrington, to recover for damages sustained by him by reason of a collision which occurred in the day time on the 28th of September, 1871, between that vessel and the schooner Margaretta. The libel sets forth that the propeller was lying at the wharf at Weehawken, New Jersey, with her bow up the river, at the entrance to the basin; and tnat the schooner came up the river some distance out, on an ebb tide, with the wind free, and, when about opposite to the entrance of the basin, suddenly changed her course, with the apparent intention of entering the basin, and came on with full speed and ran into the propeller. The answer alleges that the schooner was bound for Weehawken; that she went up the river, and, when she had arrived at a point in the river opposite Weehawken, and a few hundred feet distant, the propeller came across the river, and crossed the course of the schooner and turned towards the west and described a curve, and apparently made for the same place at Weehawken that the schooner made for, so that when the propeller had described such curve, her bow was pointed up the river and she was moving towards the north; that, while the propeller was describing such curve, the schooner had also changed her course and was running directly towards the west, and towards the place she was bound for, namely, the entrance of the basin at Weehawken; that such change of the respective courses of vessels brought the course of the propeller at right angles to and across the course and bow of the schooner; that, although the schooner had, by her movements, indicated to the propeller the fact that she was going into the basin, and was standing towards it, the propeller kept on her course and ran across the bows of the schooner, and thus caused the collision; and that the propeller could easily have got out of the way of the schooner, by stopping and backing.

The evidence establishes the case made by the libel. The propeller had crossed the mouth of the cut or entrance into the basin and passed up and come to a dead stop, with her port side lying for a considerable part of it, from her stem rearwards, against the river side of the pier, and with her stern projecting some six or eight feet beyond two canal boats, some sixteen feet wide each, which were lying at right angles to her, in the cut, one outside of the other, the inside one being against the upper face of the cut, their bows pointing outwards, but being within the line of the face of the river side of the pier. The cut is one hundred feet wide. This left to the schooner substantially the same clear space of water in the cut, through which to enter the basin, that she

would have had if the propeller had not been where she was; and according to the evidence, there was abundant room for her to go in, if she had been properly managed. The propeller was some seventy-five feet keel. Instead of heading towards the cut, the schooner, with her bowsprit, struck the pilot-house of the propeller, at a point some sixty feet or more above the upper line of the water space left in the cut. If the propeller had not been in the way, the schooner would have hit the river face of the pier, some twenty-five or thirty feet above the upper face of the cut. The case set up by the answer is wholly disproved. The case is, that the propeller was hit, while moving forward, by getting across the entrance to the basin, as the schooner was entering the basin. The evidence for the defence shows, that the helm of the schooner was put first down and then up, and that she was unmanageable. The propeller was wholly without fault, and there must be a decree for the libellant, with costs, with a reference to a commissioner to ascertain the damages sustained by him by means of the collision.

CORNELL (MORRIS v.). See Case No. 9,829.

CORNELL (PERRY v.). See Cases Nos. 11,001 and 11,002.

CORNELL v. RACINE. See Case No. 1,213.

CORNELL (UNITED STATES v.). See Cases Nos. 14,867 and 14,868.

Case No. 3,.240

CORNELY v. HENDERICKX.

[12 O. G. 431.]

Circuit Court, S. D. New York. May, 1877.

PATENTS—"BONNAZ EMBROIDERING MACHINE"—INFRINGEMENT—INJUNCTION.

[This was a bill in equity by Emile Cornely against Norbert J. Henderickx to restrain infringement of a patent. Complainant moved for a preliminary injunction, which motion was granted, and the following order was made:]

BLATCHFORD, District Judge. On the bill in this cause, and on notice of motion for an interlocutory injunction herein, with due proof of the service thereof, together with copies of the bill, and affidavits referred to in said notice on the defendant herein; and it appearing to this court that two letters patent of the United States were issued in due form of law, on the 10th day of November, 1868, to the plaintiff, as assignee of Antoine Bonnaz, each for an "improvement in sewing machine for embroidering;" said letters patent being known and distinguished as Nos. 83,909 and 83,910; and that the said defendant has infringed the right secured by the aforesaid two letters patent, by making, using, and selling to others certain embroidering machines, known as "Petit Machines," and constructed and operating substantially as described in the two letters patent aforesaid, contrary to the form of the statute in such case made and provided, and after hearing Mr. B. F. Lee, of counsel for complainant, and Messrs. Coudert Brothers, of counsel for the defendant,—on motion of Turner, Lee & McClure, complainant's solicitors, it is ordered, adjudged, and decreed, that an injunction issue, commanding and enjoining the said defendant, his clerks, attorneys, agents, servants, and workmen, under the pains and penalties which may fall upon them, and each of them, in case of disobedience, that they forthwith desist from making, using, or selling, in violation of said letters patent, any sewing machines for embroidery, constructed substantially as described and claimed in either of the said two letters patent, and particularly any of such machines known as "Petit Machines," until further order in this cause.

[NOTE. For another case involving this patent, see Cornely v. Marckwald, 17 Fed. 83.]

Case No. 3,241.

CORNETT et al. v. LAWRENCE.

[2 Blatchf. 512.][1]

Circuit Court, S. D. New York. Nov. Term, 1852.

ACTION TO RECOVER BACK CUSTOMS DUTIES—PROTEST—PROOF.

1. Where, in a protest against the payment of duties, on an addition made by the appraisers to the invoice value, the only ground of protest stated was, that the invoice exhibited the true market value of goods at the place from which they were imported: *Held*, in action to recover back the duties, that the only point raised by the protest was the correspondence of the invoice value with the value at the place of export at the date of the invoice, and that the plaintiff could not, under the protest, show that the invoice value was the actual purchase price.

[Applied in Wilson v. Lawrence, Case No. 17,816.]

2. A protest against the payment of duties must set forth the specific objections of the party, and refer the collector distinctly to the facts, otherwise the party cannot avail himself of them in an action against the collector to recover back the duties.

[Cited in Crowley v. Maxwell, Case No. 3,449.]

This was an action against [Cornelius W. Lawrence] the collector of the port of New York, to recover back an alleged excess of duties paid him. A verdict was taken for the plaintiffs [Henry T. Cornett and Horatio R. Nightingale], subject to the opinion of the court.

Elias H. Ely, for plaintiffs.

J. Prescott Hall, Dist Atty., for defendant.

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

BETTS, District Judge. In this case, and in the three preceding ones of Pierson v. Lawrence [Case No. 11,158]; Pierson v. Maxwell [Id. 11,159]; and Focke v. Lawrence [Id. 4,894],—the decisions of the court, made at the last term, were withheld, at the instance of the counsel for the plaintiffs, until re-arguments could be heard in the cases. All of them relate to importations of iron, and involve substantially the same questions.

In this case, two entries of bar-iron were made by the plaintiffs, at the custom house in New York, in May, 1849, on invoices dated at Liverpool in March and April preceding, and the valuations were raised by the appraisers to correspond with the market prices of the iron at Liverpool at the times of shipment. The proof is, that the values were stated on the invoices at the purchase-prices at the time contracts were made for the iron with the Coalbrookdale Company some months previously. The payment of the duties exacted by the collector on the increase in valuation was protested against, in writing, by the attorney of the plaintiffs, in this language, on each entry: "that, under existing laws, said amount is unjustly added, and is not liable to duty, because the said invoice and said entry exhibited the true market value of said iron at Liverpool, from whence said iron was imported."

There is no evidence to support the assertion of the protests, if they import that the invoices exhibit the Liverpool prices at the dates of the invoices. On the contrary, the plaintiffs proved on the trial, that the prices of iron advanced considerably at Liverpool between the alleged times of the purchase of these parcels and the times of their shipment; and the plaintiffs now insist that the contract prices should govern, and not the prices at the dates of the invoices.

The orders for the purchases in December and February preceding, and their acceptance by the manufacturers in Liverpool, were exhibited to the appraisers after the valuations had been raised. In our opinion, had these papers been submitted to the collector at the same time, that would not have satisfied the requirements of the act of February 26, 1845 (5 Stat. 727), and would not have amounted to such notice to him as would enable the plaintiffs to maintain a personal action against him for the recovery of the duties exacted. They must, in their written protest, set forth their specific objections, and refer him distinctly to the facts on which the objections rest, in order to be enabled afterwards to avail themselves of them, in an action against him.

On examining the protests in this case, it is palpable that no other point is raised by them than that of the correspondence of the invoice charges with Liverpool prices at their dates; and, as already observed, that fact is indisputably against the plaintiffs.

Judgment for the defendant.

Case No. 3,242.

In re CORN EXCHANGE BANK.

[7 Biss. 400; 15 N. B. R. 431; 9 Chi. Leg. News, 254; 4 Law & Eq. Rep. 29; 15 Alb. Law J. 351.][1]

Circuit Court, E. D. Wisconsin. April, 1877.[2]

BANKRUPTCY—PRIORITY OF DEBT DUE STATE.

The state has no claim for priority where the warden of the penitentiary deposits funds in his own name, as warden, in a bank which afterwards becomes bankrupt, the warden being liable to the state on his bond for the amount.

[Distinguished in Re Mellor, Case No. 9,401.]

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

In bankruptcy. The warden of the state penitentiary received from the treasurer of the state, upon the order of the directors of the penitentiary, $10,000, and deposited it in the Corn Exchange Bank at Waupun, where the penitentiary was situated, in his name as warden. It was to the credit of "H. N. Smith, warden." He had an individual account at the bank at the same time, which was kept entirely distinct from his account as warden. It seems that there was at the penitentiary no safe place of deposit for the money used in defraying the expenses of the penitentiary, and which might be received as the proceeds of the articles manufactured by the prisoners and sold, and therefore, with the consent of the directors, the warden kept this account with the bank.

Almost immediately after this sum was deposited, the cashier of the bank absconded, and the bank failed, and was put into bankruptcy. The state now comes and claims that this money, deposited under these circumstances, was its money, and that the state has priority, and should be first paid in preference to some other creditors, and according to the mode of distribution pointed out in the bankrupt law.

[The proof of the claim was made on behalf of the state, and on application of the assignee the register expunged the claim. The case was then certified to the district court, which allowed proof of the debt (Case No. 3,243), and from that decision the assignee appeals.]

A. Scott Sloan, for the State.

E. P. Smith, for assignee.

DRUMMOND, Circuit Judge. The question is, whether the money was the money of the state, so as to entitle it to a preference over certain other creditors of the bankrupt. The district court found that it was. The question before this court is, whether that decision was correct. That depends very much, as well upon general principles, as upon the

[1] [Reported by Josiah H. Bissell, Esq., and here reprinted by permission. 4 Law & Eq. Rep. 29, and 15 Alb. Law J. 351, contain only partial reports.]

[2] [Reversing Case No. 3,243.]

particular legislation concerning the warden of the penitentiary, and the duties he was called upon to perform.

He was appointed by the directors; he was the superintendent of the penitentiary, and the treasurer. He could sue and be sued on contracts connected with the management of the penitentiary, and the supply of materials and provisions. Judgment could be rendered against him, and execution levied upon his property.

He received the proceeds of the labor of the convicts, and all money appropriated by the state for necessary disbursements. It should be added that he gave a bond, as required by law, in the sum of $20,000, for the faithful performance of his duties, and for the proper accounting for all moneys that should come into his hands. Now when he received the money, which, in one sense it might be said belonged to the state—that is, when he received it for the particular purposes of his office, either as the proceeds of the labor of the convicts, or as money directly appropriated by the state, was he the mere agent of the state, performing the duty of an agent without any property in the money? If he were, and had nothing to do but the performance of a duty as agent, then, if he lost the money, exercising proper care, or if it were taken from him he would not be accountable. An agent, it is well known, who is simply acting for his principal in keeping money, is not accountable to him for it in case of loss, provided he use reasonable care and diligence in keeping it. Now if, when the warden received, at Madison, the money, or drafts convertible into money, he had lost it in transit from Madison to Waupun, would it have been the loss of the state if he had exercised reasonable care? I think, as a public officer, having given bonds to the state, the state would have a right to say to him that he was not the mere agent for the keeping of this money; but that he had certain duties to perform in relation to it; that he had generally the disbursement of the money; that he could make contracts that contemplated the expenditure of the money; that he had certain personal duties and responsibilities in connection with it; that the state had trusted him with the money, but it was his, for the purposes for which it was placed in his hands.

It is said that the money was deposited in the bank with the consent and acquiescence, it may be under the instructions, of the directors of the penitentiary; still that did not discharge the warden from the duty he owed the state. The law does not clothe the directors, as I understand, with the power to say to him where he should keep the money, or what he should do with it. It may be, contracts were to be made, with the consent of the directors, but he, as the treasurer of the penitentiary, was himself empowered and required by the statute to do certain things in relation to the expenditure of the money. He is intrusted with the safe keeping of the money, and there would seem to be no doubt that if there should turn out to be a deficiency here, after proper distribution, that the warden himself would be personally accountable for it to the state on his bond, and that he cannot rely upon the instructions of the directors to relieve himself from that responsibility.

At the time this case was decided by the district court, its attention was not called to a case in Massachusetts, reported in 11 Metcalf, 129, and which is in all essential particulars precisely like this. In fact, the material provisions of the law upon which the supreme court of Massachusetts decided that case, have been re-enacted in the statute of Wisconsin, and therefore that case is applicable to this, and that, curiously enough, was one arising out of the insolvency of a bank. The Phoenix Bank had loaned money to the state. It became insolvent, and its affairs were wound up under the law of Massachusetts. Under the claim against the state the question arose, whether the state had the right to set off certain deposit accounts which had been made in the bank by agents of the state, one of whom was a person who had the management of a bridge across the Charles river, and who was called upon to make disbursements for the repairs of the bridge, and with whom were placed the tolls of the bridge. And also, the bank had on deposit, at the time it suspended, certain moneys deposited by the warden of the penitentiary. It does not appear precisely from what source these moneys came into the hands of the warden.

The warden of the state prison, had deposited the sum of $11,930, which sum on the books of the bank stood credited to "Chas. Lincoln, Jr., warden of Mass. state prison, at Charlestown."

Now it will be observed that the court was required to determine whether the set-off should be allowed in each of these cases,—one, that of the agent of the Charles river bridge, and the other that of the warden of the penitentiary, and therefore the attention of the court was called to the particular circumstances connected with each deposit. In the one case (that of the agent of the Charles river bridge) the court decided that although the state might not have had a legal right to bring a suit, still that it had such an equitable interest in the fund deposited in the name of the agent of the Charles river bridge, that it could claim a set-off for that money against the claim of the bank for the money which had been loaned to the state. In the case of the warden of the penitentiary, the court decided that the state had no such equitable interest in that fund that it could set it off against the claim of the bank. The opinion of the supreme court of Massachusetts was given by Chief Justice Shaw, very high authority, and is very short. He says:

"Can the deposit made by the warden of

the state prison be set off? His authority and duty are regulated by the Revised Statutes, 144, sections 16 and 19. This demand stands upon a very different ground from that of the bridge agent,—a difference depending upon the very different provisions of law under which these agents are constituted. By the Revised Statutes, the state prison and its officers are constituted a separate and distinct establishment, having powers and functions, and being charged with duties and responsibilities of a peculiar nature." "It is provided that the warden shall have the charge and custody of all the real and personal estate, stock, tools and property pertaining to the prison." "That he shall receive and pay out all moneys granted by the legislature for the support thereof, and shall keep and render regular accounts." "It is provided that all contracts on account of the prison shall be made by the warden." "That the warden and his successor may sue and be sued thereon to final judgment and execution. That no such suit shall abate by reason of the office of warden becoming vacant, but that any successor of the warden pending such suit, may take upon himself the prosecution and defense thereof, and that upon motion of the adverse party, and notice, he shall be required to do so."

Similar powers and duties are conferred upon the warden by the law of Wisconsin. Indeed, it is claimed that they have been copied from the statute of Massachusetts. After having cited these provisions of the law of Massachusetts, the court says: "The court are of the opinion that in no sense can the money thus received and held by the warden of the state prison, in his official capacity, be regarded as the money of the commonwealth, or money in which the commonwealth has any equitable interest. The warden is liable to judgment and execution. Both the obligations of the warden, and the property to meet them devolve upon his successor. The statute contemplates that the commonwealth may have occasion to appropriate money from time to time, should the revenues of the prison be insufficient for its support. But to the extent of those revenues they are placed entirely under the control of the warden, he being subject only to apply them to the purposes of the institution, and to render an account of the manner of their disbursement. And we think it was the intention of the legislature to put the warden in such a situation of responsibility for all contracts made on account of the prison, that persons dealing with him, and making contracts, should not be barred of their legal remedies by being obliged to treat such contracts as made by the commonwealth, who are not liable in their sovereign capacity to be sued."

So that, unless this court should overrule the decision of the supreme court of Massachusetts on a statute, many parts of which have been incorporated in the law of Wisconsin, it must so rule this case; and the question which has occurred to the court is, whether that decision is sound under the law. Of course if the court was satisfied that it was not a correct decision, it is not binding as authority upon this court; but after the best reflection I have been able to give the subject, I am inclined to think a sound rule is there laid down. I have already stated that in my opinion the warden cannot relieve himself from responsibility in relation to the funds which, in one sense, it may be, belonged to the state, by showing that he has exercised due care over them; that he has been guilty of no fault or negligence. I think as a matter of public policy, he is bound to account absolutely to the state for the funds that have been placed in his hands. And it seems to me this consideration acquires additional strength from the fact that the law makes him personally responsible on his contract, and liable to judgment and execution.

If he had made a contract for the supply of provisions for the penitentiary, and the state had paid over to him the money necessary to meet that contract, and he had deposited it in a bank to his credit as warden of the penitentiary, and he had been sued upon the contract, judgment obtained, and execution issued against him and in the hands of a sheriff, liable to be levied upon his property, could the state come to him and say, "This is not your money; you have no right to use it for the payment of this debt?" Would not, on the contrary, the warden have the right to say, "This money has been intrusted to me for this among other purposes, and you cannot recall it? Responsible as I am under this contract, it is my legal right to hold it and to meet my liability, to relieve my own property from seizure under this execution." I can have no doubt that he would have the right so to do.

A case has been cited which was decided by the supreme court of the United States. Bayne v. U. S., 93 U. S. 642. Of course, if that case, fairly considered, ruled this, this court would follow it; but I think it does not.

That was a case where a paymaster of the army had received $200,000 of the public money for disbursement in the usual way, it is to be presumed, by him as paymaster. He had deposited the money in a bank in Washington. He thereupon entered into a fraudulent conspiracy with Bayne & Co., by which he allowed them, as the result of this conspiracy, to take control of the money for their own purposes, they knowing that it was money which he had as paymaster, and which of course belonged to the United States.

The company became bankrupt, and the question was, whether, under the circumstances, the government had a right of priority of payment as to a portion of this

money which this company had received, as against the other creditors; and it was decided by the supreme court that the government had this right of priority. But why did the supreme court so decide? It was because it was received by Bayne & Co. in pursuance of a fraudulent conspiracy, they knowing it was the money of the government, and held by the paymaster as public money.

The court say that the law imposes on the firm an obligation, and implies a promise on its part to refund the money. Such a promise can be enforced by action.

Now, if the paymaster, as to the money in his hands, occupied the same relations to the government of the United States, that the warden of the penitentiary did to this state; or if the Corn Exchange Bank, of Waupun, had the same relations to the state that the insolvent firm of Bayne & Co. had to the United States, then this decision would apply. But it is obvious from what has already been said, that the distinction between the two cases, between the obligations of the insolvent firm and those of the Corn Exchange Bank, of Waupun, the one to the United States, the other to the state, and the duties of the paymaster in relation to the money, and those of the warden in relation to the money he had, are entirely distinct, and so different as really to prevent that case from being a binding authority upon this court, under the facts in the case before me.

Therefore, I shall reverse the decision of the district court, and hold that the state is not entitled to a preference over the other creditors for the money which is claimed.

I have assumed the liability of the warden on his bond to the state for the amount. If I thought the state had not this remedy, possibly I should feel inclined to look with a little more favor upon the application which has been made for a priority, but presuming that the state has ample remedy against the warden and his sureties, and believing that the decision of the supreme court of Massachusetts is a case precisely in point, and under a law, which, so far as it affects the decision of that court, is the same as the law of Wisconsin, I must hold that the state is not entitled to priority over the other creditors. Of course the warden will be allowed, as a general creditor, to prove his account.

Case No. 3,243.

In re CORN EXCHANGE BANK.

[15 N. B. R. 216.][1]

District Court, E. D. Wisconsin. Jan., 1877.[2]

BANKRUPTCY—PROOF OF DEBT BY STATE.

1. A state may prove a claim for a balance of moneys appropriated for the support of a state prison, which have been deposited by the warden of the prison with the bankrupt, a bank, in the name of such warden as such officer, where the directors of the prison had previously arranged with the bank for such deposits and agreed upon the form in which the account was to be kept, although there was no law requiring the warden to deposit such moneys, and the state held his bond to account for all moneys coming into his hands.

[Cited in Re Smith, Case No. 12,990.]

2. But the proof should be made by some officer holding a relation to the state similar to that which a president, cashier, or treasurer bears to a corporation of which he is such officer.

On the first day of October, 1875, the state of Wisconsin made and filed proof of a claim, to the amount of nine thousand six hundred and eighty-one dollars and twenty cents, against the estate of the bankrupt. This proof was made by H. N. Smith, the warden of the state prison, for and in behalf of the state. Upon application of the assignee the register expunged the claim. The case was then certified to the court by the register for review, at the instance of the attorney general.

A. Scott Sloan, Atty. Gen., for the State.
Levi Hubbell, for assignee.

DYER, District Judge. The bankrupt was a banking corporation, doing a banking business at Waupun, in this state. H. N. Smith was warden of the Wisconsin state prison, and as such, all moneys appropriated by the state for the support of the prison and drawn from the state treasury by order of the prison directors, together with the income derived from convict labor, came into his hands and were disbursed by him. Pursuant to the requirements of statute, the warden executed to the state a bond with sureties, obligating him to account for all moneys coming into his hands as such warden. Moneys appropriated for prison purposes were from time to time drawn from the state treasury on orders of the directors of the prison. From the testimony it appears that in April, 1874, when the warden assumed the duties of his office, it was arranged between the directors and the warden that all public moneys coming into his hands should be deposited in the Corn Exchange Bank, and an understanding was had between the directors of the prison, or some of them, and the cashier of the bank that such moneys should be so deposited, and that the account should be kept in the name of "H. N. Smith, Warden," and that checks for such moneys should be drawn over such official signature. Thereafter, prison funds were so deposited, and checks therefor were so drawn. At the same time, Smith had an individual account with the bank. On the 4th of August, 1875, the warden deposited about ten thousand dollars, moneys received from the state treasurer. On the 6th day of the same month the cashier absconded, and on the 10th the bank closed its doors. At

[1] [Reprinted by permission.]
[2] [Reversed in Case No. 3,242.]

that time there was a balance of nine thousand six hundred and eighty-one dollars and twenty cents standing to the credit of "H. N. Smith, Warden," upon the books of the bank. On the 2d day of September, 1875, a petition in bankruptcy was filed against the bank, and it was subsequently adjudicated a bankrupt. The testimony shows that no interest was ever paid or agreed to be paid by the bank to Smith for the use of money so deposited. Upon this state of facts, the state asserts its right to prove a claim against the estate of the bankrupt, for the balance of nine thousand six hundred and eighty-one dollars and twenty cents undrawn at the time of the failure of the bank, which asserted right is disputed by the assignee. If this claim is a debt due to the state, it has priority over general creditors under the third subdivision of section 28 of the bankrupt law [of 1867 (14 Stat. 531)]. In determining the question involved in this controversy, it is important first to refer to legislative provisions touching some of the duties of the warden and the appropriation of moneys for prison purposes.

By an act of the legislature of 1873, the warden is made treasurer of the prison, and is required to render to the directors on the first day of each month a full and accurate statement of all moneys received by him, and all sums of money expended by him during the preceding month. The same act provides that the warden shall give bond to the state, conditioned that he will faithfully account for all moneys placed in his hands as prison treasurer, and perform all duties incumbent upon him as warden of the prison. By legislative act of 1874, twenty-five thousand dollars were appropriated for the payment of current expenses at the prison for that year, and it was provided that all moneys so appropriated should be drawn from the treasury on the order of the directors of the state prison, and in no other manner. In 1875 the legislature appropriated thirty thousand dollars to defray the expenses of the prison for that year, the moneys so appropriated to be paid, as the necessities of the prison should require, to the warden on the order of the directors. No law of the state required the warden to deposit moneys coming into his hands in any bank or other place of deposit, nor was there any statutory regulation or direction as to the manner in which such moneys should be held or kept by him.

Upon the facts before stated, in connection with the legislation referred to, the question is, whether the balance due from the bank on the account of H. N. Smith, warden, is a debt due to the state. Does it constitute a claim legal or equitable in favor of the state, to be recognized in the bankruptcy proceeding? Counsel for the assignee take the position that, as no statute required the warden to deposit in the bank moneys received by him officially, the deposit which he made was his personal, voluntary act; that, by making the deposit, the money was converted into a credit, he becoming a creditor and the bank a debtor as to the money deposited; that this credit was personal to Smith, and that the state had no legal claim against the bank thereon. Further, it is claimed that the warden did not act as the trustee or agent of the state in making the deposit; that the act of making the deposit was not a breach of any trust; that upon no principle of subrogation can the state acquire a right to the credit in question, and so that it has no demand against the estate of the bankrupt which can be enforced in equity. Undoubtedly the deposit by the warden created a simple credit and made the bank a debtor for the amount deposited. It is now well settled that the relation of banker and customer is that of debtor and creditor. The money when deposited becomes the property of the bank, the latter becomes the debtor of the depositor, and the contract is purely legal, without any element of trust in it. Marine Bank v. Fulton Bank, 2 Wall. [69 U. S.] 252; Thompson v. Riggs, 5 Wall. [72 U. S.] 663; Bank of the Republic v. Millard, 10 Wall. [77 U. S.] 155; Oddie v. Bank of New York, 45 N. Y. 739; Aetna National Bank v. Fourth National Bank, 46 N. Y. 86.

It is an important fact in the case that an arrangement was made by the directors of the prison with the cashier of the bank for depositing funds in the hands of the warden, and as to the manner in which the account should be kept. Keeping in view that fact, the question seems to be, who was the real party in interest in the transaction between the bank and the warden? The moneys deposited came to the warden from the treasury of the state. They were designed for certain public uses, and were to be expended by an agent of the state designated by law to perform that duty. Before deposited, and while in the hands of the warden, it seems clear that the ownership of the moneys was in the state. Suppose that, by robbery, that officer had lost the possession of the moneys; could they not properly have been described, in an indictment against the robber, as the property of the state? I do not regard the question as open to discussion that before the deposit was made these funds belonged to the state.

The inquiry then follows, who was, in fact, the owner of the credit established by the deposit? True, the hand of the warden placed these moneys in the bank. But he was the agent of the state. The moneys were not his. He was dealing with them in a representative capacity. His act, in connection with the act of the cashier in receiving the deposit, created the credit in question. But he had no personal ownership of or interest in that credit. True again, that, at his will, money could be drawn from the bank against that credit. But every lawful act done by him in relation to the

moneys or the credit would necessarily be done for the state and as its agent. The error in the position taken by counsel for the assignee lies, I conceive, in the assumption that, because the act of making the deposit was the physical act of the warden, therefore the credit thereby created was his personal credit. It is argued that the state did not deposit the moneys, and that it was the act of Smith; as if the state could do any act except by its officers or agents. To illustrate, the reasoning leads to this: that if the state treasurer should deposit moneys belonging to the state in a bank, the officers of which had knowledge of such ownership, and the moneys should pass to his credit as treasurer in an account kept with him as such officer, since his will had directed and his hand had made the deposit, therefore the credit thereby created was personal to him alone, not only legally but equitably, notwithstanding the fact that throughout the transaction he was the representative of the state.

Suppose the warden had died with this bank credit existing. Would it have passed to his heirs? Suppose he had become bankrupt, would his individual creditors have been entitled to it? Could the bank have been garnished upon this credit by a creditor of Smith suing him upon an individual debt? Upon the facts as they here exist, I think not. To support the claim of the state in this proceeding, it is not necessary that the transaction should be such that an action at law would lie against the bank in behalf of the state. If equitably the state is entitled to the credit, then the claim should be allowed, for the bankrupt law recognizes equitable as well as strictly legal demands. It is true, as stated, that no law required the warden to deposit moneys received by him for expenditure for prison purposes, and much stress is laid upon this fact in combating the claim of the state. But it nevertheless is the fact that, before any deposits were made, the directors of the prison, representing the interests of the state, arranged with the bank for such deposits, and agreed upon the form in which the account should be kept, and it must be assumed, upon these facts, that the officers of the bank had notice of the ownership of the moneys so deposited. The money deposited was, as we have seen, the money of the state. The bank had knowledge of the fact. The deposit account was kept in form so as to distinguish it from the warden's individual account. The transaction with the bank was the result of the concurrent action of the directors and the warden. Upon such a state of facts, I think the state may, if it will, claim the amount of the credit in question as a debt due to it, although there was no statute requiring the warden to make the deposits, or designating this bank as a depositary of moneys appropriated for prison purposes. It was strongly urged upon the argument, that as the state holds the bond of the warden it must look alone to that security. But I regard that as an obligation giving merely an additional remedy to the state, and it cannot be conceded that, because, the state may look to his bond for indemnity, therefore this credit in the bank must be treated as the personal credit of Smith.

The case of Swartwout v. Mechanics' Bank, 5 Denio, 555, was relied on in the argument by counsel for the assignee and should be noticed. Swartwout was collector of customs for the port of New York, and kept an account with the bank, in the name of "Samuel Swartwout, Collector." For a balance due upon that account he brought suit. The bank, assuming that the credit, the amount of which was so sought to be recovered, belonged to the United States, undertook to set off against the plaintiff's demand a balance due from the government to the bank. This was attempted, it must be borne in mind, in an action at law by Swartwout against the bank, and in a case where the only fact shown, touching the ownership of the money, was that of its deposit in the name of the depositor with his official addition. The court held the plaintiff entitled to recover. There was no affirmative proof that the money deposited belonged to the United States. The court was left to inference upon that point. No instructions of the secretary of the treasury as to depositing the money were given in evidence. There was nothing in the case to show that depositing the money in the bank in the manner in which it was done was by the direction or order of any officer of the government. And in the absence of any proof in the particulars mentioned it was assumed by the court that the deposit was liable to be drawn only by Swartwout. It is plain, from the opinion of the court, that, upon the facts as they appeared in the case, and in the absence of other material facts, the court regarded the bank as estopped, in an action at law between it and Swartwout, to assert that the moneys deposited belonged to the United States. That case is to be distinguished from this at bar in other respects. The moneys deposited by Swartwout were not, previous to their coming into his hands, the moneys of the government. It was necessary that they should pass into the control of the government before ownership could be asserted, and, as shown, the case was destitute of affirmative proof that the deposit was made by direction or under any arrangement with any other officer of the United States, or that it was a payment over of the money, in discharge of official duty. If Swartwout had received the deposited moneys from the secretary of the treasury, and if they had been deposited, and the form of the deposit account had been adopted, by arrangement between him or some other competent authority of the government and Swartwout and the bank, so that the

bank had thus acquired knowledge of the ownership of the moneys when deposited, I cannot doubt that the government, in a proceeding between it and the bank, could have asserted a claim to the credit created by the deposit, and that the bank could have set off against such claim a balance due to it from the government. The case of Miller v. Receiver of Franklin Bank, 1 Paige, 444, was also cited on the argument; but, upon the facts, I do not regard it as applicable to the case under consideration.

As a conclusion from the views expressed, it results that the claim of the state may be proved against the estate of the bankrupt. There is some question whether the proof of claim presented is regular in form and execution. It is made and verified in behalf of the state, by H. N. Smith, warden of the prison. I think it should be made by the state treasurer, or by some officer holding a relation to the state similar to the relation which a president, cashier, or treasurer bears to a corporation of which he is such officer. The attorney general will have leave to amend or correct the proof of claim in question accordingly.

[NOTE. The assignee appealed to the circuit court, which reversed the decision herein. See Case No. 3,242.]

Case No. 3,244.

CORN EXCH. NAT. BANK, Etc., v. PHILADELPHIA TRUST, SAFE-DEPOSIT & INS. CO. et al.

[33 Leg. Int. 401;[1] 11 Phila. 510; 22 Int. Rev. Rec. 385; 9 Chi. Leg. News, 65.]

Circuit Court, E. D. Pennsylvania. Oct. 26, 1876.

ASSIGNMENT FOR BENEFIT OF CREDITORS.

Where the effect of an instrument is to transfer property beyond the reach of an execution in trust for the benefit of assenting creditors, it is within the purview of the statutes regulating voluntary assignment for creditors.

R. C. McMurtrie, for complainants, and against master's report.

George Junkin and John Fallon, for Gregg Bros., judgment creditors.

McKENNAN, Circuit Judge. In Watson v. Bagaley, 2 Jones [12 Pa. St.] 167, a letter of attorney, authorizing the attorneys named in it to demand, sue for and receive all the choses in action of the principal, and apply the proceeds to the payment of certain enumerated debts, was held to be substantially a voluntary assignment, and within the purview of the Pennsylvania statutes regulating transfers for the benefit of creditors. The chief justice there said, "An assignment of a chose in action, or of a fund, need not be by any particular form of words, or particular form of instruments. It leaves the legal ownership, and consequent right of action, in the assignor; and it has, therefore, been treated as a declaration of trust for the assignee, or an agreement that he shall receive the money to his own use, or, as the case may be, to the use of the persons beneficially concerned. Any binding appropriation of it to a particular use, by any writing whatever, is consequently an assignment, or what is the same, a transfer of the ownership. * * * If, then, the letter of attorney, and the acts done pursuant to it, virtually constituted an assignment, it was decisively within the purview of the statutes to regulate transfers for the benefit of creditors, else these statutes might be evaded and the precious power to prefer be retained by changing the form of the instrument. * * * Here the garnishees had the property for the creditors by force of an irrevocable power, and it was consequently subject to attachment." So also in Lucas v. Sunbury & E. R Co., 8 Casey [32 Pa. St.] 461, a lease of a railroad, stipulating for the retention of a certain proportion of its earnings by the lessee, and the payment of the remainder to certain creditors of the lessor, was held to be an assignment in trust for the benefit of creditors, within the meaning of the statutes relating to such assignments. In delivering the opinion of the court below on the points reserved at the trial Hare, J., said, "Were I to express the inclination of my own mind in the point now before me, I should say that every grant or transfer by a debtor, which places the property transferred beyond the reach of an execution, and charges it with a trust for the payment of debts, is within the letter and spirit of the acts of assembly by which assignments for the benefit of creditors are regulated, and is consequently void, unless the provisions of these acts are complied with, both as it regards the nature of the trust and the formalities necessary for its creation." And this was distinctly approved by the supreme court.

Now, if we apply the reasoning of these opinions to the present case, it is decisive of the character of the instrument of November 10, 1873. Its nature must be determined by its effect, rather than by its form; and while it is undoubtedly a mortgage to some intents, as every security for creditors may be more or less so, it certainly places the property transferred beyond the reach of an execution, and creates a trust for the benefit of creditors. It is a transfer of the ownership of the property described in it, by insolvent debtors, to a trustee for the benefit of creditors assenting to it, and so operates as a binding appropriation of such property to the use of the assenting creditors. True, it is defeasible by payment of the debts secured by it at their maturity, but in like manner, might the execution of an absolute voluntary assignment be arrested, and the trust created by it be superseded. It is none the less, in its effect

[1] [Reprinted by permission.]

and operation, a voluntary assignment by insolvent debtors of part of their property in trust for the benefit of some of their creditors, and so is within the purview of the statutes regulating such transfers.

We, therefore, concur in the conclusion reached by the master, and remand the case to him, with directions to make distribution in conformity with his report.

Case No. 3,245.

CORNIER v. SAWYER.

[Crabbe, 281.][1]

District Court, E. D. Pennsylvania. Aug. 7, 1839.

SEAMAN'S ACTION FOR ASSAULT.

Where a quarrel occurred between a master and a mate, and the latter left the vessel, to consult the consul, but returned, saying that the consul advised the matter should be "made up;" and the master, third parties having mediated between them, agreed to do so; the mate has no cause of action, against the master, because of such quarrel.

This was an action [by Jean H. Cornier against Simon Sawyer, master of the schooner Frederick Reed] for assault and personal damage. It appeared that the parties, while in Porto Rico, quarrelled, and the respondent disrated the libellant, who was a mate; that the libellant refused to go before the mast, and went to see the consul; that after some days, during which time other persons had mediated between them, the libellant returned, saying the consul advised that "the matter should be made up, and dropped," to which the captain agreed; that the libellant had returned to his duty as mate, and had been paid his full wages on his arrival; and that, afterwards, this suit had been commenced.

H. Hubbell, for libellant.

Mr. Gerhard, for respondent.

HOPKINSON, District Judge. This was a very proper case for compromise; there were faults on both sides. The parties had mutual complaints against each other. The captain complained of habitual insolence, insubordination, and refusal to obey his orders; of gross carelessness, or want of skill, in the libellant's conduct as mate, and of this he has proof. The mate complains of harsh treatment, coarse and abusive language, and unprovoked and oppressive punishments. Both had some reason for these complaints. It was a fair case for compromise and mutual concession; and this was what the consul advised. It appears that the consul said they "had better make it up," and, therefore, the mate was again received; that is, the captain did drop it, gave up his causes of complaint, and certainly was entitled to expect the same to be done on the other side; otherwise they did not make it up, they did not drop it, but the captain only did so. Such was not the advice of the consul, by which the libellant was willing to abide. The mutual concession, as advised by the consul, was what the libellant came and offered to the captain, and what the latter accepted; by this both parties were to be restored to their original relations and positions, to the status ante bellum; the captain has performed his part of the treaty, the mate endeavors to withdraw from his. The libel is dismissed, without costs.

[1] [Reported by William H. Crabbe, Esq.]

CORNING (BURDEN v.). See Cases Nos. 2,143 and 2,144.

Case No. 3,246.

CORNING et al. v. BURDICK.

[4 McLean, 133.][1]

Circuit Court, D. Michigan. June Term, 1846.

ALIAS EXECUTION — SATISFACTION OF JUDGMENT BY LEVY — MALFEASANCE OF MARSHAL — FALSE RETURN.

1. An alias execution can not be issued until the return of the first execution.

2. If such execution should be shown to have been lost or destroyed, the court might order an alias.

3. When personal property has been levied on, sufficient to satisfy the judgment, it is presumed to be satisfied. But, if such property, on being sold, should not be sufficient, an alias may issue.

4. An officer is liable for malfeasance where he disposes of the property, to the injury of the defendant, without complying with the requisites of the law.

5. The officer will always be presumed to have done his duty.

6. The remedy against him is, by an action for a false return.

Mr. Douglass, for plaintiffs.

Joy & Porter, for defendant.

OPINION OF THE COURT. This is an application for an alias fi. fa. Judgment was rendered the 30th of June, 1840. Execution issued, returnable the first Monday in August ensuing. The marshal being compelled by rule and attachment, on motion of plaintiffs [Corning and Horner], returned the execution that he had made $1,473.68; and that certain property was on hand unsold, for want of bidders. This return being defective and incomplete, subsequent proceedings were had by the plaintiffs, by which the marshal was required to make a corrected return. This he filed January 8th, 1845, showing what property was levied upon, how it was disposed of, the amount of money made, and nulla bona as to the residue. The plaintiffs, it is insisted on, have a right to take out an alias fi. fa. as a matter of course, without this special application, under the 90th rule, two years not having elapsed since they were

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

entitled to sue out the same. No alias can issue until the original fi. fa. has been completely executed and returned. Grah. Pr. 351; Archb. Pr. 436. There can be no doubt that the first execution must be executed before an alias can issue; but it is supposed that if, after executed, the writ should be lost, or by accident destroyed, its return might be dispensed with. This motion is offered on the ground that the first execution was levied on personal property, sufficient to satisfy the judgment. And this is sworn to by the defendant.

And for the defendant [Justus Burdick], it is contended that a levy on personal property, sufficient to discharge the debt, is a satisfaction, even though the officer wastes the property, or loses the money. 5 Dana, Abr. 17, 18; 4 Mass. 402; 1 Salk. 323; 2 Saund. 47, note 1; 6 Mod. 292; Cow. & H. Notes, 1046, 1047, 1083, 1087.

Where a levy has been made, there can be no alias fi. fa. until the goods taken shall be sold, and, especially, where the goods levied on may be sufficient to satisfy the execution. Until the sale shall be made, the execution, by the levy, must be considered as satisfied. And if the property be lost through the negligence of the sheriff or marshal, he is liable to the plaintiff, whose agent he may be considered for the purpose of making the judgment, by a sale of the property. For malfeasance, the officer may also be responsible to the defendant. In this case, it is alleged that there has been malfeasance, which is alleged to consist in the sale of a very small part of the property at private sale. The marshal is undoubtedly liable to the party injured, if he has disposed of any part of the property levied on, in a way which the law did not authorize. But the marshal has made his return, that he made the levy on the property, sold it for a certain sum, which leaves a balance on the judgment unsatisfied; and he says there is no other personal property, out of which he can make the residue. And an alias fi. fa. is asked by the plaintiff. This return is conclusive, and can not be contradicted. 4 Phil. Ev. 1087–1089; Har. Dig. 2486; 7 Comyn, Dig. "Return," F, p. 287.

The best evidence of the value of the property, is the sale of it by the officer. On execution, personal property rarely sells for its value, and it would be a new principle, if the plaintiff in the execution should be held responsible for the value of the property, at whatever price it might sell. Misconduct in the officer is not presumed, but must be shown. A failure to comply with the requisites of the law would subject the officer to damages, if the property were sold greatly below its value. Where the return of the officer is made, as in this case, on the presumption that he has done his duty, the plaintiff may ask for an alias. If the defendant has been injured, he has his remedy against the marshal. When a sci. fa. is brought to revive a judgment, on which execution has been issued, and levied upon personal property, and remains unreturned, the judgment will be regarded as satisfied. No action can be maintained on a judgment, while there is an outstanding execution levied and unexecuted. It is believed there is no case where the execution had been returned, showing a deficiency of property, that its sufficiency in value might be shown in an action on the judgment, in bar of the execution. The truth of the return can not be thus controverted. This can only be done by an action for a false return.

The motion of the plaintiff for an alias fi. fa. is granted.

CORNING (PERRY v.). See Cases Nos. 11,-003 and 11,004.

CORNING (TROY I. & N. FACTORY v.). See Cases Nos 14,195–14,198.

CORNING, The ANGELINA. See Case No. 384.

Case No. 3,247.

The CORNUBIA.

[Cited in The R. E. Lee, Case No. 11,691. Nowhere reported; opinion not now accessible.]

Case No. 3,248.

The CORNWALL.

[8 Ben. 212.][1]

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

COLLISION AT PIER—EXPOSED POSITION.

A bark was placed alongside of pier 17, North river, so that her stern extended beyond the end of the pier, her master having notice that a steamship, so long as to cover three piers, was coming into her berth at pier 18. The steamship worked slowly and cautiously into her berth, and in so doing came in contact with the projecting stern of the bark and did her some damage: *Held*, that the steamship was not guilty of negligence in thus coming in contact with the bark, and that she was not liable for the damages.

[Distinguished in The Canima, 17 Fed. 272; Shields v. Mayor, Aldermen, etc., 18 Fed. 749.]

In admiralty.

Beebe, Wilcox & Hobbs, for libellants.

Foster & Thomson, for claimants.

BENEDICT, District Judge. This action is to recover damages sustained by the bark Excelsior, while lying moored at a pier, by contact with the steamship Cornwall.

The bark was placed alongside pier 17, North river, with her stern extending beyond the end of the pier. The Cornwall was a large steamship endeavoring to reach her berth at pier 18 on the other side of the slip

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

in which the bark was lying. It was necessary for the steamship to warp into her berth; and in so doing she came up to the end of the pier 17, where the bark was lying, inasmuch as she was a long vessel extending in length across three piers. As the bark lay with her stern projecting beyond the end of the pier, it was impossible for the steamship to come to the end of that pier without touching the bark; and yet it was necessary for her to come to the end of the pier in order to reach her berth. She therefore swung slowly and carefully in, broadside to the bark's stern. While thus in contact some slight damage was done to the bark. For damages thus occasioned, the steamship is not liable, because the bark without cause placed herself in an exposed place, and one necessarily involving her contact with the steamship as it occurred, provided the steamship attempted to reach her berth. This position the bark took after notice that the steamship was about to go into that berth. All that the bark could require of the steamship, under such circumstances, was the exercise of all diligence and care to place as little pressure as possible upon the bark. This was exercised. The slight damage that occurred was no more than the natural consequence of a contact, made necessary by the action of the bark, in placing herself where she did, when she had notice that such position would involve contact with a steamer about to come into the slip. I find no negligence on the part of the steamship, and therefore must dismiss the libel with costs.

Case No. 3,249.

The CORNWALL.

[10 Ben. 108.][1]

District Court, E. D. New York. Sept. Term, 1878.

WHARFAGE—MAKING FAST TO PIER.

The C. was a large steamship, having a regular berth at a pier, which she could enter with safety only at slack water. She arrived at her berth one day at 10 a. m., when the tide did not serve till 1 p. m., and she accordingly made fast at the end of her pier. She was so long that she overlapped the piers on either side, and a line was thrown from her to the pier which was overlapped by her bow, for her better security while waiting the tide: *Held*, that the C. did not "make fast to" such pier within the meaning of the wharfage act of the state of New York, and that the owner of that pier was not entitled to recover against her for wharfage.

[In admiralty. Libel by the mayor, aldermen, and commonalty of the city of New York against the steamship Cornwall.]

Beebe, Wilcox & Hobbs, for libellant.
Foster & Thomson, for claimant.

BENEDICT, District Judge. This is an action to recover wharfage. The facts are not in dispute. The Cornwall is a large steamship which has a regular berth at the pier at foot of Fletcher street, but which she could enter with safety only at slack water. At the time in question, she arrived at her slip at 10 a. m., but the tide did not serve till 1 p. m. She accordingly waited for the tide and made fast at the end of the pier. When so made fast, her length was such that she overlapped an adjoining pier on either side. To the pier thus overlapped by her stem, which belonged to the libellant, a line was run from the steamship for her better security, while so waiting for the tide. Upon these facts the libellant claims to be entitled to recover wharfage for a day, upon the ground that the steamship made fast to his wharf for part of a day, within the meaning of the statute of the state, which declares that "it shall be lawful to charge and receive from every vessel that uses or makes fast to any pier, or makes fast to any vessel lying at such pier or to any vessel lying outside of such vessel—for every day or part of a day, for a vessel of 200 tons burden and under, 2 cents per ton, etc., etc." [Laws 1872, c. 320, as amended by Laws 1877, c. 315.]

This statute has been interpreted by the highest court of the state (Taylor v. Atlantic Mut. Ins. Co., 37 N. Y. 275) to intend that the rates named are to be paid for the use of the wharf, and also to make the fact of making fast to a wharf or to any other vessel which is itself fastened to such wharf, evidence of a use of the wharf within the meaning of the act. But I do not understand that it has ever been held that proof of making fast to a wharf shall, under all circumstances, be conclusive evidence of a use of the wharf within the meaning of the act. In the moving of vessels, it often becomes necessary to cast a line upon a wharf, when no one can suppose that the wharf has been used within the meaning of the statute. so as to render the vessel liable for wharfage. Evidently, it was intended that there should be some limitation attached to the words "made fast to." It may be difficult to fix with precision the extent of the limitation intended; but I think it can safely be said, that, notwithstanding the fact that this steamship had a line fast to the libellant's pier, the other facts in evidence show that she did not make use of the wharf within the meaning of the act. It may be that for such an obstruction of access to the libellant's wharf as the evidence shows an action can be maintained; but upon the facts proved no liability for wharfage was incurred on the part of the Cornwall. The libel is therefore dismissed with costs.

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

Case No. 3,250.

In re CORNWALL.

[9 Blatchf. 114; 6 N. B. R. 305; 6 Am. Law Rev. 365.][1]

Circuit Court, D. Connecticut. Sept. Term, 1871.[2]

INVOLUNTARY BANKRUPTCY — CREDITOR—CONVEYANCE FOR MAINTENANCE — LIMITATION — NEW PROMISE.

1. In a proceeding in involuntary bankruptcy, the alleged debtor may deny that the petitioner for an adjudication is a creditor, and may, if he maintains such denial by proof, have the petition dismissed.

[Cited in Re McKibben, Case No. 8,859.]

2. Where a person, whose property exceeds in value all that he owes, with a view to the payment of his debts, and to secure to himself a maintenance in the future, conveys that property to another, on an agreement that the grantee shall pay all that he owes, and support him during the residue of his life, such a conveyance is not, per se, fraudulent and void, as against creditors.

3. Where the statutes of limitation of the state in which the petitioning creditor in a proceeding in involuntary bankruptcy and his alleged debtor reside, have created a bar to the recovery of the alleged debt by action, such debt cannot form a basis for an adjudication of bankruptcy on the petition; and the holder of a claim, so barred, is not entitled to prosecute such a petition.

[Cited in Andrae v. Redfield, Case No. 367; Re Noesen, Id. 10,288; Nicholas v. Murray, Id. 10,223; Re Eldridge, Case No. 4,331. Distinguished in Re Hertzog, Id. 6, 433.]

4. Where a debt is barred by the statute of limitations, a promise by the debtor to pay it when he is able, is conditional, and does not create an obligation, as a revival of the debt, until ability to pay appears; but, where there is a present debt, a promise to pay it when able does not destroy or postpone the right of the creditor to sue, or prevent the running of the statute.

This was a petition by Nathaniel O. Cornwall for the review and reversal of an order of the district court [of the United States, for the district of Connecticut] dismissing his petition, as a creditor of David Cornwall, for an adjudication, declaring the latter a bankrupt. [Case No. 3,251.]

Simeon E. Baldwin and Edwin E. Marvin, for petitioner.

Charles E. Perkins and Alfred Hall, for respondent.

WOODRUFF, Circuit Judge. On the 16th of June, 1870, Nathaniel O. Cornwall, a resident of Portland, in this district, presented to the district court his petition, under the 39th and 40th sections of the national bankrupt law [of 1867 (14 Stat. 536, 537)], alleging that he is a creditor of David Cornwall, (his father), also a resident of said Portland, averring that the latter has committed an act of bankruptcy, and praying that he be declared a bankrupt, and that a warrant issue to take possession of his estate, that the same may be distributed, &c. The act of bankruptcy, as stated in the petition, is, that the said David Cornwall, being possessed of certain estate or property, situated in Portland, real and personal, and being indebted to the petitioner and others, did, on the 31st day of March, 1870, with a view to insolvency, and with intent to delay, hinder or defraud, as the case may be, his creditors, convey the property mentioned in the petition to Maria and Elizabeth Cornwall, of the said Portland, (his daughters, and sisters of the petitioner,) the same being all the property, real and personal, which he possessed, or which could be held as security for the payment of his, the said David Cornwall's, just and lawful debts. The indebtedness, claimed by the petitioner to constitute him a creditor of David Cornwall, is stated to be upon a promissory note, for money loaned to the said David, dated Portland, August 29th, 1869, for five hundred dollars, payable to the petitioner, or to his order, on demand, with interest from its date; and, also, the sum of five hundred and twenty dollars and eighty-eight cents, loaned to the said David, July 14th, 1854, the receipt of which is acknowledged in writing, with a promise to deposit the same, for the petitioner's benefit, in the savings bank; together, amounting to $1,020 88, exclusive of interest.

The respondent, David Cornwall, appeared and answered the petition, and, by his answer, denies that he is indebted to the petitioner in any sum whatever. He admits that he did, on the 31st day of March, 1870, execute the alleged conveyance of all his property to his daughters, Maria A. and Elizabeth, but denies that the same was done with a view to insolvency, or with any intent to delay, hinder, or defraud his creditors, and states, that, at the time of such conveyance, he had no creditors except his two daughters, (to whom he was then largely indebted,) and except a few small bills in the neighborhood, not amounting to three hundred dollars; that his two daughters, in consideration of such conveyance, promised and agreed with him, that they would support him during life, and would pay all his debts then existing; that they are ready and willing to pay all valid claims existing against him; and that they informed the petitioner, before he commenced the proceedings, that they would pay all valid claims he had against his said father. The answer also states the history of the apparent indebtedness of the respondent to the petitioner in detail, averring, that the $520 88, received from the petitioner in 1854, was given to him by his said son in consideration of, and in part repayment of, advances which he had made for the education of the petitioner at college, in order to which he had been compelled to borrow money; that, afterwards, in his advanced years, he was embarrassed by debts,

[1] [Reported by Hon. Samuel Blatchford, District Judge, and here reprinted by permission. 6 Am. Law Rev. 365, contains only a partial report.]

[2] [Affirming Case No. 3,251.]

which he had been unable to pay, while his said son had accumulated large wealth, and such sum was given and received to relieve him from such embarrassment, and without any expectation that the respondent was to repay the same, or to be considered or treated as a debtor to his said son therefor; that more than six years have elapsed since the said sum was so given to him by his said son, and, if the same constituted a debt, it has been barred by the statute of limitations of the said state of Connecticut; that the note for $500, dated August 29th, 1869, was made without legal consideration; that the sum of $500 was a voluntary gift made by the petitioner for the especial relief and benefit of his aged and infirm mother, to be expended, and, in fact, was expended, in repairing a portion of their dwelling house, which had become old and decayed, and which the respondent had not means then to repair; that such repairs were proposed by the petitioner, the furnishing of the money for the purpose was tendered by him, and the repairs were consented to, and were made by the respondent, in assent to the petitioner's proposal, and on his agreement to give the money to pay therefor; that, when the petitioner requested a note therefor, he reiterated that the money was a gift, but stated, that, as the respondent was then embarrassed by indorsements for another, he desired to hold a note for the benefit of his sisters, so that, if the respondent should fail or die, he could present said note against the respondent's estate, and obtain something for his said sisters; and that the respondent, in confidence in his said son, gave him a note, as requested, and afterwards, on the 29th of March, 1869, upon the request of the petitioner, and his statement that said note was lost, he gave him another note for the same purpose, which is the note mentioned in the petition, and is without consideration and void.

Upon the petition and answer, and upon the proofs of the parties respectively, the matter was brought to a hearing in the district court, and the petition was dismissed. The opinion of the district judge shows that, without deciding other questions, he deemed it sufficient to find that the petitioner is not in fact a creditor, upon two principal grounds—First, that the note mentioned in the petition was without legal consideration, the moneys advanced, and alleged by the petitioner to be the consideration of the note, having been, in truth and in fact, a voluntary gift by the petitioner, out of his abundance, to and for the relief and comfort of his aged and infirm parents, and accepted as such; and, second, that, if the moneys furnished to the father in 1854, and applied by him to the repayment of moneys borrowed, ever created or constituted an indebtedness by the father to the son, the latter was, by the statute of limitations of the state of Connecticut, barred from having or maintaining any action therefor, and he, therefore, had no standing thereupon to ask, as a creditor, that David Cornwall be decreed a bankrupt.

Upon this appeal or review of the order of the district court, it is insisted, that the order should be reversed, on various grounds, the chief whereof may be stated and considered in the following order, namely: 1st. That the petitioner having, by his petition and the proofs furnished in support thereof, shown himself to be apparently, or prima facie, a creditor, the respondent was not at liberty, by putting that fact in issue, to have a trial of the question, and an adjudication dismissing the petition, but the cause should have proceeded to a decree upon the matter charged as an act of bankruptcy, and, that being established, the petitioner, when he offered proof of his debt, with a view to share in the distribution of the estate, would, if his claim was contested and disallowed, be entitled to a trial by jury before its final rejection. 2d. That the proofs do not warrant the finding that the $500, advanced for the repairs of the respondent's dwelling house, were a gift, but, on the contrary, they show, that the money was sought as a loan, advanced as a loan, and secured as a loan by the promissory note of the respondent, upon the loss of which the note mentioned in the petition was given, as a new or substituted security. 3d. That the state statutes of limitation have no application to proceedings in bankruptcy; that, notwithstanding the lapse of time, the debt still exists; that, while it may be true, that, in one or even more states, no action will lie for its recovery, an action may be maintained therefor in another state, if the respondent is found therein; and that, unless it is shown that it cannot be recovered in any of the United States, it must be declared a debt, and the court of bankruptcy, as a national tribunal, must recognize as a creditor any one who has a cause of action valid in any state of the Union. 4th. That, if the statute of limitations in Connecticut be, in general, recognized by the federal court in bankruptcy, as disabling the holder of a claim from proceeding against his debtor, the petitioner's claim, in the present case, is not barred thereby, for two reasons—First, the promise made in 1854, as it appears by the proofs, in writing, was, that the respondent would, "as soon as it is in his power," deposit it in the savings bank, according to the petitioner's previous direction, so that the latter would be able to control it at pleasure, and that it has not been proved that six years have elapsed since it was in the power of the respondent to do this, and, therefore, it does not appear that six years have elapsed since the cause of action accrued; or, second, the respondent held the money of the petitioner upon a trust, to deposit it in the savings bank, to the account of the petitioner, and to such a trust the statute of limitations does not apply, and, therefore, the claim is not barred.

1. The claim, that, in proceedings for a compulsory decree, declaring a respondent a bankrupt, the latter may not deny that the petitioner is a creditor, or may not, by proofs, maintain such denial, and thereupon dismiss the petition, is, I think, wholly untenable. It is true, that, where a party has been adjudged a bankrupt, no one claiming to be a creditor can be excluded from a share in the distribution of the estate, without having the opportunity, furnished by the 24th section, to appeal, and, on that appeal, to have his claim tried, as in an action at law, in the usual manner in the courts of the United States. But this does not reach the question, whether a party has been, by the law, made liable to be declared a bankrupt, at the instance of one who has in fact no claim against him, and no interest in the question whether the party has committed an act of bankruptcy or not.

Section 39 of the bankrupt law declares what shall be deemed acts of bankruptcy, and makes him, who has committed such an act, liable to be "adjudged a bankrupt, on the petition of one or more of his creditors, the aggregate of whose debts provable under this act amount to at least two hundred and fifty dollars, provided such petition is brought within six months after the act of bankruptcy shall have been committed." To the maintenance of the petition, or to give the petitioner any standing in court, several things must concur. The petitioner must be a creditor, the debt due to him must be provable under the act, and the amount thereof must be at least two hundred and fifty dollars. Unless all these concur, he has no right to prosecute the petition; and, however he may be able to prove, or does prove, the commission of acts of bankruptcy, he is not, by the law, clothed with the right or power to begin or sustain a prosecution, or ask a decree. It is nowhere, expressly or impliedly, said, that one who can furnish proof which, unexplained and uncontradicted, would show, prima facie, that he is such creditor, may file such a petition, or that a party may be adjudged a bankrupt upon such a petition. The objection goes not merely to the disability of the petitioner, but to jurisdiction of the cause. And this should be so. It would be monstrous injustice, if parties were not only liable to be proceeded against, but must necessarily be adjudged bankrupt, submit to a warrant, and be dispossessed of all their property, at the instance of any one and every one who, either dishonestly or by mistake, was able to present, by petition and affidavits, prima facie evidence of a debt, when, in truth, none existed. It might often happen, that the only act of bankruptcy alleged depended, for its character, upon the very question whether any debt was owing to the petitioner; and, if a mere prima facie case, shown by the petitioner, precluded further inquiry on that question, a party might be declared a bankrupt, his property be subjected to administration under the law, and, in the end, it would appear, that, the petitioner having no debt, no act of bankruptcy had been committed, and the whole proceeding, injurious as it must be, was wholly groundless. Not only so; no other creditor appearing, the proceeds of the estate must be returned to the party groundlessly prosecuted.

If, therefore, there were nothing further in the act bearing upon this point, I should not hesitate to say, that a respondent, called by the petition into the district court, had the clear and full right to meet the petitioner at the threshold of the proceeding, by denying and disproving any of the facts without which the petitioner has no authority in law to maintain the proceeding. But section 41 gives this right in express terms, and makes it the imperative duty of the court to proceed summarily to hear the allegations of the alleged debtor; and, as to the commission of the act of bankrutcy, it must order a trial by jury, if he demands it, and if, upon such hearing or trial, the debtor proves that the facts set forth in the petition are not true, "the proceedings shall be dismissed, and the respondent shall recover costs." What are "the facts set forth in the petition?" Obviously, all those which are, by the 39th section, necessary to make it the duty of the court to adjudge the respondent a bankrupt. That is to say, there must be before the court a creditor, by a provable debt, to the required amount, and, this being true, there must be established an act of bankruptcy, within six months before the filing of the petition. Let it be supposed, that the petition did not state all these facts, it cannot be doubted that it would be the duty of the court to dismiss it. So, if the respondent shows that any of these facts, when alleged in the petition, are not true, the statute requires that the proceedings be dismissed.

The inquiry in the district court, whether, in this case, the petitioner was a creditor, having a debt against the respondent provable under the act, was, therefore, a proper inquiry, and, if it was properly found in the negative, the order dismissing the proceeding was not erroneous.

2. Upon the merits of the case, there is, to my mind, a difficulty in sustaining the petitioner's application, in the point upon which no opinion was expressed in the district court. As already observed, to warrant the adjudication sought, it must appear that an act of bankruptcy has been committed. In the petition herein, the precise act upon which the petitioner relies is stated, to wit, that the respondent, being indebted to the petitioner and others, conveyed his property to Maria and Elizabeth Cornwall, with a view to insolvency, and with intent to delay, hinder or defraud, as the case may be, his creditors.

Now, the proof is, that the object of the conveyance was the payment of all the debts

of the respondent, and to make provision for his support by his daughters in his old age. This was not a purpose fraudulent as to any one. So far from being a conveyance with a view to insolvency, it contemplated actual solvency, and actual payment of all he owed; and his property, according to the proof, was fully adequate, and more than adequate, for the purpose, even conceding that the petitioner was a creditor to the full amount which, according to his own statement of the transactions, he could be allowed. Unless, then, the transaction was, per se, fraudulent and void, as against creditors, it could not, upon this proof, be pronounced an act of bankruptcy. This raises the question—When a person, whose property exceeds in value all that he owes, with a view to the payment of his debts, and to secure to himself a maintenance in the future, conveys that property to another, on an agreement that the grantee shall pay all that he (the grantor) owes, and support him during the residue of his days, is such conveyance, per se, fraudulent and void, as against creditors? Such arrangements, by aged and infirm parents, to relieve themselves of care and labor in their declining years, have not heretofore been unusual. They are commonly made with children, or with some one selected, and, in a sense, adopted, to stand in that relation. The facts, that the grantor is aged, infirm, and incapable of labor to make his estate productive, that the grantee is already a creditor, and, therefore, has a claim to receive a portion of such property, that the grantor owes but little besides, that the grantee is already, (irrespective of such conveyance,) of sufficient ability to pay all the debts, and that he proceeds to do so, and stands ready and willing to pay all that the grantor owes, may not give a transaction validity, which, on its face, must be held fraudulent; but, they do utterly repel the suggestion of fraudulent intent or purpose in the minds of the parties thereto, and all these facts concur in the present case. And, according to the proofs here, the only reason why the petitioner has not been paid is, that there is a question, and a very serious question, to say the least, whether there is any debt whatever due to him.

The grantees here have always been ready and willing, and have declared to the petitioner, that they are ready and willing to pay him whatever, if anything, his father owes him. If, in fact, anything is due, he could not, (had no such conveyance been made,) recover it, in the face of his father's denial thereof, until he had established the indebtedness by an appropriate proceeding therefor; and there is no existing difficulty in obtaining payment when he has so established a debt, the said grantees being ready and willing, thereupon, to pay it, and being compellable to pay it, by proofs and proceedings adapted to such a state of facts. Under such circumstances, the allegation of the petitioner savors more of bitter, not to say malignant, hostility, provoked by the confidence reposed by his father in his sisters, or some unexplained family dissension, than of any sincerity or belief, even by the petitioner, that any fraud was intended.

The court below having expressed no opinion upon this point, it received little attention from the counsel, on the argument of the review in this court. I have, therefore, deemed it proper to examine the other grounds upon which the propriety of the order was discussed, instead of resting the decision upon a failure to prove an act of bankruptcy.

3. Upon the question, whether, upon the proofs, it was rightly held that the petitioner was not a creditor of the respondent, it is not insisted that, if the advance of five hundred dollars, for the repairs of the dwelling house, was in fact a free gift, made chiefly for the relief and comfort of the petitioner's aged mother, and in part, (as the evidence tended to show,) to provide a room which the petitioner might himself conveniently occupy on his visits to his parents, there was any error in holding, that such gift constituted no legal consideration for the note set forth in the petition, or the prior note for which, on the loss thereof, such note was given; and that, it being without legal consideration, the petitioner could not be held a creditor by reason thereof.

That the advance was a gift, voluntarily made, and accepted as such; that the repairs were consented to by the respondent, and the money received and expended upon that understanding, was distinctly found, as a fact, by the district judge, upon the trial of the cause, with the witnesses before him, and with an opportunity to hear, observe and consider, not only what the witnesses testified, but their appearance and their manner while testifying. Such finding, it is true, is not conclusive upon this hearing. It is open to review; but it ought not to be lightly regarded, nor should it be overruled, except upon a very decided conviction that it is erroneous. A careful study of the evidence, aided by the suggestions of the petitioner's counsel, has not produced that conviction. On the contrary, the preponderance of the testimony is, that it was a purely voluntary contribution by the son, under the then influence of filial affection towards his mother, to render her latter days more comfortable; that it was received as such, and mutually so understood; that there was, on the part of the respondent, neither intention nor willingness to run in debt for the purpose; and that it was in distinct response to the son's offer to bear the expense, that the father consented to make the repairs. True, the giving of the note for the amount is very strong persuasive evidence that the respondent regarded it as a loan. Unexplained, it might override the evidence of the

previous offer and acceptance. But the explanation makes the whole transaction consistent. Upon further reflection, and in view of the motive which had prompted his generosity, it occurred to the son, that, as his father was under some indorsement or indorsements for a third person, and might fail or die insolvent, it might happen that his purpose to benefit his mother by the gift might be defeated, and that he might better secure his whole purpose, if he could induce his father to execute a note, to be held, and, in such a contingency, be made a claim against his estate, for the benefit of his mother and sisters. Whatever might be said of such a design, if the contingency had happened, and the attempt had been made thus to withdraw a portion of that estate from creditors, it is clear that such an arrangement was entirely consistent with the original and actual intent of the petitioner to advance the money as a gift, and with its acceptance and appropriation to the repairs, upon that understanding. So that it not only remains true, that the consideration for the note was a gift, but the force of the evidence, which the giving of the note involves, is weakened, and, in fact, overcome, by the proof of the purpose for which it was solicited by the petitioner and given by his father. And this view of the subject is greatly strengthened by the fact, that when, on the representation that the first note was lost, another was given, there was no claim for interest, as upon a loan to the father. If it appeared, that, upon all other grounds, the note was a valid note, I should hesitate, at least, in allowing parol evidence of an agreement with the father, either prior or contemporaneous therewith, that he should not be held bound to pay it. But, on the question whether it ever had any legal consideration, whether the money advanced was a gift which neither party intended or expected would be repaid, or would create any indebtedness by the respondent, the facts, that it was not treated as a debt, that the father was never called upon to pay it, and that, when a note was given in apparent renewal thereof, it was not treated as if given for a loan, and no interest was charged, go very strongly in support of the direct testimony to the point in controversy.

4. Whether, where the statutes of limitation of the state in which the parties reside have created a bar to the recovery of an alleged debt by action, the holder may, nevertheless, pursue the alleged debtor, under the bankrupt law, and, by that means, compel its payment, is a question of wider and greater importance than the immediate effect of this particular litigation.

In the present case, both parties reside in the state of Connecticut. If the advance secondly mentioned in the petition was a loan or created an indebtedness, it was for money received by the respondent in this state, in the year 1854, he then and ever since residing here. For the purposes of this question, it is assumed that such advance did create a debt, and, therefore, that the cause of action arose more than fifteen years before the filing of the petition in the district court, and is within the statute of the state, which declares, that no action "shall be brought but within six years after the right of action shall accrue."

In the construction of this statute, and in declaring its effect, the courts of the state hold, that the statute does not merely prohibit the maintenance of an action technically so called, but it bars the claim in whatever form it may be asserted. They declare, that it applies to the nature of the indebtedness as well as to the form of the action; that, although in terms applicable to actions only, it applies to all claims which may be the subjects of actions, however presented; that the lapse of time prescribed as a bar is regarded as furnishing a presumption of payment; that this presumption, when it is not overcome by a new promise, withdrawing it from the operation of the statute, is conclusive; and that the presumption, from the lapse of time, is, that the defendant has lost the evidence which would have availed him in his defense, if seasonably called upon for payment. Hence, after the lapse of six years, the claim can no more be used as a set-off than it can be made the subject of an action in form. Nor can it be successively urged before commissioners appointed by a court of probate to receive and allow claims against the estate of a deceased, with a view to the distribution of such estate. This construction and declaration of the effect of the Connecticut statute, establishes fully that the claim of this petitioner is, in their view and by force of the statute, absolutely barred. The appropriation of the estate of a deceased to the payment of his debts by an auditing and allowance thereof, presents a close analogy to the appropriation of the estate of a bankrupt; and, in effect, the Connecticut courts declare, that no legal claim exists in favor of the petitioner, if the statutes of limitation of this state are to have their actual legal operation. See, on this subject, Robbins v. Harvey, 5 Conn. 335; Hart's Appeal, 32 Conn. 520, and the cases there cited.

The federal courts, sitting within the respective states, regard their statutes of limitation, and give them the interpretation and effect which they receive in the courts of the state. This has been repeatedly declared in the supreme court of the United States, and is now the familiar practice. Shelby v. Guy, 11 Wheat. [24 U. S.] 361; M'Cluny v. Silliman, 3 Pet. [28 U. S.] 270; Green v. Neal's Lessee, 6 Pet. [31 U. S.] 291; Ross v. Duval, 13 Pet. [38 U. S.] 45, and cases therein cited. In Ross v. Duval, Mr. Justice McLean says: "These acts are of daily cognizance in the courts of the United States,

and no one has ever doubted, that, in fixing the rights of parties, they must be regarded as well in the federal as in the state courts." More than this, instead of regarding the nature and design of statutes of limitation as a mere withholding of the remedy, while a subsisting cause of action is nevertheless supposed to continue, the supreme court, in recent cases, regard them as proceeding on the presumption which, as above stated, the courts of Connecticut declare to lie at their foundation. Thus, in U. S. v. Wiley, 11 Wall. [78 U. S.] 508, 513, Strong, J., says: "Statutes of limitations are indeed statutes of repose. They are enacted upon the presumption, that one having a well-founded claim will not delay enforcing it beyond a reasonable time, if he has the power to sue." In Levy v. Stewart, 11 Wall. [78 U. S.] 244, 249, Clifford, J., says: "Statutes of limitations exist in all the states. * * * They are regarded as statutes of repose, arising from the lapse of time and the antiquity of transactions, and they also proceed upon the presumption that claims are extinguished whenever they are not litigated in the proper forum within the prescribed period." See, also, the recognition of state statutes of limitation, and their binding force in the federal courts, in Stewart v. Kahn, 11 Wall. [78 U. S.] 493, and in Hanger v. Abbott, 6 Wall. [73 U. S.] 532.

It may be suggested, that an act of congress (Act Sept. 24, 1789, § 34; 1 Stat. 92) requires the federal courts, sitting in the respective states, to make the laws of such states the rules of decision in trials at common law, and that the recognition of state statutes of limitation is founded on that act. Doubtless, the act so requires; but it does not follow, that, looking to the grounds upon which statutes of limitation proceed, as above stated, in repeated cases, the federal courts would not have recognized those statutes as a defence, had there been no such act of congress. The reason of the statutes, and the obvious justice of giving them due application, as well as consistency of adjudication, and the right of each state to prescribe the conditions and limitations of the liabilities of its citizens, all forbid that a plaintiff should be legally entitled to recover in the federal court against one whose defence is perfect in the state tribunals. The terms of the act of congress do not reach the federal courts when sitting as courts of equity; and yet it is certain, that, as courts of equity, they do recognize and allow lapse of time as a defence, in precise analogy to the statutes of limitation, in cases where such analogy is appropriate. Besides this, if the act of congress be the ground of these decisions in the federal courts, it may be regarded, for the purposes of this question, as an adoption, by congress, of the statutes of limitation of the respective states within which the federal courts are held; and, thereupon, the same rules of interpretation and of application obtain as are above stated to govern the state courts, and the foundation and scope of the statutes will be as also above stated. This leads to the same result. They will be held to apply to claims according to their nature, and in whatever form asserted. They will be deemed statutes of repose, proceeding upon presumption of payment, and of loss of evidence, and will bar all claims which may be the subjects of actions at law, however presented; and hence, also, their recognition by the federal courts, when sitting as courts of equity, as furnishing the proper analogy.

With these declarations before us, of the nature, foundation and effect of statutes of limitation, by the courts of the state and of the United States, and in the face of the well-settled recognition thereof by the latter, in their several circuits and districts, at law and in equity, we are called upon to say, that, when sitting as a court of bankruptcy, in the state of Connecticut, the district court of the United States may and must disregard the statutes of limitation of the state, entertain a party alleging a claim long since barred, as a prosecutor, upon his demand take possession of the estate of the respondent, and actually appropriate such estate to the payment of such claim; and this is claimed notwithstanding the second section of the bankrupt law requires this court, on review of the proceedings, to determine all cases arising under that law as in a court of equity. If there be any warrant for thus calling upon the district court to depart from the settled rule governing the federal courts on this subject, it must be sought in the express provisions of the bankrupt law, in its necessary construction, or in an evident intent of congress to produce this result, manifested in the act itself or in the circumstances of its enactment.

It is not claimed that there is any express declaration in the act, forbidding the court sitting in bankruptcy from giving the same effect to the statutes of limitation of the state in which the court is held, which it would be bound to give in a litigation between the same parties in any other form, either at law or in equity. Nor, in my judgment, does its language, in any respect, or its necessary construction, as a system of bankruptcy, work such a result. When it employs the terms, debtor and creditor, debt, claim, demand, and other like or kindred terms, as a guide to the court in the discharge of its duty, within the jurisdiction where it is acting, it uses those terms in their usual accepted sense, and they are to be applied by the court, within that jurisdiction, and tested there. When the inquiry arises, in the circuit or district court of the United States for the district of Connecticut, whether, between two citizens of that state, the relation of debtor and creditor exists—

whether A. B. has a debt against C. D.—it is to be answered by the enquiry—Is C. D. under a legal obligation to pay money to A. B.?—Has A. B. a claim which the law will recognize as entitling him to recover money from C. D.? The law of the jurisdiction answers the question.

It is suggested, that, in the federal court, the question must be answered by enquiring, whether, in any state of the United States, such claim would be recognized as a debt entitling A. B. to a recovery from C. D., if he were brought within its jurisdiction, and, if yea, then it must be so recognized by the federal court for the district of Connecticut, within the jurisdiction of which he is, and in which the question of his liability is to be determined, and, therefore, if it appear that, should C. D. be found in Wisconsin, the courts of that state would treat him as a debtor, he must be so treated here; or, in effect, the rights and responsibilities of a resident of Connecticut are to be determined by the laws of Wisconsin, and not by the laws of this state, though the matter arises here. The principle of this argument is nothing short of this—If he would be held a debtor anywhere, he must be held a debtor in the district court for the district of Connecticut. There is no ground for restricting the meaning of the word "debt" or "debtor" to a liability which would be enforced within the states of this Union. If, for the mere reason that, by the laws of Wisconsin, a resident citizen of Connecticut could be adjudged to pay what is claimed to be a debt, provided he were found there, he must, also, in the district court for Connecticut, be adjudged a debtor, it must be because, if anywhere such claim would be so enforced, it must be here; and, in short, whatever, in any place on this globe, could be recovered as a debt, if the parties should be subjected to its jurisdiction, is a debt within the meaning of the bankrupt law, and must be so treated by the federal courts, wherever they are exercising their jurisdiction as courts of bankruptcy.

There is no law of the United States defining a debt or describing a creditor, except as one to whom a debt is due. The bankrupt law speaks of debts due and payable either presently or at a future day. An alleged debt is not to be deemed due and payable, if the claimant cannot by law compel its payment. It is conceded, by the argument, that this is true, if, by the law of no state of the United States such payment could be compelled, if the parties were there. No reason can be assigned for this limitation, as already suggested; and, if there is any foundation for the argument, the proposition should be—If payment could be compelled anywhere on the habitable globe, were the parties there, then it must be treated as a debt in this court and in this district. In my judgment, the district court for Connecticut had not, nor have I, sitting in this district, anything to do with the question, what are the laws of Wisconsin, or, what are the laws of China, when considering the relation between two resident citizens of Connecticut, growing out of transactions in this state. The parties to this controversy are not and have not been in Wisconsin. The transaction did not arise in Wisconsin. Neither the parties, nor the subject matter, have ever been, and are not, under the jurisdiction of that state, or affected by its laws; and, whether, in the supposed contingency of the respondent's going to that state, and being pursued there by the petitioner, the latter could establish, and recover a sum of money from him as, a debt, seems to me wholly irrelevant to the inquiry before the district court, and just as irrelevant as the same question would be if applied to China. The respondent is not there; he is in Connecticut; he is pursued in Connecticut; and here he is to be judged, not by the laws of Wisconsin nor the laws of China. It may be, that, in some state of the United States, no statutes of limitation exist, or, at least, for the purpose of testing this question, we may assume that to be possible. If so, then, upon the argument, the legislation of Connecticut, in all respects just, wise, and entitled to favor, exercised for the protection of the citizens of that state, and within its competent power, is to be defeated and rendered wholly inoperative, because some other state has no such enactment. It is using very moderate terms, to say, that such a view of the subject is unreasonable, and one of which the inhabitants of the several states, within their respective limits, might justly complain.

When the inquiry is permitted—What was the intent of congress, inferrible from the terms of the act, or from any other considerations, or what should be deemed the true construction of the act, when it is open to construction?—it is, as it seems to me, conclusive to observe, that the grounds taken by the counsel for the petitioner inevitably result in this, that congress, by the bankrupt law, has abrogated wholly all the statutes of limitation of the several states; not, it is true, in very terms, but, in every case, has destroyed their effect, as a protection against stale demands. The enactment of such laws, as statutes of repose, as a protection against unfounded claims and debts presumptively paid, and to stand as a defence, when, presumptively, the evidence is lost which would have availed the defendant if the claim were seasonably prosecuted, is within the unquestionable sphere of state legislation. In regard to its own inhabitants, and to transactions within its own limits, the state may properly insist upon its power in this respect, and the uncontrolled right to exercise it for the benefit of its citizens. If so, the congress of the United States is not to be deemed to have legislated in contravention of that power, or so as to destroy its efficiency, unless

the terms or necessary construction of the act very clearly import such an intent. Indeed, the question may pertinently be asked,—Has congress the power to pass an act which shall work such a result? It has power to enact uniform laws on the subject of bankruptcy throughout the United States. If power to pass such laws necessarily involved the power to abrogate all laws of a state designed for the protection of its inhabitants within its own limits, for the purposes and upon the grounds on which statutes of limitation proceed, if bankrupt laws, as understood and construed when the constitution was adopted, had the effect, (notwithstanding statutes of limitation,) to let in stale demands, and to permit the claimants to prosecute in bankruptcy, it might be claimed at least, that the power was not wanting. But it was conceded, on the argument herein, that the bankrupt laws of England have no such effect, and that the court of bankruptcy, like courts of equity, recognizes the statute of limitations as a bar. See 1 Archb. Bankr. (Ed. 1867), p. 533; 2 Doria & M. Law & Pr. Bankr. 787; Ex parte Dewdney, 15 Ves. 479, 2 Rose, 59; Ex parte Roffey, 19 Ves. 468; Ex parte Ross, 2 Glyn & J. 46; Gregory v. Hurrill, 1 Bing. 324, 8 Moore, 190; In re Clendinning, 9 Ir. Ch. 284; Ex parte Woodward, 3 Deac. 294; Ex parte Topping, 34 Law J. (N. S.) pt. 1, "Bankruptcy," 44; Ex parte Kidd, 7 Jur. (N. S.) pt. 1, p. 613.

The practical consequences of the claim here asserted by the petitioner, also require us to say, that congress, in the enactment of the bankrupt law, had no intention to override state statutes of limitation. Examples are numerous, of citizens who have for many years reposed in safety under the protection of those laws, and have been able, from the earnings of careful industry to save some provision for old age, sickness, or the education of their children, and now, by the warrant of the bankrupt law, stale claims are produced; they are made the basis of prosecution in bankruptcy; acts otherwise wholly just and proper are called fraudulent, and deemed acts of bankruptcy, by reason of such stale claims now elevated to the character of debts; parties who could not in any form maintain a claim, in any court whatever, having jurisdiction of the parties, become prosecutors; all the legal presumptions of payment, or other defence, or loss of evidence, on which statutes of limitations proceed, are disregarded; and all that the, now indeed, unfortunate respondents have is swept away. Truly, if this be so, congress has provided a new way to collect old debts. This was not the design or purpose of the law, and I cannot yield my assent to the argument which gives it such an operation. It is true, that the consequences adverted to are not of such force as to control an express constitutional provision of an act of congress, but they are of great importance, when an incidental effect is sought to be given to the act, which is not necessarily involved in its express words.

We are not left to the considerations above suggested, as our sole guide to the determination of this question. The act itself, so far from declaring that the statutes of limitation shall not affect the prosecutor of the petition, contains a provision which seems very clearly to indicate that such statutes are to be regarded in the court of bankruptcy, as fully as they have heretofore been recognized in the federal courts. It was conceded, by the counsel for the petitioner, that, had the respondent been adjudged a bankrupt, the claim of the petitioner would, nevertheless, be open to contention, and his debt must be established. This concession was clearly correct. The mere fact that he is a petitioner is not conclusive upon other creditors that he is to be allowed, in the distribution of the estate, just what he claims in his petition; nor is it conclusive upon the assignee. If this were not so, collusion between a debtor and a petitioner setting up a pretended but fictitious claim would work the grossest injustice.

In the first instance, the validity of claims, and their title to allowance in the distribution of the estate, are passed upon in the district court (sections 22, 23). If rejected, an appeal lies to the circuit court; and here the claimant must file a statement, setting forth his claim, substantially as in a declaration for the same cause of action at law, and the assignee must plead or answer thereto, in like manner, and like proceedings must thereupon be had, in the pleadings, trial, and determination of the cause, as in an action at law, commenced and prosecuted in the usual manner, in the courts of the United States. Section 24. This section clearly imports, that the assignee may interpose any legal defence whatever, which could be interposed in an ordinary action in the United States courts, and the issue must, on the trial, be determined, and judgment must be pronounced, as in such an action. It has already been seen, that, in actions at law in those courts, the state statutes of limitation are fully recognized as a defence; and they must, by the clear language of this section, be, in like manner, available on such an appeal, and the claim of this petitioner, in such case, must be rejected. The bankrupt act, therefore, not only does not abrogate the state statute of limitations, but here plainly warrants its interposition as a defence, and requires the court to sustain it. That act has, doubtless, furnished some new defences, but it has deprived the party of none which were available in an ordinary action at law for the same cause. This is, also, apparent from the provisions of the 21st section, which, although it provides for a temporary stay of pending suits, permits them to proceed to judgment. Clear-

ly, therefore, the defence of the statute of limitations, wherever it has been interposed, must avail in all such suits.

These provisions seem to me to show, conclusively, that nothing is further from the intention and effect of the bankrupt law, than to deprive a party and his estate of the protection of such laws; nor could language be better adapted to secure their benefit, as a defence against stale claims. And this should be so. No equity pertains to a prosecutor in a court of bankruptcy, to be allowed to enforce a claim, which, in a court of law, and in a court of equity which proceeds in analogy to the statute of limitations, would be rejected. He is in no worse condition than in either of those courts. All that can be suggested is, that, if courts of bankruptcy recognize state statutes of limitation, and yet the discharge of a bankrupt operates against claims barred thereby, the claimants lose their chance of finding their alleged debtor in some other state, and compelling payment. So far as this applies to the present petitioner, or any other prosecuting in this district, the answer is easy. If he prosecute the respondent in any other form, the effect is precisely the same. The judgment in an action at law here would forever bar any prosecution of an action in any other state.

The precise question in this case is, whether one who alleges that he is a creditor by a debt which is, under the state law, barred, can become a prosecutor in the court of bankruptcy, and demand that, on his petition and proofs, the respondent be adjudged a bankrupt. A conflict of opinion is found in the decisions of some of the district courts, on the question, whether, after a debtor has been adjudged a bankrupt, a debt, barred by the state statute, should be allowed to share in the distribution of the estate. In re Ray [Case No. 11,589]; In re Sheppard [Id. 12,753]; In re Kingsley [Id. 7,819]; In re Hardin [Id. 6,048]. Many of the views above suggested are ably presented in the discussion of that question. Incidentally to that discussion, the question has arisen, whether, if such claims are not allowed, the discharge of the bankrupt would avail as a defence thereto, if he should afterwards be sued in another state. If it can be successfully insisted, that a claimant can be permitted to prove his claim and share in the distribution of the estate, who could not have prosecuted the respondent, and required the court to adjudge him a bankrupt, then the decision herein determines nothing on the question thus in conflict. It is, however, obvious, that the views here expressed are quite pertinent to that question. It is, therefore, not irrelevant to add, that the apprehended consequence, of leaving the discharged bankrupt exposed to prosecution and judgment for all claims barred by the laws of the state in which the discharge is granted, if he be found in another state, because they are held in the bankrupt court not to constitute the claimant a creditor, nor to entitle him to share in the distribution of the estate, is not necessarily the result of such a holding. True, it is declared (section 34), that a discharge shall "release the bankrupt from all debts, claims," &c., "which were or might have been proved against his estate in bankruptcy;" and, in another form (section 32), the order of the court must direct a discharge "from all debts and claims which by said act are made provable against his estate." Whether a claim is provable or not, is to be determined by its nature, and not by enquiring whether it is possible to establish it. Provision is made, in the act itself, for the exclusion of many debts and claims which are in their nature provable, but it is not questionable that they are, nevertheless, released by the discharge. Under section 23, one who has accepted a preference contrary to the provisions of the act, shall not prove his debt or claim, nor receive a dividend, unless he have surrendered to the assignee the property received by him. The right of a mortgagee or pledgee to prove his debt is qualified by section 20. By section 35, one who obtains money or property as an inducement for forbearing to oppose, or for consenting to, the debtor's discharge, is excluded from any share in the estate. A creditor, having reasonable cause to believe his debtor insolvent, &c., who receives a conveyance or payment, as mentioned in the 39th section, is not allowed to prove his debt in bankruptcy. It is not at all doubtful, that the discharge, if granted, is equally effectual, as against such creditors, to release the bankrupt, as it is against any other creditor. This is sufficient to show, that a holding that an alleged debt is, in the court of bankruptcy, as well as in a court of law or court of equity, barred by the statute of limitations, does not necessarily include a holding that the bankrupt cannot successfully plead his discharge as a defence thereto, should an action be afterwards brought against him in this or any other state. The rejection of the claim by the court of bankruptcy proceeds upon the same grounds as its rejection in a court of law when there tried, whether in an ordinary action, or on the appeal from its disallowance (section 24), namely, that it has no legal existence, that it is not a debt due and payable; and, therefore, if an action were afterwards brought therefor, it would stand just as a claim would stand, which, on such an appeal and trial, was found usurious, or to have arisen out of an illegal transaction, or to have been released or paid, or to be held by one who was forbidden to prove his debt by section 39. In either case, the claim thus rejected is found not provable against the estate; and yet, in such subsequent action therefor, the discharge would be a conclusive defence.

For these reasons, I am clearly of opinion, that a petitioner alleging a claim which is

barred by the statutes of limitation, cannot maintain a petition, in involuntary bankruptcy, for an adjudication declaring his alleged debtor a bankrupt.

5. The suggestion, that the advance of money made by the petitioner in 1854 is not within the statute of limitations, because it was held as a trust, or because, the promise to repay it being conditional, six years have not elapsed since the cause of action accrued, is not sustained by a just view of the actual transaction. Taking the account of the advance as given by the petitioner himself, (and, therefore, assuming that it was not made and received as a partial return of the money advanced by the father for the education of the son,) there has never been a moment when the son could not have maintained an action of assumpsit, at law, therefor. If treated as a loan, or as payable at all, it was payable whenever the lender saw fit to require it. Depositing it in the savings' bank, to the credit of the son, was a mode suggested, which would have been satisfactory, but the son could have required payment to himself personally at any moment, and the savings' bank was merely constituted the agent to receive it. The statement of the father, in his letter, that he would deposit it as soon as in his power, called out no dissent, but there was no contract binding on the son, which required him to forbear. It was, therefore, payable on demand, and the statute began to run from the time the advance was made. The debt, if any, existed from that time. Where a debt is already barred by the statute of limitations, a promise by the debtor to pay it when he is able, has been regarded as conditional, and not to create an obligation, as a revival of the debt, until ability to pay appears; but, where there is a present debt, a promise to pay it when able does not destroy the right of the creditor to sue, nor postpone such right, and it in no wise hinders or prevents the running of the statute. I am inclined to say, also, that, if the transaction were treated as a contract to pay when the respondent was able, and was binding, as such, upon both parties, the proofs show no change in the pecuniary condition of the father since that time. He was able, in fact, to repay it when he received it, and ever since. True, he was embarrassed by the debts he incurred in providing for his son's education, and he wished to pay them, and did not wish to sell his farm for the purpose; but he was not insolvent. He wished to retain his property, as a means of support to himself and family; but it is idle to say, that, had his son brought an action of assumpsit, at law, for money lent, the father could have successfully defended on the ground of any inability to pay, shown by the proofs in this cause, or upon any idea of trust, cognizable only in a court of equity.

The order dismissing the petition herein was in no respect erroneous, and it must be affirmed, with costs.

Case No. 3,251.

In re CORNWALL.

[4 N. B. R. 400 (Quarto, 134.)] [1]

District Court, D. Connecticut. 1871.[2]

CONSIDERATION OF PROMISSORY NOTE—GIFT—BANKRUPTCY.

A gift is not in itself a sufficient consideration to support a promise of payment, even if expressed in a note, neither is a mere moral consideration sufficient to support a promise to pay. A note given in place of a lost note, if there was no consideration for the making of the original (or lost) note, whether a voluntary gift, is not a sufficient claim on which to base a petition for bankruptcy proceedings.

In bankruptcy.

E. E. Marvin, for petitioner.

Charles E. Perkins and Alfred Hall, for respondent.

SHIPMAN, District Judge. This was a creditor's petition, brought by Nathaniel O. Cornwall, praying that David Cornwall might be declared a bankrupt. The petitioner alleges that his demand exceeds the sum of two hundred and fifty dollars, and that the respondent has committed an act of bankruptcy within six months next preceding the filing of the petition. These allegations are denied by a special answer. The indebtedness of the creditor is thus stated in his petition: "A certain promissory note for money loaned to and signed by said David Cornwall, payable to the order of your petitioner, of which the following is a copy: 'Portland, August 29, 1869. For value received I promise to pay Nath'l O. Cornwall, or order, five hundred dollars on demand, with interest from date. $500. (Signed) David Cornwall.' The further sum of five hundred and twenty-eight dollars and eighty-eight cents, loaned to the said David Cornwall, July 14, 1854, the receipt of which is acknowledged in writing, with promise to deposit said sum for petitioner's benefit in the savings bank, etc., amounting to one thousand and twenty-eight dollars and eighty-eight cents, exclusive of interest."

The answer of the respondent avers, that the note was without consideration, and therefore void, and that the alleged loan of five hundred and twenty-eight dollars and eighty-eight cents is barred by the statute of limitation. A brief statement of facts will show the light in which these transactions are presented. The respondent is an old gentleman eighty years of age. The petitioner is his son. In 1854 the latter was in South America, engaged in business, while the former resided at Portland, in this state, where he had always lived. He was somewhat embarrassed by debts. He had given the petitioner a liberal education, part of the advancements for which had been made to the latter after he was twenty-one years of

[1] [Reprinted by permission.]

[2] [Affirmed in Case No. 3,250.]

age. Some of these advancements had been paid by the petitioner, but whether or not all had, does not clearly appear, and is not important. Prior to 1854 the respondent had written the petitioner asking for a loan to assist in paying off his debts. In March, 1854, the petitioner forwarded to the respondent a bill or order, on a house in New York, for five hundred and ten dollars, which, when received by the respondent, amounted, with interest, to five hundred and twenty-eight dollars and eighty-eight cents. In the letter containing this remittance the petitioner requested the respondent to deposit the avails in some savings bank paying six per cent., in the name of the former, so that the same would not, in the event of the respondent's death, become mingled with the latter's estate. He also informed the respondent that he could collect the interest as it became due and make use of it, adding, "I intend this to be the beginning of a sinking fund which may help to clear off your embarrassments in time." The respondent, on the 14th of July, 1854, wrote the petitioner advising him of the receipt of the amount, and stating that he had not deposited it as requested, but had applied it in payment of his (respondent's) "church debt," adding, "and shall, as soon as it is in my power, deposit (it) in the savings bank, according to your direction." In November following the respondent wrote again, substantially to the same effect. Both these letters were received by the petitioner, and there is no proof in this case that the latter ever made any objection to the disposition made of the money. On the contrary, I infer from the evidence, and find as matter of fact, that he acquiesced. I find, too, from the evidence of the petitioner himself, that he never expected to call upon the respondent for the payment of this money, but did expect to collect the amount out of the latter's estate after his death. No promise has ever been made by the respondent to pay this sum since November 3, 1854.

The question arises, is the statute of limitation a bar to this claim? It is obvious that it is so, unless the claim of the petitioner, that it was not an ordinary debt, but a trust against which the statute did not run, is well founded. Undoubtedly, where a trust in the strict and technical sense exists, cognizable only in a court of equity, it will not be affected by the statute of limitations. As was remarked by Lord Redesdale, in Hovenden v. Lord Annesley, 2 Schoales & L. 607, "if a trustee is in possession, and does not execute his trust, the possession of the trustee is the possession of the cestui que trust; and if the only circumstance is that he does not perform his trust, his possession operates nothing as a bar, because his possession is according to his title." But he is here speaking only of direct trusts and those over which courts of equity have exclusive jurisdiction. Direct trusts are usually created by deed or will, though trusts equally binding sometimes arise out of other acts of the parties or the relations to which the law holds them, jurisdiction over which belongs exclusively to courts of equity. But no such trust was created in this case. The respondent was never the trustee of this five hundred and ten dollars. He was the agent of the petitioner to deposit it in the savings bank, and although his failure to comply with the request of the petitioner was in a certain popular sense a breach of trust, it was not so in any sense known to the law. The respondent converted the sum sent him to his own use, and immediately informed the petitioner that he held himself as his debtor for the amount, and that he would place it to his credit as soon as he could. To this the petitioner made no objection. The latter describes it in his petition as a "loan to the said David Cornwall." He never asked him to repay it, but says in his testimony that he did not expect to collect it from him while he lived, but intended to collect it of his estate after his death. I think it no strained inference to hold, as matter of fact, that the petitioner assented to the disposition made of the money, and treated it as a debt due him from his father. His notion that the law would still regard it as a trust, and thus exempt it from the bar of the statute, cannot change the fact nor the principles applicable to it. From the day he was advised of its conversion and assented to it, it was a legal debt, enforceable at law and not in equity. No preliminary demand was necessary, for the conversion was admitted, and, as I have already said, impliedly assented to. From that date it was a simple legal demand, upon which the statute of limitations ran. No subsequent promise has ever relieved it from the operation of the statute, and as it is now set up in answer to the demand, it is a conclusive bar.

As to the note for five hundred dollars. The origin of this was somewhat peculiar. The petitioner, in 1859, returned from South America on a visit, and while at his father's home in Portland, which was then in a somewhat dilapidated condition, the propriety of some repairs on it was a subject of conversation in the family. The respondent said he was not able to defray the expense. The petitioner urged that the repairs be made, and voluntarily advanced the money, five hundred dollars, for that purpose. He says the advance was a loan, while the respondent insists that it was a gift. On this point the evidence is conflicting. But after mature consideration, I find, as matter of fact, that the advance of this five hundred dollars was, in terms, and so understood by both parties at the time, an absolute gift. Two hundred dollars were immediately advanced and the balance a few months later. After the first two hundred dollars were paid, and before the payment of the balance, the petitioner requested the respondent to give him a note for the whole five hundred. A

to the reasons which induced the petitioner to ask for the note, the evidence is also conflicting; but I find, as matter of fact, that he obtained the note after objection by the respondent, and on the assurance that the whole sum of five hundred dollars was a free gift, and that he did not intend to require the respondent to pay it; but that he would hold it, and in the event his father should become embarrassed again, the petitioner could, by means of the note, realize something out of the estate for the benefit of his mother and sisters.

Passing now the element of possible prospective fraud in this transaction, let us inquire what was the real consideration of this note? It was this absolute gift of five hundred dollars—a gift made, not on request of the donee, but voluntarily and freely by the donor, and accepted by the donee. The note was not exacted on consideration of the two hundred dollars which had been paid, nor as a condition on which the three hundred dollars more was to be paid. The only consideration was this gift. This was not such a consideration as will support the promise contained in the note; at most it was only a moral consideration, which, as Baron Parke said in Jennings v. Brown, 9 Mees. & W. 501, is nothing. Notwithstanding some dicta, and perhaps decisions, to the contrary, it is now settled that a mere moral consideration is not sufficient to support a promise. In Eastwood v. Kenyon, 11 Adol. & E. 438, it was decided that a pecuniary benefit, voluntarily conferred by the plaintiff and accepted by the defendant, is not such a consideration as will support an action of assumpsit on a subsequent express promise by the defendant to reimburse the plaintiff. Lord Denmore, in giving his opinion in that case, cited with approval from the note to Wennall v. Adney, 3 Bos. & P. 249, the doctrine that "an express promise can only revive a precedent good consideration, which might have been enforced at law through the medium of an implied promise, had it not been suspended by some positive rule of law; but can give no original cause of action if the obligation on which it is founded could never have been enforced at law, though not barred of any legal maxim or statute provision." Now, a gift made and accepted leaves the parties thereto just where they were before, so far as their legal relations are concerned. The gift is not recoverable back, any more than a promise to make a gift would be enforceable. The law will not enforce its restitution or damages for its detention, through the medium of an implied promise, not because of any rule of public policy, such as renders the contracts of infants and married women, or contracts contra bonas mores, void; but, because no legal obligation or duty ever existed, whatever the condition of the parties, or the time, or circumstances of the transaction, upon which the law will raise an implied promise. An express promise, therefore, founded upon a naked gift, can never have anything more than a moral consideration to support it. There is no legal obligation or duty which such a promise can reach and rest on. There never was any legal duty or obligation, once existing, but afterwards barred or suspended, for such a promise to reach and revive. Such a promise, therefore, rests, in the terse language of Baron Parke, upon nothing.

Though the note described in the petition is dated and was actually given in 1869, yet it was a mere substitute for the first one given in 1859, the latter having been lost. It was given upon the request of the petitioner, and upon no other consideration than the first one. It was a mere renewal or repetition of the original promise, and is, like that, without consideration and void. It follows that the creditor has proved no demand against the respondent. This conclusion renders the consideration of the alleged act of bankruptcy unnecessary. Let the petition be dismissed with costs.

[NOTE. Nathaniel O. Cornwall petitioned the circuit court for the review and reversal of the order herein, and the order dismissing the petition was affirmed. Case No. 3,250.]

CORNWALL v. CORNWALL. See Cases Nos. 3,250 and 3,251.

CORP (CHILDS v.). See Case No. 2,677.

CORPORATION OF.

[Note. Cases cited under this title will be found arranged alphabetically under the names of the corporations; e. g. "Corporation of Georgetown v. Bank of the United States. See Georgetown v. Bank of the United States."]

Case No. 3,252.

CORPS v. ROBINSON et al.

[2 Wash. C. C. 388.][1]

Circuit Court, D. Pennsylvania. Oct. Term, 1809.

WITNESS—INTEREST—PRIVILEGE—EVIDENCE—ACCOUNTS PRODUCED ON NOTICE — ACKNOWLEDGMENT OF DEBT BY PARTNER — PROOF OF PARTNERSHIP.

1. In an action for the recovery of a debt, said to be due by the defendant, as the dormant partner of B. and A., a person who is a creditor of the partnership, is not a competent witness to prove the defendant a dormant partner in the firm indebted to him.

2. There is no objection to the examination of the head clerk of one of the parties, for he has no privileges like those of an attorney.

3. Where accounts have, on notice from the plaintiff to the defendant to produce them, been delivered to the plaintiff, and retained by him, and without objection, the defendant may insist on their being read on the trial of the cause.

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

4. The acknowledgment of a debt by one partner, will bind another partner, after the partnership is proved; but it is not sufficient or proper to be given in evidence to prove a partnership.

[Cited in Winship v. Bank of U. S., 5 Pet. (30 U. S.) 574; Bispham v. Patterson, Case No. 1,441.]

This suit was brought to recover from the defendants, Robinson & M'Clure, the amount of one out of three notes, due from Barker & Annesley, for ninety-six hogsheads of tobacco, sold to them by the plaintiffs, upon the ground that the defendants were dormant partners with Barker & Annesley in that purchase, and were to share in profit and loss. The two first notes were paid by Barker & Annesley, before their failure. Mr. Cope, the voluntary assignee of Barker & Annesley, was sworn in chief; and after having given some part of his evidence, he stated that he was a creditor of Barker & Annesley, and considered himself interested in fixing this debt upon the defendants. He was then objected to by the defendants on this ground.

PETERS, District Judge, considered the witness as incompetent, upon the ground of interest; because, although, as it was said by the plaintiff's counsel, if the plaintiff recover against the defendants, the defendants will become creditors of Barker & Annesley, instead of the plaintiff, still, they will not be creditors for so large an amount; and, consequently, will not diminish the fund out of which the witness can expect to be paid, as much as if the plaintiff should recover. For the plaintiff, if he should be obliged to seek payment from the estate of Barker & Annesley, would receive his dividend on his entire claim, whereas, should the recovery be had of the defendants, on the ground of a partnership, the defendants could only receive a dividend on one-half, they being, as partners, bound to pay the residue themselves.

WASHINGTON, Circuit Justice, was of the same opinion, as to the incompetency of the witness, and concurred in the reason assigned by Judge Peters. He stated another reason, which was, that it did not, and could not now appear, that the defendants would, in case of a recovery against them, be entitled to diminish the fund, out of which the witness expected to be paid, a single dollar; because the defendants could not come in, as a creditor, upon the separate estate of Barker & Annesley, except for any balance, which, upon a settlement of accounts, might be due to them; as to which, the court cannot now say that any such balance would be due. So far as the evidence has gone, it appears that Barker & Annesley paid two of the notes given for this tobacco, and as to this transaction, the defendants, if partners, would be debtors to Barker & Annesley. The plaintiff called upon the head clerk of the defendants to communicate what he knew of the partnership, which was objected to by the defendants' counsel, on the ground, that he, no more than an attorney, ought to be compelled to disclose the secrets of his principal.

BY THE COURT. It is certainly a very unpleasant thing, to compel a person, standing in the situation of this witness, to betray the confidence of his principal. But it has never been considered as an objection which the witness can make, and were it to be laid down as a general rule, that a person, standing in such a situation, could excuse himself from giving evidence, it is impossible to foresee the extent of the mischief which might arise from it. The objection cannot prevail.

The counsel for the plaintiff waived the examination of the witness. The plaintiff gave notice to the defendants to produce the accounts rendered to them by Barker & Annesley, in certain years, in relation to their joint purchases in tobacco. The accounts were now produced, but the defendants objected to their being read, upon the ground that they could not be evidence against them, to prove a partnership between Barker & Annesley, the point in issue between the parties.

BY THE COURT. These accounts having been rendered by Barker & Annesley to the defendants, and retained by them without objection, that appears, are proper to be offered in evidence; as much, and rather more so, than if Barker & Annesley had, in the presence of the defendants, declared the partnership.

The plaintiff then offered to give evidence of the acknowledgment of Annesley, that a partnership did exist between Barker & Annesley and the defendants, in the purchase of this tobacco.

BY THE COURT. The acknowledgment of a debt by one partner, will bind the other, because each is bound for the whole. But where the question is, whether a partnership exists or not, the acknowledgment of one of the defendants, or of a third person, is no evidence against the other. Overruled.

PETERS, District Judge, charged the jury; and after summing up the evidence, left to them the question, whether the partnership in this purchase was proved.

Verdict for the defendants.

Case No. 3,253.

CORREY et al. v. LAKE et al.

HAIZLETTE v. LAKE.

[Deady, 469.][1]

Circuit Court, D. Oregon. Nov. Term, 1868.

ATTACHMENT—DISPOSITION OF GOODS WITH FRAUDULENT INTENT—REDELIVERY.

1. An attachment will lie against the goods of a debtor who is about to dispose of them with intent to delay or defraud the plaintiff in the action without reference to the defendant's conduct or purpose as to his other creditors.

2. Proof of a general intent by the defendant to dispose of his property for the purpose of preventing a particular creditor from collecting his demand, by legal proceedings, is sufficient proof that the defendant is about to do so, whenever such creditor brings an action to recover his debt.

3. Effect of re-delivery of property, taken on attachment, under sections 152 and 157 of the Civil Code (Code Or. 178, 179), to the defendant.

The first entitled action [D. J. Correy and Cunningham Haizlette against B. H. Lake and J. R. Lake] was brought upon a judgment given against the defendants by confession of attorney, in the court of common pleas for Hancock county, Ohio, on November 15, 1867, for $1,052.08, with interest and costs. The second one [Cunningham Haizlette against J. R. Lake] was brought upon the promissory note of the defendant, J. R. Lake, made and delivered to the plaintiff therein, on June 22, 1859, in the state of Minnesota, for the sum of $777.57, with interest at ten per centum per annum. Upon October 8, 1868, an attachment was issued in each action, upon which the property of the defendant, J. R. Lake, was attached to answer the demands of the plaintiff therein. Thereafter the marshal delivered the property attached to the defendant upon his undertaking to re-deliver the same or pay the value thereof, in case the plaintiff recovered judgment.

On October 17, J. R. Lake filed motions to dissolve the attachments on the ground: (1) That they were allowed without sufficient cause; and, (2) That the undertakings for the writs were not given in sufficient amounts. The motions to dissolve were heard and submitted together, on November 3, and reserved for consideration.

Walter W. Thayer, for plaintiff.

J. H. Reed, for defendant, J. R. Lake.

DEADY, District Judge. The affidavit for the writ of attachment in each of these actions was made by Thomas Fitch, the agent of the plaintiffs, who are residents of the state of Ohio. The affidavit states that R. J. Lake "is about to remove his property from the state of Oregon, or assign or dispose of it, with intent to delay or defraud his creditors." On the argument, the objection that the undertakings for the writs were not given in sufficient amounts was abandoned. In support of the objection that the attachments were allowed without sufficient cause, counsel read the affidavit of defendant, J. R. Lake, and of sundry other persons, who appear to be more or less acquainted with the business and resources of such defendant, in Portland. In reply, counsel for the plaintiffs read the affidavits of Fitch and one Williams. The affidavits of the plaintiffs tended to prove that J. R. Lake, had, in 1866, assigned his property to his Portland creditors, primarily, for the purpose of preventing the collection of these claims, and that if sued upon them, he would again make some disposition of his property to prevent the plaintiffs from making anything on execution, if they obtained judgments against him. The affidavits of the defendant tended to prove that J. R. Lake, in partnership with one Robinson, his brother-in-law, had, since 1864, been doing quite an extensive business in stoves and tin-ware, at Portland; and, that since 1867 he had been engaged with one Goddard, dealing in horses; and that these two firms, of which Lake is a member, are in apparently a prosperous condition, and have, in certain instances within the knowledge of affiants, and generally so far as they know, done business in Portland in an honest and business-like manner. The affidavit upon which the attachments were issued, establishes a prima facie case, which is not overcome by the affidavits read by the defendant. A defendant may be in prosperous circumstances, and have dealt fairly by his creditors in Portland, and yet he may intend to dispose of his property, so as to prevent non-resident creditors —these plaintiffs for instance—from collecting their debts. If a defendant intends, or it appears probable that he intends to dispose of his property, for the purpose of delaying or defrauding the particular creditor who is plaintiff in the action, that is a good cause for an attachment by the latter. A creditor is delayed or defrauded when his debtor hinders or prevents him from taking his property on execution to satisfy his debt; and an intention or purpose to so delay or defraud a creditor is equally a cause for attachment. Code Or. 175. So far as appears from the proofs submitted, the defendant J. R. Lake, however honest in his conduct or intentions as to his other creditors, did intend to so dispose of his property if he could, as to prevent the collection of these demands; and this purpose he has deliberately entertained for years past.

Counsel for the motion make the point, that proof of a general intent on the part of the debtor to prevent the collection of these debts, is not sufficient to support the statement in the affidavit upon which the attachments issued—that the defendant is now about to dispose of his property with intent, etc. But this is a distinction without a difference. That which a person intends

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

to do generally, it may be properly said he is about to do, ready to do, whenever the particular occasion for so doing occurs. The bringing of these actions was such an occasion in these cases. If a plaintiff, under such circumstances, must wait for an attachment until the defendant is apprised of the commencement of the action, and begins to carry out his general intent, by disposing of his property, he may as well not have it at all. Counsel for plaintiff objects to this motion, that the defendant having received the property attached from the marshal under section 152 of the Civil Code (Code Or. 178), he cannot now move to discharge the attachment, as such receipt and the undertaking therefor to the marshal, were in legal effect an affirmance and discharge thereof. But this view of the matter is not tenable. The delivery under section 152 is optional with the marshal, and cannot be compelled by the defendant. When it takes place, practically, the defendant becomes the bailee of the marshal, who, in contemplation of law, still holds the property under the writ of attachment. Duncan v. Thomas, 1 Or. 314. The transaction takes place between the officer and the defendant, and is permitted for their mutual convenience. By it the attachment is not effected, nor does the defendant admit or affirm its legality. On the other hand, the re-delivery to the defendant which takes place under section 157 of the Civil Code (Code Or. 179), in pursuance of a judicial order on the application of the defendant, does supersede the attachment and discharge it. After obtaining a delivery under this section, the defendant cannot go back and question the legality of the attachment for any cause. The motions to dissolve the attachments, are denied at the costs of the defendant.

CORRIE (UNITED STATES v.). See Case No. 14,869.

CORRIGAN (HYDE v.). See Case No. 6,968.

Case No. 3,254.

Ex parte CORSE.

[1 N. Y. Leg. Obs. 231.]

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

BANKRUPTCY—POWER OF DISTRICT COURT—SETTING ASIDE VERDICT.

The district court has the power to set aside the verdict of a jury found under the 4th section of the statute [5 Stat. 443], and to order a new trial in consonance with the rules upon which such new trials are granted in courts of law.

[In bankruptcy. In the matter of Barney Corse.]

W. C. Wetmore and M. S. Bidwell, for bankrupt.

T. Sedgwick and J. W. Gerard, for creditors.

BETTS, District Judge. The issue formed in this case between the bankrupt and his creditors, was tried by a jury under the provisions of the 4th section of the bankrupt act [of 1841 (5 Stat. 443)], and the jury found a verdict against the bankrupt. A motion being made for a new trial by the bankrupt, a preliminary objection is raised on the part of the creditors, that the court has no power, in bankrupt cases, to grant new trials. The objection is rested on two general propositions: (1.) That this being a court of limited jurisdiction, it has no inherent power to grant new trials; and (2.) That in the execution of the bankrupt law, the district judge, acting under a special delegated power, can exercise no jurisdiction not plainly given him by the terms of the act.

The 17th section of the judiciary act (Sept. 24, 1789 [1 Stat. 83]) declares that "all the courts of the United States shall have power to grant new trials in cases where there has been a trial by jury, for reasons for which new trials have usually been granted in the courts of law." This act gives the equity courts the same authority to order new trials on issues sent to be tried at law, as is exercised by the chancellor in England. Harrison v. Rowan [Case No. 6,141]. It was decided in one of the earliest cases under the bankrupt act by this court—Frisbee's Case [Id. 5,130]—that, in administering this act, the functions of the district court as a court were employed, and that it was not a jurisdiction conferred on the judge as a commissioner in the nature of the appointment, by which the chancellor formerly executed the bankrupt law in England. Every provision of the statute indicates this purpose distinctly. The first section authorizes the decree of bankruptcy in voluntary and compulsory cases, on petition made to the proper court or appropriate court, and the party declared bankrupt at the instance of a creditor, may, by petition to such court, be entitled to a trial by jury before such court. The last clause of the same section demonstrates that when the judge is referred to it is not as the officer presiding in the tribunal, but as the court technically: for it is declared, that "the judge, in his discretion, may direct such trial by jury to be had, etc., etc.," in such manner, and under such directions, as the said court may prescribe and give. The second section in the proviso again refers to the court, as holding the proceedings in bankruptcy, and the third section directs the estate to pass on a decree of bankruptcy by the proper court, and subjects the judgment of the assignee in setting apart effects for the benefit of the bankrupt to the final decision of the court. The 7th section still more explicitly declares, that all proceedings in bankruptcy shall be had in the district court, etc., and points out minutely the various processes by which the court shall bring the matter to an ultimate determination. The 6th section declares, that the district court shall have jurisdiction in

all matters and proceedings in bankruptcy, the said jurisdiction to be exercised summarily in the nature of summary proceedings in equity. This clause indicates most clearly the purpose of congress to impose upon the district courts, as they are organized, the duty of executing the bankrupt law, and to relieve those courts of the embarrassment of procrastination attendant upon conducting business as law courts merely, it imparts to them in this behalf, the chancery faculty of exercising the jurisdiction summarily in the nature of summary proceedings in equity.

Judges Story, Sprague, Judson and Conkling, have reasoned ably in demonstration of the intent of congress to give full chancery powers to the United States courts in matters of bankruptcy (5 Law Rep. 18, 55, 158 [In re Vila, Case No. 16,941; Ex parte Foster, Id. 4,960; Ex parte Martin, Id. 9,149]) and if this is so, the authority to frame issues and revise the findings of juries thereon, would follow as a necessary incident. But, without deriving the power from that source, it would seem one of the most natural, if not usual methods of exercising a summary jurisdiction in chancery to re-examine a verdict rendered under the direction of the court, and for its information, and to set it aside and order a new trial for adequate cause. Congress plainly contemplated this as a power needful and proper in one instance, for in the 7th section it gives a conclusive effect to a verdict on a contestation of debts, unless a new trial shall be granted, thereby recognizing the power of the court to direct such new trial by an implication of equal form with an express declaration. Nor is this, as supposed by the counsel, referable to a probable trial in the state courts, for "the contestation must be in the proper court, having jurisdiction over the proceedings in the particular case in bankruptcy."

Independent of this view of the subject, I have no difficulty in holding, that the United States courts are empowered to exercise in bankruptcy cases, all their powers as courts, appropriate to the nature of the case, and the proceeding presented for their consideration. It is believed to be a universal rule, that the augmentation of the authority of a court by introducing new matters within its jurisdiction, in no way changes the functions of the court, or the methods by which it performs them. It applies all its accustomed powers to the new subject, and so models its proceedings as to fit them to the character of the additional duties enjoined. The lawgiver understands the existing capacity of his courts, and, in adding to the range of their employment, must be supposed to contemplate, that they will continue the use of their customary powers, unless he specially limits and restricts that use. In enjoining upon the district and circuit courts, to take cognizance of and administer the bankrupt act, congress must be accepted to intend, that in every particular, not otherwise designated by the statute, those courts should proceed with this new jurisdiction upon the principles appropriate to like process, under any other branch of their powers.

A further analysis of other provisions of the statutes would tend to demonstrate this intent still more fully—those in relation to the adjournment or appeal of matters to the circuit court—the continuance of both courts open at all times, etc.; the first proviso to No. 167, § 1, of May 18, 1842 [5 Stat. 483], furthermore manifests the understanding of congress, that the judges sitting in bankruptcy, were holding their respective courts with all the concomitants of a sitting in term. It prohibits the per diem compensation allowed the officers of the court for attendance upon the district and circuit courts during their sittings, to be so construed as to authorize such payment for their attendance upon those courts whilst sitting for the transaction of the business under the bankrupt law merely or any portion of the time, for which either of the said courts may be held open, or in session by the authority conferred in that law. This discussion has been, however, already sufficiently extended, and I shall here terminate this branch of it, by declaring my opinion that this court has power to set aside the verdict of a jury found under the provisions of the 4th section, and to order a new trial in consonance with the rules upon which such new trials are granted in courts of law.

CORSE (ALEXANDRIA v.). See Case No. 183.

CORSE (NORTHWESTERN DISTILLING CO. v.). See Case No. 10,335.

Case No. 3,255.

CORSER v. CRAIG.

[1 Wash. C. C. 424.][1]

Circuit Court, D. Pennsylvania. April Term, 1806.

INDORSEMENT OF BILL OF EXCHANGE — ASSIGNMENT OF CHOSE IN ACTION — RIGHTS OF ASSIGNEE IN EQUITY—SET-OFF.

1. A, having funds in the hands of B, drew a bill of exchange in favor of C, who endorsed it to D and E, to whom he was indebted, and the bill being protested for non-acceptance, D and E brought a suit against B, the drawee, in the name of C, the endorser; and, before judgment, an attachment was laid upon the funds in hands of B, as the property of C, and judgment obtain-

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

ed against B, as the garnishee. *Held*, that the attachment will not affect the right of D and E, to recover the amount of the bill from the drawer; the right to the funds in the hands of the drawee, being completely vested in D and E, by the endorsement of the bill.

[Cited in Brown v. Hartford Fire Ins. Co., Case No. 2,009.]

2. Courts of law, as well as equity, will take notice of assignments of choses in action; and to every substantial purpose, will protect the rights of the assignee.

3. The beneficial interest of the assignee is so far regarded, that the defendant may set off a debt due from the assignee to him; in like manner as if the suit had been brought in his own name.

[Cited in Whetmore v. Murdock, Case No. 17,509.]

The case was as follows. In December, 1799, Philips & Corser, of Curracoa, being indebted to Petit & Bayard, in a considerable sum, transmitted them a bill of exchange, drawn by Chanceaulm, in favour of Philips & Corser, on John Craig of Philadelphia, endorsed by Philips & Corser, for 3450 dollars, in part discharge of this debt, as they expressly state in their letter to Petit & Bayard, dated the 22d March, 1800. The bill not being accepted, it was duly protested, and was retained by Petit & Bayard, who produced it on the trial. The bill appears, upon the face of it, to be drawn to reimburse Philips & Corser, the above sum advanced by them for the repairs and disbursements of the George Washington, a ship purchased by Chanceaulm, in the West Indies, for Craig. This suit was instituted by Petit & Bayard, in April, 1803, in the name of Corser, the surviving partner of Philips & Corser, to recover the above sum, being the amount of the advances made as above mentioned. The defendant put in two pleas. First; the general issue: and, secondly; an attachment by Barry, Cole & Barry, against Corser, on which the defendant was summoned, as garnishee, in September, 1803, on which judgment was rendered in December, 1804, for 2029 dollars and 93 cents. To the second plea, the plaintiff replied, in substance, that this debt was assigned to, and vested in Petit & Bayard, long before the suing out the above attachment; on which issue was joined. On the trial, it appeared that Corser continued debtor to Petit & Bayard, to a larger amount than the sum now demanded; and, it was agreed, that the jury should only try the question, whether Craig was liable to Corser in any, and what sum; reserving the question, whether the attachment and judgment, under the circumstances of the case, are a bar to the recovery of the sum which the jury should find, or to any part of it.

The only question for the jury to decide, was, whether Chanceaulm had authority to borrow this money, to lay out upon the repairs and disbursements of the vessel. The jury found a verdict for the whole sum, with interest.

The cause coming on upon the point reserved, Ingersoll, for the plaintiff, contended, that the bill of exchange was an assignment of this debt to Petit & Bayard; and, though the bill being refused acceptance, their title was only an equitable one; yet, that was sufficient to protect the debt, in the hands of Craig, from the attachment of the creditors of Corser. Cases cited: [Ex parte Byas] 1 Atk. 124; 1 Strange, 165, 166; Amb. 297; 1 Ves. Jr. 280; Doug. 365; [Vanhorn's Lessee v. Harrison] 1 Dall. [1 U. S.] 139; [Pollard v. Shaaffer] 2 Dall. [2 U. S.] 215.

Hopkinson, on the other side, insisted, that a bill, drawn on the personal credit of the drawee, generally does not operate as an appropriation, or assignment of the debt; and that it is absurd for Corser to recover this money, upon the ground of showing that Petit & Bayard, not he, is entitled to it. That great mischiefs would happen, if these latent equities receive the sanction of courts; particularly, if they are to be so far noticed, as to overreach the judgment obtained by another creditor upon attachment. But that, at any rate, Petit & Bayard could not be noticed, unless it appeared on the face of the proceedings, that the suit was brought for the use of the equitable claimant. Cases cited: [Mifflin v. Bingham] 2 Dall. [2 U. S.] 276; 1 Ves. Sr. 332; 1 Ves. Jr. 280.

WASHINGTON, Circuit Justice, delivered the opinion of the court.

The point reserved is, whether, under the circumstances of this case, the plaintiff is prevented, by the attachment and judgment, from recovering the sum found due by the verdict, for the use of Petit & Bayard. In considering this, there are two questions which present themselves: First; did the bill of exchange, separately, or taken in connexion with the letter of the 22d March, from the plaintiff to Petit & Bayard, amount to an assignment and appropriation of the debt due from Craig, (and for which the bill was drawn,) to Petit & Bayard? and, secondly; if it did, is that right so far protected by law, that it could not be attached, in the hands of Craig, by other creditors of Corser, so as to defeat the right of Petit & Bayard? First; what is the nature of a bill of exchange? The definition of it is, "an instrument, by means of which a creditor may assign to a third person, the legal, as well as the equitable interest in a debt raised by it, so as to vest in such assignee, a right of action against the original debtor." 1 H. Bl. 602; Chit. Bills, 1, 2. It is an open letter of request, from one person to another, authorizing that person to pay the sum therein mentioned, to a third person; and is an assignment, to such third person, of a debt

due from the drawee to the drawer. If the drawee acknowledge that the debt thus assigned is due, by accepting the bill, then the holder may recover against him in his own name; bills of exchange being considered in favour of commerce, exceptions from the common law rules, respecting the assignment of choses in action. If the drawee refuse to accept, and pay the bill, the right of the holder, to the debt once assigned to him, is not thereby impaired; although he may not be entitled to recover the same in his own name, for the want of a promise to pay. But he may sue the drawer, or the drawee, in the name of the drawer, for the debt originally due, in consequence of the implied contract of the assignor of a chose in action, that the debtor shall pay, and on failure, that the assignor will. The bill being retained after protest, by the assignee, is evidence, that the amount has not been paid by the drawer, or any of the endorsers. I see no possible mischief which can result from this doctrine. For, if after payment refused, and protest made, the drawee should pay over the funds in his hands to the drawer, or to his order, without notice from the first assignee, that he should retain the bill, and look to him for the amount, so far as he was bound to pay; this would be a good defence against a suit brought in the name of the drawer. If, then, the debt in question was assigned to Petit & Bayard, by the bill of exchange, and the same remains still unsatisfied to them, and unpaid by the defendant; can third persons, creditors of Corser, but not claiming as assignees from him, defeat the right of Petit & Bayard, by an attachment served on Craig, as the debtor of Corser? It is now a long time since those objections, which once existed to the assignment of choses in action, have ceased to be more than formal. Courts of law, imitating the example of courts of equity, take notice of such assignments, and will, to every substantial purpose, give them effect; although they have not yet ventured to sustain an action brought in the name of the assignee. But the beneficial interest vested in the assignee, is so far regarded, that the defendant is allowed to set off a debt due from the assignee, in the same manner, as if the action had been brought in his name.[2] Regarding Petit & Bayard, therefore, as being substantially the plaintiffs in this action, and beneficially entitled to the debt, upon which this attachment is levied; they have a right to recover under the name of Corser, notwithstanding the attachment and judgment against him in the state court. Judgment must be entered for the plaintiff.

[2] Whether it is necessary, that the interest of the cestui que trust, should be mentioned in the writ and declaration, need not be determined, because, if such be the rule, it is sufficient, if it appears in any part of the pleadings; and this replication states fully, the title of Petit & Bayard; which title the second issue is intended to try. See Winch v. Keeley, 1 Term R. 619.

Case No. 3,256.

The CORSICA.

[6 Blatchf. 190.][1]

Circuit Court, S. D. New York. Oct. Term, 1868.[2]

COLLISION BETWEEN STEAM VESSELS—CHANGE OF COURSE.

Where two vessels, under steam, were crossing, so as to involve risk of collision, and vessel No. 1, which had vessel No. 2 on her own starboard side, apprehending danger, stopped and backed, until she had stern-way on in the water, and vessel No. 2, instead of keeping her course, changed it, so as to make a collision inevitable, and one occurred: *Held*, that vessel No. 2 was in fault, for violating the provisions of articles 14 and 18 of the act of April 29, 1864 (13 Stat. 58), and that, under the circumstances, the change of course by vessel No. 2 did not come within any of the qualifications in article 19 of the same act.

[Cited in The Sunnyside, Case No. 13,620.]

[See note at end of case.]

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

This was a libel in rem, filed in the district court, by [Samuel Schuyler] the owner of the steamer America, against the propeller Corsica, to recover for the damages caused to the America by a collision which occurred between the two vessels, in the harbor of New York, off the Battery, in the North river, near the Jersey shore, or about one-third of the way from it across the river, and opposite the Morris Canal basin, or the coal wharves near by, on the 9th of September, 1865. The district court decreed for the libellant [Case No. 12,495], and the claimants [the British and North American Steam-Packet Company] appealed to this court.

Cornelius Van Santvoord, for libellant.

Daniel D. Lord, for claimants.

NELSON, Circuit Justice. The collision, in this case, took place at mid-day, in an open river, in clear weather, and between two vessels which were in plain sight of each other. The case has been ably and earnestly argued, as might well be expected, from the character of the counsel, and the amount of property concerned, and, especially, from the fact, that it involves, to a considerable degree, the intelligence and skill of those who were in charge of the navigation of the vessels. I have, therefore, studied the case with a care and attention corresponding with its magnitude, and the interests involved; and shall proceed to state, in a few words, the conclusions arrived at.

The Corsica was descending the river, (having come out of her dock, next below the Jersey City ferry, on her way out to sea,) some three hundred yards off the Jersey shore. The America had come from the East

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

[2] [Affirming decree of the district court in Case No. 12,495. Decree of the circuit court affirmed by supreme court in The Corsica, 9 Wall. (76 U. S.) 630.]

river, and, after she had rounded the Battery, and when she was about off Castle Garden, she shaped her course diagonally across the river, to reach her dock, at the foot of Sussex street, on the Jersey shore, heading, however, somewhat south of it, for the purpose of getting inside of the vessels which were usually anchored outside, or in front, and of then moving along the shore or docks, up to her berth. This was the relative position of the two vessels, when they were discovered by the hands on board of each other respectively. The America had reached the middle of the river, or thereabouts, when this discovery was made. There is some conflict, in the testimony, as to the exact distance the Corsica was up the river, above the America, at this time. She was still descending, on her track, already stated, along the Jersey shore. But the better opinion, I think, is, that she was some three or four time her length above the America. The America continued a short distance on her course, and then, apprehending danger in attempting to cross the bows of the Corsica, stopped, and backed, until she had stern-way on in the water, which, upon the evidence, would, beyond all doubt, have avoided a collision; but, unfortunately, about the same time, or a little later, the Corsica starboarded her helm, turning her course eastward, directly toward the America, and rendering a collision inevitable. Her starboard bow struck against the starboard side of the America, near her forward gangway, in an oblique direction, inflicting severe injury.

The proof is clear, that, if the Corsica had kept her course down the shore, no collision could have taken place; and, also, that there was room between her and the shore, for her to have ported her helm, and to have passed even further inward. The error of the pilot and master of the Corsica consisted in not observing the rule of navigation established by law. Article 14 provides: "If two ships under steam are crossing, so as to involve risk of collision, the ship which has the other on her own starboard side shall keep out of the way of the other." Under this rule, the burden of avoiding the collision rested upon the America; and she took the proper measures to discharge that duty. Article 18 provides, that where, by the above rules, one of two ships is to keep out of the way, the other shall keep her course, subject to the next article (19), which provides, that, in obeying these rules, due regard shall be had to all dangers of navigation, and also to any special circumstances, which may exist in any particular case, rendering a departure from such rules necessary, in order to avoid immediate danger. The counsel for the Corsica has strongly urged, that that vessel, under the existing circumstances, comes within the qualification; and that her pilot or master had a right to assume that the America intended to cross his bows, in which event a collision would certainly have followed, if the Corsica had not starboarded her helm. I do not doubt, that the pilot and master acted honestly under this belief, when the order to starboard was given. But I cannot forget, and they should not have forgotten, that it was the duty of the America to give way, and that of their vessel to keep her course; and, as there was opportunity for the America to take measures in fulfilment of this duty, it was a fault in the pilot and master of the Corsica not to have acted on this view. It was the departure from the rule that embarrassed the America, and led to the disaster. Acting under this rule, and carrying out its injunction, the America had disabled herself from remedying the error committed by the Corsica. She had stopped her headway, and was lying helpless in the water. Inasmuch as the movements she adopted would have prevented the misfortune, to permit special circumstances in the case to modify them or render them inefficient, would be such an administration of the rules as would operate to entrap the responsible vessel.

Decree affirmed.

[NOTE. The claimants appealed to the supreme court, where the decree of the circuit court was affirmed.

[Mr. Justice Bradley delivered the opinion, which was to the effect that it was apparent that the change of course on the part of the Corsica was the immediate cause of the disaster; that the burden of proof was upon her to show a sufficient cause in the conduct of the America to justify such a change; that the evidence failed to disclose conduct amounting to such a justification, and that, according to the account of the collision as given by the master of the Corsica, it occurred in consequence of her assuming to perform the duty which devolved on the America under the rules of navigation. The Corsica, 9 Wall. (76 U. S.) 630.]

CORSICA, The (SCHUYLER v.). See Case No. 12,495.

Case No. 3,257.

CORT et al. v. DELAWARE INS. CO.

[2 Wash. C. C. 375.][1]

Circuit Court, D. Pennsylvania. Oct. Term, 1809.

EVIDENCE—SURVEY AT FOREIGN PORT — SEAWORTHINESS—INSURANCE—TOTAL LOSS.

1. A survey, ordered by an American consul, where the vessel insured put into a foreign port for want of repairs, and a report of the surveyors thereon, is not evidence to be laid before the jury. Query, if the same would not be evidence, if there were no tribunals at the port, from which an order for a survey could be obtained.

[Cited in The Henry, Case No. 6,372; The Vivid, Id. 16,978; The Director, 34 Fed. 59.]

2. If a vessel, after she commences her voyage, becomes unfit to prosecute it, having been

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

exposed to no extraordinary peril of the sea, this may authorize so strong a presumption of want of seaworthiness at her departure, as to require strong evidence from the assured to repel the presumption.

[Cited in Higgie v. American Lloyds, 14 Fed. 147.]

3. Where a vessel has, upon a report of a survey under an order given by the American consul, been sold by the captain, without a regular condemnation, the loss cannot be made total; but the assured is entitled to no more than the amount of loss actually sustained.

Action [at law by Cort and Edwards] on a policy of insurance, dated the 18th of July 1806, on the schooner Triumph, at and from New York to Campeachy, and to three other ports in the bay of Campeachy, and back to New York; vessel valued at 1500 dollars, insured at 1000 dollars; premium, 10 per cent., to return one for each of the three ports to which she should not go. The vessel sailed on the voyage, and after experiencing some hard weather, from which, however, she sustained no particular injury, she arrived at Campeachy, tight, and in such order as to require no repairs; took in her homeward cargo, and on her return, was so much injured by gales and severe weather, that she was obliged to put into Havana, to repair. A survey was there directed, by an order of the American consul, and a report made, which this court would not permit to be given in evidence, it not being a judicial act; nor in notice, if one. The court observed, that if it appeared in evidence, that there were no tribunals at Havana, to which an application could be regularly made for a survey and condemnation, in case it should be deemed necessary, that this mode of proceeding might possibly be allowed. In this case, the persons who made the survey ought to have been examined. The vessel was sold at public auction for 350 dollars. On notice received by the plaintiffs of these circumstances, they offered to abandon, which was refused, on the ground that the vessel was not seaworthy. Sundry depositions were taken, in which the witnesses declared their opinions that the vessel was seaworthy, and fully sufficient for the voyage. The captain, in his deposition, stated that her inability to complete the voyage arose from the injury she had sustained by the gales, on her return. The court excluded such parts of the depositions, as gave the contents of the report of the surveyors at Havana.

WASHINGTON, Circuit Justice, charged the jury. As to the objection to the want of seaworthiness in this vessel, there is nothing in it. Although she was not particularly examined by the witnesses, they nevertheless state, that when she left New York, she was sound, and in all respects fit to perform the voyage insured. The witnesses are, the ship-carpenter, who repaired her at New York, before she left that port, her former master, and the one who commanded her on this voyage. Although she was exposed to bad weather on her outward voyage, she was yet so tight and staunch at Campeachy, as to require no repairs. The necessity she was under of putting into Havana, on her return, is accounted for by the severe gales she encountered. This evidence is sufficient to prove her seaworthy when she left New York, unless the contrary had been proved by the defendants. But they have given no evidence upon the subject. If a vessel, after she commences her voyage, becomes unfit to prosecute it, and has been exposed to no extraordinary perils of the sea, this circumstance may raise so strong a presumption of her having been unseaworthy at the time of her departure, as to call upon the insured to give strong evidence to repel the presumption—much stronger than has been offered in this case. But no such presumption is raised against this vessel.

The next objection to the plaintiffs' recovery, is, the want of evidence to justify the sale at Havana. This is certainly a well-founded defence. All that we know about the matter is, that the vessel sustained such injuries, on her return voyage, as to render it necessary for her to put into Havana, to repair. What ought the master to have done, after his arrival at that port? He ought to have had her repaired, if he could; or, if she were unfit to be repaired, or the expenses would have been so great as to have rendered the measure improper, he should have had a regular survey and condemnation, if in his power. But instead of this, he sells the vessel, breaks up the voyage, and thus attempts to convert a partial into a total loss, without showing that it was not in his power to repair, or that the vessel was not worth repairing, and without showing what the repairs would have cost. The sum for which the vessel sold, is no proof at all of the extent of the injury she had sustained. Though valued in the policy at 1500 dollars, she might not have been worth 500 dollars, or she might have been sold at an unfavourable market, or under unfavourable circumstances. If the insured would justify the conduct of their agent in breaking up the voyage, they should have satisfied the jury, by legal evidence, that the measure was proper, and not leave them to unsatisfactory conjectures as to this important fact.

On this point, the verdict ought to be only for such partial loss as the plaintiffs have proved.

Verdict for 500 dollars.

Case No. 3,258.

The CORTES.

[6 Ben. 288.][1]

District Court, E. D. New York. Dec. Term, 1872.

SEAMAN'S WAGES—INJURY TO SEAMAN ON BOARD SHIP—COSTS.

A seaman, who had shipped in New York for a voyage to New Orleans and back, after the vessel had started on her return voyage from New Orleans fell from the yard and broke his arm. The owners of the steamer sent him at once to a hospital, paying his wages till the date of his leaving the ship, and afterwards brought him to New York. The seaman having filed a libel to recover wages for the rest of the voyage, and damages for the injury, the owners of the vessel paid the amount of the wages into court, which the libellant drew out. *Held*, that the libellant was entitled to the wages for the rest of the voyage, and as there was no proof or allegation of a tender of the amount, he was entitled to a decree for his costs.

This was a libel in admiralty by William Price, who alleged that he shipped on the Cortes in New York for a voyage to New Orleans and back; that, after the vessel had started on her return voyage, he fell from the yard and broke his arm, and was sent to a hospital in New Orleans, and, after a few days, was brought to New York in another steamer and sent to the hospital in New York; and he claimed to recover $18, a balance of wages due, and $400 damages for the broken arm.

The owners of the steamer answered that they had paid the man up to the time when he left the ship, and were willing to pay him up to the time of the arrival of the Cortes in New York. His claim for damages they denied. And they paid into court the amount of the wages which they offered to pay.

A. Nash, for libellant.

Man & Parsons, for claimant.

BENEDICT, District Judge. The libellant having incurred no expenses in his cure is entitled to recover no more than the wages which the claimants have heretofore paid into court.

In the absence of any proof or allegation of a tender of this or any sum, the libellant is also entitled to his taxable costs. The sum paid into the registry having been heretofore withdrawn by the libellant, he is now entitled to a decree for his costs only.

CORTLAN (LARABEE v.). See Case No. 8,084.

Case No. 3,259.

In re CORWIN.

[19 N. B. R. 422.]

District Court, S. D. New York. April Term, 1880.

[See 1 Fed. 847.]

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

CORWIN (UNITED STATES v.). See Case No. 14,870.

CORWINE (UNITED STATES v.). See Case No. 14,871.

Case No. 3,260.

CORY v. CLARK.

[2 N. J. Law J. 122.]

District Court, D. New Jersey. Feb. Term, 1879.

SUIT BY ASSIGNEE IN BANKRUPTCY—ACCOUNTING—RECEIVER—PAYMENT OF PARTNERSHIP DEBTS.

1. Upon a bill filed by an assignee in bankruptcy of two insolvent partners, for an account and a receiver, against the only solvent partner, a receiver will be appointed, but the bill for an account will be retained until the receiver has reported a settlement of all other demands against the partnership, and then an account will be taken, if desired.

2. The principle is settled that one partner cannot claim or receive from the assets of the partnership payment of a debt due to him in the course of the business, until all the other partnership debts are paid.

[Bill in equity by Cory, assignee of Watson & Twitchell, bankrupts, against Clark, praying the appointment of a receiver and for an account.]

NIXON, District Judge. The bill was filed in this case by the assignee of the two bankrupt partners against the solvent partner of a firm, for an account and for a receiver. The counsel for the defendant consenting, a receiver was forthwith appointed by the court, and was ordered to take charge of the partnership estate and assets, to reduce the same to money with all convenient despatch, and the creditors were directed to verify and file their claims against the late firm with him. It appears from the bill, answer and proofs, that the firm of Watson & Twitchell was organized and commenced business May 12, 1868. It was engaged in the manufacture of wooden packing boxes and the general retail lumber trade. Anson G. Phelps Dodge of New York was a special partner, furnishing capital to the amount of $50,000. At the end of five years, to wit, May 1, 1873, a dissolution of the partnership took place. It was reckoned solvent at the time, although its indebtedness was nearly or quite $150,000. The terms of the dissolution were substantially that Dodge was to have and receive all the property and assets of the late firm, in consideration of which he was to assume all its debts and liabilities, to pay in cash to Watson & Twitchell each the sum of $8,000 on account of their interest therein, and upon a final settlement of the business whatever additional sum they would be entitled to out of the net profits of the late co-partnership. The name of the firm, Watson & Twitchell, was to be used in the liquidation of its affairs by the said Watson & Twitchell, whose duty it was to collect all debts and pay all claims, and to account to Dodge for all moneys collected and remaining in their

hands after the payment of the liabilities of the firm. An agreement under seal was formally executed by the parties to the foregoing effect, in which Watson & Twitchell conveyed and transferred all their interest in the assets of the firm to Dodge, and acknowledged the receipt in cash of the sum of $8,000 paid to each by Dodge.

Mr. Dodge thus retiring on the 1st of May, 1873, the partnership of Watson, Twitchell & Clark was formed. Written articles were entered into by the parties, stipulating that it was to continue for five years from that date, and to have a cash capital of $32,000, Watson and Twitchell each contributing $8,000, and Clark $16,000. The expenses of carrying on the business, and the profits and losses, were to be borne and shared by the partners in the following ratio, to wit, seven-twentieths by said Watson, seven-twentieths by Twitchell, and six-twentieths by Clark, and legal interest was to be paid on all the capital before any account was to be taken of profits or losses in the business. It is proper to observe in passing that the amount of cash capital put in by Clark, as it appears by the answer and the evidence, was in fact $17,000. Lumber and other property of the old firm of Watson & Twitchell, and then in their hands as the agents of the special partner, Dodge, of the appraised value of upwards of $95,000, was transferred to the new firm of Watson, Twitchell & Clark, upon which payments were made from time to time to the amount of about $80,000. After carrying on the business a year, it became manifest that Watson & Twitchell would not be able to meet their liabilities arising from losses sustained in the former partnership. In the beginning of August, 1874, a petition in bankruptcy was filed against them, and on the 18th day of that month they were adjudged bankrupts by this court, and the complainant was appointed their assignee. The bankruptcy dissolved the partnership, and the assignee of the two bankrupt partners has brought this suit against the solvent partner, praying for a receiver and for an account, and claiming that there is due to him from Watson, Twitchell & Clark about $15,000, the sum remaining unpaid upon the above stated transfer of property to the new firm.

I think it is quite clear, upon the case made, that the complainant properly asked for the appointment of a receiver, and also that he is entitled to an account, and that it is equally clear that he is not in a position to demand from the assets of Watson, Twitchell & Clark, before an account, the payment of the balance due on the consideration for the property transferred.

This is a proceeding in equity, and it is the duty of the court to look at all the equitable rights of the parties. The $33,000 cash capital paid in has been sunk, and fourteen-twentieths of the loss, by the terms of the partnership, were to fall upon Watson & Twitchell, and six-twentieths upon Clark. Stripped of all accidental and incidental qualities, this is in truth a suit between the parners for the adjustment of their liabilities to each other, and the principle is settled that one partner cannot claim or receive from the assets of the partnership moneys for a debt due to him in the course of the partnership business until all the other partnership debts are paid. Whether Dodge, the special partner of the old firm, can maintain an action against Clark, the only solvent partner of the new firm, I do not consider, as that question does not arise here. But the property was left in the hands of Watson & Twitchell to be disposed of, and its proceeds accounted for to Mr. Dodge, and the disposition which they thought proper to make of it was to put it into the new partnership as assets, and, on the controversy arising between the partners, the court will not permit it or its value to be taken out, by decree or otherwise, until all other claims against the partnership have been settled by the receiver. The bill will be retained, and the receiver be directed to proceed with the settlement of all duly authenticated demands, not including, however, this claim of the assignee. When he reports a settlement, if the parties cannot come to an account, the court will order one in the pending suit.

CORY (LIDDLE v.). See Case No. 8,338.

CORY v. The NORFOLK. See Case No. 10,297.

CORY v. The UNION. See Case No. 10,297.

CORYELL (CORFIELD v.). See Case No. 3,230.

CORYELL (SYLVIA v.). See Case No. 13,713.

COSGROVE (POLK v.). See Case No. 11,248.

Case No. 3,261.

The COSTA RICA.

[3 Sawy. 538;[1] 5 Ins. Law J. 395.]

District Court, D. California. Dec. 13, 1875.

NEGLIGENCE—PERIL OF THE SEAS.

Where the master of a steamer attempted to come up the bay of San Francisco in a dense fog, the vessel being in good safety, and the master not being compelled by any exigency to make the attempt, and the vessel was stranded: *Held*, that the master was guilty of negligence, and that the damage to the cargo was not to be attributed to perils of the seas.

[Cited in The Ontario, 37 Fed. 222.]

[Libel in admiralty by Hackfield & Co. against the steamer Costa Rica for damages due to the injury of certain goods shipped on the Costa Rica.]

Milton Andros, for libellant.
Delos Lake, for claimant.

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

HOFFMAN, District Judge. The libel in this case is brought to recover damages for injuries to goods shipped on the above vessel. The shipments and injuries to the goods are admitted. The defense relied on is injury by "peril of the seas." The circumstances under which the loss occurred are clearly shown by the evidence.

On the afternoon of September 17, 1873, the steamer Costa Rica, then on a voyage from Honolulu, arrived off this port. A very dense fog prevailed, and the master cautiously made for the land, giving to the Farallones Islands a wide berth to the north. He continued on this course until he discovered the land about a quarter of a mile distant. He at once stood off shore, and having fallen in with a fishing boat, ascertained that he was ten miles distant from the North Head. At 6.20 o'clock he made Seal Rock, a few ship's lengths distant, on his starboard beam. He then stood to the northward to avoid Mile Rock, which is the chief danger to vessels entering the Heads, and soon afterward passed the mid-channel buoy. He then shaped his course directly up the harbor, proceeding slowly and sounding at short intervals. About seven o'clock he found himself in ten fathoms of water. Knowing from this that he had approached very near to the north shore of the harbor, he altered his course to the eastward, and when he had, as he supposed, reached mid-channel, he resumed his direct course up the harbor. Shortly afterwards he discovered land dead ahead and a few ship's lengths distant. The order to back was at once given, but the engineer reported that the propeller was gone. The ship had not entirely lost her headway, and the master, knowing that if she struck on the rocky bluff ahead of him she might founder in deep water, with great presence of mind ordered her helm to starboard and succeeded in beaching her in the small cove which extends from Point Bonita to Point Diablo. The vessel was subsequently hauled off and repaired, but her cargo sustained considerable damage.

It is not denied that the master was one of the most skillful and experienced commanders of this port. He was on deck during the whole afternoon and evening, personally directing every movement of his vessel. The course he ordered was proper, and should have carried him clear of all danger. He is unable to give any certain explanation of the accident. It is conjecturally accounted for by supposing that some current may have caused the ship to drift from her course, or that her compass may have been affected by some disturbance caused by the vessel (which was of iron) or by local attraction, or that perhaps the helmsman did not keep the vessel on the courses ordered by the master.

With respect to the first two of these hypotheses, it is to be observed that the possibility of danger from those causes was well known to the master, and should have been considered before making his perilous attempt to enter the harbor in a dense fog, when no object was visible by which he could assure himself of his true position. With regard to the last hypothesis, it must be said that it involves a confession of negligence. The master could not himself watch the binnacle and at the same time keep a lookout for the land; but an officer could readily have been detailed for the purpose. Where the safety of the vessel and the lives of all on board depended on the prompt and exact obedience by the helmsman of every order given by the master, it was negligence to have omitted any means of preventing the possibility of a mistake. But if it be claimed that every proper and usual precaution was taken, and that the mistakes of the helmsman could not have been guarded against, then the danger from that cause should have been considered before an operation was attempted the success of which entirely depended on the skill and attention of the helmsman.

The real and only question in the case is: Had the master the right to expose his vessel and the lives of his passengers to the risks which he voluntarily affronted? It is not pretended that there was the slightest necessity for attempting to come up the harbor. The wind was moderate and the sea smooth. Safe anchorage could have been obtained at almost any time after entering the Heads, and especially when the master found himself in ten fathoms of water and knew from that fact that the vessel had deviated from her course. It is not pretended that there was any objection or obstacle to anchoring, especially in the cove where there would have been no danger of a collision with other vessels during the night. It is plain that the master, relying on his skill, or perhaps his fortune, and emboldened by previous impunity, voluntarily exposed his vessel to a danger which common prudence would have refused to encounter.

Several experts have testified that the attempt to come up the harbor was, under the circumstances, an act of the highest imprudence. But no testimony on the point is needed. A moment's consideration of the possible consequences of failure will convince any one of the unjustifiable temerity of the attempt. Had the master not succeeded in stranding his vessel on the beach, another might have been added to the long list of appalling catastrophes at sea, occasioned by the rashness or unskillfulness of commanders of ships.

It may seem unnecessary to cite authorities in support of the principles on which I have decided this case. But they have been so emphatically recognized by the supreme court in many cases that a reference to two of them may be appropriate. In the case of The Portsmouth, 9 Wall. [76 U. S.] 682, it was held that "a captain who in the night and in a fog enters a port, supposing it to be his

port of destination, enters at his peril of its being so, unless there have been some necessity for his seeking a port. If there was proper ground to doubt whether this port was the one he supposed it to be, and he could safely wait outside until morning, or could signal a tug-boat to pilot him in, he should not proceed until he can see and know what he is doing." It is worthy of remark that in this case the indications by which the master was misled were such as might have deceived a very careful person, and almost sufficient to justify a belief on the master's part that he was running no risk whatever. In the case at bar the hazard of the undertaking was well known and willfully incurred. In the case of The Mohler, 21 Wall. [88 U. S.] 230, it was decided by the supreme court "that when in a high or uncertain state of the wind a vessel is approaching a part of the river in which there are obstructions to the navigation, as e. g. the piers of a bridge crossing it, between which piers she cannot, if the wind be high or squally, pass without danger of being driven upon one of them, it is her duty to lie by until the wind has gone down and she can pass in safety."

The rule of law laid down and enforced in these cases by our highest tribunal is commended to us as well by its humanity as by its sound policy. It is that the master of a vessel has no right to expose her, and still less the lives of his passengers, to any unnecessary danger.

Decree for libellants.

Case No. 3,262.

The COSTA RICA.

[3 Sawy. 610.][1]

District Court, D. California. May 7, 1876.

SALVAGE—TOWAGE.

Ten thousand dollars awarded as salvage compensation.

[Applied in The Sirius, 6 C. C. A. 621, 57 Fed. 858.]

W. W. Crane, Jr., and Jas. T. Boyd, for libellant.

Delos Lake and Milton Andros, for claimant.

HOFFMAN, District Judge. At about one o'clock on the morning of the 26th of October, 1874, the steamer Costa Rica, of the burden of about 1475 tons, bound on a voyage from Panama to San Francisco, became suddenly disabled by the breaking of the shaft of her propeller. She was then about one hundred and thirty miles to the southward of San Diego, and about twenty-five miles off shore. Soon after the accident the mate was dispatched in a boat with orders to proceed to San Diego and thence telegraph to the Pacific Mail S. S. Co.'s agents at this port for assistance. At about noon of the same day, and while proceeding on his way, he was overtaken when about four miles from San Diego by the steamship Newbern, of about 943 tons and belonging to the libellants. The mate was recognized by the officers of the Newbern by the aid of their glasses, and the steamer bore down to his boat and he was invited on board. On being informed of the accident Capt. Metsger, master of the Newbern, inquired of the mate if the master of the Costa Rica desired to be towed into port, to which the mate replied that he did not know, that his orders were to go to San Diego. He also declined to advise Capt. Metsger to go to the assistance of the Costa Rica, telling him that Capt. Nolan intended to work his ship into Cape Colnette. Capt. Metsger, however, determined to turn round and see if Capt. Nolan required assistance. This he did at about half past twelve o'clock, and reached the Costa Rica about half past four the same afternoon. The distance run back was about twenty-five miles. As soon as the Newbern was seen by the Costa Rica the sails of the latter vessel were clewed up and furled. When the Newbern arrived alongside of the Costa Rica, Capt. Nolan was already in his boat and immediately came on board, and a conference took place between the commanders.

Some attempt was made to come to an agreement for a specific sum to be paid for towing the vessel into San Diego, but it was finally agreed that the service should be performed, leaving the compensation to be settled by the two companies in San Francisco. The Newbern at once took hold of the Costa Rica, and at about nine o'clock on the evening of the succeeding day arrived with her in tow, off the mouth of the harbor of San Diego. As no pilot presented himself the vessels remained outside until about half past seven of the succeeding day, when Captain Metsger determined to enter the port, and at about nine o'clock brought the Costa Rica to anchor along the Pacific Mail S. S. Co.'s wharf. He shortly afterwards proceeded on his way to San Francisco, where he arrived at about eight o'clock on the evening of the thirtieth of October. The distance run by the Newbern, after turning back, was, as above stated, about twenty-five miles. The distance towed was about one hundred and ten miles. The hawsers used in towing belonged to the Costa Rica. The time consumed in the service was about forty and one-half hours, but to this must be added the time employed in running back twenty-five miles, about four hours. But it is to be remembered that the Newbern, while towing the Costa Rica was still proceeding towards her port of destination, though not by the most direct course, nor at her usual rate of speed. The service was attended by no particular difficulty or danger. The weather was fair and the sea smooth. At

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

the time the Newbern took hold of the Costa Rica the latter was in no immediate danger. With favorable winds she could probably have reached Cape Colnette, where there was safe anchorage, in eighteen or twenty hours, and San Diego in four or five days. But at that season of the year no reliance could reasonably be placed on having favorable winds, or, indeed, any winds at all, and any estimate of the time a vessel so imperfectly rigged for sailing as the Costa Rica, with a propeller dragging at her stern, would have taken to reach either of the ports mentioned, is purely conjectural. If a gale had occurred, her propeller, which had been secured by chains passed under it from the stern of the vessel and made fast above, might have been a source of danger. But the probability of encountering gales sufficient to create a sea heavy enough to tear the propeller from its fastenings was remote, and the danger from that source was hardly appreciable. Captain Metsger testifies that when he came down to the Costa Rica her ensign was at half mast. Captain Nolan denies that this was done by his orders, if at all. And he states that such a signal would indicate death and not distress, the proper signal in the latter case being an ensign with union down.

The value of the Costa Rica was about $145,000; that of the cargo, including treasure, $93,000; freight to be earned, $6,756.64; total, $244,756.64. The value of the Newbern was $100,000; that of her cargo, $7,000; treasure on board, $185,400; total, $242,000. The value of the coal consumed by the Newbern, while performing the service, was about $800. The case of The Ellora, Lush. 550, bears a striking resemblance to the case at bar.

On the eleventh of June, 1862, the Ellora, a screw steamer of 1,070 tons, belonging to the Peninsula & Oriental Nav. Co., then between Alexandria and Malta, and bound to Malta, Gibraltar and Southampton, carrying passengers and the mail, suddenly lost her screw, which broke off and sunk. By this accident her steam-power became entirely useless. She was in all respects fully equipped as a sailing ship, and she at once made sail. The weather was fine but the wind was light and adverse. Between the time of the accident and the morning of the fourteenth of June, the Ellora beat up to the windward 130 miles. The Juno then hove in sight and, being signalled, bore down to the Ellora. The Juno was bound with cargo to Hull, and it was agreed between the masters of the two ships that she should tow the Ellora to Malta. She thereupon took the latter in tow and on the seventeenth the two vessels reached Malta; the weather being throughout quite moderate. During the passage two outward bound vessels of the Peninsula & Oriental Co. were met and signals exchanged. The Ellora was also passed during the passage by another of the company's steamers, then bound from Alexandria to Malta. On the arrival of the Ellora at Malta her mails were transferred to the Juno, which conveyed them to Southampton and then completed her voyage to Hull. The value of the Ellora was in dollars, $250,000; net passage money, $2,500; mail money, $4,750; total, $257,250. The value of the Juno and her cargo was $175,000. Dr. Lushington awarded $6,000. It will be noted that the value of the Ellora, her passage money, etc., was slightly in excess of that of the Costa Rica. The value of the Juno and her cargo was less than three-fourths of that of the Newbern. The duration of the service was more than one-third longer than in the case at bar. The Ellora was fully equipped as a sailing ship and had proved her qualities as such by beating up 130 miles against light and adverse winds. She was therefore in no greater danger, either immediate or prospective, than any sailing ship under similar circumstances. In both cases aid from other sources was attainable. In that of the Ellora from other vessels of the company which met or passed her. In that of the Costa Rica from the Arizona which had been dispatched to her assistance, and which arrived at San Diego on the morning after the two vessels reached that port. I do not feel bound to strictly adhere to the rate of allowance adopted by Dr. Lushington. The great difference in the cost of coal, labor, etc., the higher rate of interest on capital, the large profits expected and usually obtained from undertakings of all kinds on this coast, justify a higher compensation for services like those in the case at bar, than would be allowed in England.

I shall award the sum of ten thousand dollars.

Case No. 3,263.

COSTELLO v. AMERICAN STEAMSHIP CO.

[1 Wkly. Notes Cas. 204.]

District Court, E. D. Pennsylvania. Feb. 6, 1875.

SEAMEN'S WAGES—FORFEITURE—WHAT CONSTITUTES DESERTION.

[A seaman arrested and imprisoned in a foreign port is not a deserter, within the act of 1790, so as to forfeit wages due at the time of the arrest.]

In admiralty. Libellant [Michael Costello] shipped on respondent's steamship Illinois on April 16th, at Philadelphia, for a voyage thence to Liverpool and back to Philadelphia. The vessel arrived in Liverpool on April 27th, 1874. On the evening of April 28th libellant obtained leave to go ashore for 24 hours. While ashore he became intoxicated, and was arrested by the Liverpool police, and locked up in the station house.

In the meantime, on the night of April 30th, the vessel hauled out into the stream, and at mid-day of May 1st, libellant being absent, the vessel sailed without him. An-

other man was shipped in his place, and he was logged as a deserter. As soon as released, libellant proceeded to the vessel, and found that she had just started on her voyage, and he was unable to reach her. This was at 12 o'clock m. of May 1st. He obtained a free passage home on the next vessel of the same line that sailed from Liverpool, and on arriving in Philadelphia claimed his wages up to the time of his leaving the vessel in Liverpool. Respondent refused to pay him, on the ground that libellant, having been 48 hours absent from the vessel without leave, and having been entered on the log as a deserter, had forfeited his wages under the act of July 20, 1790 [1 Stat. 131].

Mr. Coulston, for libellant.

Morton P. Henry, for respondent.

THE COURT (CADWALADER, District Judge) held that this was not a case of statutory desertion, but docked the libellant six or nine dollars from his wages, according to the date at which his services began.

COSTER, In re. See Case No. 17,027.

Case No. 3,264.

COSTER v. PHOENIX INS. CO.

[2 Wash. C. C. 51.][1]

Circuit Court, D. Pennsylvania. April Term, 1807.

"AVERAGE" DEFINED—INSURANCE—CONFLICT BETWEEN WRITTEN AND PRINTED PARTS OF POLICY.

1. The order for insurance on goods on board the Draper, directed it to be made free of average under ten per cent., and the ship, on her arrival in the Texel, was subjected to charges and damages under ten per cent. in the nature of general average.

2. The original meaning of average, was a general contribution on ship, cargo, and freight, towards a loss sustained for the benefit of all. At this time, such average is always called general. It is usual to add to the terms, general, partial, or particular, to designate the average intended.

3. Where the written clause in a policy is inconsistent with the printed parts of it, the former will be deemed and taken as the contract of the parties.

This was a case agreed, which stated, that in 1805, an order for insurance of goods on board the ship Draper, at and from New-York to Amsterdam, was given by the plaintiff's agent to the defendants; in which it was stated the same were to be free of average under ten per cent. On the 26th of December, 1805, a policy was subscribed by the defendants on goods on board the same ship, at and from New York to Amsterdam, at five per cent.; which insurance was declared to be made on one hundred and twenty-five bales of cotton, and thirty-six boxes of sugar, valued at 12,150 dollars, and warranted free from average under ten per cent., and with other warranties not in question. That the following (printed) clause was also contained in the policy, viz. "Memoranda. It is agreed that salt, wheat, Indian corn, peas, or any other kind of grain, malt, dried fish stowed in bulk, leaf tobacco or otherwise, fruit of all kinds, and any other articles that are perishable in their own nature, are warranted by the assured free from average, unless general; all other goods free from average under five per cent., unless general." The vessel sailed from New York, and arrived in the Texel, where she was subjected to certain extraordinary expenses and damages, of the nature of general average.

The question submitted to the court was, whether the defendants are liable and chargeable with the said average loss, being general, but under ten per cent. If the court should be of opinion that the defendants are liable for the said general average, judgment to be rendered for the plaintiff; the amount to be agreed upon by the parties. If the opinion should be that they are not so liable, judgment to be rendered for the defendants.

Mr. Ingersoll, for plaintiff, argued that the written clause, taken in connexion with the printed, clearly shows that the intention was merely to exempt the underwriter from particular average under ten per cent., instead of five per cent., as in the present form of the policy; and that the words, "unless general," in the printed form, should be applied to the written clause, which would make the whole plain.

Mr. Rawle, for defendant, insisted that the written words in the policy always control the printed. Average, in its general signification, means a contribution to a general loss; and unless it be qualified, it is always to be taken in this sense. But, taking both together, the meaning is, that the defendant should not be liable either for general or partial loss, under ten per cent.

Mr. Ingersoll replied, that the written part never controls the printed, unless where they are inconsistent. Average is the general term, and comprehends as well partial as general average. He cited Park, 99, 121.

WASHINGTON, Circuit Justice. The word "average" originally meant a contribution, by the owner of the ship, cargo, and freight, towards a loss sustained for the general benefit of all. But when understood in this sense, it is at this day always called "general," to distinguish it from "particular" average, which means nothing more than a partial loss. So that from the time that the term "average" was used to express a partial loss, the word "average" has, in the common understanding of commercial men, so far varied its original meaning when applied to

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

original insurances, as to import as well a general contribution, as a particular loss; and is intended to be used in either of those ways: the adjuncts "general," "partial," or "particular," are always affixed.

An attention to the true meaning of this phrase, will assist us in understanding the point in controversy. The printed clause liberates the underwriters from particular average to any amount, on articles of a perishable nature, and on other articles where the loss amounts to less than five per cent. The written clause discharges the underwriter from all responsibility for average losses, whether general or particular, under ten per cent. These clauses are inconsistent with each other, and one or the other must give way. If the written clause varies from the printed, it is evidence of a special contract made in that particular case, different from the usual contract of insurances; and it must necessarily be considered as the real agreement of the parties. If the written and the printed clauses can be reconciled by any fair construction, it ought to be done; if they cannot, the former must prevail. Whether, in this case, the not qualifying the general expressions, proceeded from mistake or was designed, is quite uncertain. The insured may possibly have expected that the usual words, "unless general," would be added, and the underwriter may have taken a smaller premium in consideration of being exempted from general average losses, under ten per cent. There is no certain ground to go upon, but the construction fairly deducible from the expressions which the parties have used. The opinion of the court therefore is, that the defendants are not liable for the average loss, and that judgment should be rendered for them.

Case No. 3,265.

COSTIGAN et al. v. WOOD.

[5 Cranch, C. C. 507.][1]

Circuit Court, District of Columbia. Nov. Term, 1838.

EJECTMENT BY VENDOR AGAINST VENDEE IN POSSESSION.

If the vendee of land, who has paid part of the purchase money, enters into possession, and fails to pay the residue according to the contract of sale, although demanded, the vendor cannot maintain ejectment against him without a notice to quit, or a notice that the contracts are rescinded, or a demand of payment and notice of rescinding.

Ejectment for lot No. 1, in square 882, in the city of Washington.

The defendant [Henry S. Wood] claimed under a contract of sale, upon which he had paid sixty-three dollars, and taken possession of the lot, but failed to pay the residue, long since due, and unpaid at the time of the demise from the lessor of the plaintiff [Joseph Costigan], although demanded.

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

Mr. Bradley, for defendant, moved the court to instruct the jury, in effect, that the plaintiff cannot recover without a notice to quit, or a notice that the contract of sale was rescinded, or a demand of payment, with notice of rescinding.

THE COURT (CRANCH, Chief Judge, contra) gave the instruction.

The plaintiff then gave such a notice, and had a verdict in his favor.

Mr. Bradley, for defendant, cited Jackson v. Rowan, 9 Johns. 330; Jackson v. Wheeler, 6 Johns. 272; Shepard v. De Bernales, 13 East, 565.

R. J. Brent, for plaintiff, cited Smith v. Stewart, 6 Johns. 45; 1 Saund. Pl. 565.

In the cases cited from 9 Johns. 330, and 13 East, 565, the defendant was lawfully in possession, and in no default; so, also, in the case of Jackson v. Wheeler, 6 Johns. 272. See Smith v. Stewart, Id. 46, and the cases cited in the margin of that case (3d Ed.).

Case No. 3,266.

COSTIN v. WASHINGTON.

[2 Cranch, C. C. 254.][1]

Circuit Court, District of Columbia. Oct. Term, 1821.

CONSTITUTIONAL LAW—CHARTER OF CITY OF WASHINGTON—RESIDENCE OF PERSONS OF COLOR.

The clause in the charter of Washington which gives power to the corporation "to prescribe the terms and conditions upon which free negroes and mulattoes may reside in the city," is applicable only to those persons of color who come to reside in the city after the promulgation of such terms and conditions. That clause in the charter is not, in itself, repugnant to the constitution of the United States; nor is the by-law of the 14th of April, 1821, c. 133, in its prospective operation.

This was an appeal from the judgment of a justice of the peace of the county of Washington for the penalty of five dollars under the 7th section of the by-law of the corporation of Washington, passed on the 14th of April, 1821, c. 133, entitled "An act to prescribe the terms and conditions upon which free negroes and mulattoes may reside in the city of Washington, and for other purposes." The first section requires the city commissioners to give notice to all free persons of color in their respective wards to appear before the mayor within thirty days from the time of such notice wth their evidence of freedom, and subscribe a statement of their trades, or means of subsistence, and of their family. The third section requires every free negro or mulatto, at the time of his appearing before the mayor, according to the first section, to produce a satisfactory certificate from three respectable white inhabitants, householders in his neighborhood, as to his living peaceably, his means of subsistence, and his character. The fifth section

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

requires every free male colored person, who then resided in the city of Washington, whose evidence of freedom should be found satisfactory to the mayor, "to enter into bond with one good and respectable white citizen, as surety in the penalty of twenty dollars, conditioned for the good, sober, and orderly conduct of such person or persons of color, and his or her family for the term of one year, and that such person or persons, his or their family, nor any part thereof, shall not, during the said term of one year, become chargeable to the corporation in any manner whatsoever, and that they will not become beggars in or about the streets," &c., whereupon they shall obtain a license to reside, &c. The 7th section imposes a penalty of five dollars on every person of color, who may have been notified as aforesaid, who shall be found residing within the limits of the city after the expiration of the thirty days aforesaid, without having entered into the bond and obtained the license as aforesaid, for the first week he may continue so to reside.

Mr. Caldwell, for appellant.
Mr. Law, for appellee.

CRANCH, Chief Judge. The ground of the judgment of the justice of the peace, in the present case, is, that the defendant was found residing, and had continued to reside one week, within the limits of the city after the expiration of thirty days from the time of the notice given to him, according to the provisions of the first section of the by-law, without having entered into the bond, and obtained the license agreeably to the provisions of the fifth section. On the part of the appellant, it has been contended, 1st. That the by-law is not authorized by the charter; and 2d. That if it is, the charter is, in that respect, repugnant to the constitution of the United States.

1. Upon the first point, it is said that the clause in the charter must be construed prospectively, and not retrospectively. That it could not reasonably be supposed to be the intention of congress to banish old and long-established inhabitants of the city who have acquired real estates therein, whose lives have been unexceptionable, who can neither be reproached for, nor suspected of any crime. Such a construction of the charter would abolish the distinction between moral good and evil; would inflict punishment on the innocent, and would take away the incentive to good conduct. That the process to require surety for good behavior was a criminal process; and that, at common law, such surety could only be demanded upon conviction of some offence. That it is not reasonable to suppose that congress intended that color alone should be a good cause for demanding it. That the constitution knows no distinction of color. That all who are not slaves are equally free; that they are equally citizens of the United States, as those free white persons in Virginia who have no freehold, or those in the other states who have not the property required to qualify them to vote or to serve on juries, or who are too aged to be enrolled in the militia. That those people of color, who are citizens of any state in the Union, have a right to come here and claim all the privileges of citizenship under that clause of the constitution which gives to the citizens of each state all the privileges and immunities of citizens in the several states. That to cause a warrant to issue for surety of good behavior or of the peace, without an allegation of some crime actually committed, or of the apprehension of some crime, supported by oath, or affirmation, would be contrary to the constitution of the United States, and therefore the charter must not be construed so as to give that power.

2. On the 2d point, it is said, that if the charter is capable of such a construction as to warrant the by-law, the reasons which have been urged to show that such a construction is inadmissible, show also that the charter, in that respect, in unconstitutional. But in answer to this position it may be said, that if those reasons are not sufficient to show that the by-law is not warranted by the charter, they are not sufficient to show that the charter is unconstitutional; for before the by-law can be warranted by the charter, the charter itself must be shown to be warranted by the constitution. And if the constitution prescribes any limits to the terms which the corporation may impose upon free persons of color as the condition of their residence in the city, they are bound by those limits, however broad may be their charter. The clause in the charter does not, in itself, seem to be repugnant to the constitution. The power, given by that clause, may be so exercised by the corporation as not to violate any right secured by the constitution. The only question, then, is, whether the by-law itself is unconstitutional. What constitutional right does it violate? It is said that the constitution gives equal rights to all the citizens of the United States, in the several states. But that clause of the constitution does not prohibit any state from denying to some of its citizens some of the political rights enjoyed by others. In all the states certain qualifications are necessary to the right of suffrage; the right to serve on juries, and the right to hold certain offices; and in most of the states the absence of the African color is among those qualifications. Every state has the right to pass laws to preserve the peace and the morals of society; and if there be a class of people more likely than others to disturb the public peace, or corrupt the public morals, and if that class can be clearly designated, it has a right to impose upon that class, such reasonable terms and conditions of residence, as will guard the state from the evils which it has reason to apprehend. A citizen of one state,

coming into another state, can claim only those privileges and immunities which belong to citizens of the latter state, in like circumstances. But the present case is like that of a state legislating in regard to its own citizens, and I can see no reason why it may not require security for good behavior from free persons of color, as well as from vagrants, and persons of ill-fame. The clause of the constitution which requires that warrants should be founded upon probable cause, supported by oath or affirmation, does not apply to the warrant in this case, which was for a debt due as a penalty for the violation of a by-law. But it is said that the charter does not apply to those free negroes and mulattoes who were residing in the city when the charter was granted. No law ought to be construed to have a retroactive effect unless the intention of the legislature be clear. The words of the charter, in this respect are equivocal. They are, "To prescribe the terms and conditions upon which free negroes and mulattoes may reside in the city." The word "prescribe" is prospective, and seems to imply that the rule is to be applied only to those who should come to reside in the city after the promulgation of the rule. It would seem to be unreasonable to suppose that congress intended to give the corporation the power to banish those free persons of color, who had been guilty of no crime, and who, by their residence had acquired a right to support under the poor-laws. Many such persons had been long residents of the city; some had been born there; had been useful members of society; had acquired property, and had contributed to the growth and improvement of the city, and had paid taxes for the support of the poor. They could not compel any white person to become their surety; and banishment would be the consequence of their inability to give the security required; unless they should submit to repeated imprisonments in the workhouse, and to the breaking up of their families, the ruin of their business, and the binding out of their children, by the guardians of the poor. If such had been the intention of congress they might have expressed it by using equivocal terms; as they have not, I feel myself bound, by the ordinary rules of construction, to say, that the charter only authorizes the corporation to prescribe the terms and conditions of residence for those persons of color who should come to reside in the city after the promulgation of such terms and conditions. In the present case the appellant was a resident of the city at the time of the charter, and has continued to reside there ever since, and therefore was not a person in regard to whose residence the corporation had, by the charter, a power to prescribe terms and conditions; and consequently was not liable to the penalty of the 7th section of the by-law. I am, therefore, of opinion that the judgment ought to be reversed with costs. Judgment reversed, with costs.

COSTS AND FEES. See Append. Fed. Cas.

COSTS AND FEES IN PRIZE CASES. See Append. Fed. Cas.

COSTS, FEES AND COMPENSATION IN PRIZE CASES. See Append. Fed Cas.

COSTS IN CIVIL CASES. See Append. Fed. Cas.

Case No. 3,267.

In re COTE.

[2 Lowell, 374;[1] 14 N. B. R. 503.]

District Court, D. Massachusetts. Dec. Term, 1874.

BANKRUPT—DISCHARGE—TRADESMAN.

1. The word "tradesman," in section 29 of the bankrupt law (Rev. St. § 5110), cannot fairly be held to mean trader, in the large sense of the old bankrupt law. Its meaning considered.

[Cited in Re Stickney, Case No. 13,439; In re Moss, Id. 9,877.]

2. A farmer, who occasionally bought and sold horses, cattle, and hay, was *held* not bound to keep books as a tradesman, within that section.

[Applied in Re Kimball, 7 Fed. 462.]

In bankruptcy. The bankrupt's discharge was opposed on the ground, that, being a tradesman, he had not kept proper books of account. The evidence tended to show that he was a farmer, and conducted his farm chiefly through his hired men; that several times in each year he visited Canada, and he then usually bought horses or cattle, and sometimes hay, partly for use on his farm and party for sale. His dealings in these articles were for cash. He was unable to write, and had never kept any books. There was no evidence that his failure was connected with his buying and selling. The amount of his dealings was a subject of some conflict of proof.

G. W. Morse, for objecting creditors.

N. B. Bryant, for bankrupt.

LOWELL, District Judge. I have more than once referred to the difficulty which I find in understanding what persons congress intended to include in the class of tradesmen. That this is not a fanciful objection may be seen by the remarks of the court in construing a statute of Pennsylvania, which exempted the necessary tools of a "tradesman" from seizure on execution, in Richie v. McCauley, 4 Pa. St. 472. "It is to be regretted," says Bell, J., in delivering the opinion in that case, "that, in framing a statutory provision of so much importance, a term so vague, and admitting of such variety of signification, should have been employed." He then goes on to say that in England the word is applied to small shopkeepers, but that in the United States it is rarely applied to persons engaged in buying and selling, but to mechanics and artificers of every kind, whose

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

livelihood depends upon the labor of their hands. Burrill, in his Law Dictionary, adopts this meaning, and gives this case as the authority. Bell, J., cites, too, the opinion in a case in Massachusetts, where the word is used in the same sense. Howard v. Williams, 2 Pick. 80, 83. In Webster's Dictionary the definitions are: 1. One who trades; a shopkeeper. 2. Any mechanic or artificer whose livelihood depends upon the labor of his hands (citing Burrill). 3. A handicraftsman in a borough (citing Scot.). In Wharton's Law Lexicon (English), the definition is "a shopkeeper."

The act of congress is taken in this part from the insolvent law of Massachusetts (Gen. St. c. 118, § 87); but I have not seen any reported case in which it is construed by the courts of the state. We may well regret that the bankrupt act of 1841 had not been followed, which imposed this duty on every merchant, banker, factor, broker, underwriter, or marine insurer. Persons coming within that description might be expected to keep books; but it will be difficult to find any modern definition or use of either "merchant" or "tradesman," which will include underwriters; so that the description probably omits some classes of persons who might well enough be included. Our present inquiry, however, is, whether it describes a person whom no one would expect to find subjected to such a duty, as, for instance, a handicraftsman. [This cannot be contended, because such people never keep books, and are not expected to keep them. It must refer to traders of some sort.] [2]

It cannot be believed that congress really expected that a farmer, who sometimes incidentally, whether more or less often, bought and sold farm stock in addition to his own, and who would not be fitted by education to keep books, and who could not afford to have a clerk, should become an accountant. And yet if "tradesman" means "trader" in the largest sense, and if occasional trading makes a trader, no doubt this defendant was a tradesman.

I am of opinion that "tradesman" cannot fairly be stretched to mean "trader," in the large sense of the old bankrupt law. That law was, for some time, confined to persons who used the trade of merchandise, or sought their living by buying and selling. Among its earliest maxims was one, still important and binding in many respects, that it was to be taken largely and remedially for the benefit of creditors; and accordingly the class of persons subject to the law was continually extended by successive statutes and by decisions. Under these conditions, it was determined that any person might be brought within the act as a trader who bought and sold for gain, though his dealings might be on a very small scale compared with his means invested in other ways, or might be remote from his usual occupations. He would be a trader if he owned one share in a bank or trading company not incorporated. There is no such reason for giving a large meaning to the word "tradesman" in section 29 of the act of congress, and I do not think the word is ordinarily so used at present.

Nor am I prepared to admit that the word has a very different meaning in England and the United States. In both countries it is, I think, most often used as synonymous with "shopkeeper," and not seldom as a person who supplies your daily or occasional wants, such as a butcher or baker, or even a plumber or carpenter, whether he keeps a shop or not. But in both countries it has a signification much more restricted than that given to "trader" in the old bankrupt law; and I doubt if a dealer in horses and cattle has often been called a "tradesman" in either country.

The English statutes, for some forty or fifty years past, have put at rest the nice and perplexing questions about traders, by giving an alphabetical list of the occupations which should constitute trading, for the general purposes of those acts. But there is nowhere any such definition of "tradesman;" and the word has not become a technical one, excepting in some state statutes, such as have been already referred to, which are not in pari materia with the bankrupt law, and in which it is certain that the meaning is different from that intended here. The question, therefore, is addressed to the common usage of this country, and to the judge's knowledge of his own language. The word might, in many connections, be used in the sense of any man who trades; but I doubt if that is at the present time its usual signification, and whether it has that meaning in this section. The subject-matter proves that the act does not apply to handicraftsmen, or at least that there are many such to whom it cannot apply. The meaning of "tradesman" is. I think, substantially the same as "shopkeeper." "Merchant," in this connection, contrasts with "tradesman," as the greater with the less, and not vice versa.

The trading of this defendant is small enough in amount to bring him down below the grade of a merchant; and there remains a further question, whether congress intended that an occasional dealing by a farmer in farm products, other than those he has raised on his land, will make him a tradesman within this section, even if a person whose sole busines should be to trade in such products, like what we call a grocer, or provision dealer, or cattle salesman would be. Here a distinction fairly arises out of the intent of this part of the statute, opposite to that which caused such an extension of the class of traders as general subjects of the bankrupt laws. It does not seem to me that congress intended to say that every one who ever bought and sold, under whatever circumstances, must

[2] [From 14 N. B. R. 503.]

keep books of that part of his business; but that real merchants and actual tradesmen, being the class of persons whom the common practice of mankind makes bookkeepers, should keep their books properly; and that there may be persons who trade, such as peddlers, in a small way, but more especially persons like this defendant, who buy and sell merely by way of eking out their living, which is principally earned in other ways, that are not to be required to do this. Such a construction may leave the law a little uncertain; but it is, in my judgment, a sound construction, and the only one that will effect justice in the long run. In short, the distinction I take between this part of the law and that which made traders an extensive class, is, that the latter was remedial between debtors and creditors, and to be extended; and this imposes a duty on a certain class of persons, as such, and ought to be confined to those who actually belong to that class with some degree of permanence. [I conclude that this defendant was not such a tradesman as is bound to keep books.] [2]

Discharge granted.

COTTINGHAM (UNITED STATES v.). See Case No. 14,872.

Case No. 3,268.

COTTLE v. PAYNE.

[Brunner, Col. Cas. 59; [1] 3 Day, 289.]

Circuit Court, D. Connecticut. Sept., 1808.

ACTION ON BOND—RIGHT, WHEN ACCRUES—PAYMENT — PRESUMPTION FROM LAPSE OF TIME — COSTS—WHEN TAXED AGAINST PLAINTIFF.

1. The condition of a bond being that the defendant should carry on the business of distilling cider brandy for seven years and three months, and keep an exact account of the quantity distilled and deliver to the plaintiff when demanded one tenth part thereof, and it appearing that the defendant did carry on said business, but kept no account and delivered nothing to the plaintiff; it was held that the plaintiff could have no right of action on the bond until the end of said term.

2. Payment of a bond will not be presumed from lapse of time alone within a shorter period than twenty years; but where the demand is a stale one, the plaintiff will be held to strict proof of the amount of damages which he is entitled to recover.

3. The court, in the exercise of their discretion, will not tax costs against a prevailing plaintiff, except where he must have known that he was not entitled to recover five hundred dollars.

This was an action of debt on bond dated the 17th of April, 1780, the condition of which was that [Stephen] Payne should carry on the business of distilling brandy from cider, and should continue to do so for seven years and three months from the date of the bond, and should keep an exact account, during that term, of all brandy or other spirits distilled from cider by him, or on his account, or should deliver to [Grant] Cottle, when demanded, one tenth part of all such brandy or other spirits distilled from cider, free from expenses. The declaration averred that Payne did carry on the business for the term above specified, but kept no account and had delivered no brandy or other spirits. A special demand was alleged on the 20th of June, 1806. The action was commenced on the 10th of June, 1807. The defendant pleaded full payment. This plea was traversed and issue joined thereon.

The counsel for defendant stated that they should rely upon the lapse of time in support of the plea. By our statute of limitations no action can be sustained on any bond, bill, or note for the payment of money only, unless brought within seventeen years (St. Conn. tit. 101, c. 1, § 3); but as this bond was given for the performance of certain collateral acts, the statute does not attach upon it. The length of time in this case is such that payment is to be presumed at common law.

The counsel for plaintiff then introduced proof of the situation and circumstances of the parties to repel the presumption arising from lapse of time. It appeared that the plaintiff was a poor man; that soon after the execution of the bond he went out of the state, and was absent several years; that when he returned the defendant did not know him at first, though on hearing his name he recollected him. The defendant was a man of large property. A special demand was proved, as stated in the declaration. As to the amount of damages, it was proved that the defendant had carried on the business of distilling cider brandy for several years; but no specific quantity was proved to have been distilled except in one year. It was shown, on the other hand, that during some part of the period in question there was no cider to be had.

T. S. Williams and Mr. Trumbull, for plaintiff, contended: (1) That to raise the presumption that a bond has been paid, there must be a lapse of the full period of twenty years from its becoming forfeited, unless there be other circumstances which do not appear in this case. Colsell v. Budd, 1 Camp. 27. (2) That this bond did not become forfeited until the expiration of seven years and three months from the date; and from that time until the demand was less than nineteen years, and less than twenty years until the commencement of the action. (3) That the lapse of even twenty years affords only a presumption of payment that may be repelled, which in this case has been done by showing the plaintiff's absence from the state, and his inability, from that circumstance, and his poverty, to institute and carry on a suit. Very slight evidence is

[2] [From 14 N. B. R. 503.]

[1] [Reported by Albert Brunner, Esq., and here reprinted by permission.]

sufficient for this purpose. Peake, Ev. (3d Lond. Ed.) 25.

Daggett & Goddard, for defendant, contended: (1) That in England the period of time within which a bond shall be presumed to be satisfied is not invariably fixed at twenty years, but may be eighteen or nineteen years. Oswald v. Legh, 1 Term R. 272. (2) That by the terms of the condition the defendant was to keep an exact account of the brandy distilled in each year. But he kept no account whatever. The condition was therefore broken and the bond forfeited at the end of the first year, which was more than twenty years before the commencement of the action. (3) That from the situation and circumstances of the parties, which had been proved, the presumption of payment was rather strengthened than rebutted. The defendant was a man of property, and abundantly able to pay. If the plaintiff was poor he stood in greater need of his money, and was more likely to call for it. (4) That in this state payment ought to be presumed after the lapse of seventeen years, in analogy to cases within the statute. Thus it has been held that an equity of redemption shall be barred after fifteen years' possession by the mortgagee, in analogy to the statute limiting the right of entry into lands. Smith v. Skinner, 1 Day, 124.

LIVINGSTON, Circuit Justice. This is an action of debt on bond, the condition of which is that the defendant should distil cider brandy and keep an account thereof for seven years and three months, and deliver one tenth part thereof to the plaintiff. The defendant pleads payment generally, and relies altogether upon the lapse of time since the date of the bond. In England payment is presumed in twenty years, but this rule is controlled by courts of justice where the presumption of payment is opposed by other circumstances. But in Connecticut, as the legislature have acted on this subject, and fixed a term after which bonds of a certain description shall not be enforced, it deserves serious consideration whether the rule is to be extended to cases not within the statute. Upon this point, however, the court deem it unnecessary to express an opinion. For in our view of the case the plaintiff had no right of action for his part of the brandy distilled until the expiration of the term of seven years and three months, which was in July, 1787; though, had the defendant distilled no brandy at all, perhaps the plaintiff might have sustained an action at the end of the first year, as such neglect would have been a breach of the condition. But if twenty years had elapsed since the cause of action accrued, we think the circumstances disclosed by the plaintiff are such as to remove any presumption of payment. (Here his honor commented minutely upon the evidence.) Though the plaintiff, upon strict principles of law, is entitled to recover, it is difficult to estimate the damages. The demand is, indeed, a stale one. The plaintiff calls upon the defendant, after a great lapse of time, for an account of the brandy he has made; yet it cannot be expected that the defendant should have kept such an account until this time. No inference is to be made against him for not producing it now. He had good reason to believe he never should be called upon. He would have been justified even had he destroyed it. Under such circumstances, it is incumbent upon the plaintiff to prove the quantity distilled. During one year the plaintiff has furnished some data, from which an estimate may be made; in no other year is there any. The jury have no right to supply this want of proof by conjecture, or to calculate that he distilled as much in other years as in this, especially when it appears that in some of these years there was no cider.

Daggett inquired whether the rule of damages should be the value of the brandy at the time of the demand, or at the time the right of action accrued?

PER CURIAM. The brandy was to be delivered on demand. The value at the time of the demand, therefore, is to furnish the rule. Verdict for the plaintiff for $69.21.

Daggett moved that costs be allowed the defendant, under the twentieth section of the first judiciary act. 1 Stat. 61.

PER CURIAM. The court will not exercise their discretion to tax costs against a prevailing plaintiff, except where he has knowingly brought forward an unfounded claim, or, in other words, where he must have known that he was not entitled to five hundred dollars damages. In this case the plaintiff might naturally and fairly suppose he was entitled to recover more than five hundred dollars. Motion denied.

NOTE [from original report]. Costs—Taxation against Prevailing Plaintiff.—See Greene v. Bateman [Case No. 5,762]. Payment — Presumption from Lapse of Time.—See Dox v. Postmaster General, 1 Pet. [26 U. S.] 318.

COTTOM (UNITED STATES v.). See Case No. 14,873.

Case No. 3,269.

In re COTTON.

[2 N. Y. Leg. Obs. 370; 6 Law Rep. 546.][1]

District Court, D. Connecticut. Nov. Term, 1843.

"DEBTS" IN BANKRUPTCY.

The petitioner for a decree in bankruptcy sought to be discharged from two judgments (the only two claims inserted in his schedule),

[1] [6 Law Rep. 546, contains only a partial report.]

one of which was obtained under the provisions of the statute of Connecticut, whereby he was ordered to make certain quarterly payments for the maintenance of a bastard child, of which he had been adjudged the putative father; and the other was for damages recovered in an action for seduction. *Held*, that these judgments were not "debts," within the first section of the bankrupt act, and the petition was accordingly dismissed.

[Cited in Re Lachemeyer, Case No. 7,966.]

This was a voluntary application for the benefit of the bankrupt act [of 1841 (5 Stat. 440)], presented on the 4th day of February, 1843. The petitioner [Samuel S. Cotton], being a minor under the age of 21 years, presented his petition by Joseph Cotton, his parent and natural guardian. There were only two debts stated in his list, one to Harriet Francis, and the other to John Francis. The cause came to its hearing for a decree in bankruptcy at the March term, when Harriet and John Francis appeared and filed the following objections against the decree in bankruptcy: (1) That at the time of filing the application the petitioner was a minor; (2) that the claim of Harriet Francis was for the maintenance of a bastard child, the petitioner having been adjudged the putative father; (3) that the claim of John Francis was for the seduction of his daughter, now resting in a judgment recovered in an act of trespass on the case; and (4) that this last judgment was not perfected when the petition was filed, because the bill of costs had not been taxed until the day subsequent to the presentation of the petition. The verdict had been rendered and recorded before.

Welch and Backus, for petitioner.
Strong and Foster, for creditors.
Cur. ad. vult.

JUDSON, District Judge. The principles involved were of so much importance, and being entirely without precedent, the decision has, from time to time, been postponed for deliberation; and during this period the court had availed itself of the aid of one of the most learned jurists in the country.

The questions now recur, and in disposing of the case the first and fourth objections may be passed by without any determination. The other questions having been settled, there is no necessity of discussing those. It may not be improper here to remark that the petitioner's counsel made an application for the adjournment of these questions into the circuit court. For causes not necessary to be stated, this court has been obliged to deny that motion, and proceed to a determination of the case at this time.

In support of the second and third objections, the record of the two cases specified in those objections is brought up, and on inspection it is found that the first proves to be a prosecution on the statute of Connecticut against bastardy. Therein, the petitioner is alleged to be, and is adjudged, the putative father of the child of Harriet Francis, one of the objectors. By this judgment, the petitioner has been ordered to support that child by the several quarterly payments therein specified, and the petitioner puts this judgment in his list, as a debt from which he seeks a discharge, under the provisions of the bankrupt law of the United States, passed August 19th, 1841 [5 Stat. 440]. This question is now to be discussed by the construction to be given to the term "debt," as used in the first section of the act. The provisions of the act are, "All persons whatever owing debts," &c. On the side of the petitioner, it is urged that this has passed into judgment; it is a judgment debt, and may, like any other debt, be barred by a bankrupt certificate. In aid of this construction, Hinman v. Taylor, 2 Conn. 357, has been cited, as conclusive authority. The point determined in that case is that as the prosecutrix was a minor, and as the suit was a civil suit, and not criminal, it should have been by prochein amy or guardian. From this authority it has been urged that a judgment in bastardy is but a judgment in a civil suit, and therefore is a debt of record,—a judgment debt,—a "debt," within the meaning of that term, as used in the act of congress. To the full extent of that case, its authority will not be doubted, but it will be readily perceived that the authority of that case reaches only to the forms of the law. It was not decided that the maintenance of an illegitimate child is itself a debt, but the process of enforcing this maintenance upon the putative father is regulated by statute, and the process, in its form, must be civil. It may be quite otherwise in different states, for there, as here, the form of the proceeding would be regulated by statute. In the present case, it will be too much to say that the court is bound by the formula —the dress—the garb it wears when it comes here for justice. We must look at the nature of the liability,—the original cause of action. One of the learned judges in that case said, "These cases proceed manifestly on the ground that not the form of proceeding, but the end of the suit, is to be regarded in the ascertainment of its real character. The court is not influenced by the superficies, but endeavors to penetrate to the core." This language was appropriate and exceedingly adapted to the matter in hand. It is deemed equally adapted to the present question. The counsel argue that this is not a judgment debt; it is in its drapery, but in its substance it cannot be called a debt. To support a natural child is a duty, but is not a debt, in the sense of the common law, or the statute of bankruptcy.

A child born in lawful wedlock has a right to claim of its father protection, support, and education; and these are all duties, in their nature and essence, similar to the duty which the natural father owes his illegitimate child, yet it cannot be admitted that these duties would be avoided or discharged by a decree in bankruptcy. They are not provable un-

der a commission in bankruptcy. The father, having obtained a certificate of discharge under the bankrupt act, could never plead that discharge, and avoid the duty to protect, support, and educate his child born in lawful wedlock, because those duties are not debts, within the meaning of the act. The same reasons apply to this case.

So far as forms are concerned, it was decided in Atcherson v. Everett, being an action in debt on St. 2 Geo. II. c. 24, against bribery, that it was a civil suit for the penalty attached to that crime. The form of action adopted in this case, to enforce the right, was civil, but the cause of action itself, no one can pretend, was debt. The definitions of that term, given in the books of law, are most of them definitions of the action of debt, rather than debt itself. Applying the significant language, above quoted, to this case, we may see that the rights of the parties are not to be "influenced by the superficies," but we must look into the nature of the claim. To show that the petitioner seeks a construction not warranted by the practice of the courts in Connecticut, we must look to the termination of the proceedings in a bastardy case. When a debtor is committed to jail for a debt, he may avail himself of the poor debtor's oath, and go free, but, when committed on a bastardy proof, he cannot take the poor debtor's oath. If the counsel claim this to be a debt, because the suit is civil, then this claim is no more than overbalanced by the experience, which is universal, that when committed he cannot swear out of jail. There has been no diversity of opinion in regard to that proposition.

Third objection: John Francis, the father of Harriet, interposes another record, from which it appears that a judgment has been recovered for seduction, and that record constitutes the foundation of the third objection. The arguments are much the same, as were urged on the second objection, though with much more apparent confidence. If the judgment only is to be inspected, and the original cause of action can be excluded from consideration, then this would be a debt, and no further doubt could remain, but we have no rule which prohibits the inspection of the whole record. Taking the record as it is, displaying the cause of action, and the nature of the injury, there was no such debt due John Francis as the statute contemplates. Suppose this claim had not been passed through the forms established in such a case. Suppose no action had been brought by John Francis prior to the filing of the petition. Nevertheless, the claim, the injury, was there; the liability was resting on and against Cotton, but it was not a debt, in any sense. It was an injury, a wrong, — trespass; and an action of trespass on the case is the "superficies" thrown around it, only for the purpose of giving it shape and form, not to change the nature of the wrong, for that is, and always will be, seduction. To place the matter in its true light, the petitioner comes here saying, "I have seduced, by my promises and my arts, a young and confiding female,—have robbed her of virtue and character. I confess the wrong, but will have my discharge from this debt by being declared a bankrupt." In the history of every bankrupt law, no such claim was ever sustained. There is no precedent for any construction ever given to the word "debt," used in the bankrupt act, as the petitioner claims. We might as well contend that assault and battery with intent to kill, slander, libel, or burning another man's house, were debts. Each and all those wrongs, by process of law, may be put into judgment. So also is a vast variety of cases, where a penalty is forfeited by statute, and the action of debt may be maintained for that penalty, or by action on the statute, which is equally a civil action. In the case of horse stealing and other larceny, treble the value of the goods stolen is forfeited to the owner. So, in case of forgery, the party injured may recover double damages, and the action of debt may be brought to enforce the penalty. The statement may embrace the numerous cases where fines are imposed, on the conviction of crimes. If the state should be desirous, after conviction, of securing the payment of a fine thus imposed, there can be no objection to the action of debt, upon which property may be attached, and the execution levied. It will follow from the suggestions that all these forfeitures and penalties are debts, within the provisions of the bankrupt act, to be discharged by the certificate, if the petitioner's claim be well founded.

Misprision of treason, manslaughter, and bribery have attached to their commission a fine of $1,000; sending a challenge, $3,000; assault and battery, $1,000, &c. According to the claim of the petitioner, in all these cases, and a vast variety of others, the state would become a creditor, and the criminal a debtor. Assuming these new titles, the offender might, were the bankrupt law in existence, march into court with his petition, and rid himself of the penalties of crime, as well as his contracts.

Standing as this case does without precedent, the court will adopt that construction which shall not encourage evil and crime, but promote virtue and protect innocence. The second and third objections are sufficient causes shown against decreeing Samuel S. Cotton to be a bankrupt. Decree denied and petition dismissed.

Case No. 3,270.

The COTTON PLANTER.

[1 Paine, 23.][1]

Circuit Court, D. New York. Sept. Term, 1810.

EMBARGO—TIME OF TAKING EFFECT—FORFEITURE—ACTION OF SECRETARY OF THE TREASURY.

1. The promulgation of laws should be such as to afford every person who is to be affected by them a reasonable opportunity of being as early as possible acquainted with them.

2. As it regards trade laws, unless previous notice of them be brought home to the party charged with violating their penal provisions, they are to be considered as beginning to operate in the respective collection districts only from the times they are received from the proper department by the collector.

3. The court in considering a question of forfeiture disregards a refusal of the secretary of the treasury to remit the penalty.

4. The embargo law was passed the 22d of December, 1807 [2 Stat. 451]. A vessel cleared out and sailed from St. Mary's, Georgia, on the 15th of January, and in the evening the collector received the information of the passage of the law, and gave public notice of it. It did not appear that it was known to the master or owners of the vessel prior to her sailing. Having been seized for a violation of the law, the court decreed her restoration.

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

[Libel in admiralty by the United States against the ship Cotton Planter (Benjamin Morris and Benjamin Chase, owners).]

R. Harison, J. O. Hoffman, and B. Robinson, for appellants.

N. Sanford, D. A., for respondents.

LIVINGSTON, Circuit Justice. The libel in this case alleges that the Cotton Planter, being a ship of the United States, proceeded on the 18th of January, 1808, from St. Mary's in Georgia, to Antigua in the West Indies, contrary to the act—4 Laws U. S. 129 [1 Stat. 451]—laying an embargo on all ships and vessels in the ports and harbours of the United States; and that by reason of the premises and by force of the statute in such cases made and provided, the said ship with her tackle, &c., became forfeited. Benjamin Chase, who claims for himself and Benjamin Morris, as owners of the said ship, states in his answer, that she was cleared out on the 15th of January, 1808, in due form of law by the collector of the port of St. Mary's, for a voyage to Antigua, with a proper cargo for that island. That the same day she proceeded on her said voyage and left the territories of the United States, and having discharged the cargo she took out, she returned with another to the port of New-York. He further says that when the Cotton Planter was cleared at St. Mary's, and when she sailed from thence for Antigua, and when she quitted the territories of the United States, on that voyage, no law of the United States was known to him, or to the said Benjamin Morris, or had been promulgated at St. Mary's, whereby such clearance and voyage were prohibited, or the exportation of such cargo for Antigua rendered unlawful. A replication being filed, and proofs taken, the district court, after argument, condemned the Cotton Planter as forfeited to the United States [case not reported]. From this decree an appeal was interposed to this court, on the argument of which both fact and law have been greatly controverted.

Did the claimant know of the act laying an embargo which passed the 22d of December, 1807? or of the act supplementary thereto, passed on the 9th of January, following, or had these laws been duly promulgated at St. Mary's antecedent to the clearance of the vessel from the United States? If he were ignorant of these laws, and they had not been thus previously made known at St. Mary's, is his vessel protected from forfeiture? The court, whose office it is in cases of this kind to decide the fact as well as law, is of opinion that this ignorance in the claimant was real and not affected. But did it entertain doubts on this point, considering itself bound by the same rules which govern juries in penal cases, it would acquit the owners of all knowledge of the laws in question. It is certain that the collector of the port of St. Mary's did not receive the first embargo law until the evening of the day on which the Cotton Planter was cleared at his office, nor until she had sailed beyond the jurisdiction of the United States. It is not proved that a printed or any other copy of the act had reached St. Mary's, or been published, or that the same was in any other way known there. The claimant denies such knowledge on oath; and the mate declares that at the time the vessel sailed he had never heard of any act of congress laying an embargo, and that he does not believe the owners had. Several witnesses also who reside in Port St. Mary's, and who have been examined under a commission, testify that they knew nothing of the act until the collector's publication of it in the market, which was on the 16th of January, 1808. If then the law was not published at St. Mary's, and not known even to the collector, why impute without proof a knowledge of it to the claimant? Although rumours may have reached St. Mary's of such an act prior to the 15th, there could be no reason for the merchants there suspending their ordinary business until the truth of them could be known. It appears, indeed, from his letter to the secretary of the treasury, that the collector of that port believed, after the vessel had sailed, that the claimant knew of the act when he obtained a clearance ; but all his information being hearsay, whatever credit the secretary of the treasury might very properly be disposed to give to it, the rules of evidence compel this court to pass it by as no testimony. The persons from whom his informa-

[1] [Reported by Elijah Paine, Jr., Esq.]

tion was received, should have been examined. The fact then, on which the defence rests being satisfactorily established, it remains to see what influence it is to have on this prosecution.

On the part of the United States it is said, that ignorance is no excuse; that every man is bound, or at least presumed, to know the law; that such an inquiry is therefore never made, and would, if tolerated, lead to uncertainty and introduce incalculable mischiefs. That if ignorance be allowed as an excuse in one case, it must be in another; by which means the ignorant members of a community, who are as apt as any to commit offences, would generally escape with impunity. That there is power in the secretary of the treasury to relieve in case of an unintentional violation of laws relative to trade, and therefore the less occasion for the interposition of the judiciary; that the secretary has refused relief here, because he considered the alleged ignorance of the claimant a mere pretence.

The court will not dispute the correctness of any of these principles, but it is much doubted whether they apply to this case. We are not inquiring whether ignorance of a law is ever to be received as an excuse, but at what time an act of congress is to be considered as having the force of a law within a particular district. The act under consideration, it is said, is silent as to the time of its commencement. It neither fines on any particular day, nor is it declared in terms that it shall be in force from and after the passing thereof. It is unnecessary therefore to decide whether congress has it not in their power by express provisions for the purpose to pass a law of the most penal nature, which shall go into operation in every part of the United States on the very day on which it receives the president's sanction. This law has no such provisions; and therefore in settling the time of its commencement, the court is not required to encroach upon the province of the legislature, or to interfere with any of its proceedings; an office at all times of high delicacy, and which no court would enter upon without great reluctance, and extreme circumspection. But whether a law thus worded be in force throughout the United States on the day of its passage, or not until after a reasonable time for promulgation of it in the different parts of the Union, is a question purely of judicial cognizance, and may be decided without interfering with any other department of government; and this again resolves itself into the simple question, whether in a case like this any promulgation is necessary. A more abject state of slavery cannot easily be conceived, than that the legislature should have the power of passing laws inflicting the highest penalties, without taking any measure to make them known to those whose property or lives may be affected by them. It is not only necessary, therefore, in a country governed by laws, that they be passed by the supreme or legislative power, but that they be notified to the people who are expected to obey them. The manner in which this is done may vary; but whatever mode is adopted, it should be such as to afford a reasonable opportunity to every person who is to be affected by them, of being as early as possible acquainted with them. "Whatever way is made use of, it is incumbent on the promulgators," says the learned commentator on the laws of England, "to do it in the most public and perspicuous manner." The court will not stop to inquire in what manner the laws of congress, relating to different subjects, should be promulgated, or whether a mere deposite of them in the proper office, after a reasonable lapse of time, would not amount to a sufficient notification. But as it regards laws of trade, which is the case before it, rendering penal acts, although sanctioned by former laws, and done in concurrence and with the consent of its own officers, the court thinks it cannot greatly err in saying, that such laws should begin to operate in the different districts only from the times they are respectively received, from the proper department, by the collector of the customs, unless notice of them be brought home in some other way to the person charged with their violation. A proposition so reasonable, and so consonant to those principles of justice and humanity which are unchangeable, requires only to be stated to receive our universal assent. That a law which passes at Washington should subject to forfeiture every vessel which sailed from the United States on the very day of its passage or the day after, however remote the port of departure, and after a regular clearance by the authorized agent of government, is a doctrine leading to such unjust and tyrannical consequences, that nothing but a course of decisions, whose meaning admitted of no doubt, could induce this court to sanction it. There may be a difference in name, but there is none in reality, between an ex post facto law, which congress cannot pass, and one whose operation is to be so universal and instantaneous. The position that the law intends every person to have notice of what is done in parliament, as soon as it is concluded, because the whole realm is there represented, is too quaint to require refutation. Indeed, the same learned writer, who would very gravely persuade us that a merchant in Boston, at the distance of five hundred miles, must know every law of congress, the moment it is passed, merely because he may have had a voice in the choice of a few representatives, who may all have voted against it, as if not satisfied with his own reasoning, and feeling, no doubt, the propriety of affording to the subject some other and better means of information, tells us, that he had found upon examination, that not long after the art of printing found its way into England, which was between three and four hundred years ago, the practice had

been to publish acts of parliament in the counties, to the end "that the subjects might have express notice thereof, and not be overtaken by an intendment in law." For this purpose he mentions, that at every parliament the acts passed were transcribed on parchment, and by the king's writ, which was either in Latin or French, directed to the sheriff of every county, commanding him to proclaim the same in all places throughout his whole bailiwick when he should think most fit, and see that they were firmly observed and kept. Now this practice, which we have on such high authority, together with the forms of the writs which were used, is considered as furnishing better evidence of the ancient common law of England than any of the modern decisions which have been referred to; and although it is no reason for insisting on a similar mode of promulgating acts of congress by proclamation, it is abundantly sufficient, were any authority necessary, to show that in some way or other some notification must take place previous to their operation. And if such promulgation be at all necessary, it is as clear that one made at one port is not enough to bind the citizens at another, unless after a lapse of time at least sufficient to convey the intelligence thither. But whatever mode may be best suited to other laws, the practice of our government has not left us in the dark as to the manner in which laws of this nature should be promulgated. It has been its invariable practice, if my information be correct, to transmit them to the different collectors, with or without instructions from the treasury department, as to the manner of their execution. When the inquiry then is thus limited to the time of its reception by a particular collector, none of that uncertainty will follow, which is so much deprecated by the district attorney. From that time, and not till then, should the rule of ignorantia legis neminem excusat be enforced; and such, if this court be not greatly mistaken, is the meaning of it; not that a party shall suffer, notwithstanding his ignorance of a law with which he had no means of becoming acquainted, or which it was impossible for him to know; but that when this opportunity has once been afforded, the law properly presumes that every person knows or may know it, and therefore shuts its ears against every allegation to the contrary. It must have been with the same understanding of this rule, that Mr. Justice Blackstone remarks, that "all laws should be made to commence in futuro, and be notified before their commencement, which is implied in the term prescribed; but when this rule is in the usual manner notified, or prescribed, it is then the subject's business to be thoroughly acquainted therewith; for if ignorance of what he might know were admitted as a legitimate excuse, laws would be of no effect, but might always be eluded with impunity." To the rule thus modified no objection lies. But to give it the sense which the respondents put upon it, would interfere with another maxim at least as ancient and more self-evident—which is, that the law never compels a man to do an impossibility—"lex neminem coget ad impossibilia." No man in England is bound to observe an act of parliament impossible to be performed. Why then should he be compelled here to as great an impossibility, that of conforming his conduct to a rule which he had no opportunity of being acquainted with?

It has thus far been supposed, that the act laying an embargo contains no provision as to the time of its commencement, and, the argument at the bar proceeded on that ground; but it is not very clear that it is altogether silent in this respect. With regard to foreign vessels, it is provided, that they may depart with the cargo which they have on board when notified of the act. This not only determines its commencement as to foreign vessels, but by implication at least as to our own also. It is equivalent to saying, that no vessel of the United States, although cleared, should be permitted to depart after being notified of the act. The president also is authorized to give such instructions to the officers of the revenue as shall appear best adapted for carrying the act into effect; thereby again implying that it was to have no force in the different districts until promulgated at the custom houses. A great many vessels must have sailed from the United States after the passing of this law, and previous to its being received by the different collectors, but no mention has been made of the seizure or condemnation of any such vessel. Nor is there any doubt that the secretary of the treasury would have remitted the forfeitures, if any had accrued, if he had been satisfied of the bona fides of the transaction. As the decision of that gentleman has been incorporated with the proceedings in this cause, and has in some way or other come up with the appeal, it may be thought by some that this court thinks itself competent to reverse what he has done. The court disclaims any such right. It is not now examining or revising what he has done, but whether a forfeiture has been incurred; not whether the penalty should be remitted, but whether it ever attached. If the penalty were incurred, it would have nothing to do but to say so, and leave it to the department to which the law has assigned it to determine on its remission. After the condemnation of the Cotton Planter in the district court, the claimant, agreeably to the act of March 3, 1797 (4 Laws U. S. 585; [1 Stat. 506, § 1]) presented his petition to that court in order to obtain a remission of the penalty by the secretary of the treasury. A statement of facts, with an expression of the favourable opinion of the court, was transmitted to the secretary of the treasury, (Mr. Gallatin) who refused to remit the penalty. All the papers relating to this proceeding were sent up

to the circuit court as a part of the transcript.

Upon the whole, as the act laying an embargo contains no express provision as to the time of its commencement, and as it appears that the law was not received or promulgated at the custom-house at St. Mary's, nor in any other way made known to the inhabitants of that port, or to the claimant himself, before the clearance and sailing of the Cotton Planter, this court is of opinion that no forfeiture has accrued, and that therefore the judgment of the district court must be reversed.

Case No. 3,271.

COTTON PRESS CO. v. COLLECTOR.

[1 Woods, 296.][1]

Circuit Court, D. Louisiana. Nov. Term, 1873.

INTERNAL REVENUE—CORPORATIONS — APPEAL TO COMMISSIONER—WHEN PERFECTED.

1. An incorporated company, whose business is to make gain by compressing cotton, is not required to pay a tax on its dividends by section 120 of the act of June 30, 1864 (13 Stat. 283).

2. An appeal to the commissioner of internal revenue, for the refunding of a tax illegally collected by the collector of internal revenue, dates from the time the application to have the tax refunded is filed in the office of the commissioner, and not from the time it is lodged with the collector of internal revenue.

This was an action at law against the collector of internal revenue to recover a tax illegally collected.

Charles Case and J. D. Rouse, for plaintiff.
J. R. Beckwith, U. S. Atty., for defendant.

WOODS, Circuit Judge. The parties have waived the intervention of a jury, and submitted the case upon an agreed statement of facts. The action is brought to recover of defendant the sum of eight hundred and twenty-five dollars, which the plaintiff avers was illegally collected from it by the defendant, acting as collector of internal revenue, as a tax upon a dividend declared to its stockholders by plaintiff.

The facts are, that on the 25th of August, 1869, the tax having been regularly assessed, was paid to defendant under the threat that, if not paid, he would seize and sell the plaintiff's property to make the tax. The plaintiff appealed, according to law and the treasury regulations, to the commissioner of internal revenue, and demanded the refunding and return of the said sum of eight hundred and twenty-five dollars.

The appeal and application for refund were executed, dated, and deposited with the defendant on November 30, 1869, and on that day certified by him in his official capacity and forwarded by mail to the commissioner of internal revenue, by whom it was received and filed in his office on a day subsequent to the 4th of December, 1869. The appeal has not been acted upon or decided.

This action was commenced December 3, 1869. The plaintiff seeks to recover back the money on the ground that no tax upon its dividends was imposed by any law of the United States. The defendant pleads that the tax was authorized by law, and that the action to recover it back was not brought until after the expiration of one year from the taking of the appeal, and that it is therefore barred.

The law under which it is claimed that the tax was imposed on the dividends of the plaintiff is the 120th section of the act of June 30, 1864 (13 Stat. 283), entitled "An act to provide ways and means for the support of the government and for other purposes." This section provides that there shall be levied and collected a duty of five per centum on all dividends declared "as part of the earnings, income or gain of any bank, trust company, savings institution and of any fire, marine, life, inland insurance company, either stock or mutual, under whatever name or style known or called in the United States or territories."

The "Levee Steam Press Cotton Company" is not a bank, is not a trust company, is not a savings institution, is not a fire, marine, life or inland insurance company. It is an incorporated body whose business is to make gains by compressing cotton. By what construction is was supposed to fall among the companies enumerated in the section cited it is difficult to imagine. The language of the section makes it clear, no argument can make it clearer, that such companies as the plaintiff are not included in its terms. The tax collected by Stockdale was therefore not authorized by law, and the plaintiff has the right to recover it back, unless his claim is barred by the limitation of the statute.

The limitation is prescribed by the 19th section of the act approved July 13, 1866 (14 Stat. 152), which declares that "no suit shall be maintained in any court for the recovery of any tax alleged to have been erroneously or illegally assessed or collected until appeal shall have been duly made to the commissioner of internal revenue, according to the provisions of law in that regard and the regulations of the secretary of the treasury established in pursuance thereof, and a decision of such commissioner be had thereon, unless such suit shall be brought within six months from the time of said decision, or within six months from the time this act takes effect: provided that if said decision shall be delayed more than six months from the date of said appeal, then said suit may be brought at any time within twelve months from the date of such appeal."

It is conceded in this case that the decision was delayed more than six months. The limitation was therefore twelve months from the date of the appeal. This branch of the case then turns on the question, when was the ap-

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

peal taken? If it was taken when the application for refund was executed, dated and deposited with Stockdale, the defendant, and certified by him, then the suit was not brought within one year from the date of the appeal. But if the appeal was made when the application for refund reached the commissioner of internal revenue, and was filed in his office, then the suit was brought within one year from the time of the appeal, and is not barred.

Upon this point there can be no serious question, it seems to me. The appeal is to be made to the commissioner of internal revenue, and not to the collector. It is the commissioner who is to examine the application and pass upon it. It would seem, therefore, that when the application is brought to his notice, or filed in his office, and not till then, the appeal is taken. The papers are lodged with the collector, not for his decision, but that he may certify to the date of payment of the amount claimed, and that the claim has not been before presented. No appeal will lie until the application has his certificate. The application is not lodged with him as an appeal, but that he may perfect the papers by his certificate so that the appeal may be made to the commissioner. If the papers never go beyond the office of the collector there is no appeal. The appeal, therefore, should take date from the time of its filing in the office of the commissioner of internal revenue, who alone can act on it.

I am of opinion, therefore, that the appeal in this case was not taken till after December 4, 1869. The suit was commenced on the 3d day of December, 1870. It is therefore within the year, and not barred. The result is, that there should be a judgment for plaintiff for eight hundred and twenty-five dollars, the amount of the illegal tax collected, with interest from August 25, 1869, the date of its payment.

Case No. 3,272.

COTTRELL v. ADAMS.

[2 Biss. 351;[1] 2 Chi. Leg. News, 373; 2 Leg. Gaz. 275.]

Circuit Court, N. D. Illinois. Aug., 1870.

ASSIGNMENT OF MORTGAGE—RIGHTS OF ASSIGNEE.

1. To enable the assignee of a mortgage to recover in ejectment the possession of the mortgaged premises, he must show a conveyance or grant to himself of the estate which he seeks to recover.

2. The assignment of a note and mortgage, with authority to the assignee to foreclose, does not transfer the legal estate nor enable the assignee to maintain ejectment.

This was an action of ejectment brought by the plaintiff as assignee of a certain mortgage given by the defendant, John Adams, to the Kenosha & Rockford Railroad Company for the premises in question. The mortgage was in due form, and, with the assignment thereof, was the only title which the plaintiff presented. No exception was taken by the defendant to the mortgage or assignment, but it was claimed that they did not make out such a legal title as authorizes a recovery. The assignment under which the plaintiff claimed is as follows: "Know all men by these presents, that the Kenosha & Rockford Railroad Company is justly indebted and promises to pay to Adam Cottrell, or bearer, one thousand dollars, on the first day of July, A. D. 1867, at the People's Bank, in the city of New York, together with interest thereon from and after the first day of July, A. D. 1857, at the rate of ten per cent. per annum, payable on each first day of January and July, on the presentation and surrender of the annexed coupons at said bank. To the payment whereof the said company hereby bind themselves firmly by these presents; and for the better security of such payment being made to the holder thereof, the said company have assigned and transferred, and by these presents do assign and transfer to the said holder of this bond, a certain note for the sum of $1,000, executed by John Adams, together with a mortgage given collateral to and for the purpose of securing the payment of the same, dated on the 16th day of June, A. D. 1857, payable in ten years from the first day of July, A. D. 1867, with interest at the rate of ten per cent. per annum, which said note and mortgage are hereto appended, and are transferable in connection with this bond to any parties or purchasers whomsoever, and not otherwise. And the said company do hereby authorize and empower the holder of this bond, at any time in case said company shall fail to perform any of the foregoing stipulations, by neglecting to pay either principal or interest on this bond when the same shall become due, to proceed and foreclose the said mortgage, or to take such other legal remedy on said note and mortgage against said mortgagor or against this company, on this present bond, or on both, as shall seem proper and expedient to said holder thereof."

Sleeper & Whiton, for plaintiff.

Winston, Campbell & Willard, for defendant.

BLODGETT, District Judge. The only question to be decided is, whether this assignment is such a grant of the fee of the mortgaged premises as authorizes the assignee to maintain an action of ejectment for the recovery of the premises conveyed. The rule is well settled that a mortgagee can maintain ejectment after condition broken, for the recovery of the mortgaged premises; but when an assignee attempts to exercise the rights of the mortgagee, it seems to me, he must, if he would attempt to recover the possession of the premises by ejectment, show a conveyance or grant to himself of the estate

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

which he seeks to recover. And I do not think that this assignment is a grant of the fee in the land—the mortgaged premises. It authorizes the holder or assignee to proceed and foreclose the mortgage, or to take any other remedy at law or equity. Now there is no grant of the fee, and it is well settled that no person can recover possession in ejectment unless he shows that he is entitled to the estate which he describes in his declaration. He has an equitable interest in the mortgage as assignee of the debt thereby secured.

But does the legal estate pass by the terms of the assignment? It seems to me not. There are no words of grant. There are no words by which it would appear that the assignor intended to convey the mortgaged premises themselves to the assignee. He simply authorizes and empowers the holder of this bond, "at any time, in case said company shall fail to perform any of the foregoing stipulations by neglecting to pay either principal or interest on this bond, when the same shall become due, to proceed and foreclose the said mortgage, or to take such other legal remedy on said note and mortgage against said mortgagee or against said company, on its bond or on both, as shall seem proper and expedient to said holder thereof."

Before ejectment can be maintained for the possession of the property, there must be an investiture of the legal estate in the plaintiff. I shall, therefore, be compelled to find for the defendant.

NOTE [from original report]. A mortgagee may in Illinois bring ejectment after condition broken. Carroll v. Ballance, 26 Ill. 9; Karnes v. Lloyd, 52 Ill. 113; Pollock v. Maison, 41 Ill. 516; Morrison v. Buckner [Case No. 9,844]; Hughes v. Edwards, 9 Wheat. [22 U. S.] 489. As to how far mortgagee is considered as the owner of the fee, consult Nelson v. Pinegar, 30 Ill. 473; Moore v. Titman, 44 Ill. 367. The assignment of a note secured by mortgage carries with it only an equitable interest. Edgerton v. Young, 43 Ill. 464. The transfer of a note secured by mortgage carries the mortgage with it. Dick v. Mawry, 9 Smedes & M. 448; Henderson v. Herrod, 10 Smedes & M. 631; Burdett v. Clay, 8 B. Mon. 287. But the estate of the mortgagee can only be assigned by deed. Warden v. Adams, 15 Mass. 232; Smith v. Kelley, 27 Me. 237. In Massachusetts the assignment of a mortgage debt is but an equitable assignment of the mortgagee's interest, and has no direct effect upon the legal estate. Damon v. Bryant, 6 Gray, 564; Young v. Miller, Id. 152; Crane v. March, 4 Pick. 131; Cutler v. Haven, 8 Pick. 490; Warden v. Adams, 15 Mass. 232. In New Hampshire, however, as also in Pennsylvania, Ohio, and several other states, it is held that the assignment of a mortgage debt carries the mortgagee's estate in the land, in the same manner as if passed by deed. Page v. Pierce, 6 Fost. 317; Southerin v. Mendum, 5 N. H. 420; Smith v. Moore, 11 N. H. 55; Rigney v. Lovejoy, 13 N. H. 247. The assignment of the note or bond which a mortgage is intended to secure, unless there is some contract to the contrary, is an equitable assignment of the mortgage; and the assignee of the note or bond may use the name of the mortgagee to enforce the mortgage at law. Graham v. Newman, 21 Ala. 497. But if the mortgage itself is assigned in proper form, the legal title of the mortgagee passes to his assignee, and proceedings at law to enforce the mortgage must be in the name of the assignee. Id.

COTTRILL (MYERS v.). See Case No. 9,985.

COUCH (UNITED STATES v.). See Case No. 14,874.

Case No. 3,273.

COULON v. The NEPTUNE.

[2 Pet. Adm. 356.][1]

District Court, D. Pennsylvania. 1804.

SALVAGE—PURCHASER OF CONDEMNED VESSEL.

The brig Neptune had been purchased by the libellant after a condemnation by an unauthorized tribunal; and, having been brought into Philadelphia, she was here claimed by the former owners, and was restored to them by the district court. A claim for salvage was made by the purchaser after the condemnation, he having brought her within the power of her former owners. The district court dismissed the claim.

[Libel in admiralty by Paul Coulon against John Jolly, Richard Keys, and William Manson, owners of the brig Neptune, for salvage.]

Before PETERS, District Judge.

Decree: The brig Neptune, being American property, belonging to the respondents, citizens of the United States, and resident in Baltimore, was seized by a French armed vessel, commanded by a certain Henry Anderson, under pretext of having violated an arrette issued by the late General Le Clerc, when comander in chief and governor of St. Domingo, interdicting trade and commerce with certain ports in the French part of that island, to prevent supplies to the revolted blacks. On her being so seized, at sea, several leagues from the island, and out of all territorial jurisdiction and limits, she was sent to St. Jago de Cuba, in the island of Cuba, belonging to, and under the actual government of, Spain. The vessel having been so dispatched for St. Jago, a pretended court of admiralty was held, at sea, on board the capturing cruizer, by General De Noailles, then in the service of France, and some officers of a tribunal which had been established in St. Domingo. The brig, by this self-created court, was condemned. The persons composing this pretended court were then in a state of flight from the island of St. Domingo, then in full possession of the blacks, who had expelled the French soldiers and citizens, and extinguished all power and government, under France, in that island.

The libellant, stating himself to be an American citizen, purchased the brig in St. Jago, from an agent of Anderson, the seizer (from whom he took a warranty), with intent to employ her in commerce, or as a passenger ship, for his emolument. Considerable outfits were made on the vessel for

[1] [Reported by Hon. Richard Peters, District Judge.]

these purposes by Coulon. Some passengers embarked in the vessel, and arrived in Philadelphia, where the brig was restored, by a decree of this court, to the American owners, now the respondents. [Case No. 7,439.] The facts of intercourse with interdicted ports, for purposes of traffic, were denied; and the condemnation was deemed and declared illegal and invalid.

A claim is now brought forward for salvage. No demand for amelioration. The allegations contained in the procedings were insisted on, as entitling to salvage (no matter from what motive the libellant acted), as a benefit had accrued to the owners by the purchase in St. Jago, and bringing into an American port, in a capacity to be restored. I can find no precedent in the books to warrant a claim to salvage by a purchaser of a ship liable to be restored. There are some instances where recaptors or rescuers have had salvage, though the vessel was restored to the owners after having been purchased under a bad title. Such cases seldom occur. A neutral may lawfully purchase, in the port of a belligerent party, a ship legally condemned as prize. But care must be taken on this point, as some national tribunals are more strict than others in scrutinizing the title of a ship procured in this way. The English permit purchases by neutrals of ships legally condemned in their enemies' ports. The French do not acknowledge their validity.[2] Salvage is not given as a mere quantum meruit for benefit received. It is a premium to stimulate exertion, prowess and personal danger and risk.[3] The novelty of this claim may create a bias in my mind, which I have in vain endeavoured to resist. The case has always appeared to me to be brought forward more to ground a recovery over, on the guarantee, than under a hope of success here. It is true that the motives for saving property are generally interested. But the motives, in this case, are not so important as the principles of the claim. Before anything can be saved, it must be lost to the owner, or on the point of so being, without hope of recovery, either specifically or in value. I am inclined to consider the seizure in this case a mere spoliation, for which either the French or Spanish government should have paid the owners of the brig in case of loss. My official respect for those governments will not permit a belief that they will not do what they ought. The courts of one country must presume that the governments of friendly nations will always do justice. I do not, however, think it incumbent on me to determine collaterally a question involving national duties and obligations, further than the case before me compels an opinion. A neutral government ought not to restore a vessel of its friend, brought into port, captured by another friend, as prize in war. But it is otherwise where a ship belonging to a friend is brought in under restraint on seizure by another friend, and all parties at peace. A pretext of seizure for breach of local regulations ought not to take the case out of this rule of the law of nations. Such pretexts would never be wanting, if they would justify sales and transfers of vessels seized under these pretences.

If this view of the subject be correct, the brig in question was not legally, or in fact, lost, to the American owners, when carried into the Spanish port of St. Jago. The purchase by Paul Coulon (more especially if an American citizen) was not justifiable, much less meritorious. If he bought under a bad title, he must take the risk. He appears to have considered this consequence when he took the guarantee from the vendor in St. Jago. If he is disappointed in his expectations of profit, the owners should not reimburse expenditures for this object. As well might they be called on to repay the purchase-monies paid the captors. Why ask to retribute a part? I agree with the counsel for the respondents, that if salvage, in our own courts, could be obtained, great encouragement would be given to such captures and illegal sales. In this case, what is given to the libellant would be so much saved to the vendor, when called on under his guarantee by Mr. Coulon.

I do not think it necessary to discuss all the points in this cause. How far and in what manner a nation has a right to interdict commerce by other nations with its revolted subjects, or their slaves in a state of insurrection? Whether French colonial arrettes die with the extinction of the government promulgating them? And what is the state of things, as they respect us, in the island of St. Domingo? These questions seem to be subjects more fit for diplomatic discussion, or legislative direction, than judicial decision. They are unimportant in this case, as the fact of intercourse, for the purposes of traffic with interdicted ports, is denied. If Spain was bound to restore the brig in question, or remunerate the owners for their loss; if at any rate no sale such as herein stated could be legally made, and of course the purchase unwarrantable, and defective in that merit which is the foundation for a claim to salvage, it is enough for the purposes of decision in this suit.

The results from this view of the case tend to shew: 1st. That the vessel or value thereof, was not lost to the owners by the seizure and carrying to the port of St. Jago. 2d. That the benefit derived to the owners by Mr. Coulon's purchase is at least problematical, and not a direct consequence of such purchase, or flowing from any meritorious conduct on his part. He has not the equitable claim to considerations attaching to an innocent purchase, by mistake or ignorance

[2] 1 C. Robb. Adm. 104.

[3] See the case of Warder v. The Belle Creole [Case No. 17,165].

of title. The whole circumstances were known to, and guarded against by, the libellant. I do therefore adjudge, order and decree that the libel filed in this cause be dismissed with costs.

Case No. 3,274.

COULSON v. HOLMES et al.

[5 Sawy. 279; 6 Reporter, 674; 11 Chi. Leg. News, 49; 24 Int. Rev. Rec. 358; 7 Cent. Law J. 446.] [1]

Circuit Court, D. Oregon. October 14, 1878.

REVOCATION OF WILL—ALTERATION OF ESTATE—JUDGMENT OF PROBATE OF WILL.

1. A conveyance of property previously devised works a revocation of such devise; and this, where the conveyance is to the devisee, accompanied by a trust in favor of the devisor.

2. A will does not take effect upon an after-acquired estate; and any alteration of the estate of the testator in the premises after the devise works a revocation of the will.

[Cited in Hardenberg v. Ray, 33 Fed. 818.]

3. A court may determine that certain premises are not within the operation of a certain will, without questioning the validity of such will, or the legality of the judgment admitting it to probate.

Suit in equity [by Teresa E. Coulson against Byron Z. Holmes, Alice J. Strowbridge, and Mary A. Hueston] to establish and declare a trust in real property.

[Heard on exceptions to the answer of the defendant Holmes.]

John H. Reed and Sidney Dell, for complainant.

Eugene A. Cronan and John Waldo, for defendants.

DEADY, District Judge. This suit is brought to establish an alleged trust in certain real property situate in Portland, in favor of the complainant, Teresa E. Coulson, nee Holmes, and her two sisters, the defendants Alice J. Strowbridge and Mary A. Hueston, who, having refused to join in the suit as complainants, are therefore made parties defendant; and for an account of the rents and profits as against the defendant Byron Z. Holmes; and also to procure an equal partition of the premises between the plaintiff and said defendants, by a sale thereof and a division of the proceeds.

The bill alleges that at and long before March 29, 1870, Thomas J. Holmes, the brother of the plaintiff and the defendants, was the owner of an undivided half of the premises in question, and the defendant, Byron Z., the owner of the other such half; that at the date aforesaid, said Thomas J. executed a conveyance of his interest in the property to the plaintiff for the expressed consideration of one dollar, but in fact, without any consideration, and in trust for himself; that at and before the date of such conveyance the said Thomas J. was threatened with an action for seduction, and being of weak mind, and greatly under the influence of the plaintiff, he was induced by the latter to make the same so as to prevent his property from being taken to satisfy any judgment for damages which might be obtained against him in such action; that the plaintiff accepted said conveyance with a full knowledge and understanding of the purpose with which it was made, but afterwards and upon various pretenses deferred the reconveyance of said property in pursuance of said trust, with the hope of defrauding the lawful heirs of said Thomas J. of their just rights in the premises, the said plaintiff being well aware that said Thomas J. was not likely to live long; that said Thomas J. died on December 27, 1875, leaving as his only heirs at law the plaintiff and defendants; that since the date of said death there has been received and appropriated by the plaintiff from the rents and profits of said premises the sum of six hundred dollars per month; that said premises are of the value of thirty thousand dollars, and consist of lot 2 in block 38, and the southwest quarter of block 16, together with a strip eighty feet long by five and one half feet wide off the west end of lots 3 and 4 of said block, upon which there are valuable buildings; that an equal partition of the same among the parties aforesaid cannot be made in kind without irreparable injury thereto; and that since the death of the said Thomas J. the complainant has frequently demanded from the defendant, Byron Z., a conveyance of her interest in the premises, and an account of the rents and profits thereof, but he has always refused, and claims to own the same absolutely.

The defendants Strowbridge and Hueston do not answer. The answer of the defendant Byron Z. admits the making of the conveyance as alleged, but denies that it was made in trust, and denies all the allegations of the bill as to the causes which induced the execution of the same. Admits that since the death of Thomas J., he has received from the property, as rents and profits, about twelve thousand dollars, and that the rents now amount to the sum of five hundred and fifty dollars per month. By way of "a further and separate answer," the defendant also alleges that Thomas J., on February 27, 1868, duly made and published his last will and testament, whereby he bequeathed and devised to said defendant all his real and personal property of whatever nature and kind; that said Thomas J. died as aforesaid, leaving said will unrevoked; that the conveyance aforesaid was afterwards made by said Thomas J. to prevent the possibility of his intentions, as expressed in said will, from being defeated by the loss or destruction of the same, or any improvident disposition which he might otherwise make of his property prior to his death, and not with any intention to

[1] [Reported by L. S. B. Sawyer, Esq., and here reprinted by permission. 6 Reporter, 674, contains only a partial report.]

revoke said will; and that the same was duly proven in the proper court about April 16, 1877.

The complainant excepts to so much of the answer as sets up the making and proof of the alleged will for impertinence, upon the ground that the subsequent conveyance of the same premises operated so far as a revocation of the will. The law of Oregon (section 790, Civil Code), following the statute of frauds of Charles II. (section 6, c. 3), provides that "a written will cannot be revoked or altered, otherwise" than by another writing executed by the testator in the same manner; or else by burning, tearing, canceling, obliterating or destroying the will, with the intent and purpose of revoking the same, by the testator, or in his presence and by his direction.

But notwithstanding this statute, it has always been held that a will may be revoked by implication or inference of law. 4 Kent, Comm. 521. Among these implied revocations is any act of the testator which alters the estate or interest held by him in the lands devised at the date of the will; as for instance, a conveyance of the same, or a valid contract to do so. The will takes effect only at the death of the testator. Real property acquired after making the will goes to the heir. If, therefore, the testator is not seised at the time of his death, of the same estate or interest in the premises that he was at the time of making the will, the same does not pass by the devise, but goes to the heir. Ballard v. Carter, 5 Pick. 114; Jettie v. Pickard, 4 Or. 298. This is held either upon the ground that the alteration of the estate is evidence of a change of purpose on the part of the testator; or more properly, that it works a revocation of the will by depriving the testator of the estate devised and thus leaves nothing for the will to operate upon at his death. Walton v. Walton, 7 Johns. Ch. 268; Minuse v. Cox, 5 Johns. Ch. 450; Herrington v. Budd, 5 Denio, 322; Bosley v. Bosley, 14 How. [55 U. S.] 395; Ballard v. Carter, 5 Pick. 116; Kean's Will, 9 Dana, 25; 4 Kent, Comm. 528; 2 Am. Lead. Cas. 668; 2 Greenl. Ev. § 686; 8 Bac. Abr. 500.

The statute of this state upon the subject of wills (section 9)[2] has changed this rule so far, as to provide that "a bond, covenant or agreement * * to convey any property devised or bequeathed in any last will previously made, shall not be deemed a revocation of such previous devise or bequest," but that the same shall pass to the devisee, subject to said bond, covenant or agreement. A mere agreement, therefore, to convey no longer works a revocation of a previous devise of the same property, but a conveyance or other act which passes the title and produces an alteration in the estate of the devisor, is left by the statute to have the same effect upon a prior devise as before its passage.

[2] [6 Reporter, gives § 8.]

The answer of the defendant Byron Z. admits the conveyance of the premises to himself subsequent to the making of the will; and if such conveyance was absolute as claimed by said defendant, there could be no question but it operated to revoke the previous devise to him. In that case Byron Z. would hold under the deed and not the will, because before the will took effect—December 27, 1875—the testator had conveyed all his interest in the premises to the defendant, and there was then nothing left in the former upon which it could operate or take effect. In such case the devise would be adeemed or defeated.

Upon this view of the matter, any reference in the answer to this will, except so far as the personalty is concerned, is certainly impertinent. For as to the realty conveyed by the deed, the will is non-existent and of no effect. In Kean's Will, supra, Patrick Kean devised a tract of land to John Kean and afterwards executed a deed conveying him the same land. The court held that Kean took the land under the deed and not the will, and "consequently the will was inoperative and void"—that is, so far as the land conveyed was concerned. But the bill alleges that this conveyance was made in trust for the grantor therein, and unless it was so made the complainant has no equity. The effect of the conveyance upon this view of the transaction was to pass the legal estate that was in Thomas J. at the time of making the will out of him and into the defendant Byron Z., but in trust for the use and benefit of Thomas J. It was said by Lord Mansfield in Doe v. Pott, 2 Doug. 722, that the doctrine of revocation by alteration of the estate had been carried to an absurd length in some of the English cases; and in Ballard v. Carter, supra, Parker, J., in delivering the opinion of the court, said, that in assenting to the doctrine, "we would understand by any alteration of an estate, a material alteration; one which changes the nature and effects of the seisin of the testator;" and that the court was not inclined "by anticipation to adopt as law" such cases as where the alteration was for the express purpose of giving effect to a will, or where an estate was changed to a fee by a common recovery, the testator supposing when he made his will that he had a fee, or when the testator, parting with his estate for an instant, took the same estate back again or conveyed the estate to another for his own use, but would consider them when they arose.

But in Walton v. Walton, supra, Chancellor Kent held that an agreement to sell, being in equity equivalent to a conveyance, was a revocation of a prior devise of the same property—and this, although such agreement was rescinded whereby the testator at his death held his estate in the lands free from the effect of the act which produced the revocation—substantially as though

it had never taken place. And in Bosley v. Bosley, supra, Mr. Chief Justice Taney states the rule with apparent approval which is deduced from the authorities in 4 Kent, Comm. 528, as follows: "The same interest which the testator had when he made his will should continue to be the same interest, and remain unaltered to his death, and that the least alteration in that interest is a revocation." In this case the legal estate in the premises passed from the devisor to the devisee by the conveyance of March 29, 1870—according to the answer absolutely, but according to the bill in trust for the grantor. In the one case, the whole estate having passed from the testator and none taken back, nothing is left on which the devise can operate, and it must fail, not so much on the ground of revocation as the want of a subject-matter on which to operate. 2 Am. Lead. Cas. 671. In the other case, the whole estate passed from the devisor also, but at the same time he took back another estate in the premises—a use to himself. And although this may be said to be substantially the same estate yet it is technically different. There was an alteration of the estate, and that, according to all the authorities, works a revocation of the devise.

The application of this rule to cases where the conveyance is inoperative and passes no estate, or where by the same instrument or transaction the testator takes back a beneficial interest in the property, doubtless had its origin in the very natural preference which the common law gave to the heir over the devisee—a stranger to the inheritance. In England since 1 Vict. c. 26, § 23, and in many of the American states, this rule has been modified by statute so that a conveyance shall not affect the operation of a prior devise upon any interest in the property which the testator had power to devise at his death. 1 Redf. Wills, 333. Even under this rule an absolute and unqualified conveyance of the devise works a revocation of the will ex necessitate, but any disposition short of or other than this leaves the devise to stand subject to the conveyance. Under these statutes the legal estate in the premises in controversy would vest in the defendant Byron Z. at the date of and by means of the deed, while the trust estate or use given to Thomas J. would also pass to the former under the will upon the death of the latter.

If the law were not so well settled otherwise by a long and uniform course of decisions, and if the Oregon statute changing the rule as to agreements to convey had not omitted conveyances therefrom and thereby indicated the intention of the legislature to leave them to have the same effect upon a prior devise as before, I should be inclined to hold that this was a case where the alteration of the estate, being technical rather than substantial, is not sufficient to revoke the prior devise but rather suggests an intention to anticipate or facilitate it by vesting the legal estate in the devisee at once and leaving the use to pass to him under the will upon the death of the testator.

But this point was not made in the argument for the defendant. Indeed the ground mainly relied upon for the defense was that "the question whether the will was revoked or not is a question of factum;" and that this question under the law of Oregon is in "the first instance exclusively for the probate court," and cannot be inquired into collaterally in any other; citing 1 Jarm. Wills, 106, 150, 220; 2 Greenl. Ev. § 680; State v. McGlynn, 20 Cal. 262, and other like authorities.

But as has been shown a will may be revoked by implication or operation of law as well as by the express act of the testator; and the question of revocation in this case is one of law and not of fact. The inquiry does not touch the validity of the will nor the legality of the judgment of the county court admitting it to probate. Therefore it is not necessary to consider whether by the laws of this state the judgment of such court is conclusive upon the validity of the will or not. In both Bosley v. Bosley and Ballard v. Carter, supra, it was held that the devise was revoked and that the property passed under the conveyance and not the will. But it does not appear to have been suggested that that was a collateral or any attack upon the judgment of the court admitting the will to probate. In fact, neither the will nor the judgment of the county court can be affected by the decree of the court in this suit. At most, the court will only determine that the premises in question are not within the purview or operation of the will—that the estate of the testator therein at the time of his death having been acquired in contemplation of law after the devise, is not affected by it. The exceptions are allowed.

Case No. 3,275.

COULSON et al. v. PORTLAND et al.

[Deady, 481;[1] 2 Am. Law T. Rep. U. S. Cts. 156.]

Circuit Court, D. Oregon. Dec. Term, 1868.

EQUITY JURISDICTION—CLOUD ON TITLE—ENJOINING MUNICIPAL CORPORATION—UNLAWFUL TAXATION—ORDINANCES.

1. The jurisdiction of a court of equity to remove a cloud upon title to real property, is confined to instances where the instrument or proceeding complained of appears to be valid on its face, but is in fact void or invalid, for some reason or matter, which can only be shown by extrinsic evidence; but, semble, that such court has jurisdiction to prevent a cloud being cast upon title to real property, without reference to the fact whether such instrument or proceeding appears to be valid on its face or not.

[Cited in West Portland Homestead Ass'n v. Lownsdale, 17 Fed. 618; McConnaughy v. Ponnoyer, 43 Fed. 342.]

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

2. A court of equity has jurisdiction to enjoin a municipal corporation from committing a breach of trust concerning property or franchises held by it for the inhabitants thereof, but an ordinance providing for levying a tax is an exercise of legislative power, in the enactment of which such corporation acts not as a trustee, but as a local government, exercising a portion of the supreme power of the state.

3. A court of equity will enjoin a municipal corporation from unlawfully issuing interest coupons, payable through a period of twenty years, and levying a tax for the payment thereof, upon the complaint of an owner of property liable to such tax, so as to prevent a multiplicity of suits.

[Cited in Tilton v. Oregon Cent. M. R. Co., Case No. 14,055; Dundee Mortg., etc., Co. v. School Dist. No. 1, 19 Fed. 364; Salem Capital Flour Mills Co. v. Stayton Water Ditch & C. Co., 33 Fed. 155.]

4. Where a municipal corporation which has power to construct public buildings, but is forbidden "to raise money for or loan its credit to or in aid" of any private corporation, passes an ordinance providing for contracting with a railway company for the erection of public buildings, a court has no power to inquire whether the real object of such ordinance is to provide for the construction of such buildings or to raise money, etc., in aid of said railway company.

5. Section 135 of the charter of Portland, prohibited the city from contracting an indebtedness exceeding $50,000. *Held*, that an ordinance assuming a liability of $350,000, to be paid in semi-annual installments in the course of twenty years, although it provided for the payment of such installments by the levy of taxes as they fell due, was in violation of such section and void.

[Cited in Murphy v. East Portland, 42 Fed. 309.]

6. A court of equity has no power to restrain a municipal corporation in the disposition or management of taxes collected under a void ordinance, on the complaint of a single property holder therein.

[Cited in Murphy v. East Portland, 42 Fed. 309.]

This suit is brought [by Henry and Theresa Coulson against the city of Portland, Hamilton Boyd, William S. Caldwell, C. P. Ferry, and others] to enjoin the defendants from countersigning and issuing the interest coupons to the bonds of the Oregon Central Railroad Company, and from levying and collecting a tax upon the real property of the complainants, within the corporate limits of the city of Portland, for the purpose of paying such interest coupons as they become due. The complaint was filed on November 14, and a rule was then entered and served, requiring the defendants to appear on the twenty-fifth of the same month and show cause why a preliminary injunction should not issue against them, as prayed for in the complaint. On the twenty-fifth, the complainants and defendants appeared by their counsel, and consented to postpone the hearing of the motion until December 2d. On that and the following day, the motion was heard on the complaint and exhibits, and was continued for consideration.

John H. Mitchel, for complainants.

W. Lair Hill and Addison C. Gibbs, for defendants.

DEADY, District Judge. The material facts stated in the complaint are as follows:

1. That the complainants are husband and wife, and citizens of California; and that the city of Portland is a municipal corporation of the state of Oregon, and that the defendants—Hamilton Boyd, W. S. Caldwell and C. P. Ferry, are citizens of the state of Oregon, and officers of such municipal corporation, namely: mayor, clerk and treasurer.

2. That the complainants are owners of real property within the corporate limits of the city of Portland, of the value of $15,000, and that such property is subject to all taxes, charges and assessments imposed on real property within the corporate limits aforesaid, by the authority of such municipal corporation.

3. That on February 5, 1868, the city of Portland, by means of the common council and the mayor thereof, passed an ordinance, entitled as follows: "An ordinance to secure material for the public buildings, and the construction of streets adjacent to the public grounds, and for other purposes, and to levy a special tax therefor."

A copy of the ordinance is attached to the complaint and made a part of it. The first section thereof reads as follows:

"Section 1. That for the purpose of securing gravel, stone, brick, clay, lumber and timber, and the construction and repair of the city buildings of the city of Portland, and of the streets adjacent to the public ground, and for the other purposes hereinafter provided, the corporation known as the 'Oregon Central Railroad Company, of Portland, Oregon,' be and is hereby authorized to issue two hundred and fifty bonds of a thousand dollars each, bearing interest at the rate of seven per centum per annum, commencing on the first day of July, 1868, and payable on the first days of January and July thereafter, semi-annually, for the term of twenty years; said bonds having thereto attached forty interest coupons to each bond, each coupon representing the half yearly interest of its respective bond; said coupons to be signed by the secretary of said company, and countersigned by the mayor and auditor of the city of Portland, as hereinafter provided, and to be made payable in United States gold coin, at the city of Portland, at the city treasury of said city, at Portland, Oregon."

Section 2 of the ordinance substantially provides, that in 1868 a tax of two and a half mills on the dollar shall be levied and collected on all taxable property within the city, in the same manner as other city revenue may be collected; and that the moneys derived from said tax be appropriated and set apart as railway fund, out of which "fund" the said interest coupons, payable January 1, 1869, shall be paid as they fall due and are presented for payment.

Section 3 provides that in 1869, and annually thereafter for the period of eighteen years, in addition to the other taxes, a tax of four mills on the dollar shall be levied and collected on all taxable property within the city, in the same manner as other city revenue may be collected; and that the moneys derived from such tax be appropriated and set apart as a railway fund, out of which "fund" the interest coupons on said two hundred and fifty bonds shall be paid as they fall due and are presented for payment.

This section also provides, that the city may reduce the rate of taxation in proportion to the increase of taxable property, so that the revenue derived from the same shall not be less than the sum of $17,500 per annum in gold coin; and that, if at any time the money in the railway fund should be insufficient to pay such coupons when due, they are to be paid from the "general fund," or the common council may make such other contracts or arrangements to supply the deficiency as may be necessary; and that the city of Portland shall never be liable for the principal of such bonds.

Section 4 provides that the O. C. R. Co. shall grade and prepare for the rail the first five miles of the track of their railway, before December 31, 1868, and also the first twenty miles thereof before July 1, 1869, otherwise the ordinance to be null and void.

Section 5 provides, that upon the grading of the first five miles of the track, as provided in section 4, the mayor and auditor of the city shall countersign the coupons attached to one hundred of said bonds, and deliver the same to W. S. Ladd, to sell for the benefit of the company, at not less than eighty-five cents on the dollar, with the privilege of hypothecating the said bonds, or any portion thereof, on the best terms said company can secure to raise money; and upon the grading of another five miles of said track, said mayor and auditor shall countersign the coupons attached to seventy-five others of said bonds, and deliver the same to said Ladd to sell or hypothecate for the benefit of the company, as above mentioned; and also upon the grading of ten additional miles of said track, as provided in section 4, the said mayor and auditor shall countersign the coupons attached to the remaining seventy-five of said bonds, and deliver them to said Ladd, for sale or hypothecation, for benefit of the company, as in the case of the preceding bonds, and upon the completion of the first twenty miles of the track, said Ladd is to surrender to the company all the bonds remaining unsold.

Section 6 provides for the examination of the work on the track, and the certificate to be presented to the mayor and auditor to authorize them to countersign the coupons and deliver the bonds as directed in section 5.

Section 7 provides that this ordinance and the agreement of the city to pay the interest coupons as provided therein, is made upon the condition and consideration that the O. C. R. Co. contracts and agrees "at any and all times for the period of twenty years from January 1, 1869, to transport and convey over their railway all public messengers required to travel at the expense of said city, free of charge, and also transport, carry and convey over their said railway, to or from any point on their line, as may be required, free of charge, or other compensation for transportation than is provided in this ordinance, all stone, gravel, earth, lumber and timber, or other materials which the city of Portland may require, to be transported over the said company's railway for the construction or repair of streets adjacent to public grounds, public buildings of said city, and any and all purposes for which the city of Portland may now, or any other time hereafter, lawfully provide."

Section 8 provides for the execution and filing with the city clerk of the O. C. R. Co., agreement to accept the propositions contained in the ordinance, and "perform the conditions and considerations" on the part of said company, as therein specified.

Sections 9 and 10 of the ordinance provide for the contingency of the O. C. R. Co. not accepting or complying with the terms and conditions of the ordinance, and have no bearing upon the questions arising in this suit.

4. That the O. C. R. Co. is a private corporation, incorporated under the laws of Oregon, for the purpose of constructing a railway from Portland to the northern boundary of California.

5. That the title and body of said ordinance do not truly state the object thereof, but the contrary, for the purpose of deceiving the tax payers; and that the real object of such ordinance is to raise money for and to loan the credit of the city of Portland to the O. C. R. Co., for a period of twenty years, and to the amount of $350,000 in coin; and that said common council and mayor had no power or authority to pass said ordinance, and the same is therefore illegal and void.

6. That in pursuance of section 2 of said ordinance, the corporate authorities of the city of Portland, during the present year, have levied and collected, in gold coin, two and a half mills on the dollar, upon the taxable property within its limits, which tax, amounting to over $10,000, is now in the hands of the defendant, C. P. Ferry, who threatens to pay out the same to the holders of said coupons as in said ordinance provided; and that the complainants are interested in said $10,000 to the extent of the tax collected from their property aforesaid.

7. That the O. C. R. Co. is grading the first five miles of its track, and threatens and intends to complete the same as in said ordinance provided, before December 31, 1868, so as to entitle it to the benefit of the first 100 of said bonds; and the said corporate author-

ities are threatening and do intend to issue as provided in said ordinance, the interest coupons to said 100 bonds, and deliver the same to said W. S. Ladd, whereby the faith of the city of Portland will be pledged in aid of said company to pay said interest coupons on said 100 bonds semi-annually for twenty years; and that said Ladd intends to put such bonds upon the market in the Pacific and Atlantic states for sale and circulation; and said Ferry threatens to pay the first interest coupons of the first 100 bonds on presentation of the same at his office, out of the proceeds of the two and a half mill tax, now collected.

8. That defendants threaten and intend to levy and collect further taxes as provided in said ordinance for the purpose of paying the interest coupons of said bonds, thereby involving the city of Portland in a debt, and lending its credit to the O. C. R. Co., of $350,000; and unless such defendants are restrained in the premises, such bonds and coupons will pass into the hands of innocent purchasers, whereby the right of the complainants and the city to defend against the same will be defeated.

9. That unless the defendants are restrained in the premises, the complainants will be put to the necessity of maintaining a multiplicity of actions to recover back the taxes so wrongfully collected from them, and threatened to be collected for the next twenty years in aid of said O. C. R. Co.

10. That by virtue of the act incorporating the city of Portland, real property may be sold for delinquent taxes, upon a warrant issued by the auditor and clerk of the city, attached to the tax roll and directed to the city marshal, and that upon such sale a deed is made to the purchaser by the marshal, which deed is not required to recite the previous proceedings therein, and is deemed to convey the interest or estate of the person to whom the same was assessed, and that if defendants are not restrained from levying and collecting taxes upon the property of the complainants under the provisions of said ordinance, and by the means provided for the collection of taxes in the charter of said city, then there will be a cloud cast upon the title of the complainants to the real property above mentioned.

11. That the matter in controversy exceeds the value of five hundred dollars; and that the act and doings aforesaid are contrary to equity, etc., and that the complainants are without a plain, adequate and speedy remedy at law—wherefore they pray a temporary injunction, and that upon the final hearing the defendants may be perpetually enjoined, etc.

Assuming that ordinance numbered 468 is illegal and void, the complainants' counsel insist that they are entitled to maintain suit for relief in equity upon all or either of the following grounds: (1) To prevent a cloud being cast upon the title to their property by the enforced sale of it, for this tax; (2) to prevent the corporation of Portland from violating its trust; and, (3) to prevent a multiplicity of suits. Upon the consideration of the first ground, the question arises—what constitutes a cloud upon title?

For the defendants it is claimed that a proceeding which is void upon its face cannot cast a cloud upon title; and therefore, if ordinance 468 is void, as claimed by complainants, the tax complained of is invalid, and the invalidity is apparent upon the proceedings to enforce it. For the complainants it is answered that the invalidity is not apparent, and can only be shown by extrinsic proof, because the deed given to the purchaser of property sold for delinquent taxes does not recite or set forth the proceedings prior to the sale.

The following is an abstract of the provisions of the city incorporation upon that subject: The corporation has power by ordinance to collect taxes for general municipal purposes, not to exceed one half of one per centum upon all property within its limit subject by law to state and county taxation; and also to collect a special tax of one per centum upon the same property for any specific object within its authority, but the ordinance providing for such special tax must specify the object thereof and the amount necessary therefor; and the aggregate of such general and special taxes levied in any fiscal year, must not exceed one and a half per centum. Section 38, subds. 1, 23, 134.

Property must be assessed annually for taxation and in the manner prescribed by state laws, but the time of making assessments and the returns thereof are to be prescribed by ordinance. Sections 55, 57.

The time for the voluntary payment of taxes to the treasurer is prescribed by ordinance, and within five days thereafter, the treasurer must return the tax roll to the council with the taxes paid to him marked thereon; and all taxes not paid to the treasurer within the time prescribed, are to be deemed and collected as delinquent. Sections 113, 114.

Delinquent taxes must be collected by the marshal, and for this purpose the auditor, by order of the council, must deliver to him the tax roll with a warrant annexed thereto, commanding such marshal to collect the delinquent taxes therein as provided by law; such warrant is to be deemed an execution against property, and must be executed and returned as such; and if sufficient personal property be not found out of which to make the tax, the marshal must levy on any of the real property of the person against whom the tax is charged, but not more than enough to pay all the taxes charged to such person, and the costs of collecting the same, and sell it as upon execution. Sections 115–117.

When real property is sold for delinquent taxes, the person making the sale must make a deed of the same to the purchaser, which

passes all the estate of the owner therein, subject to redemption as provided by law; and the return on the warrant must specify the sum for which each parcel of such property sold, and the name of the purchaser; such deed need not recite the proceedings prior to the sale, but it must appear therefrom that the property was sold by virtue of a warrant from the city of Portland, and the date thereof, together with the date of sale and the bid of the purchaser. Sections 99, 120, 123, 140.

From this abstract of the law governing the levy and collection of taxes by the corporation, I think it clear that if ordinance 468 is void, no extrinsic evidence is necessary to show the invalidity of this special tax. True, the deed to a purchaser at a sale for delinquent taxes does not recite the prior proceedings at length, but they are all a matter of record, and the deed refers to them particularly, by names, dates and amounts. The warrant is identified. Annexed to it is the tax roll, from which it appears what taxes were levied, and what are delinquent. If the complainants' property were sold for this special tax to pay coupons on railway bonds, the facts of the levy and delinquency would appear on the tax roll; and the warrant annexed to it and returned with it into the clerk's office, would show the sale, and to whom and for what amount. These latter facts also appearing in the deed, there can be no difficulty in tracing the matter upon the records of the corporation from the end to the beginning—from the deed back to the ordinance.

But the authorities are not uniform as to what constitutes such a cloud upon title as will justify or authorize a court of equity to remove or prevent it, as the case may be. They all agree in the rule contended for by the defendants, but many of them go further, and decide, that although it may not be necessary to resort to extrinsic evidence to show the invalidity of the instrument or proceeding complained of, yet equity has jurisdiction to prevent, cancel or annul the matter, thing or proceeding, for the purpose of preventing the title to property being affected or encumbered thereby.

In Hamilton v. Cummings, 1 Johns. Ch. 522, Chancellor Kent, after a careful review of the English authorities, says: "I am inclined to think that the weight of authority and the reason of the thing, are equally in favor of the jurisdiction of the court, whether the instrument is, or is not, void at law, and whether it be void from matter appearing on its face, or from proof taken in the cause, and that these assumed distinctions are not well founded."

Mr. Justice Chipman, sitting in the circuit court for the S. D. of N. Y., cites Hamilton v. Cummings, as authority for the expression —"the fact that the deed in question is a void instrument does not take the case out of the jurisdiction in equity." Am. Law Reg. (Nov., 1867), p. 35. But in this last case, the deed complained of was forged and had been admitted to record in the proper office. It was not only void, but its invalidity did not appear upon its face, and could only be made apparent by extrinsic evidence. Prima facie, the deed was a valid one, and sufficient in law to pass the title to the property described in it.

In Oakley v. Trustees, etc., 6 Paige, 265, it was held that an assessment upon a town lot for altering the grade of a street, although so far void as not to affect the legal title to the lot, was a cloud upon the title, and an injunction was allowed to prevent the proposed illegal change of grade and consequent assessment.

In this case the court assumed that the assessment was void, and its invalidity must have been apparent on the face of the proceedings. The ruling in this case coincides with that in Hamilton v. Cummings, but appears to be in direct conflict with that made by the same chancellor in Van Doren v. Mayor, etc., 9 Paige, 388.

Yet in Oakley v. Trustees, etc., the complainant was threatened with what appears to have been an irreparable injury to his property, by the illegal digging down of the street in front of it. To prevent this injury the injunction was prayed and might well have been allowed, whether the illegal assessment was void upon its face or not. Notwithstanding, then, the remark of the court that the void assessment would cast a cloud upon the title, I am inclined to think that the injunction was really granted to prevent a material and probably an irreparable injury to the property of the complainant.

In Burnet v. Corporation of Cincinnati, 3 Ham. [Ohio] 73, the sale of town lots for an illegal assessment to improve streets was enjoined. In this case the court says: "In a city the sale of a part of lot for assessments may often be very destructive to the interests of the proprietor, though no title passed by such sale. A cloud would be cast upon the title, which litigation only could remove; and until removed the property might be valueless to the owner; subject, too, during the period of litigation to additional assessments and embarrassments."

But the more modern cases do not appear to go the length of Hamilton v. Cummings or Burnet v. Corporation of Cincinnati. By these, the jurisdiction of equity to remove or perhaps prevent a cloud being cast upon title to real property is confined to the instances where the instrument or proceeding complained of appears to be valid on its face, but is in fact void or invalid for some reason or matter which can only be shown by extrinsic evidence. Van Doren v. Mayor, etc., 9 Paige, 389; Susquehanna Bank v. Supervisors of Broome County, 25 N. Y. 314.

In Ewing v. City of St. Louis, 5 Wall. [72 U. S.] 418, Mr. Justice Field, delivering the opinion of the court, says: "With the pro-

ceedings and determinations of inferior boards or tribunals of special jurisdiction, courts of equity will not interfere, unless it should become necessary to prevent a multiplicity of suits, or irreparable injury, or unless the proceeding sought to be annulled or corrected is valid upon its face, and the alleged invalidity consists in matters to be established by extrinsic evidence. In other cases the review and correction of the proceedings must be obtained by the writ of certiorari. This is the general and well-established doctrine."

This was a proceeding before the mayor to enforce an assessment imposed for benefits to adjoining property by the opening of a street. The object of the suit was to enjoin the enforcement of the order for the collection of the assessment, upon the ground that the proceedings were invalid for want of authority in law. The court said: "If the statutes and ordinance under which the proceedings took place were void, no cloud was thereby cast upon the title of the complainant; nor were the remedies at law for the protection of his property or the redress of trespasses committed upon it in any way impaired."

As to the jurisdiction of a court of equity to remove a cloud already cast upon the title to property, the case of Ewing v. City of St. Louis furnishes an intelligible and authoritative statement of the doctrine of to-day on the subject; but as to when a court of equity may interfere to prevent such a cloud being cast, I apprehend the case does not directly determine. The question did not arise in it, but it is also true that the distinction now suggested is not noticed by it. The case of Burnet v. Corporation of Cincinnati was a case upon which the jurisdiction of the court was invoked to prevent a cloud being cast. The court said that the proceeding complained of (a tax to improve a street) was void and that the invalidity was apparent, yet it enjoined the collection of the tax, and gave reasons as follows:

"When an assessment of a tax is made and its legality disputed, the uncertainty attendant upon the final result puts the estate upon which it operates in imminent jeopardy. If no title pass by the sale, the party has a remedy at law. He can defend his possessions; but if the title do pass, he is remediless altogether. A mode, therefore, of deciding the question before any right is affected, is safest for all parties." 3 Ham. [Ohio] 73.

The feudal reverence for real property of which the common law was redolent, and which the modern mercantile spirit has not yet altogether overcome, doubtless had some influence in the decision of the earlier cases in favor of the interference of equity to prevent a cloud being cast upon title to land. Under the influence of this feeling and the kindred one, that municipal corporations and inferior tribunals were not qualified in power or dignity to take proceedings and make orders affecting the title to or interest in lands, courts have gone great lengths in enjoining the interposition and collection of assessments and taxes upon real property, by municipal corporations for local purposes.

But with the growth of the country and the development of its polity and institutions, so much of the power of the state—both legislative and administrative—has been parcelled out to these local governments and corporations, that it has been found impracticable to subject their proceedings to the risk of being stopped by injunction upon every suggestion or complaint of irregularity or illegality by reluctant or selfish taxpayers and property holders.

Whether, then, a court of equity has jurisdiction to prevent the levy and collection of a tax which is void in law, although such invalidity is apparent, upon the ground that such proceeding, if allowed to be completed, would cast a cloud upon title, is a question that I will not now definitely pass upon. Notwithstanding the generality of the language in Ewing v. City of St. Louis, against the jurisdiction, I am inclined to think that a careful examination of the authorities and the reasons for them, will show that the apparent invalidity of the proceeding or matter complained of, does not necessarily affect the jurisdiction of a court of equity, to prevent by injunction the imposition and collection of an illegal assessment or tax upon real property.

The second ground upon which the equitable jurisdiction of the court is invoked by the complainants, involves the question: Does the issuing of these coupons and the levy and collection of the tax to pay them, amount to a breach of trust by the corporation? In support of the affirmative of the question the complainants cite Davis v. Mayor, etc., 1 Duer, 451, Willard, Eq. 499, 737–739.

These authorities show that a court of equity has jurisdiction over a municipal corporation, in regard to its conduct concerning property and franchises held by it in trust for the inhabitants thereof, the same as in the case of a natural person; and that it will enjoin and prevent such corporation from disposing of its property or franchises fraudulently or for a mere nominal consideration—and this, although the forms of legislation are used to give the transaction the appearance of an exercise of political power for public purposes. The privilege of exemption from judicial interference terminates where legislative action ends. Tried by this standard, it is apparent, that in the passage of this ordinance or the enforcement of it, there is or can be no such breach of trust by the corporation as will justify judicial interference.

The trust, if any, is a political one, for the exercise of which the corporate authorities are only answerable at the polls. The ordi-

nance, if valid, is an exercise of legislative power for public purposes, and not a merely administrative act concerning the management or disposal of property which the corporation, like a private individual, may hold in trust for its constituents. In the passage of such an ordinance, the corporation acts not as a mere trustee of property, but as a local government, exercising for that purpose a part of the supreme power of the state. This rule is affirmed in the clause of the city charter (section 139), which declares that "when any proceeding, matter or thing is by this act committed or left to the discretion or judgment of the council, such discretion or judgment, when exercised or declared, is final, and cannot be reviewed or called in question elsewhere." The injunction cannot be allowed upon this ground.

The prevention of a multiplicity of suits is an acknowledged head of equity jurisdiction, to be exercised by injunction, either against an individual or corporation whether public or private. The case of Ewing v. City of St. Louis, supra, is sufficient on this point. The rule being shown, is this a case for its application? Will a multiplicity of suits arise between these parties, unless equity intervenes to prevent the enforcement of this ordinance? Assuming that the ordinance is void, the complainants may pay the tax under protest and then recover it back by action at law, or may suffer their property to be sold for it and defend the possession at law against the purchaser at the sale for taxes.

If the ordinance only provided that this tax should be levied and collected once, then it might be said that the complainants had a plain, adequate and complete remedy at law, and therefore could not maintain this suit in equity. But the ordinance provides for a levy and collection of taxes to pay these coupons, once a year, for a period of twenty years. To recover them back or defend the possession of the property sold for them, will require a multiplicity of suits, and what is more, arising separately through a long period of time.

In answer to this the defendants argue that the complainants may not own this property for twenty years, and that the corporation may not levy this tax beyond the coming year. I know of no legal presumption that the complainants will part with their property, and if they should, in the meantime they are entitled to protect it, for themselves or the benefit of their successors in interest, as the case may be. They are owners in fee simple and their estate in the premises is without limit as to time.

Nor can the court presume that the corporate authorities will cease to levy this tax after the present year, but the contrary. The complaint states that they will continue to levy it, and as they have commenced to carry out the ordinance, there is no reason to presume that they will cease to do so, unless restrained by external authority.

But this is not all; if these coupons are allowed to issue, they will pass into the hands of third persons. The trustee is directed to sell the bonds for the benefit of the O. C. R. Co. as fast as they are issued to him. The presumption is that they will be negotiable and pass by delivery. White v. Vermont & M. Ry. Co., 21 How. [62 U. S.] 577; Mercer Co. v. Hackett, 1 Wall. [68 U. S.] 95. Whether they will show upon their face the authority under which they are issued does not appear, and for anything I have been able to see in the ordinance, they need not. Innocent holders may and probably will attempt to enforce their payment against the city, and the property of the complainants will be burdened with additional taxation to meet the expense of this litigation. Upon this ground, there can be no doubt but that this court has jurisdiction to grant an injunction to enjoin the levy and collection of this tax, and the issue of these coupons, if the ordinance authorizing the same is illegal and void.

As the validity of ordinance 468 depends upon certain provisions in the state constitution and laws, it is to be regretted that the supreme court of the state has not had occasion to construe these provisions in this respect, so as to furnish this court an authoritative precedent upon the subject.

Complainants cite the following constitutional and legislative provisions as affecting the legality of the ordinance: "Acts of the legislative assembly, incorporating towns and cities, shall restrict their powers of taxation, borrowing money, contracting debts and loaning their credit." Const. Or. art. 11, § 5. "No county, city, town or other municipal corporation, by vote of the citizens, or otherwise, shall become a stockholder in any joint stock company, corporation or association whatever; or raise money for or loan its credit to or in aid of any such company, corporation, or association." Id. § 9.

The act incorporating the defendant—the city of Portland—was approved Oct. 14, 1864. In pursuance of section 5 of the constitution above quoted, it provides: "Sec. 135. The indebtedness of the city of Portland shall never exceed in the aggregate the sum of fifty thousand dollars, and any debt or liability incurred in violation of this section, whether by borrowing money, loaning the credit of the city, or otherwise, is null and void and of no effect." And further, the act of incorporation provides: "Sec. 128. No money shall be drawn from the treasury but in pursuance of an appropriation for that purpose, made by ordinance; and an ordinance making an appropriation of money must not contain a provision upon any other subject, and if it does, such ordinance, as to such provision, shall be void, and not otherwise."

Under these constitutional and legislative

provisions, complainants insist that Ordinance 468 is void for all or either of the following reasons: (1) That, although it pretends in the title thereof, and elsewhere, to be an "ordinance to secure material for public buildings, and the construction and repair of streets adjacent to the public grounds, and to levy a special tax therefor," yet that is in fact intended as a means to raise money for and to loan the credit of the defendant to the O. C. R. Co., contrary to article 11, § 9, of the constitution of the state; (2) that such ordinance creates an indebtedness against the city of Portland exceeding fifty thousand dollars, contrary to section 135 of the act of incorporation; and (3) that, although such ordinance appropriates money, it nevertheless contains provisions on other subjects, contrary to section 128 of the act of incorporation.

The first objection to the validity of the ordinance raises a question of fact, beyond the jurisdiction of this or any other court to inquire of or pass judgment on. True it may be, and true it most probably is, that the real object in passing the ordinance was not to secure material, etc., as stated in the title thereof, but to raise money for and loan the credit of the city to the O. C. R. Co. Yet the city has express authority to construct many kinds of public buildings, including a hospital and water works within or without the city (charter, § 38), and may pass any ordinance not otherwise unlawful, that it may deem necessary or convenient for exercising or carrying out such authority (Id. § 39). It may contract with a railway company as with an individual, unless the primary and express object of that contract be to raise money for or loan credit to such company. The matter of constructing public buildings is committed to the judgment and discretion of the corporation legislature, and whether they act wisely or unwisely, or from good or bad motives, is not the province of a court to inquire. It is a matter between the council and it constituents. Willard, Eq., 739; Charter, § 139.

It may be urged that the constitutional prohibition against raising money for private corporations or associations will be nugatory, if the city is allowed to deal and contract with such a corporation as with a private person; and to some extent this consequence may follow. But I apprehend a court may more safely put some limit upon a prohibition so general as this, than to deny the city the choice of any means not expressly forbidden to it, whereby to exercise its undoubted authority.

The second objection raises the question: Can the city lawfully issue interest coupons to railway bonds, payable half yearly through a period of twenty years, and amounting in the aggregate to over $300,000? The charter (section 135) seems to answer this question in the negative, when it substantially declares in pursuance of section 5 of article 11 of the constitution that the indebtedness or liability of the city must never exceed in the aggregate one sixth of that sum. But the defendants insist, that as the ordinance providing for the issue of these coupons, also provides for raising revenue and appropriates it to the payment of them as they fall due, no indebtedness or liability is thereby created or incurred. In support of this extraordinary proposition they cite the single case of People v. Pacheco, 27 Cal. 175.

This case was decided upon two grounds—the one that a law providing for the issuing of interest coupons on railway bonds did not create a debt, because, at the same time provision was made for levying taxes and appropriating the proceeds thereof to their payment; the other, that the act was passed "in case of war," and therefore the constitutional inhibition against creating a debt did not apply. The act in question was passed during the late Civil War, and the soundness and sufficiency of the latter ground of the decision does not admit of question. The assembly that passed the act put the power upon that ground in the preamble thereof. Mr. Justice Rhodes concurred specially in the decision for the same reason, and as I understand him, expressly dissented from the other.

I have never been able to bring my mind to assent to the reasoning by which the court arrived at the conclusion that the act in question did not create a debt. By means of such artificial reasoning and unlooked for construction of popular and plain terms and phrases, constitutions may be purged of every prohibition upon the legislative power of taxation and creating indebtedness, which the wisdom or fears of the people may place in them.

These constitutional provisions restraining the creation of public debts are the gradual outgrowth of the last twenty or thirty years. They have been erected by the peoples of various states as barriers against the creation of debt by the legislature in a time of popular excitement about internal improvements. In the adoption of these and kindred provisions in the constitution of this state, the people of Oregon supposed that they were thereby putting it out of the power of the assembly and municipal corporations, to pledge the present and future property and labor of the country, for the payment or guarantee of stocks or bonds of private corporations formed for building railways and the like, for the benefit primarily of a few individuals.

To say that a sum of money due or owing from A to B, is not a debt, because A has promised to appropriate, or has appropriated, a portion of his future income to its payment, is a proposition in legal metaphysics that I cannot comprehend. A debt exists against the city whenever the city agrees to pay money in return for services or for money

borrowed. Every one of these interest coupons, when issued by the mayor and auditor as presented in the ordinance, is a promise by it to pay to the holder so much money. If this is not a debt, or evidence of one, then an ordinary promissory note is not. The fact that the ordinance appropriates money to pay these coupons, as they fall due, makes no difference. There is no magic in the legislative formula—"there is hereby appropriated." That does not change the fact that the city owes these coupons, and what it owes to another is a debt due that other. Besides, there is no money in fact set apart by this formula of appropriation, until it is collected.

The ordinance, by providing for the levy and collection of taxes to pay these coupons, recognizes the fact that their issue creates a debt against the city, and thereby undertakes to provide means of payment. But the object of the prohibition in section 135 of the charter is to prevent the council from pledging the future resources of the city beyond the sum of $50,000. The language of the prohibition is explicit and comprehensive. It includes all forms of indebtedness, "whether incurred by borrowing money, loaning the credit of the city or otherwise." If this obligation to pay these coupons is not a debt—is not any form of indebtedness or liability—because the ordinance authorizing their issue promises that the city will pay them when due, then what is there to prevent the council from contracting to pay the O. C. R. Co. for furnishing material to build public buildings, etc. (always including the transportation of all city messengers), the sum of $100,000 per annum for the next one hundred years? If the present limit of annual taxation—one and a half per centum—would raise the sum, and the ordinance so provided, and for its appropriation to that end, such a contract would be every whit as lawful as the one provided for in ordinance 468. Again, every provision of the ordinance, except the part making the appropriation, is void, by reason of section 128, as above cited.

The idea contained in this section was taken from article 8, § 7, of the state constitution. The latter reads as follows: "Laws making appropriations for the salaries of public officers, and other current expenses of the state, shall contain provisions on no other subject."

In the act of October 24, 1864, providing for contracting with certain persons for keeping the insane, a provision was inserted appropriating money to pay the contractors, as per contract. In March, 1864, on a mandamus to the secretary of state, Mr. Justice Boise, of the supreme court, decided that the provision making the appropriation was in conflict with section 7, just cited, and therefore void. The prohibition in the charter against combining appropriations and other matters in the same act, is more comprehensive and explicit than that in the constitution. The former includes all appropriations and declares the consequence of its violation, namely: that all the provisions of the ordinance, except the appropriation shall be void. Under the ruling of Mr. Justice Boise (and I have no doubt of its correctness), every provision of this ordinance other than the ones making the appropriations are void. All the provisions of the ordinance directing the issue of bonds and coupons, and the levying of taxes and making contracts, were enacted in plain violation of section 128 of the charter, and are therefore invalid and of no force or effect.

This ordinance must be held void upon the double ground that it attempts to create a debt against the city exceeding $50,000, and that it was enacted contrary to the prohibition in section 128 of the charter.

The complainants are thus shown to be entitled to the temporary injunction prayed for. It may therefore issue, restraining the city of Portland and its officers from countersigning, issuing or paying any of said interest coupons, and from levying or collecting any tax mentioned and provided in said ordinance upon or off the property of the complainants, in the complaint mentioned, for the payment of such coupons; but such injunction must not in any manner restrain or direct the defendants in the disposition and management of the tax collected under ordinance 468, in the year 1868. So far as appears, the complainants paid their portion of this levy voluntarily, and they cannot now recover it back. It is no longer their individual money. It has passed into the city treasury, and become municipal property or funds. The complainants, as individuals, cannot maintain any proceeding in court to prevent any appropriation of this money whatever. If any illegal appropriation of it is attempted or threatened, it can only be restrained upon the complaint or information of some one who represents the whole public, to whom it belongs.

COULSON (WALTON v.). See Case No. 17,132.

Case No. 3,276.

In re COULTER.

[2 Sawy. 42;[1] 5 N. B. R. 64; 1 Am. Law T. Rep. Bankr. 257; 3 Chi. Leg. News, 377; 4 Am. Law T. 131.]

District Court, D. Oregon. May 29, 1871.

MECHANIC'S LIEN, WHEN ATTACHES—BANKRUPTCY PROCEEDINGS DO NOT AFFECT LIEN—LIEN NOT OPPOSED TO POLICY OF BANKRUPT ACT.

1. Under the lien act of Oregon, the lien of a mechanic, or material man, arises from the doing of the work or furnishing the material, and attaches to the building from that time, upon the condition subsequent that the lien creditor file a notice of his intention to hold such lien

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

within three months from the completion of the building.

2. The notice required to be filed does not create the lien, but is necessary to preserve or continue it beyond three months after the completion of the building, and, therefore, the commencement of proceedings in bankruptcy between the doing of the work, or furnishing of material, and the filing of such notice does not impair or affect the lien or the right of the lien creditor to continue it by filing the notice.

[Cited in Re Cook, Case No. 3,151.]

3. The lien given by the local act to mechanics or material men is not opposed to the terms or policy of the bankrupt act, as it in no way prefers one creditor at the expense of another, or diminishes the general assets of the debtor otherwise applicable to the payment of his general creditors.

[In the matter of J. M. Coulter, a bankrupt.]

M. W. Fechheimer, for trustee.

Charles B. Bellinger and H. Y. Thompson, for creditors.

DEADY, District Judge. This is a motion by the trustee of the estate to expunge a certain proof of debt. On February 23, 1870, petition was filed in bankruptcy against Coulter, and on March 3 he was adjudged a bankrupt. The usual warrant to take possession of the estate of the bankrupt issued at the same time, and on March 4 the first notice was published by the marshal. At the date of filing the petition the bankrupt was indebted to Uzafovage & Wright in the sum of one hundred and twenty-nine dollars and seventy-three cents, for material furnished by them to the bankrupt to be used in the construction of a brick building on lot four, in block fifty, in the town of Salem, Oregon, then, and at the date of the adjudication aforesaid, owned by said bankrupt.

That on March 8, and within three months from the furnishing of said materials, said creditors filed in the proper office a notice of their intention to hold a lien on said building and lot as a security for said indebtedness.

On March 21, U. & W. made proof of their debt before Willis, commissioner, as one secured by a lien upon the lot and building aforesaid, and stating in such proof the facts aforesaid.

On January 30, 1871, the trustee of the estate filed objections to the proof of debt, and moved that the same be expunged. The motion was referred to Mr. Register Hill, who found the facts as above stated, and the conclusion of law that U. & W. had no lien.

The question arising upon the objections, and argued by counsel, is whether the change of property in the lot and building, consequent upon the adjudication in bankruptcy, prevented the creditors U. & W. from thereafter filing their notice of lien with effect, although filed within the time allowed by the local lien act. The amount involved in this motion is small, although by stipulation other claims of a like nature are to abide the decision of this one, but the principle involved is of great practical importance to the community. The decision of the question must turn mainly upon the proper construction to be given to the lien law. Before passing to that subject, it is well to note and bear in mind that the security given to mechanics and material men is not obnoxious to the letter, spirit or policy of the bankrupt act, because it works no injustice to any other creditor. In Foster v. Heirs of Stone, 20 Pick. 543, the court, in considering a somewhat similar case, said: "It may be remarked, however, that in one respect there is an important difference between mechanic's lien for labor and materials, and a lien created by attachment. In the latter case, an attaching creditor has no claim for preference over other creditors, except by his attachment; whereas, when a mechanic obtains a lien under the statute, and relying thereon, increases the value of the land by erecting buildings thereon, he has a strong equitable claim for reimbursement to the extent of the value of his labor and materials, furnished for building, and in this respect he has a marked preference over the other creditors of the land, who had trusted to the personal credit of their debtor."

The lien is given to secure the claims of certain persons for the value of their labor and material bestowed upon the property of the debtor. The operation of the law is a convenient substitute for the giving of a mortgage or other express security day by day, for the value of such work and material, and is to be considered and enforced as such.

Upon the faith of this security, so given, the one party furnishes labor and material, and the other receives the benefit of them. This transaction, as has been said, is not in violation of the terms or policy of the bankrupt act, even although the owner of the property should be insolvent at the time, because such security or lien is only equivalent to the additional value which the creditor has by this means given to the property of the debtor, and therefore does not diminish the assets of the latter applicable to the payment of his pre-existing debts.

In Darby's Trustees v. Boatman's Sav. Inst. [Case No. 3,571], Mr. Justice Dillon,—Treat and Krekel concurring,—held in the language of the syllabus, that: "Advances made in good faith to an indebted person, to enable him to carry on his business, upon security taken at the time, do not violate either the terms or policy of the bankrupt act, since the debtor gets a present equivalent for the new debt he creates and the security he gives."

Bearing in mind, then, that so far as the bankrupt act is concerned, there is nothing to prevent these creditors from acquiring and enforcing this lien or security for their debt, I proceed to consider the main question —Have U. & W. acquired a lien upon the

property in question by reason of the facts stated?

The lien law of Oregon (Code Or. p. 763) provides (section 1): "Any person, who by virtue of a contract with the owner of a building," shall furnish any material for the construction of such building, "shall, upon filing the notice prescribed in the next section, have a lien upon such building and the lot of ground upon which the same is situated, for such * * * material * * * furnished." [Section 2:][2] If the person furnishing such material desires to avail himself of the provisions of the lien law, he must "at any time within three months from the completion of such building" file in the office of the county clerk a notice of his intention to hold a lien upon such building for the amount due. Section 3: "Such lien shall cease to exist at the end of one year after the completion of the building," unless proceedings are commenced to enforce it. Section 7: "Liens created in pursuance" of this law "shall have precedence over all other liens after the commencement of the building," and if the property is insufficient "to pay all such liens," they are then to be satisfied pro rata. Section 8: The lien against the building is to extend to the lot on which it is erected, if "at the time of erecting such building" the same "was the property of the person" who caused it to be erected. The remaining sections of the statute relate to the enforcement of the lien, and do not bear upon the question under consideration.

From the terms of this statute, indeed from the very fact of its enactment, it is manifest that it was the intention of the legislature to give mechanics and material men security for the amounts due them, without the trouble or inconvenience or even foresight upon their part, of taking any such security by special contract or pledge.

Counsel for the trustee maintains that as U. & W. did not file notice of intention to hold a lien until after the commencement of proceedings in bankruptcy, no lien was created on the property, when under the operation of the bankrupt act, it passed to the trustee; and that no lien upon the property could be created by filing such notice after the building and lot had vested in the trustee for the benefit of the general creditors. If the premises are admitted the conclusion follows. An adjudication in bankruptcy, and the assignment thereunder, relate to the filing of the petition and vest the property of the bankrupt, as of the date of such filing, in the assignee or trustee. Bank. Act, § 14 [1867 (14 Stat. 522)].

This argument for the trustee rests mainly upon the effect claimed for the provision quoted from section 1 of the act: "shall, upon filing the notice," etc., "have a lien upon such building," etc. Upon the language of this provision, it is maintained that the filing of the notice is a condition precedent to acquiring a lien under any circumstances. That the lien is then and thereby created, and if prior thereto, the interest of the owner or debtor in the property has in any way become vested in another, the right and opportunity to create such lien is lost. No other provision of the law is relied upon as sustaining this position, although it is claimed that none can be found in direct conflict with it. It seems to me that this construction rests more upon the language of the clause than the reason and purpose of it, considered with reference to the whole act. In the majority of instances, where the owner and debtor is insolvent, it would make the statute of no avail to the creditor, who furnished his labor or materials upon the security of the property.

I think that the statute, taken as a whole and construed with reference to the end to be obtained, and the mischief to be remedied by it, gives a lien in any case from the commencement of the labor or delivery of the material furnished, and that the filing of the notice as prescribed in section 2, is only a condition subsequent, which is necessary to be performed to preserve the lien for a greater period than three months from the completion of the building.

Section 3 of the act, in providing that in a certain contingency the lien shall cease "to exist at the expiration of one year after the completion of the building," by implication asserts that it does exist from the completion of the building. But the notice need not be filed for three months after such completion. True, it may be said, that "the completion of the building" is here referred to merely as an event or point of time in the transaction, from which to date the year given by the section for the enforcement of the lien. But admitting such to be primary purpose of the reference to this event or point of time, still, in asserting or declaring that the lien shall cease to exist in one year from such completion, the legislature have by implication, although not a necessary one, said that such lien does exist during such year.

Section 8, in providing that the lien shall extend to the lot on which the building is erected, if at the time of such erection the same was the property of the debtor, by necessary implication asserts that the lien exists at such time. Now "the time of the erecting of such building" is the time occupied or consumed in its erection from foundation to roof. If the lien exists during all or any portion of this period, it must also exist before the time limited for filing the notice, and cannot therefore be created by it. It may be a question whether this notice can legally be filed before the completion of the building. But it appears probable that such completion is here referred to merely as the event from which to compute and ascertain the point of time in the transaction within which the notice must be filed to preserve

[2] [From 5 N. B. R. 64.]

the lien; and that such notice may be filed at any time after the performance of the contract for labor or material, and within three months from the completion of the building. Indeed, it may be that the act will permit notice of the lien to be filed day by day, as the work or delivery of material progresses, but it does not appear reasonable that the creditor is under any obligation to file a notice in any case before the completion of his contract to labor or furnish material. So, if the creditors' lien extends to the lot at any time during the erection of the building as provided by this section, it follows that it may exist before the filing of the notice.

Section 7, in providing that the "liens created in pursuance" of this act, not the notice, "shall have precedence over all other liens after the commencement of the building," declares in effect that for the purpose of preferring this lien to all others, it shall be deemed to exist from the commencement of the building. This indicates very plainly that it was the intention of the legislature, to so fasten these liens upon the property as not to permit any other class or description of creditors, under any circumstances, to subject the value of the labor and material furnished upon the faith of them, to the payment of their debts, unless it be with the express or implied assent of the mechanic or material men.

Taking the whole act together, and considering the manifest purpose of it, as well as the necessary consequence of a different construction, I am satisfied that notwithstanding the letter of the clause in section 1, referring to the filing of the notice, that a lien is given from the commencement of the work or delivery of material, upon the condition subsequent that the creditor files the notice prescribed in section 2, within the time limited therefor. A failure to perform this condition will doubtless work a loss of the lien. The omission, at least as against third persons, should be construed as an abandonment of the lien. The same effect would follow a failure to enforce the lien within the time prescribed in section 3.

Here the trustees succeeded to the rights of the bankrupt in this property at the date of the filing of the petition, and also to such rights, if any, as the general creditors had in it or could assert against it notwithstanding the bankrupt, and nothing more. If he had been a purchaser without notice, for a valuable consideration, under the same circumstances, the property would have passed by the sale, subject to the lien and the right of the lien creditor to do any act which he might have done but for such sale, necessary or required to perfect, preserve, continue or enforce his lien. Hotaling v. Cronise, 2 Cal. 64; Soule v. Dawes, 7 Cal. 576; Blauvelt v. Woodworth, 31 N. Y. 287; Foster v. Heirs of Stone, 20 Pick. 542.

In the course of the argument, counsel for the trustee cited and relied on the case In re Dey [Case No. 3,870]. The case arose under a statute of New Jersey, and decides that under that statute the lien did not attach from the time of doing the work or delivering the material, but from the filing of the claim for lien, and that the proceedings in bankruptcy having been commenced before such filing, no lien could be created by a subsequent filing. The statute of this state and that of New Jersey are not alike in some respects, but the difference is more verbal than otherwise, and the case is one in point. I do not adopt its conclusions, because I am not convinced by its reasoning and do not approve of its policy. To my mind there was no difficulty in holding that under the New Jersey statute the lien attached from the time the work was done and the material furnished. These acts and the indebtedness which arose from them were the meritorious cause of the lien—the reason for which the statute gave it—and not the mere technical act of filing the claim. The latter is only required as a means of giving notice to the world of what already exists—a lien upon the property—and the intention of the creditor to hold or continue it.

The case cited in the opinion from 1 C. E. Green, 150–161, does not, so far as I can perceive, necessarily support the conclusions. It may well be that a claim "not filed according to the requirements of the statute" does not constitute an "incumbrance on the premises," and still a lien attach upon the delivery of the material. For although the lien does attach from such delivery, yet if a claim is not filed within the term or to the effect prescribed, it would cease to exist and the filing of such claim would not constitute an "incumbrance on the premises."

It is not until after long and careful consideration, that I have declined to follow the ruling upon this question of the learned judge, who decided In re Dey [supra], and who has done so much to illumine the bankrupt act, and establish the practice under it.

My conclusion is, that the lien of U. & W. attached from the delivery of the material, and that the right given by the lien law of the state, to file a notice of intention to hold, not create, this lien, was not in any way impaired or affected by the subsequent proceedings in bankruptcy. The trustee took the property as the bankrupt held it, with this incumbrance.

The motion is denied with costs, as prescribed in rule 55.

Case No. 3,277.

COULTER v. L'ESPERANZA.

[Bee, 97.][1]

District Court, D. South Carolina. March Term, 1799.

PROCEEDS OF SALE IN ADMIRALTY.

Money or goods in the hands of the marshal by order of this court are subject to any further order of court; and claim may be made to the same, after a decree. Not so, if the money has been paid over.

[Cited in British Consul v. Thompson, Case No. 1,899; Leland v. The Medora, Id. 8,237.]

BEE, District Judge. After sale under the preceding decree, but before the marshal had paid over the money, the present claimant Joseph Coulter interposed a petition, stating that he was an American citizen of Philadelphia, and sole owner of the cargo of the Esperanza, the same having been purchased at an out-port and captured in its way to the Havanna. He prayed leave to file a claim and produce proofs in order to manifest his right to the said cargo; and that the marshal might be ordered to hold the proceeds in his hands, subject to the future order of the court. This was done; and a commission issued to take his claim and answer, and examine witnesses in support of it. On the return of these papers it appeared beyond a doubt that the said Coulter was an American citizen, and that the cargo of the Esperanza, consisting of eighty-four hogsheads of molasses, were his property at the time of the capture.

On this claim and these proofs, counsel were heard for the said Coulter in support of his claim; and for the British consul on behalf of the owners of the privateer.

For the latter it was contended, that the court has already pronounced its decree in this cause, and cannot review or alter it. That the question of prize or no prize can only be determined in a court of the captors. That the sale by consent of the parties to the decree ought not to injure their rights, but that the monies arising from the sale of the cargo should be considered as the cargo itself would have been before the sale. And the British consul offered to retain the proceeds of sale till the question could be tried in a court of admiralty of Great Britain. That the decree was not interlocutory, but final; that, as such, it secured those who purchased under it; and that the 25th article of the treaty with Great Britain deprived this court of further jurisdiction.

On the other side it was insisted, that this vessel was not, on her arrival here, in possession of the British, but had been abandoned at sea, and brought in by an American captain; that, therefore the British treaty did not apply. That the claimant would be without remedy, except in this court. That the rights of a third person being involved, the court may review the decree.

The case appears to me important, and I have considered it with much attention. I am of opinion that decrees of this court, completely carried into effect, can only be affected by appeal to a higher tribunal. But it has long been settled that the court may control its officers, and that money in their hands by order of the court is subject to further order thereof, until paid over. That parties concerned who had no notice of the proceedings are entitled to a hearing, more especially as they have no right to appeal. Coulter would, I apprehend, be altogether without remedy, if this court does not give it to him. I do not see how a British court of admiralty could hold jurisdiction of this vessel after abandonment; for neither res nor persona is within its reach. The libel for salvage brought this subject properly before this court in the first instance; and it is an established principle that matters necessarily flowing from or dependent upon the first cause of action shall follow the original rights of jurisdiction. Hopk. 140. If I had referred the American captain's claim for salvage to a British court, I should have yielded up the powers of this. The Esperanza was brought in here as abandoned; as such, the court interfered to settle the claims of the different parties. The question of prize was cautiously avoided. Had Coulter's claim been brought forward at first, no doubt could have attached to it; for, by our treaty with Great Britain, the goods of either party found on board the vessel of an enemy shall be restored. To have decreed, therefore, restitution of this cargo to Coulter would have been no more than a fulfilment of that treaty.

Upon the whole, I adjudge, order, and decree, that Coulter receive the money for which his molasses sold, after deducting the salvage allowed by my former decree, the costs of both suits, and a reasonable freight. Let this be fixed by the registrar and one or two merchants, if he thinks proper to call for their assistance; and let the freight and amount-sales of the vessel be paid to the British consul for the benefit of those entitled to the same.

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

COULTER (UNITED STATES v.). See Case No. 14,875.

Case No. 3,278.

COUMBE v. NAIRN.

[2 Cranch, C. C. 676.][1]

Circuit Court, District of Columbia. May Term, 1826.

APPEAL FROM SUPERSEDED JUDGMENT.

The defendant, against whom a judgment has been rendered by a justice of the peace, cannot maintain an appeal from that judgment after having superseded it by confessing a new judg-

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

ment, with sureties, and six months' stay, according to the provisions of the act of assembly.

This was an appeal from the judgment of a justice of the peace. The defendant had superseded the judgment by confessing a new judgment for the same amount, with sureties, and thereby obtained a stay of six months, as provided by Act Md. 1791, c. 67.

THE COURT (MORSELL, Circuit Judge, absent) was of opinion that the original judgment was merged in the new judgment, and could not now be the subject of appeal.

Appeal dismissed with costs.

Case No. 3,279.

COUNCER v. The A. L. GRIFFIN.

[5 Am. Law Reg. (N. S.) 45.]

District Court, N. D. New York. Aug. Term, 1865.

MASTER'S REPORT—"GOLD OR CANADIAN CURRENCY."

A libel for the loss of a vessel on the Canadian shore of Niagara river, having been referred to a master, he reported that at the time of the loss the vessel was worth a certain sum of "dollars in gold, or Canadian currency," and that gold or Canadian currency was, at such time, at a premium of forty-nine per cent. over United States legal-tender notes. *Held*, that the value being reported at a certain sum in foreign currency, the damages were to be estimated at the value of that sum in United States notes, and the use of the word "gold" in connection with Canadian currency did not require any different rule than would have been applied had the value been stated in the foreign currency only.

[Disapproved in The Blohm, Case No. 1,556.]

In admiralty. This suit was brought [by Richard Wells Councer against the steam-tug A. L. Griffin] to recover the damages sustained by the libellant in the loss of the scow Andrew Murray, on the Niagara river, at the mouth of Chippewa creek, in Canada West, on the 14th day of December, 1863. After the hearing, upon pleadings and proofs, an interlocutory decree was made, referring it to a commissioner "to take the necessary proofs, and report the amount of damage which the libellant had sustained by reason of the loss of his scow," &c. In pursuance of such decree of reference, the commissioner reported "that on the 14th day of December, 1863,—on which day the said scow Andrew Murray was lost,—she, the said scow Andrew Murray, was worth, including equipments, at Chippewa, the sum of nine hundred and fifty dollars in gold, or Canadian currency, and that the interest on nine hundred and fifty dollars from the 14th day of December, 1863, to and including the date of this report, is the sum of forty dollars and fifty-three cents," and also "that on the 14th day of December, 1863, gold, or Canadian currency, was at a premium in the city of Buffalo of forty-nine per cent. over United States legal-tender notes." The commissioner's report was dated on the 24th day of July last. Upon the coming in of this report, it was insisted by the counsel for the libellant that, in estimating the damages of the libellant, the forty-nine per cent. reported by the commissioner as the difference between Canadian currency and United States legal tender notes should be added to the value of the property lost, and the interest on that value as reported by the commissioner; while the counsel for the respondent insisted that, by the act of congress, the dollar of the U. S. legal tender note was in law the exact equivalent of the gold dollar, and that therefore the premium reported and claimed could not be allowed.

G. B. Hibbard, for libellant.

A. P. Nichols, for respondent.

HALL, District Judge. The commissioner has reported the value of the property lost, and not the amount of the libellant's damages; and the value thus reported he states to be the value in Canadian currency or gold, at the time and place of the loss,—that is, at the mouth of Chippewa creek, in Canada, in December, 1863. The report also shows, or rather assumes, that Canadian currency and gold were of equal value; and states that both then bore a premium of 49 per cent. in this city. The report shows in substance that the value of the scow, at the time and place of the loss, was $950, in the currency of Canada, and that the dollar of Canadian currency was then worth $1.49 in the currency which then was and now is the universal if not the legal standard of value in the United States. Whether this currency is or is not the present legal standard of value it is not necessary now to inquire, for the counsel for the libellant and the counsel for the respondent alike assumed, as the basis of their respective arguments, that the decree in this case might be legally paid in the United States legal-tender notes, and that the libellant could not require its payment in the gold and silver coins which formerly constituted the only legal-tender money of the United States. "Consensus facit legem." Assuming, then, that the decree in this case may be discharged by the actual offer, in proper form, of United States legal-tender notes in payment, the question is how, upon the commissioner's report, the damages of the libellant are to be computed? In thus stating the question I intend to avoid the discussion, in detail, of the several exceptions taken to the commissioner's report, for such exceptions relate, in form at least, to that portion of the report which states the value of the libellant's scow at the time and place of loss, and not to the fact that the commissioner has not reported, in direct terms, the amount of the libellant's damages. The report does not state the actual damages of the libellant, but simply furnishes the data upon which those damages can be computed, according to the

rule of damages or computation which may be adopted by the court. It assumes that the proper measure of damages for the loss referred to is the actual value of the property lost at the time and place of the loss, with legal interest, and then states that value in Canadian currency, and computes interest thereon. The use of the word "gold" in connection with "Canadian currency," although the American gold dollar may in fact have been in the contemplation of the commissioner, does not require that any effect should be given to the report which would not have been required if the value had been stated in "Canadian currency" only. Canadian currency is a foreign currency; and though the Canadians use the term "dollar" as the designation of the unit of their currency, as we do in reference to our own currency, it does not legally or necessarily follow that their dollar is the equivalent of ours. In fact the report shows that one hundred dollars of their currency was, at the time of the loss, of the value of one hundred and forty-nine dollars of ours; and therefore, to indemnify the libellant for his loss by a payment in our currency, it is necessary to give him one hundred and forty-nine dollars of such currency for every one hundred dollars of the value of his property estimated in the currency of Canada.

Much of the appearance of difficulty, which at the hearing cast doubt upon this question, is undoubtedly due to the fact that the currency of Canada, like that of the United States, is a decimal currency, with the dollar as a unit; and that the coined dollar of the two governments is supposed to be of equal value. Whether it is so or not is not a question of law, but of fact, and the question under consideration must be decided upon the principles which would have governed it if the loss had occurred in Bordeaux or Odessa, and the value of the property lost, at the time and place of loss, had been reported in francs or rubles. That the loss occurred within a mile of the line dividing the United States and Canada, and that values are expressed in dollars and cents there as well as here, can make no difference in the principles of law applicable to the case; and, if we look at the equities of the case, it must be apparent that the legal rule is the equitable one. If the loss had occurred at Schlosser, instead of at Chippewa, on the opposite shore, the damages to be recovered would have been determined by the value of the scow and her equipments at Schlosser, in the currency of the United States; and certainly there can be no equity in adopting a different rule, and taking from the libellant nearly one-third the sum necessary to be paid for his actual indemnity, simply because the loss occurred near the opposite side of the river. If the loss had occurred in Russia, and the proof had shown the value of the property in rubles, at the time and place of the loss, it would hardly have been claimed, against the general current of authority, that the libellant would not be entitled to a decree for the actual value here, in the existing American currency, of the number of rubles which his vessel was worth in Russia, and the amount of damages in this case must be computed upon the same principles. Story, Confl. Laws, §§ 307, 314; Story, Prom. Notes, § 390, note 1; Pars. Bills & N. 648.[1] A decree in accordance with this opinion will be entered.

Affirmed by Mr. Justice Nelson, on appeal, August, 1865. [Case unreported.]

Case No. 3,280.

The COUNTESS OF DUFFERIN.

[10 Ben. 155.][2]

District Court, E. D. New York. Oct. Term, 1878.

SEAMAN'S WAGES—WAIVER OF LIEN—PRESUMPTION—LEX CONTRACTUS.

1. C. signed shipping articles at Cobourg, Canada, to go on board of a yacht as sailing master, on a voyage to Philadelphia, at a rate of wages of $1 a day. Subsequently, but on the same day, an agreement was made between C., G and B., which, after setting forth that C. had begun to build the yacht, but had not been able to finish her, and had put the title in G., provided that G. should hold the yacht in trust for C., B. and G. himself; that G. should manage her, and after she had gone to New York and Philadelphia, should sell her, and from the proceeds, after paying all debts due, should pay certain sums to B., C. and himself, and that C. should go as sailing master at $60 a month. The yacht having come to New York, C. filed a libel against her for wages: *Held*, that the right of C. must be governed by the agreement and not by the articles; that under that agreement C. must be held to have waived any right of lien on the vessel for wages.

2. As the vessel was a foreign vessel and the contract was made in a foreign port, section 4535, Rev. St. U. S., could have no effect in the case.

3. The court could not presume that the statutory law of the dominion of Canada is the same as that of the United States.

4. In the absence of any evidence as to the law of the place where the contract was made and to be in a substantial part performed, the law maritime will be presumed to be the law controlling the mariner's contract. By that law it is competent for the mariner, by his agreement understandingly made in a proper case, to waive his lien for wages.

Benedict, Taft & Benedict, for libellant.
Scudder & Carter, for claimant.

BENEDICT, District Judge. The agreement made with the libellant subsequent to the shipping articles, is the agreement ac-

[1] See the case of The Rochambeau [Case No. 11,973], in which Judge Ware, of the district court of Maine, held that a seaman shipped on board of an American ship at St. John's, New Brunswick, for a voyage to London and back, and afterwards serving on board under such contract, might recover, in the United States, double his stipulated wages; gold then being at a premium of 100 per cent.

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

cording to which the libellant's right to proceed against this yacht for his wages as the sailing master thereof must be determined. The contract of the shipping articles, if subsisting, would not avail him, as at the rate of wages stated in the shipping articles he has been overpaid. The subsequent agreement was entered into by the libellant as a part-owner in the vessel for the purpose of enabling the vessel to be finished and to run races at New York and Philadelphia, in which races she was to be sailed by the libellant. By the agreement it was stipulated that the libellant should be sailing master at $60 per month. No limit whatever is assigned to the length of the employment, either by reference to any voyage or voyages, or to any period of time. According to the agreement, the libellant was at liberty to leave the vessel certainly at the end of the first month. The agreement creates a trust for the benefit of the libellant and others, and it cannot be supposed that any of the parties contemplated that the libellant, in case he should leave the vessel at the termination of the month or at any other time, should have the right to proceed against the vessel to enforce a lien for his wages, and so put an end to the adventure. The nature and object of the agreement are inconsistent with the right of lien claimed by the libellant, and that right must be deemed to have been waived by the execution of the new agreement made subsequent to the shipping articles upon which alone his right of action rests. Section 4535 of the Revised Statutes can have no operation here, as this was a foreign vessel and the contract made in a foreign port.

The court can not presume that the statutory law of the dominion of Canada is the same as the United States statutory law declared in section 4535. 1 Greenl. Ev. § 488; Cutler v. Wright, 22 N. Y. 481.

In the absence of any evidence as to the law of the place where the contract was made and to be in a substantial part performed, the law maritime will be presumed to be the law controlling the mariner's contract. By that law it is competent for a mariner by his agreement understandingly made in a proper case to waive his right to proceed against the vessel for his wages.

The libel must be dismissed, and with costs.

COUNTY AUDITOR (LANCASTER v.). See Case No. 8,038.

COUNTY COMMISSIONERS (ASPINWALL v.). See Case No. 593.

COUNTY COMMISSIONERS OF.

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

COUNTY COURT OF HUMPHRIES (SPRAGGINS v.). See Case No. 13,246.

COUNTY COURT OF LINCOLN COUNTY (UNITED STATES v.). See Case No. 15,-503.

COUNTY COURT OF OUACHITA COUNTY. (UNITED STATES v.). See Case No. 14,-876.

COUNTY COURT OF VERNON COUNTY. (UNITED STATES v.). See Case No. 14,-877.

Case No. 3,281.

COUNTY JUDGES OF VIRGINIA.

[3 Hughes, 576.]

[See Append. Fed. Cas.]

COUNTY OF.

[Note. Cases cited under this title will be found arranged in alphabetical order under the names of the counties; e. g. "County of Muscatine v. Mississippi & M. R. Co. See Muscatine v. Mississippi & M. R. Co."]

Case No. 3,282.

COURCIER v. RITTER.

[4 Wash. C. C. 549;[1] 1 Am. Lead. Cas. 687.]

Circuit Court, E. D. Pennsylvania. Oct. Term, 1825.

PRINCIPAL AND AGENT—RATIFICATION.

1. General rule as to the duty of an agent in obeying the orders of his principal.

2. A merchant of Philadelphia sends a cargo of coffee to his correspondent at Bourdeaux, and writes as follows: "Make sale of the coffee immediately on arrival, and forward the returns in the articles mentioned below, by the same vessel." It was the duty of the agent to sell immediately on arrival, no matter at what loss, if he could; or as soon as he could. He had no right to exercise any discretion.

[Followed in Washington Fire & Marine Ins. Co. v. Chesebro, 35 Fed. 478.]

3. If the agent disobeys his orders, and makes a full and candid statement of all the facts on which his judgment was exercised to his principal, and the latter makes no objection to his conduct, or is silent respecting it, this amounts to a recognition of it, and will excuse the agent.

[Cited in Le Roy v. Beard, 8 How. (49 U. S.) 468; Norris v. Cook, Case No. 10,305.]

4. In the same case, the other part of the order was complied with; the agent sending the return cargo ordered, by the same vessel. The acceptance of that cargo by the principal, is no ratification of the agent's conduct, in not selling as soon as he could.

In October, 1812, the defendant, a merchant of Philadelphia, consigned to the plaintiff, a merchant of Bourdeaux, forty bags of coffee, weighing betwen five and six thousand pounds, which were accompanied by a letter of advice, apprizing him of the consignment, and containing the following order, viz. "You will please to make sale of the coffee immediately on arrival, and forward the returns in the articles undermen-

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

tioned, by the same schooner." The vessel was compelled to put in at Bayonne, where she arrived in December of that year, but was not permitted to land her cargo until the 24th of March, 1813, when the coffee was placed in entrepot. On the 9th of February, 1813, the plaintiff wrote to the defendant, announcing the arrival of the vessel at Bayonne, and stating that the times were very dull; that the cargo could not then be landed, but that he should ship him by the vessel, a return cargo as ordered; and concluding with assurances that he should use his best endeavours to obtain an advantageous sale of his coffee. On the 28th of April, 1813, he again wrote to the defendant as follows: "I have not been able yet to procure a sale for your coffee, but no exertions will be wanted to avail myself of the first favourable change in the market. Circumstances are not favourable at the present moment, and nothing but very dry and white Havanna sugars can command any sales." The plaintiff did not again address the defendant until the 21st of May, 1815, when he wrote to him and enclosed an account of sales, by which it appeared that the coffee had brought only one franc, seventeen centimes a pound, which made a considerable balance against the defendant, for which this action was brought.

For the plaintiff, it was contended: (1) That the operations of the hostile armies to the north, and in the Peninsula, during the year 1813, and down to the restoration of the Bourbons, produced a state of things which could not be known to, or anticipated by the defendant in October, 1812, and so reduced the price of all colonial produce in France, that had the plaintiff obeyed literally the order contained in the defendant's letter of October, 1812, he would have subjected his correspondent to a very considerable loss. That this was therefore a case where a consignee is justified in departing from the strictness of his instructions, and in exercising a discretion with an honest intention to promote the interest of his employer; and if he should be mistaken in his judgment, whereby a loss happens, it ought not to fall on the agent. 4 Binn. 361. (2) That if the law be otherwise, still, by accepting the return cargo, which was procured by an advance made by the plaintiff, and was not purchased with the proceeds of the outward cargo, and by not promptly objecting to the plaintiff's alleged violation of his orders, of which the letter of the 28th of April informed him, the defendant ratified what was done. 1 Ves. Sr. 509; 2 Term R. 188; 1 Emerig. Ins. 144, 145; 12 Johns. 300; 3 Cow. 281; 1 Yeates, 487.

The counsel for the defendant contended: (1) That the order being positive, nothing could excuse a violation of it but an inability to sell; the contrary of which is proved by the evidence. (2) The letter of the 28th of April, stating an inability to sell, disclosed no violation of the order; and consequently the silence of the defendant could not be a tacit ratification of an act of disobedience not stated by the plaintiff. The parol evidence given in the cause will be noticed in the charge.

Chauncey & Binney, for plaintiff.

Mr. Bradford and J. Sergeant, for defendant.

WASHINGTON, Circuit Justice. There are two questions for the consideration of the jury. (1) Were the defendant's orders disobeyed; and if they were, does the plaintiff stand excused by the circumstances which his counsel have urged in his favor? (2) If this point be against him, has the defendant, by his conduct, discharged him from the legal consequences of his disobedience?

1. The order contained in the letter of instruction which accompanied the coffee consisted of two parts: (1) To sell the coffee immediately on arrival; and (2) with the proceeds, to purchase a return cargo, to be forwarded by the same vessel. It will be necessary to keep in mind these parts of the order, when we come to the examination of the second question. The obvious meaning of the first part is: sell immediately on arrival, if you can, or as soon as you can. This results from the consideration that no person can be supposed to be so absurd as to require another to do what is impossible, nor can the other be supposed to contract to do it. The law contemplates no such case, and consequently makes no provision for it, otherwise than to excuse the party for the breach of a contract, the performance of which, circumstances have rendered impossible. Questions between principal and agent frequently occur in courts of justice, as to the construction of the orders which are alleged to have been violated, whether they are positive and unqualified, or leave a discretion with the agent. If they are so ambiguous that two constructions may fairly be given to them, every principle of justice demands that the want of precision in the writer should fix the loss, if any, upon him, rather than upon his correspondent. If the order leaves him a discretion, the law requires of him nothing farther than the exercise of a sound, honest judgment. But if the order be free from ambiguity; is positive, and unqualified; it must be rigidly obeyed, if it be practicable; and no motive connected with the interest of the principal, however honestly entertained, or however wisely adopted, can excuse a breach of it. This is a general and well established principle of law, to which I am aware of no exception.

It has been argued for the plaintiff, that no man can be supposed to act so absurdly as to mean that his property should be sacrificed, or even sold at a loss by his agents; and therefore, that the most positive order should be so construed as to give a direction where such a consequence, resulting from circumstances not known or contemplated by

the principal, would attend a strict performance of the order. But were this argument to receive the sanction of the court, it would be highly mischievous, by confounding all distinction between positive and discretionary powers, and thus unsettling well known and established principles of law. It would be particularly so to commerce, which cannot well be transacted but by the instrumentality of agents. Risk of profit or loss in foreign markets, is the inseparable attendant of the trade which is carried on with them; and yet no merchant in the possession of his reason ever did anticipate the incurring of the latter, much less the sacrifice of the articles consigned to his agent for sale there. But he knows that war, political occurrences, and unexpected glut of the foreign market with the articles on which he calculates to make a profit, as well as other causes, equally unexpected, may intervene to frustrate all his calculations. He may, from those considerations, deem it prudent to confer on his agent an unlimited, or a qualified discretion. But if he determine to rely solely on his own judgment, and to exclude all discretion in his agent; to sanction a latitude of action in the latter, beyond the rigid commands of his orders, would be to declare, what no person will attempt to maintain, that there is no intelligible difference between limited and unlimited powers. The principal could never be certain when he had given a positive order, and the agent could never know when he might, with safety to himself, exercise a discretion, and to what extent; since the circumstances of the different cases on which his judgment is to be employed, to find out when he may, and when he may not depart from his orders, will generally be various, and therefore always embarrassing. But so long as he is held to a strict compliance with an order plainly expressed, the principal can never complain, nor can the agent suffer; be the consequences to the former what they may. It has been observed that a strict compliance with the order in this case could not be observed, as the vessel arrived at Bayonne instead of Bourdeaux, and no sale could be made before the cargo was landed. The answer to the first part of the argument is, that the consignment was accepted by the plaintiff, after he knew of her arrival at the former port; and as to the second, the order was not disobeyed, if no sale could be made until the coffee was landed. The case of Dusar v. Perit, 4 Bin. 361, which the plaintiff's counsel supposed afforded an instance of an exception from the general rule which we have laid down, seems to us rather to illustrate and confirm it. In that case, the supercargo was authorised to sell the vessel and cargo at Havanna, at a certain price for each. He was compelled by misfortune experienced on the voyage to put in there and to unload, for the purpose of having the vessel hove down. Whilst in this situation, the limited price for the vessel was offered and accepted; and the market for the flour promised to equal that at which his instructions restricted him, and at which he actually sold a part; but before the sales of the whole cargo were completed, the market fell, and he was compelled to take, for the residue of the cargo, less than the limited price. As to that part of the cargo, the sale was a matter of uncontrollable necessity; since having, in compliance with his order, sold the vessel, and having no authority to purchase, or to hire another vessel, it was impossible to comply with his orders, in case the prescribed price could not be obtained, to proceed to another market. A strict compliance with the orders therefore, became impracticable.

The only question for the jury to decide on this point is, whether the order to sell immediately on arrival, was practicable? It is clear that it was not so until the coffee was landed. Was it then practicable? This is a question for you to decide upon the evidence. Two of the witnesses examined by the plaintiff, have deposed that the state of the market for all colonial produce, during the year 1813, was bad, and that the plan of holding up these articles was generally adopted by the merchants of Bourdeaux. One of them states, that during that year, sales were impossible. The other deposes, that till July, 1813, sales were made in Bourdeaux, but that after that month the price was nominal, there being no purchasers. The clerk of the plaintiff swears, that sales of coffee could not be made at Bayonne in that year; for which reason the plaintiff was unable to dispose of that consigned to him by the defendant. A fourth witness has sworn nearly to the same effect; and all of them agree, that the plaintiff adopted the same conduct in relation to his brother's coffee, as he did in the instance now under consideration; and that other merchants observed a similar policy, from a view to the interest of their employers. Upon this latter part of the evidence, it may be proper to observe, that it might have been of material importance, if discretionary powers had been confided to the plaintiff; but it can have no weight in a case like the present, where the order to sell immediately was imperative. On the other side, the captain of the vessel has deposed, that he had about the same quantity on board with that shipped by the defendant, which he sold at Bayonne, whilst it lay in entrepot, in two parcels, one for four francs twenty-five centimes per pound, and the other for four francs fifteen centimes per pound. But his officers were unable to dispose of the quantity which they took out. Two other witnesses, merchants of Bayonne, have deposed, that this article sold there from March to May, 1813, at from four francs twenty centimes to four francs forty centimes, and in June, at from four francs ten centimes to four francs twenty centimes; and that sales

at those prices were easily effected, both publicly and privately, during those months. If, upon this evidence, and the principle of law which has been stated, the jury should be of opinion that the plaintiff is chargeable with a breach of orders; the remaining question is, has the defendant by his conduct discharged him from the legal consequences of his disobedience? The plaintiff's counsel have very properly insisted, that, if the principal, being informed by his agent of his deviation from his orders, make no objection to his conduct, the law construes his silence into a tacit recognition of the act or omission, against which he will not be permitted afterwards to complain. The reason is obvious. He shall not, by his silence, place his agent in the predicament of losing all the gain which may result from his well intended disobedience, and yet be exposed to sustain the loss which a mistaken judgment, or unforeseen circumstances, may produce. But to entitle the agent to the benefit of this principle of law, it is incumbent upon him to act with the utmost good faith, by making to his employer a candid disclosure of his conduct, and of the causes which influenced it, in order that the latter may have the means of judging in respect to the course which it becomes him to adopt. The question then is, has such a disclosure been made by the plaintiff in this case? His counsel endeavour to excuse him upon the ground that political events, unknown to and unexpected by the defendant, had so depressed the price of all colonial produce in France, that sales could not be made of the coffee in question, after its arrival and being landed, without subjecting their principal to a heavy loss, and on that account he was justified in disregarding the strict injunctions of the order to sell immediately. But did their client make such a statement in his letter to the defendant of the 28th of April, 1813? This is its language: "I have not been able yet to procure a sale for your coffee, but no exertions will be wanted to avail myself of the first favorable change in the market. Circumstances are not favorable at the present moment, and nothing but very dry and white Havanna sugars will command any sales." He does not say that he has declined selling on account of the low price of coffee, which would subject his correspondent to a loss—but, that the sale of it is impracticable,—and that no colonial produce will command any sales except a particular kind of sugars. He discloses no breach of orders whatever, if the fact was that no sales could be made; and consequently the defendant's silence had no known violation of duty to recognize or to ratify. He had a right to conclude that, if no sales could then be made, yet, that regarding the original order, the plaintiff would sell as soon as it should be in his power to do so. No further communication was made to the defendant till March, 1815, when the letter, covering the account of sales, was written. If, then, the jury should be of opinion, upon the evidence, that sales could have been effected at the time the letter of April was written, the silence of the defendant does not amount to a ratification of the plaintiff's conduct in not selling.

But it has been further insisted for the plaintiff, that the defendant, by his acceptance of the return cargo, although it was not purchased with the proceeds of the coffee, amounted to a dispensation from a strict compliance with the defendant's order. The court is of a different opinion. I have before observed, that that order consisted of two parts. One of them I have just disposed of; the other was, to purchase a return cargo with the proceeds of the coffee. This was not done, and consequently, the defendant might have refused to take that cargo to himself, or he might have received and sold it for his own security, but as the plaintiff's agent. But having chosen to pursue a different course, he cannot now, nor does he complain of a breach of that part of his order which pointed out no fund with which this cargo was to be purchased. But this has nothing to do with that part of the order which directed the plaintiff to sell the coffee immediately on its arrival. The whole cause then turns upon the question of fact, whether it was practicable to sell the coffee at all, at or after the time it was landed in 1813? If it was, the loss must be borne by the plaintiff.

The jury found for the plaintiff $443 damages, being about the balance claimed by the counsel in the event of his being considered as having broken his orders.

Case No. 3,283.

The COURIER.

[1 Adm. Rec. 287.]

Superior Court, S. D. Florida. Feb. 27, 1836.

SALVAGE—COMPENSATION.

[1. Standing by a vessel in such a perilous position as to excite apprehension for her safety, and relieving her of a part of her cargo, is a salvage service, although the assistance rendered might not have been actually necessary.]

[2. Such a service should be compensated because the presence of the salving vessel stimulated those on board the one in danger to exert themselves to preserve the vessel and cargo, and prevented the attention of the crew from becoming distracted from such preservation by fears of their personal safety.]

[3. The vessel and cargo being worth upwards of $38,000, the salvors should be allowed the sum of a little over 6 per cent. of the value of the property relieved.]

[Cited in The Philah, Case No. 11,091a; Pent v. The Ocean Belle, Id. 10,961.]

[In admiralty. Libel by Latham Fitch against the French brig Courier de Vera Cruz and cargo for salvage service.]

A. Gordon, for libellant.

Wm. R. Hackley, for respondent.

WEBB, Judge. This is a libel filed for the recovery of compensation in the nature of salvage for services rendered the French brig La Courier de Vera Cruz, while stranded on the Florida reef. The facts in connection with the transaction are variously stated by the different parties, and the merit of the services rendered seems to be variously estimated by them. One fact, however, is rendered certain; and that is that the brig, laden with a valuable cargo, was ashore on a rocky bottom, and in a condition to excite considerable apprehension on the part of her master and those interested in her preservation. The most valuable portion of her cargo, was taken out and transferred to the vessel of the libellant, and afterwards, by using proper exertions, she was hauled off the rocks, and brought to this port.

On the part of the respondent, it is urged that, had no assistance been afforded them, the crew of the brig, by throwing overboard about twenty tons of logwood, could have relieved her, and saved all the residue of her lading. This may be true, and yet, under a different condition of weather from that which prevailed at the time, or had there been a mistake in this expectation, the vessel and her cargo, without assistance, might have been wholly lost. The services may therefore have been highly important to its preservation. They are not, however, of that character which is imputed to them by the libellant. Still, the fact of their having assistance at hand was, of itself, even though no actual services had been rendered, of much importance. It tended to excite the energies of those who were placed in difficulty, and to stimulate them in the use of those exertions which were essential to the preservation of the property, instead of distracting the attention of the crew by an inquiry into the reasons of personal safety.

The brig and cargo are estimated to be worth upwards of thirty-eight thousand dollars, the whole of which was involved in difficulty and peril, and have been relieved from that difficulty and danger by the aid of the libellant, and for which the court conceives he is entitled to a liberal reward. Two thousand five hundred dollars will be but little over six per centum upon the value of the property relieved, and will not, in the opinion of this court, be more than a fair compensation for the service rendered. Wherefore, it is considered, adjudged, and decreed by the court that the marshal pay into the registry, out of the money levied on in this case, the sum of two thousand five hundred dollars, and a sufficient sum to pay the costs of this suit, and that he then restore the said brig and the residue of her cargo to Mr. Juan Baptiste Dolhaborth, the master, for and on account of all concerned and interested therein. And it is further ordered and decreed that the clerk of this court pay over the said sum of two thousand five hundred dollars to the libellant, in full for the services rendered in this case, and the costs to the parties entitled to the same.

COURSAULT (DUTILH v.). See Case No. 4,206.

COURSE v. JOHNSON. See Case No. 3,288.

Case No. 3,284.

In re COURT et al.

[17 N. B. R. 555.][1]

District Court, S. D. New York. May 3, 1878.

MOTION BY PETITIONER TO SET ASIDE ADJUDICATION IN BANKRUPTCY.

C. joined in a voluntary petition with his partners and participated actively in the proceedings. After the lapse of about five months he moved to set aside the adjudication on the ground that he was induced to join in the petition by fraudulent misrepresentations of his copartners and the attorney who prepared the petition and schedules, that the firm was not in fact insolvent and that the proceedings were carried on in the interest of his copartners for the purpose of depriving him of his property. *Held*, that, upon the bare possibility that C. might, against all his laches and against all his acts of acquiescence, prove the fraud alleged, substantial justice does not require that the creditors whose rights have become fixed through his voluntary acts should be subjected to the delay and expense incident to such an investigation.

[Cited in Re Lalor, Case No. 8,001; Re Meade, Case No. 9,370.]

[In the matter of J. W. Court, John C. Barlow, and Robert A. Rutter, bankrupts.]

CHOATE, District Judge. Motion by one of the bankrupts, J. W. Court, to set aside the adjudication on the ground that he was induced to join in the petition for an adjudication by fraudulent misrepresentations of his copartners, Barlow and Rutter, and the attorney who acted for them and him in preparing the petition and schedules, and that the proceedings are in fact carried on in the interest of Barlow and Rutter, for the purpose of depriving him of his property, to enable them to have it bought up in their interest, and that the firm was not in fact insolvent. Court, Barlow, and Rutter constituted the firm of J. W. Court & Co., and on the 13th of November, 1877, on their own petition they were adjudicated bankrupts. Court joined in the petition and signed and verified the schedules. This motion is made upon the affidavit of Court, which alleges in substance the fraud as above stated and the actual solvency of the firm and that a large part of the debts of the firm had been bought up by or in the interest of his copartners, and that the remaining creditors of the firm as well as his individual creditors are will-

[1] [Reprinted by permission.]

ing to release him. On this affidavit an order to show cause was granted with a temporary stay of proceedings in the case. Notice of motion has been served on the assignee and the creditors. The assignee alone appears to oppose. The opposing affidavits of the attorney by whom the original papers were prepared and of the copartners Barlow and Rutter deny the allegations of fraud and misrepresentation. But without going into disputed questions of this character, I am of opinion that enough appears upon the record here, which is not disputed, to make it evident that the proceedings should not be set aside.

After the adjudication, the first meeting of the creditors was held. Court appeared at that meeting and participated in its proceedings. An assignee was chosen; Court afterwards made a motion to set aside the election of the assignee, which motion was heard and denied. He was also examined as one of the bankrupts and was represented by counsel other than the attorney who prepared the original papers in the case. Upon his examination he swore that he had no knowledge whatever as to the value of the stock and machinery belonging to the firm, and yet his own affidavit to their value is now relied on so far as that value is important on the question of the solvency of the firm, as the only evidence upon which the court can rely. A bid having been made for the property of the firm at private sale, a reference to the register has been ordered to inquire into the expediency of accepting the bid. Court attended the reference and was examined as to value of the property. He swore that the amount bid, two thousand and eighty-five dollars, was its full value and ought to be accepted. Afterwards a higher bid was made by another person, and the bid of the party who offered two thousand and eighty-five dollars was increased and these two bidders continued to bid against each other until the second bidder reached three thousand two hundred dollars, where the matter now rests. It is pretty evident that the original bid was really in the interest of Court, and the other bidder was acting in the interest of his copartners, and they have each been trying to use the bankruptcy proceedings to get possession of the partnership property. After all these proceedings and the apparently intelligent participation of Court therein he now makes this motion.

The proper expenses and charges of the assignee, who is not charged with participation in the fraud, are up to this time upwards of four hundred dollars.

As to the alleged solvency of the firm, which is an essential element in the case attempted to be made on behalf of Court, his own statements, taken in connection with the evidence he has made against himself on the record in the course of the proceedings, do not show the solvency of the firm, even throwing out the claim of Barton & Co., which he disputes, and the assets of the firm are evidently on his own sworn statements, of little money value.

This motion was made April 11th, 1878. It must be denied on the ground of laches, acquiescence and general failure to make out on the admitted facts an equitable ground for relief. The rights of other parties have intervened, and become fixed through the voluntary acts of Court. The creditors have been interrupted in the exercise of their rights to proceed at law for the collection of their debts. If these proceedings are stayed, to await an inquiry by a reference into the truth of Court's charges of fraud as against his copartners, the creditors besides losing their ordinary remedies at law, will virtually through the delay and expense incident to such an investigation be denied the benefit of what advantages the bankrupt law gives them against their debtors. I do not think that the creditors should be deemed to have acquiesced in the prayer of the moving papers by not appearing. The amounts of their several claims as shown by the schedules are mostly small, and not such as to warrant the employment of counsel to represent them, and they may well have relied on the assignee to bring the principal facts, which indeed appear of record, to the attention of the court, and upon the court to protect them against clearly inequitable applications, and the averments of the moving papers unsupported by other proof are not sufficiently certain or sufficiently authenticated to show either that they have been settled with by the other copartners, or that they are willing to release Court. I do not say that against all the laches of the petitioner and against all his acts of acquiescence he cannot prove the fraud alleged, but I do decide that upon such a bare possibility substantial justice does not require the interruption of the regular proceedings in this case. Motion denied.

COURT (UNITED STATES v.). See Case No. 14,877a.

Case No. 3,285.

COURTNEY v. HUNTER.

[1 Cranch, C. C. 265.][1]

Circuit Court, District of Columbia. Nov. Term, 1805.

JURISDICTION OVER ADMINISTRATOR — STATUTE OF FRAUDS.

1. A defendant, who obtained letters of administration in Fairfax county, before the District of Columbia was separated from it, cannot, in a suit in the district, after its separation, sustain the plea of never administrator.

2. An implied promise is only coextensive with the consideration An implied promise, in con-

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

sideration of assets alone, is a promise as administrator.

Verdict for the plaintiff, subject to the opinion of the court upon the following questions: —1. Whether the defendant, who obtained letters of administration in Fairfax county, before its separation from Virginia, can maintain the plea of "never administrator." 2. Whether it was necessary, under the statute of frauds, that the promise alleged in the 2d count should be in writing. The 1st count was upon the promise of the intestate. The 2d count was that in consideration that the intestate was indebted to the plaintiff, and that the defendant had assets, the defendant promised to pay, &c.

E. J. Lee, for defendant.

1. An administrator in Virginia is not an administrator here, unless he has letters of administration from the orphans' court of this county. Fenwick v. Sears' Adm'r, 1 Cranch [5 U. S.] 259. The defendant might have been sued as executor de son tort. In Virginia he could not be sued as administrator until administration granted. Estates in Alexandria are to be administered as in Maryland, pari passu. If he is bound to pay as administrator, and yet cannot collect the assets, how can he avoid a devastavit? How can he ever plead plene administravit? How can he maintain a counter suit? The 2d count charges the defendant personally, upon his own promise, and the judgment will be de bonis propriis; he cannot be charged upon such a promise to pay out of his own estate, without a note in writing according to the statute of frauds. Rose v. Bowler, 1 H. Bl. 108; Segar v. Atkinson, Id. 102; Lewis v. Lewis, Id. 112, note; Rann v. Hughes, 7 Term R. 350, note; Hawkes v. Saunders, Cowp. 289.

Mr. Youngs, for plaintiff, was stopped by THE COURT on the 2d point. As to the 1st point: If an administrator in Virginia goes into Maryland, is he not liable there? He cannot be sued as executor de son tort, because he had rightful possession of the assets. If sued as administrator in Maryland, he may plead plene administravit according to the laws of Virginia.

THE COURT gave judgment for the plaintiff upon both points. The case of Rann v. Hughes [supra] seems decisive, on the 2d point, that the implied promise can only be coextensive with the consideration. If the consideration be assets merely, the implied promise is a promise as administrator, and the judgment is de bonis testatoris. If the consideration be personal the implied promise is personal, and the judgment de bonis propriis.

COURTNEY (SWOPE v.). See Case No. 13,-703.

Case No. 3,286.

COURTOIS v. CARPENTIER.

[1 Wash. C. C. 376.][1]

Circuit Court, D. Pennsylvania. April Term, 1806.

PROMISSORY NOTE PAYABLE IN MERCHANDISE — LAW OF PLACE—JUDGMENT THEREON — CUSTOM AND USAGE—INTEREST.

1. Action on a note payable in sugar, and given in Guadaloupe, where a particular custom prevails, in relation to the payment of such notes, in sugar.

2. The law of the country, where the contract is made, must govern it; but, as in the courts of the United States, a judgment can only be given in money, no other recovery can be had upon a note for a certain sum of money to be paid in sugar, than for the sum of money mentioned in the note.

[Cited in Taylor v. Carpenter, Case No. 13,-785.]

[See Searight v. Calbraith, 4 Dall. (4 U. S.) 327.]

3. When, by the law or custom of the country where such notes are given, no interest is payable upon them until judgment is obtained upon them; in the courts of the United States, interest before judgment, will not be allowed.

The plaintiff and defendant having been once subjects of the French government, and residents at Point Petre, in Guadaloupe, the defendant gave his note, 12th April, 1793, promising to pay to the order of plaintiff, 7,812 livres, 16 sous, in sugar, as money, value received. The defendant is now a naturalized citizen of the United States. The defence was, that these notes, in the island of Guadaloupe, form a kind of circulating medium; there being very little cash passing between the merchants and planters, or merchant and merchant. That when payment is to be made, or suit brought, three persons are called upon to value the sugar, and say how many pounds of sugar should be delivered, in satisfaction of the sum mentioned in the note: that these sugar notes are always in a state of depreciation, from twenty-five to forty per cent. below cash: that, in 1793 and 1794, it would have been easier to pay 3,000 dollars in sugar, than one in cash: that these notes only bore interest from the time judgment was rendered, or they were registered before a notary. On these facts, which were proved, the defendant insisted, first; that the jury should value the 7,812 livres at the depreciation thus proved; and, secondly, should give no interest.

Mr. Rawle, for plaintiff.
M. Levy, for defendant.

WASHINGTON, Circuit Justice (charging the jury). The laws of the country, where this contract was made, must govern. These notes were payable in Guadaloupe, in sugar, at a valuation. The defendant, being sued

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

here, cannot complain, if his situation is not made worse than it would have been in Guadaloupe. But, as according to our forms of proceeding, (and, as to them, the laws of our country must govern,) a judgment cannot be rendered for sugar; the value in money must be given, which, in effect, is the precise sum stated in the note. For, whether the sugar was worth one livre or seven livres per pound, still, when that sugar is turned again into money, it must come to the same sum. As to the fact of the depreciation of these notes, it should not be considered any more than in rendering judgment on bonds here, which we all know will sell, in some cases, at a considerable discount for cash. As to interest, none should be allowed; because, it is proved, that, at Guadaloupe, they do not carry interest, but from the judgment or registration.

The jury found a verdict for plaintiff.

COURTRIGHT v. CLARK. See Cases Nos. 10,767 and 10,768.

Case No. 3,287.

COUSCHER v. TULAM.

[4 Wash. C. C. 442.][1]

Circuit Court, E. D. Pennsylvania. April Term, 1824.

ACCOUNTING—PROCEDURE ON REFERENCE—REPORT.

1. In an action of account on a reference to auditors, under the judgment quod computet, all articles of account between the parties, incurred since the commencement of the suit, are to be included by the auditors, and the whole transactions between them are to be brought down to the time when they make an end of the account.

2. In this action the report of the auditors, "that the plaintiff has no legal demand against the defendant at present," is not objectionable on the ground that it is uncertain or not final. But it is so, on the ground that they do not state the account, which should always be done on the judgment quod computet.

This was an action of account, which, by the agreement of the attorneys, was referred to auditors named by themselves, to examine the accounts of the parties as under the judgment quod computet, with all the powers and rights that would belong to auditors appointed by the court. The auditors reported, "that after hearing the parties, and examining the vouchers produced, they award that the plaintiff has no legal demand at present against the defendant."

C. J. Ingersoll, for plaintiff.

Mr. Ingraham, for defendant.

WASHINGTON, Circuit Justice, delivered the opinion of the court. This case comes before the court upon a rule to show cause why this report should not be annulled; and the only objection made to it by the plaintiff's counsel is, that it is not final or certain, the non-existence of a legal demand being confined to the period when the report was made. If the report had been general, that the plaintiff had no legal demand against the defendant, it is not denied that it would have been final, and sufficiently certain. But as all articles of account between the parties, incurred since the commencement of the suit, are to be included by the auditors, and the whole to be brought down to the time when they make an end of the account (per Lord Mansfield, 2 Burrows, 1086), it is not perceived what substantial difference there can be between such a report as, it is agreed, would be clear of the objection, and the one under consideration; for if the plaintiff had no legal demand against the defendant at the time the report was made, he could have none at all, of which the auditors could take notice. Should a demand arise subsequent to the report, the plaintiff would not, in the opinion of the court, be barred from prosecuting the same in another action, or by a bill in equity. The only difficulty which the court has felt is, that the report awards that the plaintiff has no legal demand against the defendant, instead of stating the account, which would seem to be the proper course, after a judgment quod computet. But as this was not made a ground for the rule, and was not noticed in argument by the counsel, the court, feeling indisposed to favour this antiquated form of action, when the remedy by a bill in equity might have been adopted, will not set aside the report, or send it back on account of the defect which has been suggested. If the auditors conducted themselves improperly, the remedy of the party aggrieved was to bring the matter before the court, whilst the auditors were acting on it. The rule must be discharged.

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

COUSE (BIXBY v.). See Case No. 1,451.

Case No. 3,288.

COUSE et al. v. JOHNSON et al.

[4 Ban. & A. 501;[1] 16 O. G. 719; Merw. Pat. Inv. 363.]

Circuit Court, W. D. Pennsylvania. Sept. Term, 1879.

PATENTS—EXPANSION OF CLAIM—PATENTABLE INVENTION.

1. The patentee's exclusive right is enforcible only within the limits of his own definition of his invention. What he has not distinctly claimed, much more what he has not claimed at all, cannot be injected into his claims, even to save the patent.

[Cited in Delaware Coal & Ice Co. v. Packer, 1 Fed. 852.]

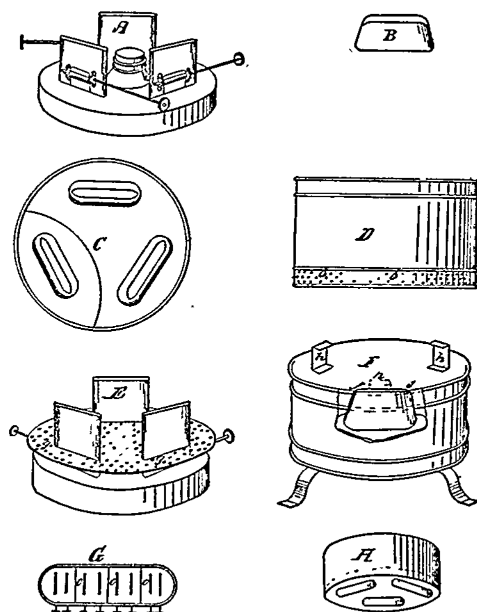
[1] [Reported by Hubert A. Banning, Esq., and Henry Arden, Esq., and here reprinted by permission.]

2. The application of old mechanical devices, without material change, to a use in which they were not before employed, but which was known and had been practised, does not constitute a patentable invention.

[Cited in Brown Manuf'g Co. v. David Bradley Manuf'g Co., 51 Fed. 227.]

3. It is not invention to make the legs of a stove long enough to allow a lamp to be placed under it, without touching it.

[This was a bill in equity by Lucius H. Couse and others against Grove H. Johnson and others to restrain the alleged infringement of letters patent No. 45,957, granted to W. B. Billings, January 17, 1865.]



Sturgeon & Hallock and B. F. Lee, for complainants.

George S. Prindle and Bakewell & Kerr, for defendants.

McKENNAN, Circuit Judge. I am unable to agree with the ingenious counsel of the complainants in his construction of the principal claims of the patent in controversy. "Nebulous" as they are, they ought not to be expanded constructively beyond the limitations which the patentee has imposed upon them, so as to cover subsequent improvements in an art in which the invention claimed was, at most, only a step in advance. The patentee's exclusive right is enforcible only within the limits of his own definition of it. What he has, then, not distinctly claimed, much more what he has not claimed at all, cannot be injected into his claims, even though that may be necessary to save his patent.

The first claim is for "the use and adaptation of the body or sides of the stove or range D to serve as and perform the office of a flue or chimney over the lamp or oil-holder A, substantially as described, and for the purposes set forth." It is urged that this is to be regarded as a claim for a combination of three elements, to wit: the parts of the stove or range D above the air-guide diaphragm, with its elongated air-guides conforming to the wick-tubes, and the lamp. Whether the specification might warrant such a claim, it is not necessary to consider, but such is not the import of the claim, as the patentee has chosen to construct and limit it. It has exclusive reference to the cylinder to be placed on the top of the lamp, and to its adaptation to a single defined purpose, viz., to perform the office of a chimney. When this is done, the object contemplated by the claim is completely fulfilled, and no other part of the invention, which does not necessarily pertain to the special office stated in the claim, can be considered as embraced in it. Now, the functions performed by a flue or chimney over a lamp in an oil-stove are to create a draft of air to carry off the products of combustion and to direct the heat to the top of the chimney. All these functions are exclusively performed by the cylinder described in the patent, and hence no other device can be properly included in the claim. Now, the employment of a chimney over a lamp filled with kerosene oil and other combustible fluids, and for all the purposes indicated in this claim, is not new. It is unnecessary to analyze the numerous exhibits in the case, or to refer to them. It is sufficient to say, that it is shown in the patents of Fish, of Eddy, and of Clinton, and in the Dietz lamp, all of which antedate the plaintiffs' patent, and, therefore, anticipate this claim.

The second claim is for "the attaching of one or more air guides, cones, or deflectors in the diaphragm C, and the adjustment of the same in the stove or range F, substantially as described, and for the purposes set forth." The following clause is all that the specification contains touching this claim: "The device for guiding the air into the flame, and to be placed over the wick-tubes, is shown in drawing B. These air-guides I fasten into a diaphragm about one fourth of an inch larger in diameter than the lamp A. The relative position of the air-guides in the diaphragm should be the same as that of the wick-tubes in the lamp A." [See drawing C.][2] Drawing B represents an air-guide of oblong shape, and nowhere else in the patent is there any specific indication of its intended form. The claim is not limited to an air-guide of this form, and the specification does not assign any peculiar merit, or claim any new result, as the product of its conformation. No particular form of air-guide, then, can be considered as an essential part of the invention. Barry v. Gugenheim [Case No. 1,061]. The attaching of one or more air-guides to the diaphragm, and their adjustment in the stove, are the only features of the alleged invention claimed. How the air-guides are to be attached, the specification does not direct, oth-

[2] [From 16 O. G. 719.]

erwise than that they are to be "fastened into the diaphragm." They are to be adjusted with reference to the location of the wick-tubes, over which they must be placed, so that the corners of the latter will be on a level with the lowest point in the slot or mouth of the air-guides.

It is not saying too much to affirm that the subject of this claim is of, at least, doubtful patentability, and that, in view of the vagueness of the specification, the patentee cannot make a valid claim to it; but, in consideration of the state of the art, I am satisfied that the matter claimed is not novel. It is embodied in several of the devices exhibited in the defendants' proofs, which are prior in date to the complainants' patent. Nor is the effect of the exhibits upon any of the claims of this patent averted by the fact that the patentee proposed to use his device exclusively as a stove and to employ kerosene for combustion, while some of the exhibits were intended for use as illuminating lamps in which alcohol or other combustible fluids were to be burned. The use of kerosene oil to produce both heat and light was not new, nor is any new function performed by the devices employed by the patentee to feed the lamp-flame with air, and to promote and govern the escape of the products of combustion. The application of old mechanical devices, without material change, to a use in which they were not employed before, but which was known and had been practised, does not constitute a patentable invention. Bean v. Smallwood [Case No. 1,173].

The third claim is for "the arrangement of the diaphragms C and g, g, thus forming an air-chamber between the oil-holder and stove or range, substantially as described, and for the purposes set forth." Between these diaphragms, a space is left about one-half inch in height. This constitutes a chamber into which the air is admitted through perforations in the lower diaphragm, or in the body of the stove at its lower end, and the object is to interrupt the radiation of heat from the burners to the oil-holder below. An air-chamber or receptacle for air around the wick-tubes, and below the burner, is an indispensable adjunct to every petroleum-burning lamp, to supply the air needed for combustion. Hence it is found in most of the exhibits produced in evidence, and, doubtless, its contemplated use was as a reservoir of air to supply the burners; but, at the same time, it "prevents the heat from being thrown" upon the oil-holder. It is the same device, operating in the same way, and producing the same result with that embraced in this claim, and, therefore, the complainant cannot appropriate it as his exclusive property.

The fourth claim is for "a non-conductor of heat used as a packing between the stove and the oil-holder, arranged substantially as described and set forth." Referring to the specification, it is plain that this is merely an alternative of the third claim. It expressly says so, and it contemplates only the substitution of a solid non-conductor for the air relied upon in the preceding claim. Its direction is to "fill the space between the diaphragm C and g, g, with a slab of corkwood, or pack it with granulated cork, asbestus, or any similar non-conductor of heat adapted to the purpose, leaving an opening under each of the air-guides for air." It is obvious that water is not the equivalent of either of the non-conductors contemplated, because its use as they are directed to be used, is utterly impracticable. The air-chamber could not be filled with water, because it would not retain any of it, and if the air-chamber could be thus filled, its indispensable use as a means of supplying the burners with air would be effectually precluded. Water, then, contained in an open vessel placed on top of the oil-holder, is not an infringement of this claim, limited as it is; but, even if it were, its use is fully warranted by a similar prior use of it in vessels outside of the air-chamber, as shown in the Clinton and Custer exhibits.

The fifth claim is for "the insulation of the lamp or oil-holder by non-contact with the heater, stove, or range, substantially as described and set forth." In simple phrase, the import of this is, that the body of the stove and the oil-holder are to be made in detached parts, which are not to be placed in contact with each other. "Insulation" is effected by making the legs of the stove long enough to allow the lamp to be placed under it, without touching. The object is to avoid the transmission of heat from the stove to the oil-holder by conduction. To call this invention, is to misapply the term. The means of effecting the desired result are so obvious that it does not require ordinary mechanical skill to devise and apply them. But, in the respondents' stove, it is not sought to avoid contact between the flue or chimney and the oil-holder. To the former are attached not less than three metallic legs, which extend downward and rest upon the top of the oil reservoir. The two parts are thus directly in contact, but the heat transmitted through the legs is intercepted by a body of water which surrounded them in a trough aranged upon the top of the oil-holder. Thus there is no infringement of the claim.

The bill is dismissed at the costs of the complainants.

COUSINERY (UNITED STATES v.). See Case No. 14,878.

COVENTRY CO. (PEARL v.). See Case No. 10,875.

COVER (FARMERS' & MECHANICS' BANK v.). See Case No. 4,653.

Case No. 3,289.

COVERDALE v. The NORTH AMERICA et al.

[Crabbe, 420.] [1]

District Court, E. D. Pennsylvania. March 29, 1841.

POSSESSION OF VESSEL—MOIETY OWNERS.

Where a party, late master, and claiming to be part owner of a vessel, prayed for possession, and, also, for security for her safe return from a voyage projected by the other owner, and the question of title depends on the state of the accounts between the parties, which could not conveniently be settled before the court; an interlocutory order was made, that the vessel be delivered to the libellant, to proceed on the projected voyage, on his own stipulation for her return and submission to the order of the court, and on payment of the costs accrued at the date of the order, but the ultimate liability for those costs to await a final decree.

This was a libel, by [Levi Coverdale[a dissentient part owner, late master, praying for possession of his share of the schooner North America, and for security for her safe return from a voyage projected by the other part owner. The libellant's part ownership was denied by the respondent [Martha Russel, owner of the other moiety of the vessel]. The case came on for a hearing, on the 27th March, 1841, and was argued by:

G. M. Wharton, for libellant.
O. Hopkinson, for respondent.

HOPKINSON, District Judge. In the present state of the evidence in this case, it is impossible to come to any certain or satisfactory conclusion as to the true character of the contract between the parties. That a negotiation was carried on, for the sale of one half part of the vessel, is undoubtedly true, but we have nothing to inform us what the contract was. The evidence consists altogether of loose, casual, and contradictory conversation; from some of which we would infer that the transfer was absolute, and from others, that it was not to be made until the libellant had actually paid his equal share of the first cost of the vessel, and of the expenses that had been incurred for her repair. In this uncertainty the acts of the parties will not only be a safer interpretation of their intentions, but furnish an equitable ground for the final disposition of the case. Of these acts none is so important as the amount of money paid by the libellant in execution of this contract. If he has paid all, or the greater part of the price, as he contends, the presumption will be in his favor; if, on the other hand, he has paid but the small sum insisted upon by the respondent, both the presumption as to the character of the contract, and the equity of the case, would forbid me from putting him into possession of a property for which he has paid so little, when his personal responsibility for the residue does not appear to be such as can be relied upon. This important part of the case depends upon the state of the accounts between the parties. They have not been examined, except in a very general way, by the counsel on either side, nor indeed do they seem to have the means of making an accurate statement. This will require some time, and may be done by the counsel at their offices, with the explanation of the parties. The evidence that has been produced here may be also used. The counsel may either do this separately, and submit their respective statements to the court, or, which will be better, make the examination together, and agree upon the result. In the mean time the vessel must not continue at an expense that is eating her up. The interest of both parties require that this should be avoided. In these circumstances I have come to the conclusion to make no final decree at this time, but an interlocutory order. One of the excellencies of the admiralty jurisdiction is the control the court has over the case, to do justice to the parties, and take care of their interests, sometimes to protect them against themselves. The judge may be mistaken as to what is just and right in the case, but he is seldom prevented from doing what he thinks to be so by any impediment of form.

It is ordered, that the vessel be delivered to the libellant to proceed on the voyage now intended, on giving his own stipulation for the return of the vessel to the port of Philadelphia, there to be placed in the custody and under the order of the court: and that the said vessel be delivered to the libellant, by the marshal of the court, on his paying the costs now accrued on her; but the ultimate liability for these costs shall await the final decree of the court.

[1] [Reported by William H. Crabbe, Esq.]

Case No. 3,290.

COVERSTON v. CONNECTICUT MUT. LIFE INS. CO.

[1 Am. Law T. Rep. (N. S.) 239; 3 Ins. Law J. 113; 4 Bigelow, Ins. Cas. 169.]

Circuit Court, Eighth Circuit. Dec. 10, 1873.

SUICIDE OF INSURED—INSANITY—BURDEN OF PROOF.

1. *Held*, that to make the insurer liable, the mind of the deceased must have been so far deranged that he was incapable of using a rational judgment in regard to the act of self-destruction.

2. *Held*, that if the insured was impelled by an insane impulse which his remaining reason did not enable him to resist, or if his reasoning powers were so far overthrown that he was unable to exercise them on the act he was about to perform, the company is liable.

3. *Held*, that there is no presumption of law that self-destruction arises from insanity, and if, by reason of sickness, or distress of mind, or a desire to provide for his family, the insured takes his own life in the exercise of his usual reasoning faculties, the company is not liable.

[Cited in Wolff v. Connecticut Mut. Life Ins. Co., Case No. 17,929.]

4. *Held*, that the burden of proof lies upon the company to show that the death was caused by suicide, and not by accident.

[This is an action by Louisa Coverston against the Connecticut Mutual Life Insurance Company.]

J. W. Defore and A. W. Benson, for plaintiff.

Mann & Parkinson and Clough & Wheat, for defendant.

DILLON, Circuit Judge. 1. This is an action on a policy issued by the defendant upon the life of the plaintiff's husband for her benefit. That the policy was issued, and that on the 16th day of December, 1871, the assured came to his death, are undisputed facts. Under the admissions in the answer, the plaintiff makes out a prima facie case for a recovery when she shows that she was the wife of the said Henry O. Coverston; that he is dead, and that due notice and satisfactory evidence of the death of the said Henry O. was given by her to the defendant, or its authorized agents, 90 days before this suit was brought. If these facts are shown, then it devolves upon the company to establish its defences pleaded in the answer, or some one of them.

2. The main defence relied on by the company is that the assured procured the policy with intent to cheat and defraud the company by thereafter taking his own life; and that, in pursuance of this purpose, the assured purposely took his own life by shooting himself on the 16th day of December. These defences are denied by the plaintiff.

3. The policy in suit contains a provision, that if the assured "shall die by suicide," the said policy should "become and be null and void."

And the first question to be determined is, did the assured shoot himself accidentally, or did he purposely take his own life by an act which he knew, designed, and intended should have that effect? If, upon the evidence, you are of opinion that the plaintiff's husband accidentally shot himself, this is not suicide, and the defence fails. If, upon the evidence, you find and believe that he intentionally shot himself with the design and purpose to take his own life, this is suicide, and avoids the policy, unless the evidence also establishes to your satisfaction insanity of such a character and degree as will in law prevent the act of suicide from having the effect of avoiding the policy.

4. It is not every kind or degree of insanity which will so far excuse the party taking his own life as to make the company insuring liable. To do this, the act of self-destruction must have been the consequence of insanity and the mind of deceased must have been so far deranged as to have made him incapable of using a rational judgment in regard to the act which he was committing. If he was impelled to the act by an insane impulse, which the reason that was left him did not enable him to resist, or if his reasoning powers were so far overthrown by his mental condition that he could not exercise his reasoning faculties on the act he was about to do, the company is liable. On the other hand, there is no presumption of law, prima facie or otherwise, that self-destruction arises from insanity; and if you believe from the evidence that the deceased, although sick, or distressed in mind, formed the determination to take his own life, because in the exercise of his usual reasoning faculties he preferred death to life, or desired thereby to make a provision for his wife, then the company is not liable, because he died by his own hand within the meaning of the policy.

5. The burden of proof to show that the death of the assured was suicide, and not accidental, is upon the company. If you are satisfied from the the evidence that the assured died by suicide, then the burden to establish the insanity of the kind and degree above mentioned, as being requisite to hold the company, is upon the plaintiff.

Verdict for plaintiff in the amount of $5,543. Defendant now moves for new trial.

COVILLAUD (UNITED STATES v.). See Case No. 14,879.

Case No. 3,291.

COVINGTON v. BURNES.

[1 Dill. 16.][1]

Circuit Court, D. Missouri. 1870.

ASSUMPSIT—PLEA OF PLENE ADMINISTRAVIT.

Where the statute classifies the debts against an estate, directs the order of payment, and only makes an administrator liable to the extent of assets received, the common law plea of plene administravit is no defense, and is not proper in an action against the executor merely seeking to establish the existence of the plaintiff's debt against the estate.

Action by the indorsee against the administrator of the indorser of two promissory notes. The plaintiff demurs to the second and third pleas, each being a plea of plene administravit.

Noble & Hunter and Glover & Shepley, for plaintiff.

Thos. T. Gantt, for defendant.

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

DILLON, Circuit Judge. This is an ordinary action against an administrator upon the contract of indorsement made by his intestate. The plaintiff seeks simply judicially to establish his claim against the estate. The statute of Missouri, in terms, declares that "Any person having a demand against an estate may establish the same by the judgment or decree of some court of record." Gen. St. 1865, p. 502, § 8. The right of the plaintiff to bring this action is clear and undisputed. Payne v. Hook, 7 Wall. [74 U. S.]

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

425. Each of the pleas demurred to is, in form and substance, a common law plea of plene administravit, viz.: that the defendant has now no assets of the decedent, but had, before the commencement of this action, fully administered the same. The demurrer raises the question, whether under the laws of the state of Missouri, the plea of plene administravit is a defense, or presents an issue which it is proper to try in an action of this character, to-wit: an action merely to establish the validity and amount of the debt against the estate.

The modes of the administration of the estates of deceased persons in England and in most of the American states, are in many respects very different. In England, if an administrator suffered a judgment to go against him by default, or failed to plead that he had fully administered, such a judgment was held to be a conclusive admission by the administrator that he had assets sufficient to pay it, and in effect bound the administrator personally, and amounted to an appropriation of such assets to the payment of the judgment. Hence the reason and also the necessity for such a plea.

Not so, however, here. Whether the administrator does or does not defend, he is not bound personally, and there is no judgment de bonis propriis, and no execution against either the goods of the administrator or of the decedent. The judgment simply establishes the debt and orders it to be paid by the administrator in due course of administration. Armstrong v. Cooper, 11 Ill. 560; Laughlin v. McDonald, 1 Mo. 684. Under the laws of Missouri, the administrator is liable only to the extent of assets received, and for waste and mismanagement. The statute classifies the debts against an estate, and directs the mode and order of payment by the administrator. A judgment such as the plaintiff seeks is no evidence that the administrator has assets or that he has been guilty of any default; and any inquiry of that kind in an action such as the present is entirely collateral, and it does seem to us most manifestly improper. For the reasons above given, the courts in other states have held, under statutes like that of Missouri, that a plea of plene administravit is not a good plea. Allen v. Bishop's Ex'rs, 25 Wend. 414; Parker's Ex'rs v. Gainer's Adm'r, 17 Wend. 559; Butler v. Hempstead's Adm'rs, 18 Wend. 666; Judy v. Kelley, 11 Ill. 211. In deciding, in the case last cited, that a plea of plene administravit is no answer to an action brought against an administrator, upon a debt due by his intestate, Treat, C. J., remarks that such a plea "presents no defense. At common law the failure of an administrator to plead want of assets, or that he had fully administered, operated as an admission on his part that he had assets sufficient to satisfy the demand, and he was afterwards estopped from asserting that he had no assets, or that he had fully administered. Hence the necessity of this class of pleas. The case is different under our statute. * * * A judgment against an administrator, only establishes the debt against the estate, to be paid in due course of administration. The creditor is not entitled to execution on his judgment, either against the administrator or the property of the intestate. Welch v. Wallace, 3 Gilman, 490. This change in the common law dispenses with the plea of plene administravit and renders it wholly unnecessary. It is in fact no defense to an action against an administrator." The same reasons obtain in this state. Whether the administrator has or has not assets, has or has not been guilty of waste or mismanagement, are questions which may be hereafter tried, if the plaintiff establishes his debt; but it is premature to try them now and improper to introduce such extraneous issues into this suit. Demurrer sustained.

COWAN v. The JACMEL PACKET. See Case No. 7,154.

Case No. 3,292.

COWAN v. MAGAURAN.

[Wall. Sr. 66.][1]

Circuit Court, D. Pennsylvania. May 20, 1801.

LIMITATIONS OF ACTION—ACKNOWLEDGMENT OF DEBT.

1. A bare acknowledgment of a debt within six years, without any evidence of a promise or intention to pay, will take it out of the statute of limitations.

2. What amounts to an acknowledgment.

This was an action on an inland bill of exchange, brought to April sessions, 1798. The defendant pleaded, 1st. Non assumpsit. 2nd. Payment. 3d. Non assumpsit infra sex annos. A verdict was taken for the plaintiff, subject to the opinion of the court on the following case.

The parties to the bill were, at the time of the transaction, resident in Ireland. On the 24th of July, 1788, one William Gibson drew the bill in question for £180 sterling, in favour of Cowan, the plaintiff, on Magauran, the defendant, payable 31 days after sight. The bill was accepted by Magauran on the 31st July, and on the 4th September following, protested for non-payment. Magauran came over to America some time in the year 1790, and has resided here ever since. Some short time previous to the issuing of the writ, which was on the 9th June, 1797, Robert Coleman having received from Cowan in Ireland a letter of attorney for the purpose, and the bill in question, called on Magauran and showed him the bill, and requested him to pay it. Coleman, in his evidence, stated, that on his showing the bill and demanding payment, Magauran seemed very much dis-

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

tressed, and said, "He never had property of Gibson's in his hands to pay it: that there were other bills on which his name was to a large amount; and even if he was to pay this, he would not be able to pay them; and requested Coleman for these reasons not to put it in suit, as he was going to Philadelphia and would consult his friends, and on his return would call and give an answer." Coleman assented to this. Magauran did call some weeks after on Coleman, but he being from home, Magauran left a note in writing, containing a declaration, "that he had taken advice, and found that by the laws of the country, he was not bound to pay the bill." Magauran did not deny his acceptance, and when he said there was no property of Gibson's in his hands, Coleman told him, "That was immaterial, for as he had accepted it, he must pay." The question was, whether the statute of limitations was avoided by the defendant's confession in this case.

Rawle & Ingersoll, for plaintiff.[2]

Admitting, that at the time of this conversation, the statute of limitations, if relied on by the debtor, would have prevented the recovery, and that the plea under it precluded all inquiry whether the debt existed or not; yet the debtor, by admitting the truth and existence of the debt in 1797, has lost the benefit of the statute. He admitted the debt; it stands revived; and his plea, that he did not promise within six years, is not true, for by acknowledging the existence of the debt, he admits himself bound to pay it—it is a constructive promise. There can be no doubt at this day, that an acknowledgment of the debt takes away the bar of the statute. The history of the adjudications is familiar to every lawyer. Andrews v. Brown (anno 1714) Fin. Prec. 385. In this case it was ruled, 1st, that where a debt was barred, and the debtor insolvent and dead, his executor, who was his brother, a long time after recovering a large sum of money due to the deceased, put out an advertisement in the Gazette, for all persons who had any debts owing from his brother, to come in, and make them out, and they should be paid; upon this general promise, Lord Chancellor King decreed payment of a note belonging to the plaintiff, and interest from the time of the bill brought.

2nd. In this case, it was clearly held, that if a man has a debt due to him by note or a book debt, and has made no demand of it for six years, so that he is barred by the statute; yet if the debtor, after the six years, puts out an advertisement in the Gazette, or any other newspaper, "that all persons having any debts owing to them by him, will apply to such a place, and they shall be paid;" this, (though it were general, and might be intended of legal subsisting debts only,) yet amounts to such an acknowledgment of that debt which was barred, as will revive the right, and bring it out of the statute again.

3d. So if, in that case, the debtor had made his will, and directed that all his debts should be paid, or made any provision for the payment of his debts in general; this likewise would revive such a debt, and bring it out of the statute, so that his executors would be liable to the payment of that debt among the rest.

4th. So if, after the six years, the debtor, upon application for that particular debt, acknowledges and promises payment, (for a bare acknowledgment has been ruled, not sufficient,) this revives the debt and brings it out of the statute; because, as the note itself was at first but an evidence of the debt, so that being barred, this acknowledgment and promise is a new evidence of the debt, and being proved, will maintain an assumpsit for recovery of it; and it was agreed, that a little matter would bring a debt out of the statute, being to restore a right. Thus stood the law in 1714; at which time, it seems, from the fourth resolution in this case of Andrews v. Brown [supra], to have been ruled, that a bare acknowledgment of the debt did not amount to a promise to pay. But in 1760 (Yea v. Fouraker, 2 Burrows, 1099), it was ruled by Mr. Justice Noel, on the circuit, and confirmed by the king's bench, without argument, upon a motion for a new trial, that an acknowledgment of the debt, after the commencement of the action, takes it out of the statute of limitations.

GRIFFITH, Circuit Judge. The point of that determination seems to be, the acknowledgment after the action brought. It did not turn on the question of bare acknowledgment; and as the facts are stated by Buller, in his Nisi Prius (149), it appears the debt was on a note in which the defendant was surety, who, being applied to, said, "You know I had not any of the money myself, but am willing to pay half of it;" though Buller takes no notice of the promise being after the action. See Esp. N. P. 151, S. C. In Trueman v. Fenton (anno 1777), Cowp. 548, it is laid down, that if a man devises his estate for payment of his debts, a court of equity says, (and a court of law, in a case properly before them would say the same,) all debts barred by the statute shall come in, and share the benefit of the devise; because they are due in conscience; and the slightest acknowledgment will revive a promise at law. Lloyd v. Maund (anno 1788) 2 Term R. 760, where Ashhurst, Buller, and Grose, held, that any acknowledgment, even the slightest, was sufficient; and the only question seemed to be, whether the letter written to the attorney, contained "any acknowledgment at all of the existence of

[2] The counsel for the plaintiff intended to submit to the court, as one point of their argument, whether the plaintiff was barred by the statute, he residing beyond sea, and a replication of this kind had been made to the plea of the statute; but they thought it unnecessary, the other point being so strongly in their favor.

the debt;" not whether he promised payment; for that was not the point to be left to the jury, but merely the defendant's admission of the debt. The opinion of the three judges was, that a new trial should be granted, that the jury might decide whether the defendant, by the terms of the letter, did "admit or acknowledge the debt." Baillie v. Lord Inchiquin, 1 Esp. 435. The defendant had assigned his property; a creditor whose debt was of very long standing, applied to him for payment. He, without any express acknowledgment, much less promise, referred him to his trustee. This was held sufficient to take it out of the statute: and Lord Kenyon said, "If the plaintiff give any general evidence of acknowledgment, that it should be taken to apply to the debt in question, and that it should lie on the defendant to explain the promise so made, and show that it applied to some other demand." In this case, as in the former, the only question was, whether the letter amounted to an acknowledgment. Lawrence v. Worrall, Peake, 93. A bill was presented, and the debtor afterwards meeting the creditor, said, "What an extravagant bill you have sent me." Lord Kenyon held this to be an admission that some money was due, and took the debt out of the statute. 2 Bl. Comm. 307, by Christian, in his notes, that any acknowledgment of the existence of a debt takes it out of the statute, and the statute runs only from that time. In Whitcomb v. Whiting, 2 Doug. 652, it was held, in an action against one of several drawers of a joint and several promissory note, that payment of interest and part of the principal by another of the drawers, within six years, was sufficient to take the case out of the statute. Here was no acknowledgment by the party sued, much less a promise to pay; yet the court said, "Payment by one, is payment for all, the one acting virtually as agent for the rest; and, in the same manner, an admission by one, is an admission by all; and the law raises the promise to pay, when the debt is admitted to be due." They insisted that it was now too late to attempt a revolution in the law on this subject; that the constructions of the English judges had been universally received in all the state courts; that it was now the law of the land; and that there was no principle of policy or justice which called for an alteration; that the necessity of an express promise had long since been exploded, and held with the greatest reason, that when a man admits the debt, it would be contrary to the intent of the statute, and not within the mischief, to permit him to plead it in bar of the recovery. They denied that the plea of the statute of itself, admitted a debt; it was a mere allegation that the party did not assume within six years, which was true though he had never assumed; it was only by inference, a negative pregnant, that such admission could be assumed; and the acknowledgment of the party that a debt existed, was a very different kind of admission of it, from that which could be collected from the common plea of nil debet infra sex annos.

Upon the evidence in this case, there is a complete admission of the debt. On the note being shown to the defendant, he appeared disturbed, and said, "he never had property of Gibson's (the drawer) to pay it." This was both admitting the acceptance, and accounting for his non-payment. He said "there were other bills on which his name was to a larger amount, and if he was even to pay this, he would not be able to pay them." He requested Coleman "not to put the note in suit, until he could consult his friends at Philadelphia, when he would give an answer;" his answer was, "that he was informed he was not bound to pay it," &c. From all this, the acknowledgment of the debt as unpaid, was incontrovertible. He did not deny his acceptance, nor pretend payment. The debt being admitted, the law raises the promise to discharge it, and that promise is within six years.

E. Tilghman and Mr. Lewis, for defendant, admitted that later cases went to make an acknowledgment of the debt, sufficient to take the case out of the statute; but that a bare acknowledgment of the original debt or instrument, was evidently not sufficient. It must be an acknowledgment of an existing debt, and made with some view of payment in whole or in part. They contended that the admission or conversation must be taken altogether, and must amount to either, 1st. An express or implied promise to pay; or, 2nd. An express or implied waiver of the statute.

1st. Here was no express promise, nor any implied admission of the demand as due in whole or in part. The defendant assigned his reasons why he ought not to pay, or could not pay; it is no matter whether or not they were available in law; he had a full right, upon any grounds which operated on his own mind as conscientious, to resist the payment, and to say, the law will protect me from defending myself at this time against the demand. The whole conversation amounts to this, "I doubt my liability. I cannot admit the demand. I will not pay until I know whether I shall be obliged. You must wait until I get advised. As soon as I can do this, you shall have my answer." The agent consents to this. His answer was, I will not pay; I am protected by law. This must be taken as the real amount of the acknowledgment in question. Then, 2nd. As to a waiver of the statute, there is nothing like it; on the contrary, he refuses payment; and that, with the express view of pleading a legal bar, if any existed. They contended, that a mere admission of the instrument or debt could never amount to a new promise, or waiver of the statute: that the plea did, in effect, admit the original promise, and relied, not on

payment, but mere length of time, as a bar. The declaration sets out a promise; the plea does not deny it, but asserts that he did not make the promise within six years. What difference, then, whether the debtor says in conversation, I admit the promise, but will not, or am not bound to pay it, or whether he plead it to the action? If the first is an acknowledgment, so is the last. The form of the plea, then, proves that a bare acknowledgment of the debt is no waiver of the statute, but the party may rely on the length of time. Bull. N. P. 148: "I acknowledge the receipt of the money, but the testatrix gave it to me;" this was held not sufficient to oust the statute, for the admission was not made with a view to pay. The defendant had a right in this case, to set up the length of time, to excuse himself from going into proof of the gift, after six years. So in the case at bar, he admits the paper, but says I ought not to pay; and why should he not have the protection of the statute after six years in this case? All the cases cited of acknowledgments, are either where the party admitted something due, or had a view to pay something; or where, though he denied any thing to be due, yet promised or was willing to pay, if the creditor could prove his demand. Cowp. 548: "Prove your debt, and I will pay you; I am ready to account, but nothing is due." 2 Term R. 760: "As to the matters between you and me, they will be rectified." Esp. 435: The creditor applied for payment; Lord Inchiquin says, "Go to my trustee;" this was an admission of the debt and a submission to pay. Peake, 93: "What an extravagant bill you have sent me." The word "extravagant" is relative; it admits something due, and, as Lord Kenyon says, a willingness to pay what was fairly due. In the case before the court, Magauran's conduct at the most, can only be taken to prove him once liable; not a particle of evidence as to present liability, or intention to pay, or to waive any legal protection, or permit an inquiry. They insisted that the policy of limitation was apparent, and that no further relaxation should be indulged, or the statute would become nugatory. 2 Burrows, 961; 2 Atk. 71; 1 Ld. Raym. 389; Salk. 421, 422; 2 Burrows, 957; 1 W. Bl. 287; Id. 355; 3 Term R. 124; Cowp. 215; general dicta on the policy of the statute, and the liberality with which it ought to be enforced.

On the cases which had been cited relative to general words in an advertisement, general expressions in a will, and general trusts for payment of debts, they observed that they were not applicable to the question now before the court; and they considered the law as advanced on those topics, to be very questionable; that Iredell, J., in the case of Barron v. Fell's Ex'rs [unreported], in the circuit court of the United States, after argument, was on the point of overruling the doctrine as relative to a will in which the testator directed his executors to pay his just debts. The determination in Blakeway v. Earl of Strafford [unreported] on a trust in a will, was reversed in the house of lords, and the plea of the statute ordered to stand for an answer.

BASSETT, Circuit Judge. My brethren will hold this matter under advisement; as I am going away, I wish to give my opinion now. I admit that the pleading of the statute is no disparagement to any man. But Lord Holt, when he said that, meant as I do, where the defendant was conscious, "that no debt existed." The policy of the statute was to prevent fraud and perjury, and to protect debtors and their estates from being ruined by stale and satisfied demands. But when fraud or perjury could not arise; when the party who is called upon cannot deny the debt; when he even admits its existence, and, as in this case, assigns a bad reason for nonpayment, namely, not having property of the drawer's in his hands: surely the mischief against which the statute was pointed cannot ensue, by enforcing the action. The law is settled; if a man acknowledge the debt, the law raises the promise.

Afterwards TILGHMAN, Chief Judge, in the absence of Judge BASSETT, after stating the case, delivered his opinion as follows:

In giving my opinion in this case, I hold myself bound by the decisions which have been made respecting the act of limitations. They are too numerous, and of too long standing, to be shaken at this day. But I have no hesitation in declaring that if the point were now to be decided for the first time, I should say, that where the act had once attached, an action could not be supported, without substantial evidence of a new assumption. The principle which has been established, I take to be this, that proof of an acknowledgment of an existing debt, within six years, is sufficient to justify the jury in finding an actual promise. In Whitcomb v. Whiting, 2 Doug. 652, Lord Mansfield lays down the position, "that the law raises the promise to pay, where the debt is admitted to be due." In that case, which was a separate action against one of several drawers of a joint and several note, the only evidence against the defendant, was, a partial payment within six years by one of the other drawers. In Hyleing v. Hastings, Ld. Raym. 421, 422, Holt, C. J., declared it to be the opinion of all the judges of England (except Lechmere) assembled at Serjeant's Inn, "that acknowledgment of a debt within six years, would not of itself amount to a promise, but that it was evidence of a promise." The same doctrine is advanced in 3 Bl. Comm. 307, (notes by Christian). In Lawrence v. Worrall (32 Geo. III.) Peake, 93, the defendant on receiving the plaintiff's bill within six years, only said, "What an extravagant bill you have sent me." There

are other cases cited by the counsel on the argument, which I forbear to repeat, establishing the same principle.

The defendant's counsel made an ingenious position, which, if they could have supported it by authority, would have turned the case in their favor. It was this; that there must not only be evidence of an acknowledgment of an existing debt, but also of an intention to pay it; and in support of this principle they cited Bull. N. P. 148, where the defendant said, "I acknowledge the receipt of the money, but the testatrix gave it to me." This was not sufficient to take the case out of the statute. Certainly it was not; for here was no acknowledgment of a debt: on the contrary, it was an assertion that there never was a debt, but only a gift of money. I think, therefore, that this position is unsupported by any adjudged case, and it is certainly contrary to many of the cases where the statute has been avoided without the defendant's having expressed the most distant intention to pay the money.

Let us now apply the legal principle to the case before us. The defendant said, he never had property of Gibson's; this was no denial of the debt, but only a representation of the hardship of being obliged to pay it. But he went on and said, "that there were other bills on which his name was, and even if he was to pay this, he could not pay all." Now, if this was not an express acknowledgment, it was so very like one, that the jury without straining, might have construed it to amount to one. It is true, the defendant did afterwards request time to give an answer, and was indulged with it. But this cannot take off the force of a prior acknowledgment made in the same conversation. You shall take a man's confession all together; but if he once acknowledges the debt, it is sufficient; and his afterwards asking time to give an answer, will not destroy the evidence arising from the acknowledgment. Upon the whole I am of opinion, that consistently with established principles, the jury might have found for the plaintiff. Judgment for the plaintiff.

Case No. 3,293.

COWDREY v. RAILROAD CO. et al.

[1 Woods, 331.][1]

Circuit Court, E. D. Texas. May Term, 1870.

RECEIVER OF RAILROAD—ACCOUNTING—MASTER'S REPORT — EXCEPTIONS — COMPENSATION — DISCHARGE FOR MISCONDUCT.

1. When the accounts of a receiver are referred to a master for report, no exceptions thereto will be considered by the court unless first made before the master.

[Cited in Whitney v. City of New Orleans, 54 Fed. 617, 4 C. C. A. 521.]

2. This rule would not, however, deter the court from directing an account to be reformed which contained manifest errors, or clearly improper charges.

[Cited in Cutting v. Florida Ry. & Nav. Co., 48 Fed. 508.]

3. A receiver is an officer of the court as well as the master, and states his own accounts and submits them to the master for inspection, under the order of the court, the master acting in place of the court in a judicial rather than ministerial capacity.

4. Exceptions to the master's report do not lie in such cases. Nevertheless, if the master adopt any erroneous principle in allowing a receiver's account, the court, on petition, will refer the matter back to him for correction.

5. When a report upon a receiver's account is submitted by a master, the duty of the court consists in reviewing the principles and rules adopted by the master in allowing the accounts, rather than in examining the items in detail, or the evidence on which they are founded.

[Cited in Strang v. Montgomery & E. R. Co., Case No. 13,523.]

6. All outlays of the receiver of a railroad intrusted with its management and operation, made in good faith, in the ordinary course, with a view to advance and promote the business of the road and make it profitable and successful, are fairly within the line of the discretion necessarily allowed him.

7. In extraordinary cases, involving a large outlay of money, the receiver should always apply to the court in advance for authority to make the purchase or improvement proposed.

8. Except in extraordinary cases, the submission by the receiver, at frequent intervals, of his accounts to the master, giving the latter an opportunity to disallow whatever he may not approve, will be regarded as a sufficient reference to the court for its ratification of the receiver's proceedings.

9. The receiver's expenses for counsel and witness fees, incurred in resisting a motion for his removal, allowed as a charge against the trust fund when it appeared that he had acted in good faith and with integrity of purpose, and when it further appeared that there were apparent grounds for the motion.

10. The question of allowance to the receiver for his services is one that properly belongs to the master's office, and not to the court.

11. When there is nothing in the administration of the trust to convict the receiver of want of integrity or good faith, want of foresight in regard to the future developments of business is no reason for denying him compensation or reducing its amount, especially when the trust has been administered with reasonable success.

12. What another, even competent, person would have done the work for, is not the proper rule in fixing the compensation of a receiver. It is to be graduated somewhat by the duties, and somewhat by the responsibilities of the office.

[Approved in Central Trust Co. v. Wabash, St. L. & P. Ry. Co., 32 Fed. 188.]

13. Defendants, in a suit in equity to foreclose a mortgage on a railroad, agreed with complainants that on giving security in the sum of $350,000, they should have possession of the road and name the receiver, and the bond was given according to this agreement, and one of complainants appointed receiver: *Held*, that defendants could not object to such receiver unless he committed some act of unfaithfulness to his trust, and the court refused a motion to discharge the receiver, the evidence failing to show any want of faithfulness on his part since his appointment.

14. While the principal cause was pending in the supreme court of the United States, the circuit court refused to authorize the receiver to

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

make any radical change in the condition of the railroad property by purchasing the bridge across Galveston bay, or by building or contracting to use a new junction road through the city of Houston.

[There was a decree of foreclosure in] the principal case in this suit. [Each of the parties appealed therefrom to the supreme court. The determination of the appeal] is reported in Galveston R. Co. v. Cowdrey, 11 Wall. [78 U. S.] 459.[2]

The following opinion was delivered at Galveston, in May term, 1870, upon points arising in the management of the property, by a receiver, pending the appeal of the principal cause in the supreme court:

The bill was filed, February 12, 1867, to foreclose three several mortgages, given on the railroad and its franchises. Tipton Walker, Esq., was appointed receiver, and acted as such until October 1, 1869, when, by consent of parties, N. A. Cowdrey, one of the complainants, was appointed, giving security to the amount of $350,000. The first receiver having rendered his accounts, the same were referred to different masters for examination, who reported thereon. Both parties excepted to these reports. The defendants also moved for the dismissal of Cowdrey as receiver. The latter moved for authority to make certain expenditures in the management of the road.

All these matters came up for hearing before Mr. Circuit Justice BRADLEY, when, after much argument and discussion, the following opinion was delivered and the following orders made:

Jer. S. Black and Wm. P. Ballinger, for defendants.

W. G. Hale, for Cowdrey, receiver.

BRADLEY, Circuit Justice. 1. The first exceptions presented, are to the report of Master Hughes, made upon the accounts of Tipton Walker, receiver, for the months of February, March and April, 1867.

The first exception is, that the defendants had no notice of the time and place of proceeding before the master in respect to said accounts. This appears not to be founded in fact. Due notice is shown to have been given to the solicitors of the defendants. None of the exceptions were made or taken before the master. No objection to these accounts appears to have been made before him. It is well settled that unless exceptions are taken before the master, they cannot afterwards be taken before the court. This is required in justice both to the master and to the receiver. To the master, that he may have an opportunity to reconsider his decision; to the receiver, that he may sustain his account (if he can), by additional evidence, or make such explanation as the case may require. This rule, it is true, would not deter the court from directing an account to be reformed which contained manifest errors or plainly improper charges; but such errors or improper charges ought to be clearly shown to exist, and their character as such ought to be evinced by the proofs in the case or by their intrinsic nature. I am not satisfied that any of these exceptions are thus sustained; and therefore feel bound to overrule them.

2. The next exceptions presented are to the report of Master Waul, made upon the accounts of Tipton Walker, receiver, for the consecutive months commencing with May, 1867, and ending with November, 1868. These exceptions are founded upon objections made before the master, and are, therefore, properly taken here—so far as exceptions (properly so called) can be taken to the report of a master on a receiver's accounts. For the books make a distinction between a master's report on a receiver's account and a master's report containing an account taken and stated by himself, or a report upon a matter referred to him for his own investigation and ascertainment. A receiver is an officer of the court as well as a master, and states his own accounts and submits them to a master for inspection under the order of the court; the master acting in place of the court, in a judicial, rather than a ministerial capacity. Strictly speaking, exceptions to his report in such cases do not properly lie, as they do to an account stated by himself, as in the case of executors, administrators, trustees or partners, who are ordered to account before him. Nevertheless, if the master adopt any erroneous principle in allowing a receiver's account, the court, on petition of the proper parties, will refer the matter back to him for correction. The exceptions now presented, if we disregard the form, may be viewed substantially in the light of such a petition. But the distinction should be kept in view. For upon this distinction depends, in considerable degree, the nature of the duty now devolved upon the court. That duty consists in reviewing the principles and rules adopted and followed by the master in allowing the receiver's accounts, rather than in examining the items of the account in detail, or the evidence on which those items are severally founded; the latter duty belonging, more especially, to the province of the master acting in his judicial capacity; analogous to the province and duty of a jury on questions of fact. In this case there are several classes of charges for disbursements made by the receiver, which can be considered in groups, and with reference to which the principles by which the master was guided in allowing the account can be reviewed. The first class which I shall consider embraces the charges for rebatement of freight, being an allowance returned to shippers of cotton, in consideration of securing their business and good will on the road. It is in proof, that this is equiva-

[2] [The supreme court affirmed the decree of the circuit court on the merits in the case referred to.]

lent to the allowance of drawbacks made by many transportation lines in the country; that it is a customary, or at least quite a usual thing; that it was necessary in this case in order to secure business on the railroad, as it had been previously adopted by a competing line; that it actually had the effect of bringing a large amount of business upon the road; and that, without it, the road would not have paid expenses. Whatever objection to these rebatements might be made by the state, or by planters and others who did not obtain like favorable terms, it does not lie in the mouths of stockholders or creditors who reap positive benefits from the arrangement to complain of it. Their doing so is calculated to raise a suspicion that they are solicitous about other interests than those which they have in the prosperity of this road. The court concurs with the master in opinion, that the receiver was justified in adopting the arrangement; and that the exceptions to that class of charges should be disallowed.

The next class of charges relates to the purchase of a truck wagon and a pair of horses and harness, for the delivery of freight in the city of Houston, and the expenses of taking care of and keeping the same. It is in proof that this was also a necessary and profitable outlay for enabling the railroad, by furnishing additional accommodations to customers, to compete with an opposition line. The court concurs with the master in allowing these charges, and disallowing the exceptions thereto. The outlay was fairly within the discretionary powers of the receiver in managing and carrying on the railroad with prudence and economy. The same may be said with regard to drayage and wharfage; and the exceptions in reference thereto will be disallowed. And it may be laid down as a general proposition that all outlays made by the receiver in good faith, in the ordinary course, with a view to advance and promote the business of the road, and to render it profitable and successful are fairly within the line of discretion which is necessarily allowed to a receiver entrusted with the management and operation of a railroad in his hands. His duties, and the discretion with which he is invested are very different from those of a passive receiver, appointed merely to collect and hold moneys due on prior transactions, or rents accruing from houses and lands. And to such outlays in ordinary course, may properly be referred, not only the keeping of the road, buildings and rolling stock, in repair, but also the providing of such additional accommodations, stock and instrumentalities as the necessities of the business may require, always referring to the court, or to the master appointed in that behalf, for advice and authority in any matter of importance, which may involve a considerable outlay of money in lump. And except in extraordinary cases, the submission by the receiver of his accounts to the master at frequent intervals, whereby the latter may ascertain from time to time the character of the expenditures made, and disallow whatever may not meet his approval, will be regarded as a sufficient reference to the court for its ratification of the receiver's proceedings. In extraordinary cases, involving a large outlay of money, the receiver should always apply to the court in advance, and obtain its authority for the purchase or improvement proposed.

With these principles in view, the court has carefully examined the master's report, and the reasons given by him for disallowing the exceptions taken to the receiver's account, as well as the evidence taken in relation thereto, and sees no reason, in the main, to differ from him in the conclusions to which he has arrived. On the contrary, the court feels bound to express its approbation of the apparent carefulness and good judgment with which the master has performed his duty. The exceptions of the defendants to the master's report are, therefore, overruled.

The receiver, on his part, has filed exceptions to the report, because of the master's disallowance of certain charges in the account. The first of these relates to the purchase of a pair of new scales, or balances, for the sum of $463.55. The master disallows this item on the score of improvidence. As these scales were procured in good faith, and for no possible advantage to the receiver himself, and remain amongst the assets and property of the road, I think the charge should have been allowed. This exception to the report is therefore allowed.

The next exception of the receiver relates to the rent paid for offices. It is alleged that the receiver rented more office room than was necessary for his purposes, and the master has deducted two items of $125 each from the amount paid for that purpose. It seems to me, from the evidence of Mr. Hitchcock, and the receiver himself, that the latter was justified, under the circumstances, in the expenditure made by him on this account. This exception is therefore sustained.

The next exception of the receiver relates to the items of $260.65, and $260, for advertising the accommodations of the road in New Orleans. The advertisement contains a favorable reference to Walker, Kent & Co., as proper persons to facilitate the forwarding of freight. For the reasons stated by the master I am satisfied with his decision on these items, and disallow the exception. It is true that the receiver has shown that he was not interested in the firm of Walker, Kent & Co., but the use of his name in the firm, with his consent, made him liable for its obligations, and to that extent he was interested in its success; an advertisement therefore which had for its object, in whole or in part, the promotion of the interests of that firm should not be charged to the fund of which the receiver was a trustee.

The next exception of the receiver relates

to the master's disallowance of interest paid by him for money borrowed of the bank. The master disallowed this interest because, as the accounts appeared before him, the receiver had large balances of money on hand at the time when he made the loans on which the interest in question accrued. But it has since been shown (and I think satisfactorily), in corroboration of what the receiver himself alleged under oath, that these balances were fictitious; that large amounts had been paid out by the receiver for which he had not obtained the proper vouchers when the balances were made up; and that he was obliged to make the loans in question in order to carry on the operations of the road. I am, therefore, satisfied that the disbursements for interest were proper, and that the receiver's exception to the report in reference thereto should be allowed.

The final exception of the receiver relates to the disallowance of his salary. As this subject will be separately discussed I pass it for the present.

The next exceptions are to the report of Edward T. Austin, master, made upon the accounts of said receiver from December, 1868, to September, 1869, inclusive. These exceptions principally relate to charges for rebatement, wharfage and drayage, interest paid for money loaned, certain payments to Mr. Andrews for services rendered, certain incidental expenses relating to the receiver's accounts, and the allowance to be made to him for his services as receiver.

I have carefully examined these exceptions with the master's report and the evidence taken by him, and I concur generally in the results to which he has arrived. Upon the additional evidence taken before him he disallows the exceptions to the payment of interest for money loaned, and I concur in this result. Several accounts have been suspended by him for further direction from the court. These are: First. The charges for moneys paid by way of rebatement on freight. These charges will be allowed, for the reasons before stated. Second. The receiver's expenses, and counsel and witness fees for defending himself against the motion for his removal. These charges amount in the aggregate to $2,902.85. If the receiver gave no occasion for that motion, he was put to unnecessary expense and ought to be reimbursed, either out of the money in his hands or by the defendants who made the motion. The trust fund as well as the receiver, ought not to suffer for an unreasonable and causeless application on the part of the defendants. But was the application of that character? Had the defendants no ground whatever for making the motion they did? Without at this point deciding upon the receiver's faithfulness or unfaithfulness to his trust, it is evident from an inspection of the reports, both of Master Waul and Master Austin, that the accounts of the receiver were all along so complicated and unintelligible, that no satisfactory conclusion could be formed therefrom as to the condition of the trust, or the relative state of the accounts as between the Galveston, Houston & Henderson Railroad Company, and the other parties in interest; of this want of certainty, this confusion of the various accounts, this vagueness as to the condition of the trust, the defendants constantly and repeatedly complained before the masters, until at last Master Austin refused to pass the receiver's accounts until they were rendered in a form calculated to give the information desired, as required by the original order. After this was done a much more satisfactory exhibit was presented. But this was after the application for removal had been made.

I cannot say that the demands of the defendants for a more specific statement of the accounts were unreasonable; nor that the difficulties which they experienced in getting at an explanation of the various items were not calculated, in connection with other things, to raise suspicion as to the faithful management of the receivership. I think that these circumstances are sufficient to exonerate the defendants from the burden of paying the costs and expenses incurred by the receiver. Are they sufficient to cast the burden on the receiver himself? If the receiver acted in good faith, and was ever ready as far as he was able, to make any explanations that were personally required, but was unskillful in the manner of keeping his accounts, he ought not for that cause to be visited with a penalty. It is not every good business man, or engineer, or superintendent, that understands bookkeeping. It requires a peculiar aptitude to state and keep accounts with clearness and accuracy, especially where the transactions are varied, extensive and complicated. I should not feel disposed, therefore, to cast the burden of the expenses referred to on the receiver, personally, unless satisfied that his method of keeping his accounts was adopted for the purpose of producing confusion and covering up the nature of his transactions. I do not see any sufficient evidence that this was the case. On the contrary it seems to have been the endeavor of the receiver to keep regular books and a constant record of his transactions; and for this purpose he has employed competent clerical assistance. But the intrinsic difficulties of the case may well afford some excuse for a defective exhibition of all the aspects of the various receipts and expenditures. If I were satisfied that the receiver was unfaithful to his trust, and did not, according to the best of his ability and understanding, perform the duties thereof, I should feel that I ought to cast the burden of these expenses on him. For that would have furnished good ground for his removal. But I cannot say, from anything which has been developed in the case, that he has not acted with entire integrity of purpose. Some things are undoubtedly susceptible of just

criticism. I refer particularly to his acquiescence in paying out of his own anticipated allowance a stipulated sum to the counsel of the complainants. But it must be remembered that he was in the habit of frequently consulting that counsel and taking his advice and direction. He had a perfect right to do this, although it would have given less cause of dissatisfaction to the defendants had he invariably sought the advice of some attorney entirely disconnected with any of the parties to the suit. On the whole I do not consider the circumstances of these payments to counsel injudicious, as it may have been for the receiver to have thus exposed himself to unfavorable criticism, as indicative in him of any want of fidelity to his trust, or of integrity of purpose. It was undoubtedly a mistake so far as it regarded his relative position towards the different parties in the cause; and was calculated to awaken suspicions, and to destroy confidence in his administration. But being done on his own responsibility, and not charged to the trust, it was not necessarily inconsistent with entire rectitude of intention, as it regards the administration of the trust fund. Besides, this was not one of the grounds on which it was sought to remove the receiver, not having been known to the defendants at the time, and did not therefore enter into the considerations upon which any of the parties were then governed, and the receiver had certainly acted on the supposition that his allowance for services would be more than sufficient to cover any advances thus made by him.

I am disposed, therefore, on the whole, to allow the receiver's expenses in this behalf; and more especially in view of the fact that the charges against him were, by an amicable arrangement, withdrawn, and he thereupon voluntarily surrendered his charge to the court, rather than continue therein to the evident dissatisfaction of one class of the parties interested. This claim will, therefore, be allowed The only other matter suspended by the master was the question of compensation for the receiver's services. This will be the next in order for consideration.

In the matter of compensation to be allowed the receiver.—The question of allowance to the receiver for his services is one that properly belongs to the master's office, and not to the court. In this case especially, the local knowledge possessed by the master with regard to the business habits and compensation for business and professional services in this community would have rendered a decision by him peculiarly valuable. But as it seems to be the desire of the parties that this matter should be decided by the court, and as the order made by Justice Swayne seems to contemplate such a course, the court will endeavor to discharge the duty as well as the means it has before it for arriving at a proper conclusion will admit.

In the first place it is claimed on the part of the receiver that this question is concluded by the report of the first master, Hughes, and the acquiescence of the defendants. I do not so regard it. It is sufficient to say that, by the subsequent decision of the court, reserving the further consideration of the subject, and requiring evidence to be taken upon it, the question is now open, if it was ever regarded as settled. But the evidence does not satisfy me that the defendants did ever acquiesce in the allowance of $15,000 a year. The receiver probably supposed they did, or at least supposed that the decision of Master Hughes was definitive, not being objected to by the defendants until so late as the 24th of March, 1868. He undoubtedly for a long time acted under that impression, and this is one reason why his payments to Mr. Hale are to be regarded as a personal matter of his own, not intended to affect the trust fund for which he was accountable. But whatever his impression may have been, neither the parties nor the court were committed to any specific allowance. For the receiver, it is insisted that the court confirmed Master Hughes' report, and that this confirmation was for a long period undisturbed, so that the receiver was misled. Besides, the fact that the confirmation of a master's report on receiver's accounts is not required, and therefore has no judicial effect, it is obvious to remark that all this was for the consideration of the court upon the hearing of the exceptions to Master Hughes' supplemental report relating to the receiver's compensation, and cannot have any influence upon the question as it now stands.

By the order of Justice Swayne, it is made an open question, and must be decided on its merits alone. The defendants, on their part, contend that the receiver has forfeited his title to all compensation, or, at least, to full compensation, in consequence of unfaithfulness to his trust, and complicity in alleged dishonest schemes entertained and attempted by the complainants.

Two matters have been specially referred to in support of this position. The first is, the before mentioned agreement to pay to the counsel of the complainant $5,000 a year out of the receiver's allowance, provided the latter should not be less than $15,000 a year. This point has already been considered, and my views upon it fully expressed. I do not regard it as furnishing cause for refusing to the receiver the proper compensation for his services. The other matter is the agreement entered into by the receiver with N. A. Cowdrey and others to give them twenty-five per cent. of the gross earnings of the railroad for the use of the Galveston bridge proposed to be built by them after the destruction of the former bridge. It is unnecessary to go into detail for the purpose of reviewing the history of that transaction. Suffice it to say, that I have failed to discover, in the proofs, evidence to convince me that the receiver acted corruptly or in bad faith. The proposition was properly referred to the court and

notice thereof given to the parties interested. A better bargain for the railroad company was effected, viz., a rent of ten per cent. of the gross earnings of the road for the use of the bridge; and there is no evidence to show that the receiver was not entirely satisfied and pleased with the result. The problem is one that might easily have led the fairest minds to quite different results. With our present knowledge of the cost of the bridge, and the amount of business commanded by the road, it is plain to see that ten per cent. is ample compensation; but at that time matters wore a different aspect. The receiver was paying 33⅓ per cent. of the gross earnings of the railroad for transportation across the bay. The perils to which a bridge would be exposed had recently forced themselves strongly upon the public attention, and the earnings of the road at this time were averaging only about $160,000 a year. Supposing the receiver to have been anxious for its prosperity, it would be very natural for him to seize with avidity a proposition which would result in less expense than that involved in the arrangement then existing, and would relieve the freight of the road from the delay of a troublesome transhipment, and perhaps from other embarrassments arising from the conflict of adverse interests, which are indicated in the evidence.

Regarding the receiver's conduct, therefore, in a spirit of fairness and common charity, I cannot see anything in this transaction which convicts him of want of integrity or good faith. It is so easy and so natural for us all, after an event has happened, to be over-wise, and to be hypercritical upon the conduct of those who were actors in the antecedent chain of transactions which led to it, that we ought to be on our guard against imputing the worst motive of which an action is susceptible. We all know how fortunes have been within our reach in the past had we but purchased property in or near growing cities at a time when the prices were depressed, and land could have been bought for a trifle. After the local improvements have been made; after the city has sprung up around us; after prices have risen; standing on the vantage ground of developed events, and looking backward at the past, we wonder at our own stupidity in not having seen the chances that lay within reach, forgetting that the light of present circumstances did not shine upon us then as it does now; that the future is ever hid from our view. This after-wisdom—this hind-sight as it has been aptly called—leads us unjustly to condemn ourselves and unjustly to condemn others, for not foreseeing events which could not be foreseen. A fair calculation of the chances may be excited into activity by keen self-interest, or keener antagonisms and competitions, which by good fortune may result in fortunate speculations. But when the question before us is one of honesty and fairness of intention, and the acts adduced as evidence to prove the opposite consist merely of estimates and conclusions with regard to the future developments of business, we ought to hesitate a long time before we adopt a harsh conclusion.

Mr. Walker is dead. His attainments as a man of science and an engineer were of no ordinary kind. Unless compelled by the interests of justice, we ought not to lend too willing an ear to suggestions affecting his character for integrity and honesty. The proof of his deficiency in these respects ought to be clear and unmistakable. His devotion to the interests of this road after his appointment as receiver was, I think, undoubted. He may have occasionally erred in judgment. He may have had too great deference for the views of the complainants, who represented the interests of the bondholders, probably under the not unnatural impression that, so far as the main line was concerned, theirs was the only substantial interest at stake, as the bonds, if valid, would be likely to absorb the entire property. But it must be acknowledged that under his administration, the road was brought up from an almost hopeless condition, after the epidemic and the destruction of the bridge, in 1867, to one in which the receipts considerably exceeded the ordinary expenses; and that a large amount of earnings, in addition to the moneys borrowed by him as receiver, were expended in the preservation and improvement of the property.

From the accounts presented to Master Austin, and from other evidences in the case, it appears that $30,310 in specie, and $91,655 in currency, were expended by him in permanent improvements and additions to the road and its equipment, besides what was disbursed for necessary expenses and repairs. This would be equivalent to $131,000 in currency, spent in improving the property. It is true that this was not all produced from the earnings. The receiver obtained $51,000 from the treasurer of the defendant's company, when he was appointed, and was indebted some $60,000 for money borrowed and other liabilities, when he surrendered his trust. But it is in proof that a sum at least equal to the $51,000 received from the treasurer was paid by the receiver on account of the debts of the Galveston, Houston and Henderson Railroad Company, successor. And at the time of the surrender, the road was doing a fine and increasing business.

Having come to the conclusion that the receiver was fairly entitled to compensation, the next question is, what ought that compensation to be? It would hardly be a proper rule for governing the case, to inquire what another even competent person would have been willing to do the work for. The receiver's office is not put up at auction. His compensation is not fixed on that principle at all.

The chancellor selects a person whom he

regards competent and trustworthy, and the amount of compensation is graduated somewhat by the duties, and somewhat by the responsibilities of the situation. In cases of moderate amount, five per cent. on the receipts and disbursements has been allowed, which in this case would have amounted to something like $25,000 or $30,000 a year. But where the amounts received and disbursed are large, it is not usual to allow a percentage, but to fix the compensation in some other manner. In one case, it is true, it was held that a receiver who discharges his duty is entitled to the usual commissions, although they appear to be more than a reasonable compensation for the services rendered; and that it was no ground for an exception to the general rules, that the business was conducted almost entirely by overseers and factors, inasmuch as the receiver had incurred the responsibility incident to these subagencies. See Price v. White, 1 Bailey, Eq. 240; note to 2 Daniell, Ch. Pr. 1435. The information elicited by Lord Langdale, in Dow v. Croft, 2 Beav. 488, quoted in Daniell's text, is useful on this head. "The masters," he says, "have each of them been good enough to furnish me with a certificate, and I find there is no general rule which universally prevails as to the allowance to a receiver, where the receipts consist of rents of freehold and leasehold estates, five per cent. upon the amount received is most frequently allowed. If there be any special difficulty in collecting the rents on account of the sums being extremely small, or of the payments being frequent, as weekly payments, then the allowance is increased; on the other hand, if there should be very great facility in receiving the rents, then less than five per cent. is allowed, etc. One master allowed four per cent. in one case; another allowed an amount equal to £300 a year at first, and afterwards £150 a year, and after that £50 a year for the same rents—the difficulty having been diminished by long leases." In conclusion, he says: "It appears, therefore, that the masters, as they ought, consider upon each occasion what is fit and proper to be allowed, having regard to the degree of difficulty or facility experienced by the receiver."

Where a receiver is a manager as well as a mere receiver, his duties and responsibilities are largely increased; and the management of a business like that of a railroad is one of the most difficult and responsible duties that a receiver is charged with. It requires a man of first rate qualities and attainments. Now, we have it in proof that the railroad presidents of the country receive various sums from $3,000 to $20,000, a year, many of $5,000, some of $10,000, a few above $10,000. Most of the defendants' witnesses think that $5,000 a year would be ample compensation to the receiver for his services, whilst most of the witnesses called for the receiver think that $15,000 coin is not any too much; that he saved much more than that to the road, etc. The receiver's income before his appointment was, by the estimation of one witness, about $7,000 a year; said to be of a permanent character; all of which he was obliged to give up when he assumed the duties of the receivership; and he himself says, that he would not have consented to take the office for less than $15,000 a year. The previous salaries given by the defendant railroad company have been referred to as being only $5,000; and sometimes not so much as that. In view of all this evidence, of the assistance which the receiver had around him, and of the principles which the law lays down with regard to the compensation of receiver, I am inclined to think that $10,000 in coin per annum would be a fair rate of compensation in this case. It seems to me, that $15,000 is large, larger than what any (except two or three) of the presidents of our most important railroads in the country receive. It also seems to me that the peculiar duties, responsibilities and accountability of a receiver entitle him to a larger amount than would be demanded by the head officer of an ordinary railroad of this size and business. An allowance of $10,000 coin per annum will, therefore, be made for the receiver Walker's compensation during the time he was such receiver. His accounts will be stated on that basis. If this allowance should bring the receiver in debt to the fund, I think the complainants in the cause should make good the deficiency to the extent of the moneys paid by the receiver to their counsel, as shown by the vouchers produced before me on this hearing, namely the payments made at the rate of $5,000 per annum. So far as the receiver chose to pay that money out of his own pocket, it was a matter for his own consideration; but so far as he paid it out of the funds in his hands, beyond the amount which is now allowed to him, it should be returned. Therefore, any deficiency or indebtedness due from him to the fund, which may appear in making up his accounts, not exceeding the sums so paid by him to counsel as aforesaid, will be charged to the account of the present receiver, as representing the complainants. I do not regard it necessary to make any other order in reference to those payments.

In the matter of motion to discharge N. A. Cowdrey, as receiver. The next question for consideration is that of the motion to discharge the present receiver. This motion is made upon several distinct grounds which are specified therein. These grounds all relate to his conduct since his appointment. The charges are, 1st. That he incited and joined in the effort to cause the abandonment and destruction of the line and track of the Galveston and Houston Junction Railway Company, thereby violating his duties as receiver. This is attempted to be proved, by showing that the receiver has privately incited the town council of Houston to pass an or-

dinance or ordinances for stopping the use of the Junction Railroad bridge at Houston, in which the defendants claim to be interested and for abating it as a nuisance, and to give a right of way for another route through the town; and by showing that he is engaged in furthering a new connection with the Houston and Texas Central Railroad through the town, in continuation of the old track of the Galveston, Houston and Henderson Railroad, and to the abandonment of the Junction Railroad; and that he has actually applied to the court for leave to procure such new connection; all this is complained of by the defendants as bad faith on the part of the receiver; as a breach of trust; as treachery towards the interests, which, by his appointment and by the terms of his bond, he was bound to protect. Now, in the first place, it is not proved to my satisfaction that the receiver did incite the town council to pass the hostile ordinances referred to; as to the part taken by him in the amended ordinance, by which the city gave the right of way to build a new road through the town, and in making application to the court on the subject of such connection, I see nothing that renders him obnoxious to the severe censures which the defendants have passed upon his conduct. He has not proposed to do anything definitive on the subject, without the leave and order of the court, to be made after due notice to the defendants. This is a sufficient answer to the whole charge. Should the court deem it for the interest of the trust to allow the receiver to send his trains through the town of Houston instead of over the Junction road, I know of no reason why the court should not make an order to that end. There seems to be no contract by which the Galveston, Houston and Henderson Railroad Company is bound to send its freight or passengers over the Junction Railroad at all events; and if the two interests should ultimately be adjudged distinct, as they have already been adjudged, it is hardly to be supposed that the parties owning the Galveston, Houston and Henderson Railroad will rest content to be dependent on the Junction road for a connection with the Central Railroad, if they can help it, without some favorable and permanent contract in reference to the terms of that connection.

Other reasons have been suggested by the receiver why a new outlet and connection would be desirable, such as the destruction of the bridge, etc., which it is unnecessary to refer to. In any view of the case I cannot see how it can constitute a crime on the part of the receiver, in view of the possibility of such a severance as I have adverted to, to lay before the court the facts of the case, and the terms on which a new connection can be had; especially so long as he submits himself to the orders and direction of the court. Nor can I regard the order by which the receiver was appointed as constituting or raising, by implication, any such agreement, to use the Junction road and nothing else, by way of connection with the Houston and Texas Central Railroad, as to make it a matter of dishonesty or bad faith to apply to the court for leave to provide an alternative connection by another route. If the defendants think that such leave would be injurious to them, and would not be a fair thing to do at this time, it is competent for them to appear before the court and say so; and it is to be presumed that the court will see that no injustice is done. And in judging of the receiver's conduct it must be remembered, as has been properly said, that he is a complainant as well as receiver, and has rights as a complainant which he is not bound to ignore and forget in any applications to the court which he chooses to make. And, in this connection, it is proper to remark that the whole transaction, which took place before Justice Swayne on the 19th of August, 1869, by which the defendants agreed that the complainants, on giving security to the amount of $350,000, should have the possession and management of the property and name the receiver, places the defendants in a somewhat different attitude towards that officer from what they would be in if he were appointed by the court in the ordinary way—it certainly does not lie with them now to object to the person of the receiver unless he commits some overt act of unfaithfulness to his trust, which can be specified and pointed out. On this account, as well as on others, it seemed to me incompetent for the defendants to go into previous transactions of the receiver, as complainant, in order to show that he had heretofore done acts which exposed him to personal animadversion. The other grounds stated in the motion are all of the same general character with that already mentioned. The defendants have entirely failed, it seems to me, in proving a single act of the receiver since his appointment, which shows a want of faithfulness in discharging the duties of his trust, and in view of the terms of the order under which he was appointed, I can see no reason or ground for his removal.

The motion is therefore denied.

In matter of motion for change of location of road. The next subject to which my attention has been directed is a motion on the part of the receiver for an order authorizing him to procure the construction of a new connecting road through the city of Houston, to connect with the Houston & Texas Central Railroad. This application was made in his report of November 19, 1869, in which he sets forth the inconveniences and dangers of the present connection, the anxiety of the city of Houston to have the present bridge removed, etc. This cause has been appealed to the supreme court of the United States, and it is expected that it will be reached for argument in January next. It is desirable that it should be disposed of at as early a day as possible, and no doubt the court will give

every facility for an early determination of the case, consistent with the practice of the court. The decision on that appeal will determine the rights of all the litigating parties, and will terminate many questions now undecided. In view of this expected early disposition of the main cause, it seems to me inexpedient to enter upon any new expenditures of much importance until that consummation can be reached. The desirableness of many contemplated changes and improvements will depend in great degree upon the final determination of the case. I do not feel disposed, therefore, to make any order authorizing the receiver to expend any of the trust funds for building a new road to connect with the Houston & Texas Central Railroad. Should any other parties build such a connection, so that the track belonging to the Galveston, Houston & Henderson Railroad in the streets of Houston can be utilized and used, and should it be shown that the interest of the entire fund would be subserved by running trains over the same instead of over the Junction Railroad, it will then be time enough to consider the question. The court cannot now make any order which should direct the receiver to use such new connection, or which should guaranty to the constructors of any new road the use thereof in preference to the Junction Railroad. My impression is, that in view of all the conflicting interests represented in the case, it will be better to continue the present connection at least, until the case shall be decided. Any saving made by the Galveston, Houston & Henderson Railroad by a new connection would be attended by a corresponding loss to the Junction Railroad Company, whose creditors and stockholders are looking to the court for protection, and as the rights of the parties are not yet finally determined, and it is uncertain how they will be determined, it seems to me best to keep the business in statu quo until the final decision shall be rendered. If it were certain that the roads would be severed by the final decree, I should deem it unjust to the bondholders to keep the Galveston, Houston & Henderson Railroad united to the Junction Railroad by force. But this is not certain, and therefore it is better for the court not to take any new and radical action in the matter.

My view is the same with regard to the purchase of the bridge across Galveston bay. I do not think it would be right for me, sitting merely to superintend the receiver's administration of the property, to authorize any such radical change as the purchase of the Galveston bridge, when the whole cause will be decided and the property will be in private hands so soon, who can then do with the property as they see fit. I therefore decline to make any order on either of these applications.

As to the application for the purchase of new rolling stock, I will make an order that the receiver be authorized to purchase such new rolling stock, iron rails, machinery, etc., as in his judgment may be required for the proper transaction of the business, beyond the rolling stock, rails and machinery now in his possession and control under his appointment as receiver, and as the funds in his hands will reasonably justify. Every dollar fairly expended on the road and rolling stock will be more than reimbursed by the increased value it will give to the whole property when sold.

Case No. 3,294.

COWELL v. The BROTHERS.

[Bee, 136.] [1]

District Court, D. South Carolina. March Term, 1799.

SALVAGE AGREEMENT—VESSEL IN DISTRESS.

Agreement, made in distress at sea, void. Salvage due, and quantum fixed by court.

BEE, District Judge. The brig Brothers, on her passage from Lisbon to Baltimore, had encountered a succession of dreadful tempests from the 12th to the 30th of December last, when she became a mere wreck, and was prevented with difficulty from foundering. For more than three weeks after this, the crew suffered all that human nature could endure; their provisions were expended, they had subsisted for nine days upon the flesh of a cat, and had actually salted one of the crew, who died of hunger and fatigue, as the only remaining means of preserving themselves from famine. Two of the crew had been washed overboard. In this situation, Cowell fell in with them, sent them a supply of biscuit, and requested them to quit their vessel, and come on board his; offering to convey them to port without any expense. The captain of the Brothers, however, prevailed on him, after some time, to take the vessel in tow, stipulating that, upon her arrival in port, Cowell should receive one half of the value of ship and cargo, as a compensation. This agreement was reduced to writing, signed by the captains, and witnessed by their mates. From this time to the 8th of February, Cowell supplied them with provisions and water. On the 6th the cable, by which the Brothers was towed, gave way, but was again fastened. But on the 8th it parted a second time, and the sea ran too high to allow of its being any more got on board the wreck. Indeed, it was proved that in so boisterous a night no vessels could keep together. These, therefore, separated, and did not again see each other. They were now in soundings, and within ninety miles of land. The brig continued to drift for nine days longer, when she fell in with a vessel from New-York, who informed the captain that he was close in with Bull's bay. He cast anchor,

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

and continued in that state for four days, when he was piloted into the bay by a coaster. Here the brig received some repairs, and on the 4th of March, arrived in this harbour. Captain Cowell has very properly relinquished the written agreement, and applies to this court for such compensation as his services may appear to deserve. On the other hand, the respondent who, by his claim and answer, at first endeavoured to set aside the agreement as void in law, and resisted all compensation for conduct which he called inhuman, has, by his counsel, acknowledged the right to salvage, and submits the amount to the decision of the proper tribunal. There cannot be a doubt that Cowell was an instrument, in the hands of providence, of saving this vessel from destruction. From the 12th of December to the 27th of January, they had not seen a single sail. From thence to the 8th of February, Cowell's vessel, by which they were assisted and taken in tow, was the only one they saw. It is evident, therefore, that they must have perished, for they had been seven days without provisions when he met with them, and could not have subsisted thirteen days longer. Salvage being thus evidently due, I shall proceed to consider the quantum. As to the agreement, it is wholly void at law, as having been made under circumstances of distress. The service rendered upon this occasion was as great as the crew could receive; nor is it at all probable that the vessel would have been saved by any other means. Cowell too risqued much in the attempt; for his ship was actually injured, and the delay of towing rendered him additionally exposed to capture, and to the forfeiture of his insurance. He failed indeed in bringing the brig into port; but not till he had done all that was possible. He brought her into soundings, within ninety miles of land; and the supplies she received from him enabled her crew to sustain the fatigue of nine subsequent days, after the separation. Upon their arrival in this port, they had plenty of wine on board, and some of the beef, with which Cowell had supplied them.

This brig and cargo have been valued by appraisers duly appointed at 8,900 dollars. From this sum various deductions must be made for duties, &c. leaving a balance of 4,855 dollars, as net proceeds of the vessel and cargo. One fourth of this balance is 1,213 dollars without the fractions. From this deduct 295 dollars for supplies furnished by the New-York captain at the entrance of Bull's bay, and for the amount due to the pilot; the remaining sum of 918 dollars I decree as salvage to Captain Cowell. I also order that he be paid for the articles he supplied at sea, according to the rate at which they may be replaced here. Let the claimant pay the costs of suit.

COWELL (CRANE v.). See Case No. 3,353.

Case No. 3,295.

COWEN v. BANKS et al.

[24 How. Pr. 72.][1]

Circuit Court, D. New York. Nov. Term, 1862.

ASSIGNMENT OF COPYRIGHT — ASSIGNEE'S RIGHT TO EXTENSION.

Where an action for the infringement of a copyright of a publication was brought by the assignees thereof, and an isue of ownership was raised on the trial, upon which the author and assignor as a witness testified that by the agreement produced, "the intention was to convey deponent's whole interest in the copyright of the work; I suppose the book to belong to my assignees, as soon as made, including all that was in it," *held*, that this testimony estopped the legal representatives of the author from subsequently claiming that the agreement was intended to be confined to the first fourteen years' limitation of the copyright, under which it was made, especially as the testimony was given after the expiration of such limitation to a portion of the work.

[Cited in Paige v. Banks, 13 Wall. (80 U. S.) 616.]

The bill is filed in this case by the complainant [Betsey Cowen, administratrix of Esek Cowen deceased], to compel the defendants [David Banks and others] to account and pay over to her moneys received by them on the sales of the nine volumes of Cowen's reports, since the expiration of the copyrights of Goulds & Banks, which, it is charged, expired on the 26th of April, 1838, 13th of November, 1843, and at various dates intermediate these two periods.

F. F. Marbury, solicitor for complainant.

W. A. Beach and Wm. Allen Butler, counsel.

Banks & Anderson, solicitors for D. Banks.

Charles O'Conor, counsel for Banks and executors of A. Gould.

Otis Allen, solicitor for W. Gould.

John K. Porter, counsel.

S. D. Law, solicitor for executors of Anthony Gould.

NELSON, Circuit Justice. These copyrights were taken out under the act of 1790 [1 Stat. 124], which secured to the author or his assigns the exclusive proprietary right to the book or books during the term of fourteen years; and further provided, that if, at the expiration of the said term, the author be living, the same exclusive right should continue to him, his executors, administrators or assigns for the further term of fourteen years, provided he or they should take out a second copyright for the period.

The 16th section of the act of 1831 [4 Stat. 439] extended the term to the author or proprietor of the book, already copyrighted, to the period of twenty-eight years, unconditionally, if the author was living at the time of the passage of the act. Judge Cowen was living at the passage of the act, and the bill charges that, according to the true construction of the articles of agreement, trans-

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

ferring the copyright of these books to Gould & Banks, the proprietary right was limited to the first term of fourteen years, under the act of 1790; and that at the expiration of this period the right became vested in the author, under and by virtue of the 16th section of the act of 1831. The construction is denied by the defendants. On the contrary they insist that the transfer embraced the contingent right to the additional term of fourteen years, under the act of 1790, which became absolute in them under the act of 1831.

We are satisfied, on a careful consideration of the provisions of this agreement, that the construction insisted upon by the complainant is the true one; and that if there was nothing else in the case, she would be entitled to the decree prayed for. But the defendants have filed a cross bill, in which they charge that, according to the true intent and understanding of the parties in the transfer at the time of the agreement, the assignees were to be entitled to the entire proprietary right, including the contingent interest of the author to the second term of fourteen years as well as at the first; and hence, that they became the absolute proprietors of this term under the act of 1831, and they ask that the agreement be reformed so as to conform to the understanding and intent of the parties.

By a stipulation in the record, a deposition of Judge Cowen, taken 3rd October, 1840, in a case pending between those claiming this proprietary interest in the reports, and one H. P. Hastings charged as violating their copyrights, is admitted as evidence. Judge Cowen was examined as a witness for the complainant; and an objection was taken to his testimony on the ground of interest. He was first examined on his voir dire, the agreement in question having been produced before him. He stated that this was the only contract between him and the assignees of the copyrights, and that "the intention was to convey deponent's whole interest in the copyright of the work." And on his examination-in-chief, he observes: "I supposed the book to belong to my assignees as soon as made, including all that was in it. I would not have taken the office of reporter, with its salary and duties, unless I was to have had a proprietary right which I could use or dispose of."

At the time of this examination, and the objection on the ground of interest taken to the witness, the first term of four of the first volumes had expired, and the proprietary right had become vested in him absolutely, unless parted with by the assignment. Judge Cowen's attention, therefore, was called directly to the fact of the understanding and intention of the parties at the time of the making the agreement of transfer. His testimony accords with his own practical construction of it, for, some two years had elapsed at the time after the expiration of the first term, as we have seen in respect to the first four volumes, and he had set up no claim to the copyright. He died the 20th of January, 1844, some three years after the expiration of the first term of the copyright of the last volume, and had all this time acquiesced in the claim of the assignees. Conceding, therefore, that, according to the terms of the written agreement of transfer, the assignees obtained a right to the term of fourteen years to the nine volumes of reports, yet, in view of the bill to reform the contract and make it conform to the true intent and understanding of the parties to the instrument at the time of entering into it, and the testimony of Judge Cowen, we do not see how we can avoid reforming the contract so as to give effect to the real agreement of the parties. The testimony of the witness is not an opinion expressed as to the construction of the instrument, but as to the question whether or not he was interested in the second term of the copyright of these books. He was not examined upon a question of law, but upon a question of fact; and in this view, and in the face of the claim of the complainants in that suit to a full title in the second term, then running, he testified that he had conveyed his whole interest to them. The evidence of Judge Cowen, under the circumstances in which it was given, is wholly inconsistent and irreconcilable with the idea that the parties, at the time the agreement was entered into, understood and intended a conveyance of a copyright only for the first fourteen years. For these reasons we think a decree must be entered for the complainants in the cross bill, according to its prayer, to reform the contract, and for the defendants in the original bill.

COWING (GOULD'S MANUF'G CO. v.). See Cases Nos. 5,642 and 5,643.

COWING (McKENZIE v.). See Case No. 8,856.

Case No. 3,296.

COWING v. RUMSEY et al.

[8 Blatchf. 36;[1] 4 Fish. Pat. Cas. 275.]

Circuit Court, N. D. New York. Oct. Term, 1870.

ACTION FOR INFRINGEMENT OF PATENT—MEASURE OF DAMAGES—NEW TRIAL—REDUCTION OF DAMAGES.

1. In an action on the case for the infringement of letters patent, it is erroneous to instruct the jury that the true rule in regard to damages is the profits made by the defendant by the infringement.

[Cited in Smith v. Baker, Case No. 13,010; Putnam v. Sudhoff, Id. 11,483; Magic Ruffle Co. v. Elm City Co., Id. 8,949 and 8,950; Mulford v. Pearce, Id. 9,908; Vaughan v. Central Pac. R. Co., Id. 16,897; Knox v. Great Western Quicksilver Min. Co., Id. 7,907; Sayles v. Richmond, F. & P. R. Co., Id. 12,424.]

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

2. The true rule is, what the plaintiff has lost, and not what the defendant has gained.

[Cited in Atwood v. Portland Co., 10 Fed. 285; Royer v. Shultz Belting Co., 45 Fed. 52.]

3. Where, under such an erroneous instruction, the plaintiff obtained a verdict for $750 damages, and the defendant moved for a new trial, on a case, because of such instruction, a new trial was denied, in case the plaintiff should consent that the verdict be reduced to nominal damages, but, otherwise, a new trial was ordered, the costs to abide the event.

[Cited in Roberts v. Schuyler, Case No. 11,-915.]

This was an action on the case [by George Cowing against John A. Rumsey and others], brought to recover damages for an infringement of the plaintiff's rights, secured by letters patent [No. 38,153], granted to him [April 14, 1863] for an "improved cylinder polisher." At the trial, the plaintiff had a verdict for $750 damages; and the defendants now moved for a new trial, on case.

Elbridge G. Lapham, for plaintiff.
David Wright, for defendants.

WOODRUFF, Circuit Judge. I have examined the grounds upon which a new trial is sought in this case, but, with the exception of one point, to be presently noticed, I am not satisfied that any error was committed, entitling the defendants to the interference of the court to set aside the verdict. The defendants have been ingenious in their endeavor to construct a cylinder polisher, that should "get around" the plaintiff's patent; and it is not unlikely that they have made improvements upon his invention. The defendants' witnesses very clearly prove differences between their machine and that of the plaintiff. Those differences may be useful differences; but, so long as the improved machine appropriates, or (to borrow the language of the charge) absorbs what the plaintiff invented and patented, the defendants are not at liberty to use it without the plaintiff's consent. I am not satisfied that the case was not tried and submitted to the jury upon a correct exposition of the law; and, as to disputed questions of fact upon conflicting evidence, the verdict of the jury should be taken as conclusive.

On the rule of damages, however, it seems to me an instruction was given which was not strictly accurate. The case states, that, on the return of the jury to the bar, declaring "that they had agreed in regard to the infringement, but had not agreed in regard to the amount of damages," the court further instructed them as follows: "The damages do not depend upon the profits the defendant may have made out of the cylinders, the profits upon the pumps, but the mere profits upon polishing the pumps, the mere improvement in the polishing of the cylinders. Everything else has nothing to do with this machine. It is the profits in polishing with this machine. That is all. That, in itself, is a very small portion of the pump. The true rule in regard to damages is the profits made by the defendants by polishing the pumps, and not the profits lost to the plaintiff."

It is difficult to resist the inference, that there has been some mistake in the preparation and settlement of the case in this respect; for, in the instructions given to the jury before they retired, the court distinctly said: "On the question of damages, gentlemen, there is only one rule. That is, to give to the plaintiff the actual damages which he has sustained by this infringement." Such previous instruction is so inconsistent with what is imputed to the court on the return of the jury to the bar, as to warrant the supposition that what the court said was, rather, that, as an aid to determine, upon the whole case, what damages the plaintiff had sustained, the jury were at liberty to consider what profits the defendants had made. The whole case might warrant a presumption, that, if the defendants had not infringed the patent, the plaintiff would have had the opportunity, through a larger patronage, to polish as many more pumps as the defendants polished and to realize as great profits. There might be some reason for believing that, by infringing, the defendants drew away this amount of work in polishing; and so, incidentally, the jury might be, and, no doubt, were, entitled to know and consider the profits of polishing pumps or cylinders by this machine. The instruction is, however, stated, in the case, to have been given, and to have been specially excepted to; and its correctness is, therefore, to be tested as it now appears, that is, as the latest, and an explicit, direction to the jury, when the question of damages was alone the subject of consideration.

A patentee whose rights are infringed has his election of remedies. He may treat the infringer, who illegally appropriates the invention to his own use, making profit thereby, as his trustee in respect of such profits, and compel him to account therefor in equity. In such case, the plaintiff may recover those profits, be they more or less; and he can recover no more, however great the damages may be which the illegal interference has occasioned.[2] If, on an accounting, it should appear that the defendant used the invention so unskillfully that he realized no profit, there could be no recovery. On the other hand, the patentee may sue at law for the damages which he has sustained; and those damages he is entitled to recover, whether the defendant has made any profits or not. In such an action, it is precisely what is lost to the plaintiff, and not what the defendant has gained, which is the legal measure of the damages to be awarded. Under this rule, it may often be entirely proper to prove the profits of the ordinary use of the invention, and the demand existing in the market, evi-

[2] By a recent statute this rule has been changed, and both profits and damages may now be recovered in equity. Act July 8, 1870, § 55 (16 U. S. Stat. 206).

denced by sales made, and so, as an element of consideration, show the profits realized by the defendant, in order to furnish to the jury all proper materials for determining how much the plaintiff has lost. But I apprehend that they are to answer the precise question—how much loss has the plaintiff sustained by reason of the defendant's infringement?

There were elements of estimate and computation in this case—the saving of time in the process of polishing, as compared with boring; the fact that pumps so polished were better and more enduring; the cost of supplying new packing to the pistons where the cylinders were not polished; the actual sales by the defendants; and the presumption that this withdrew patronage from the plaintiff. These, though not very precise, furnished means of determining the loss to the plaintiff, not greatly less definite, as aids to the judgment and good sense of a jury, than they were to an estimate of the profits made by the defendants; and, if they enabled the jury to estimate, satisfactorily to their own minds, the defendants' profits, then those in turn became an element in the estimation of the plaintiff's loss.

I think the distinction above stated has been uniformly recognized in the cases on this subject. There may be cases so peculiar that there are no means of proving the plaintiff's loss, without proof of the defendant's profits, and such proof becomes clearly admissible; but, even then, the recovery is what the jury shall find to be the plaintiff's loss, not because the defendant realized profits, but because, under all the circumstances, the jury infer, as a fact, that, but for the interference, the plaintiff would have realized those profits.

It may be said, with some plausibility, that the plaintiff's damages may sometimes be greater than the profits which the defendants have made, but ought never to be considered less; and that the defendants, having illegally infringed, should always be held to the presumption, that the plaintiff would have made as much as they have realized, and should not be permitted to retain any of the fruits of their illegal conduct, by showing that the plaintiff could not have manufactured or used the invention so profitably. In truth, no injustice can come to the plaintiff, so long as he has his election to proceed in equity for the profits the defendants have made, or, if he so prefer, to sue at law for the loss he has suffered; and, although a jury will be very likely to infer that such loss is at least equal to the defendants' profits, the legal rule still stands.

The plaintiff should, however, be permitted to avoid a new trial by remitting damages, if he sees fit; and, therefore, if he consents that the verdict be reduced to nominal damages, a new trial is denied. Otherwise, a new trial is ordered, the costs to abide the event.

COWING (UNITED STATES v.). See Case No. 14,880.

Case No. 3,297.

In re COWLES.

[1 N. B. R. 280 (Quarto, 42);[1] 1 West. Jur. 367.]

District Court, D. Minnesota. 1867.

ACT OF BANKRUPTCY — FRAUDULENT CONVEYANCE —SUSPENSION OF "COMMERCIAL PAPER"—"TRADER" DEFINED.

1. A debtor who executes a chattel mortgage to secure a preëxisting indebtedness with intent to delay, hinder, and defraud his creditors, commits an act of bankruptcy. It is not necessary to show the stoppage of payment of commercial paper was fraudulent; suspension of payment and non-resumption within fourteen days is all that is contemplated by this provision of the bankrupt act.

[Cited in Baldwin v. Wilder, Case No. 806; Re Hercules Mut. Life Assur. Soc., Id. 6,402.]

2. One who is engaged in the manufacture and sale of lumber is a trader, within the meaning of the said act.

[Cited in Re Kenyon, 1 Utah, 47.]

In bankruptcy. In this case a petition was filed by S. G. Renick, president of the First National Bank of Hastings, against the said [Walter C.] Cowles, alleging the commission of various acts of bankruptcy, and praying that he should be adjudged a bankrupt by the court. A day was fixed to show cause, a denial of the acts was filed, and by agreement the issues were tried by the court.

NELSON, District Judge, delivered a written opinion. He said the petition in substance charges: (1) That the said Cowles, being possessed of certain estate, rights, and credits, made a conveyance of the same with intent to delay, hinder, and defraud his creditors. (2) That said Cowles, being insolvent, made a conveyance with intent to give a preference to one of his creditors, and with intent to defeat the operation of the bankrupt act. (3) That, being a trader, the said Cowles has fraudulently suspended, and not resumed payment of his commercial paper within a period of fourteen days. On the return day of the order to show cause, a denial of the acts of bankruptcy was filed, and by agreement the issues were tried by the court. We shall consider the various acts of bankruptcy alleged in the order in which they are above enumerated.

The testimony shows that Cowles was engaged in the manufacture and sale of lumber in the city of Hastings, and that he, being in embarrassed circumstances, with an indebtedness, as stated by himself to be over thirty-seven thousand dollars, without any cash means, but other assets estimated as high as sixty thousand dollars, and as low as thirty-two thousand dollars, executed to the Merchants' National Bank of Hastings, on the 23d day of October, 1867, a chattel mortgage upon five hundred thousand feet of pine saw logs then lying in the St. Croix

[1] [Reprinted by permission.]

river at Prescott, Wisconsin, to secure the payment of three thousand dollars. That the money advanced to him at the time of the delivery of this mortgage was one thousand dollars, and that a due-bill was given for the balance, to be paid in weekly instalments. A part of the one thousand dollars advanced was used to release from an attachment the logs embraced in the mortgage, and the money to be paid by instalments was to be used for the purpose of defraying the expenses of sawing the logs into lumber. It appears that at this time his creditors were pressing him for the payment of their demands, and his answer invariably was that he would pay them as soon as he could cut his logs, and as fast as he could sell his lumber. These repeated statements appear to have satisfied his creditors, and they remained quiet until about the 22d day of November last, when some of them made an arrangement to take lumber for their indebtedness. Taylor & McHugh, and Pringle, commenced immediately to draw lumber from the yard, and continued until November 25th, when they were stopped by Van Dyke, president of the Merchants' National Bank, and by C. D. Tuttle, a merchant of Hastings, who claimed, in their own language, to "have chattel mortgages on the whole thing." It further appears from the testimony, that on the afternoon of the 23d of November, the day after Cowles had consented to allow Taylor & McHugh, and Pringle, to take lumber on account of their indebtedness, he executed a chattel mortgage upon all of the lumber in his yard, and upon all the logs in his boom, to Tuttle, to secure the payment of his note for two thousand five hundred dollars, that day given for supplies to be furnished during the following winter, to enable him to set men at work to cut saw logs in the pineries; and, also, that on the 25th of November he executed another mortgage to the Merchants' National Bank upon the same lumber and logs, to further secure the money which the bank had agreed to let him have in October. At this time his creditors were pressing him, and the institution of proceedings in bankruptcy against him was threatened. Cowles, in answer to their demands, says in his own language, "I am dead broke; I have no means; I can't pay." And also, that he did not think his creditors had better put him into bankruptcy; that his father had a claim of about twenty thousand dollars, which would sweep everything and leave but a small percentage to other creditors.

Now, are we authorized to declare upon this statement of the case, the first act of bankruptcy established? We think so. We readily agree with counsel that the intent to delay and hinder creditors is a question of fact to be proved; but the testimony necessary to establish it need be of no higher order than is required to prove any other fact. All the circumstances attending the transactions of the debtor, his conversations, his acts, his necessities, are to be taken into consideration, and his motive judged of by these. Put to this test, it seems to me there was a manifest design to hinder and delay creditors. We do not dispute the right of a debtor to mortgage his property, or a portion of it, for the purpose of raising money to pay his debts. Such a disposition of his property shows an honest and laudable intention on the part of a debtor to meet his liabilities. Courts always are inclined to sustain such transactions; but the conveyances by Cowles do not fall within that class of cases. They were not given for the purpose of raising means to pay off his importunate creditors, but for the purpose and with the manifest design of so incumbering his available means that they would be delayed and hindered in the collection of their demands. In fact, the president of the Merchants' National Bank says in his testimony, that when he took the mortgage in October he placed the balance of the money due Cowles to his own personal account in the bank, and gave him a due-bill, in order, as he says, that Cowles could say "no" to his creditors who asked for money, and could not use it to pay his debts. Cowles acquiesced in this, and says that when he wanted any of the money he procured the president's check on the bank for the amount.

Again, we find the second charge of bankruptcy true. The debtor cannot escape the conclusion to be drawn from his statements made prior to the last mortgage to the Merchants' National Bank, and immediately after the Tuttle mortgage was given. He told the witness (Fuller) at that time that his father had a claim that would sweep everything if bankruptcy proceedings were instituted against him. He has made no effort to explain this statement. It stands admittedly true, and notwithstanding his testimony that he had assets which he estimated worth sixty thousand dollars, we are constrained to believe that he was insolvent at that time. His statement about his father's demands, taken in connection with the evidence of other witnesses as to the value of his assets, establishes clearly his insolvency. There can be no doubt that the mortgage to the Merchants' National Bank, given in November, gave it a preference. The bank held his notes in October, and although a chattel mortgage was given at that time to secure them, Cowles executes this additional security, and must have intended the natural result of his own conduct. The counsel for the debtor relies upon the case of Curtis v. Leavitt, 15 N. Y. 9. It has no application to the state of facts as we find them here. The banking institution in that case, although embarrassed, had, at the time the trusts were created, assets over and above its liabilities; and the question decided by the court was, that such embarrassments did not create such a state of insolvency as was contemplated by the restraining act which it was

charged with violating. Besides, its property mortgaged consisted of choses in action, and creditors could not possibly be hindered or delayed by the mortgage. There are other dissimilarities to the state of facts in this case, which we think unnecessary to consider.

We now come to the charge that, being a trader, he has fraudulently suspended, and not resumed payment of his commercial paper within the period of fourteen days. We shall adopt the interpretation given this provision of the act by several of the district judges, namely, that it is unnecessary to show the stoppage of payment to have been fraudulent; suspension of payment and non-resumption within fourteen days is all that is contemplated by that provision. This view of the act presents uniformity of decision, based upon a fair and reasonable construction; and besides, it would seem that congress intended to make a failure to pay commercial paper within fourteen days after stoppage a test of insolvency. We have found no American decisions directly upon the point as to what constitutes a trader, but the decisions are numerous under the English bankrupt act of 1825, and are to be regarded as authority with us. The English statute specifies the description of traders who come within the act, and the effect of all the amendments prior to 1825 was to enlarge the classes of persons who, upon correct principles of bankrupt law, should be included within it. See introduction to Eden on Bankruptcy. Under that act the debtor would be regarded a trader. Our bankrupt act is broader in terms, and excludes no person who should, upon principles of commercial law, be included within the term "trader." The commercial definition of a trader is, one who makes it his business to buy merchandise or things ordinarily the subjects of commerce and traffic. The debtor was clearly engaged in that sort of business, and comes strictly within this commercial definition. Upon the whole, therefore, we find the several acts of bankruptcy charged fully established.

COWLES (LEAVITT v.). See Case No. 8,-171.

COWPERTHWAITE (BURR v.). See Case No. 2,188.

Case No. 3,298.

COWPERWAITHE v. GILL et al.

Circuit Court, District of Columbia. Sept. 20, 1859.

PATENTS—PRIOR USE AND SALE.

[An application for a patent of a machine for the manufacture of hat bodies was rejected on interference because of sale and use more than two years prior to the application.]

Appeal from the decision of the commissioner of patents.

The commissioner of patents refused to grant a patent to George C. Cowperthwaite, assignee of William Fosket, the appellant, for Fosket's invention in the new and useful improvement in a machine for the manufacture of hat bodies. [The application was contested by Ira Gill and Elbridge Brown.]

MORSELL, Circuit Judge. The grounds upon which the commissioner rejects the claim in this case are: "The proof is clear that Fosket, the original inventor, sold an interest in his invention to several persons who manufactured hat bodies on his machine in 1844, and sold them in the market. One witness (Stedman) named ten persons in whose presence the machine was operated in the machine shop of the Otis Manufacturing Co. in Wane, Massachusetts. This witness saw this machine manufacture a dozen hat bodies at a time, and saw it at work from a dozen to twenty times. He always supposed those hat bodies were manufactured for sale in the market. Another witness saw these machines in use in 1843; saw them daily in operation six or nine months; Fosket made hat bodies on them for Tolman; and adds that Fosket and others, joint owners with the witness (Brown) made hat bodies, with the machine, and sold them in Boston. Commissioner also states that Fosket took out a patent in 1846 for an entire hat body machine, in which he did not allude to the invention now in question. In an interview between Fosket and Gill, at the house of the latter, he showed the former all the operation of the machine, including the internal regulator, the perforated board, and Fosket then made no claim to the internal regulator. Fosket made no application for a patent on the invention in question until February, 1858.

To this decision seventeen reasons of appeal were filed. These reasons need not be here stated particularly; the substance of them has been correctly noticed. Due notice having been given of the time and place appointed for the hearing of said appeal, the said decision, with the reasons of appeal, and the report of the commissioner thereon, and all the original papers and evidence, were laid before the judge, whereupon a reasonable time was allowed to said parties to make their arguments, but, they failing so to do, and failing to comply with the rules established for that purpose, the said cause has been taken up for consideration and decision.

I have carefully examined the reasons and the testimony upon which the decision and report of the commissioner rest, and I am satisfied that he has fairly stated the import thereof, and the principles that are applicable thereto are correctly applied. The conclusion, of course, to which I have come, is that the said decision ought to be, and is hereby, affirmed.

Case No. 3,299.

COWQUA v. LAUDERBRUN.

[1 Wash. C. C. 521.][1]

Circuit Court, D. Pennsylvania. Oct. Term, 1806.

INTEREST ON PROMISSORY NOTE.

The court allowed the interest customary at Canton upon a note executed there.

This action was brought on a promissory note, given in Canton, payable eighteen months after date, without stipulating any thing about interest.

The defendant took out a commission, eighteen months ago, to examine the books of the plaintiff. When the commissioners opened the commission, about twelve months ago, the plaintiff was absent from Canton, so that the commission not being returned to the last court, the cause was continued. A motion was again made to this court, to continue the cause; but as no reason was given, why the commission was not executed, THE COURT thought there was no sufficient reason assigned for the continuance; but upon the offer of the plaintiff, made before the opinion of the court was known, to continue, on receiving a judgment and security for the debt; THE COURT directed, accordingly, execution to be stayed, and gave leave to move, next term, to set aside the judgment, if the commission being returned should afford a reason for doing so. A question then arose, what interest should be allowed? After examining a number of witnesses, THE COURT was of opinion, that twelve per cent. per annum should be allowed, from the expiration of the eighteen months; no proof being given, what is the legal interest at Canton, or whether any is fixed by law. But it appears, that the customary interest of the country, where no special agreement is made to vary it, is one per cent. a month, from the expiration of the credit. Many instances have been proved, where more and less has been stipulated in the notes executed in Canton; but all those cases seem to be departures from the regular and established rate of interest, founded on special agreements.

COX, Ex parte. See Cases Nos. 1,878 and 1,879.

Case No. 3,300.

COX v. BARNEY.

[14 Blatchf. 289.][2]

District Court, S. D. New York. Sept. Term, 1877.

JUDGMENT FOR DUTIES OVERPAID — CERTIFICATE OF PROBABLE CAUSE—WHO MAY GRANT—LACHES IN APPLICATION.

1. A judgment having been entered against a defendant, as a collector of customs, in a "charges and commissions" case, for duties overpaid, under protest, which duties had been paid into the treasury by the defendant, and such judgment not having been paid by the treasury department, the plaintiff issued an execution against the property of the defendant. The defendant applied to the court for a certificate, under section 989 of the Revised Statutes, that there was probable cause for the acts done by the collector, and for a stay of the execution: *Held*, that the application must be granted.

2. Such certificate may be granted by a different judge from the one before whom the verdict was rendered.

3. It having been the practice of defendants in like cases not to ask for a certificate of probable cause until the judgment was about to be paid by the treasury department, no laches or delay can be alleged against a defendant for not applying for such certificate before the issuing of an execution.

A judgment had been entered in this case, which was one of a class of cases known as "charges and commissions" cases, against the defendant, as a collector of customs, for duties overpaid, under protest. The amount of the judgment not having been paid by the treasury department, the plaintiff issued an execution against the property of the defendant. Thereupon the district attorney of the United States, as attorney for the defendant, moved the court to certify that there was probable cause for the acts done by the defendant, under section 989, Rev. St. U. S., and that the execution which had been issued be stayed by the court.

Almon W. Griswold, for plaintiff.

Stewart L. Woodford, Dist. Atty., for defendant.

BLATCHFORD, District Judge. I think that the proper construction of section 989 of the Revised Statutes is, that the amount of the recovery cannot be paid out of the treasury, unless there is such a certificate as the section provides for. If a recovery is had, and the court makes a certificate of probable cause, or that the collector acted under the direction of the proper officer, then there are two provisions made. One is for the protection of the collector, and the other is for the payment of the money. And the first one is not only for the protection of the collector, but it operates to restrain what otherwise would be the rights of the plaintiff. It would not be proper, however, for the court to make an order granting a certificate of probable cause, but providing that such certificate shall not be operative unless and until the money is paid. The effect of such an order would be, to allow the execution to be issued, and to take away from the collector the protection which the statute manifestly intended to give him, that if, under the directions of the secretary of the treasury, he exacts money, as a public officer, and then places that money in the treasury of the United States, his property shall be absolved from liability to respond for the exaction. He takes the office of collector under those circumstances. The person paying the exaction deals with

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

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

the government and with the collector, under those circumstances, and with the full understanding, that, if the money is exacted and is then paid into the treasury, and the court shall certify that the collector acted under the directions of the secretary of the treasury, he shall not have any remedy against the property of the collector. It is manifest, that the government re-instated the right of action against the collector, for the purpose of giving to the party from whom the illegal duties should be exacted, a standing in court to sue the collector, while it took away from him the right to obtain the fruits of his judgment by execution.

In acting upon this statute, either in granting a certificate or in restraining an execution, the court cannot look into the question, whether the reasons for not paying the money out of the treasury appear to be sufficient—as to whether there is a fund out of which it might be paid, or as to whether the secretary of the treasury ought to have paid it.

It is said, that it is discretionary with the court to give a certificate of probable cause. It seems to me, however, that, where the collector has exacted money in the performance of his official duty, under the directions of the secretary of the treasury, and has paid it into the treasury, it is the duty of the court to grant a certificate to that effect, leaving the consequences to take care of themselves.

It is further said, that the judge who tried the case is the person to grant the certificate, and that no other judge can do so. But I think, that, although the judge before whom the verdict was rendered is not the judge to whom the application for the certificate is made, yet he can properly grant the certificate. The statute provides for the making of the certificate by "the court," and not by any particular judge.

The only point that is at all troublesome is the suggestion, that the application comes too late. It is clear, from the affidavits on the part of the defendant, on this motion, that the practice has grown up of not asking for a certificate of probable cause, until the time came around for the payment of the money out of the treasury. I do not think that the plaintiff in this "charges and commissions" case is in a position to allege laches or delay, on the part of the government or of the defendant, in applying for this certificate of probable cause.

It is unfortunate for the plaintiff, that he is unable to obtain his money, and it is to be regretted that it is so, but it is for the legislative department of the government to provide for the payment of the money, and the court must assume that there is no dereliction of duty on the part of the executive officers of the government. It is not the province of this court to pass upon any such question. The statute is perfectly plain, and the court ought not to wrest it from its clear meaning, on the consideration that the effect of granting the certificate of probable cause will be to relieve the executive officers of the government from a pressure which, otherwise, would be upon them, to assist the defendant in paying the judgment. The statute looks to the exemption of the property of the collector from execution, provided he has acted under the instructions of his superior officer, and has paid into the treasury of the United States the money which he has exacted. The ultimate means of paying back the money is another question. The statute says that it shall be provided for and paid out of the proper appropriation from the treasury.

An execution having been issued, it seems to me that the good sense of the statute is, that no execution shall collect the debt, but that the money shall be paid out of the treasury. Therefore, the certificate is to be granted not only to prevent the issuing of an execution against the collector, but to stay one already issued.

[NOTE. A writ of error was sued out in this case, with others; and when the cases were reached the solicitor general, on the part of the government, moved for their dismissal, as presenting no question he desired to argue, which motion was granted. At a subsequent term the defendants in error applied to correct the judgment and mandate so as to award interest as such, or as damages for delay; but the court denied the motion, holding, per Mr. Justice Blatchford, that the application, having been made after the term at which the cause had been finally disposed of, came too late, the court having no power to grant the relief sought. Barney v. Cox, 107 U. S. 629, 2 Sup. Ct. 830.]

Case No. 3,301.

COX v. GOULD.

[4 Blatchf. 341.][1]

Circuit Court, N. D. New York. Sept. Term, 1859.

MORTGAGE BY CORPORATION — EVASION OF GENERAL MANUFACTURING ACT OF NEW YORK — LIABILITY OF STOCKHOLDER FOR DEBTS.

1. A corporation formed under the general manufacturing law of New York, passed February 17, 1848 (Laws 1848, c. 40), is, by the 2d section of that act, authorized to purchase, by its corporate name, such real estate as is necessary to enable it to carry on its operations, but is forbidden, by the same section, to "mortgage the same or give any lien thereon." Where such a corporation authorizes its agent to make such purchase for its benefit and on its account, and the real estate is conveyed to the agent, and he gives a bond and a mortgage on it in his own name, for the purpose of evading the provisions of such 2d section, the statute is violated, and an agreement by the company to indemnify the agent against all liability by reason of the transaction, is void as against an innocent stockholder in the company.

2. Under the 24th section of the said act, which provides that "no stockholder shall be personally liable for the payment of any debt contracted by any company formed under this act, which is not to be paid within one year from the time the debt is contracted," if such agreement by the company to indemnify the agent, and the payment of money by the agent

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

on his bond, constitute the agent a creditor holding a debt which may be enforced against an individual stockholder, such debt was contracted not when such payment was made by the agent, but when such agreement to indemnify was made by the company.

This was a demurrer to a declaration. The declaration alleged that, on the 2d of January, 1854, a certain corporation, known as "The New York City Paint Works Company," was incorporated under the act of the legislature of the state of New York, passed February 17th, 1848, entitled "An act to authorize the formation of corporations for manufacturing, mining, mechanical, or chemical purposes" (Laws 1848, c. 40), and the acts amendatory thereof, by the filing in the offices specified in the act, of the proper certificates, and had its office and principal place of business in the city of New York; that, on the 4th of January, 1854, the plaintiff [Abraham L. Cox], and one Henry Fake, and one James H. Salisbury, were appointed by the company a special committee to, amongst other things, negotiate for the purchase, for the company, of twelve lots of land, then the property of one John A. Bunting, situated in the city of New York, on the East river, between 88th and 89th streets, being together about two hundred feet deep and one hundred and fifty feet in width, for the uses of the company, and for the purpose of a manufactory; that, thereupon, the plaintiff and Fake and Salisbury negotiated and contracted for the purchase of the twelve lots, for the uses and purpose and under the authority aforesaid, and reported to the company their action in the premises, which report was adopted and the plaintiff and Fake and Salisbury were continued as a committee for completing the purchase; that, thereupon, the plaintiff and Fake and Salisbury, as such committee, completed and effected the purchase of the lots, in their own names, for the benefit and on account of the company, and for the uses and purpose aforesaid, and for no other purpose whatever, such purchase in their own names being the only legal way in which the same could be purchased for the benefit, account, uses, and purpose aforesaid, because the company could not then pay the whole amount of the purchase-money of the premises; that, thereupon, the plaintiff and Fake and Salisbury received from Bunting, on the 14th of January, 1854, a deed, conveying to the plaintiff and Fake and Salisbury the twelve lots of land, for the consideration of $25,000, and, thereupon, the company paid to Bunting the sum of $1,000, as a part of the purchase-money of the premises, and, to secure what was left unpaid, the plaintiff and Fake and Salisbury executed to one Joseph Foulke their bond, in the penal sum of $26,-000, conditioned to pay Foulke $13,000 on the 1st of March, 1858, with interest at the rate of six per cent. per annum, and also their mortgage on the premises, which was received by said Foulke in lieu of a prior mortgage on the premises for the same amount, theretofore given by Bunting to Foulke; that the plaintiff and Fake and Salisbury also executed to Bunting their bond, in the penal sum of $22,000, conditioned for the payment of $11,000, (that being the amount of the residue of the purchase-money,) on the 14th of January, 1859, with interest thereon from the 14th of January, 1854, at the rate of seven per cent. per annum, payable half yearly, on the first days of May and November, with a condition, that the entire principal should, at the option of Bunting, become due, on a default for thirty days in the payment of interest; that the plaintiff and Fake and Salisbury also executed a mortgage on the premises, as collateral security for the moneys mentioned in the condition of the bond, which mortgage contained a provision like that contained in the bond, in regard to the principal becoming due in case of default for thirty days in the payment of interest; that, in consideration thereof, and that the plaintiff and Fake and Salisbury had negotiated and effected the purchase of the premises, for the benefit and on the account of the company, and for the uses and purposes aforesaid, and that the plaintiff and Fake and Salisbury had taken the deed thereof in their own names, for the benefit and account of the company, and for the uses and purposes aforesaid, and that the plaintiff and Fake and Salisbury had executed and delivered to Foulke and Bunting their said bonds and mortgages, to secure the unpaid portion of the purchase-money of the premises, and that the plaintiff and Fake and Salisbury would convey the premises to the company, the company undertook, and promised the plaintiff and Fake and Salisbury to hold harmless and indemnify them against the bonds and mortgages, and to pay the said bond and mortgage so given by the plaintiff and Fake and Salisbury to Bunting, on the account of the company, in the purchase of the property, according to the conditions of the same; that, relying on the said promise and undertaking of the company, the plaintiff and Fake and Salisbury, on the 25th of January, 1854, executed a deed of the premises to the company, which deed was, in terms, made expressly subject to the said two mortgages, and in and by which deed the company covenanted to assume and pay the mortgage to Bunting, as a part of the consideration for such conveyance, and which said deed was executed by the president of the company, in his official capacity, as such president, and by him sealed with the corporate seal of the company, he being thereunto lawfully authorized by the company; that the company accepted the deed, and took possession of the premises conveyed thereby; that the company did not pay the said sum of $11,000, or the interest thereon, according to the condition of the bond and mortgage to Bunting, and that the said sum, and the interest thereon from the 1st of November, 1854, being due and wholly unpaid,

Bunting, on the 25th of October, 1855, commenced a suit, and foreclosed the mortgage, and sold the premises, and obtained and docketed a judgment for a deficiency of $11,-492.96, against the plaintiff and Fake and Salisbury, which sum the plaintiff was compelled to pay, and, on the 7th of July, 1856, did pay to Bunting; that the company did not repay the same, or any part thereof, to the plaintiff, or indemnify him therefor; that, thereupon, he commenced a suit, in the circuit court of the United States for the southern district of New York, against the company, for the collection of his said debt for the money paid as such deficiency, within one year after said debt became due; that the company was insolvent and had no property; that the whole capital stock of one hundred thousand dollars, as fixed and limited in the certificate of the incorporation thereof, had not been paid in, nor had the president and a majority of the trustees made, signed, and sworn to a certificate of the amount of the capital stock, and that the whole amount thereof had been paid in; that the defendant [Thomas Gould] was a stockholder and a holder and owner of five shares of stock in the corporation, to the amount of five thousand dollars, at the time when the company was in possession of the twelve lots of land, and at the time when the plaintiff paid the said sum of $11,492.96, and was now such stockholder; and that, by means of the premises, the defendant became individually liable for the said sum.

Samuel Blatchford and Clarence A. Seward, for plaintiff.
David Wright, for defendant.

HALL, District Judge. The 2d section of the act of February 17th, 1848, under which the paint works company was incorporated, declares, that the corporations created under that act "shall, by their corporate name, be capable in law of purchasing, holding and conveying any real and personal estate whatever, which may be necessary to enable the said company to carry on their operations named in such certificate," (their certificate of incorporation,) "but shall not mortgage the same, or give any lien thereon." The purchase from Bunting set out in the declaration, was, in substance and fact, made by the company, through its committee or agents, of whom the plaintiff was one, although not made in its corporate name, as authorized by the act. The declaration shows, that the agents were authorized, as the agents of the company, to make the purchase for the company; that they did make and complete it, for the benefit and on the account of the company; and that the purchase was completed by a deed to the company's agents, and by their giving bonds and mortgages, in their own names, for the very purpose of evading the provisions of this 2d section. By these means the statute was substantially violated, and the company did indirectly what the statute declares they shall not do, and what it is admitted they could not lawfully do, unless by indirection. The transaction was in fraud of the statute, and the whole arrangement was illegal and void, as against an innocent stockholder. I am, therefore, of the opinion that the agreement to indemnify the plaintiff was void, and that the plaintiff cannot recover in this action.

Again, the 24th section of the act declares, that "no stockholder shall be personally liable for the payment of any debt contracted by any company formed under this act, which is not to be paid within one year from the time the debt is contracted, nor unless a suit for the collection of such debt shall be brought against such company within one year after the debt shall become due." It is urged, by the plaintiff's counsel, that the debt in this case was contracted at the time the payment was made by the plaintiff upon the debt or bond against which the company agreed to indemnify him. But, if the agreement of indemnity, and the payment under it, constitute the plaintiff a creditor, holding a debt which may be enforced against an individual stockholder, I am quite clear, upon the statement made in the declaration, that such debt was "contracted" as early, at least, as January 25th, 1854. The term "contracted," as used in this section, is the past tense of the verb "to contract." There is no allegation of any contract made with the plaintiff by the company after the date I have just mentioned; and, most clearly, the principal of this debt, for which the company then in form became liable, was not to be paid within one year from that time. It is barely possible that the stockholders might be liable for two semi-annual payments of interest, when the principal was not to be paid within a year, but I am inclined to think that, even if that position can be sustained, it sufficiently appears that all the interest accruing within the year was paid by the sale of the mortgaged premises.

These conclusions render it unnecessary that I should consider the other questions raised in the cause, for they are fatal to the plaintiff's claim to recover. The demurrer is allowed, with leave to the plaintiff to amend in twenty days, on payment of costs.

Case No. 3,302.

COX v. GRIGGS.

[1 Biss. 362;[1] 2 Fish. Pat. Cas. 174; Merw. Pat. Inv. 703.]

Circuit Court, N. D. Illinois. April, 1861.

PRIORITY OF CLAIM TO INVENTION—"USEFUL" DEFINED—INFRINGEMENT.

1. It is the right and privilege of a party, when an idea enters his mind in the essential form of invention, to perfect by experiment his

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

original idea, so as not to be deprived of the fruit of his skill and labor by a prior patent, if he is the first inventor; but there must be a reasonable diligence, looking at all the facts of the case.

[Cited in National Filtering Oil Co. v. Arctic Oil Co., Case No. 10,042; Christie v. Seybold, 55 Fed. 77.]

2. It is necessary, in order to prevent a man from having the benefit of his patent, that another should have first discovered the thing and reduced it to actual practice.

[Cited in Webb v. Quintard, Case No. 17,324.]

3. If two persons are jointly experimenting and equally meritorious, a doubt should be solved in favor of him who first obtains a patent.

4. "Useful," in the patent law, is in contradistinction to "mischievous:" the invention should be of some benefit.

[Cited in Cook v. Ernest, Case No. 3,155; Converse v. Cannon, Id. 3,144.]

5. The question, as to infringement, is not whether the defendant's machine works the best, but, does it use the plaintiff's invention?

At law. This was an action on the case tried by Judge Drummond and a jury to recover damages for the infringement of letters patent [No. 25,098] granted to Thomas S. Cox, August 16, 1859, for "an improvement in the mole of drain plows." A mole plow is an implement of iron, forced by appropriate machinery, in a horizontal direction, below the surface of the earth, in such a manner as to leave behind it a drain hole or tube, the sides of which are formed of compressed earth. The claim and an extract from the specification are given in the charge of the court.

S. A. Goodwin, for plaintiff.
C. B. Waite, for defendants.

DRUMMOND, District Judge. This case has been so fully argued that it is not necessary to comment on it at much length. The questions of law are few and simple. The main controversy is as to the facts. It is proper, in the first place, to call your attention to the plaintiff's patent. The specifications are brief, and, that you may comprehend them, I will read an extract: "The nature of my invention consists in forming the terra ducts 'B' on either side of the shank 'A' in such a shape as to carry the dirt from the bottom of the ditch to the top, and deposit it in the rear of the shank 'A' which, by means of the elevated end of the mole 'C' entirely closing up the perforation made by the shank 'A' gives a better and stronger arch, owing to its peculiar shape, than any heretofore made." He then, in compliance with the patent law, describes his improved mole plow so that a mechanic could build it. He then states what he claims as follows:

"The peculiar shape of the mole 'C;' by the forward movement of the mole 'C,' the earth is carried from the bottom of the ditch, by means of the terra ducts, from the point of the mole 'D' to the rear of shank 'A' and pressed more densely by the increased earth coming in contact with the convex end of the mole 'C' in the rear of the shank 'A' in such a manner as to make a better arch and more durable than any heretofore made, leaving the bottom of the ditch almost entirely uncompressed; hence, I do not claim anything except the invention of the terra ducts 'B,' ending in the convex on the top of the mole 'C.'"

He claims the peculiar construction as described, of terra ducts on a mole plow with a shank and a convex heel. He claims terra ducts which commence near the front, pass along by the shank, and unite as one duct, and rise gradually so as to compress the dirt in the arch.

His invention consists in putting on his mole the terra ducts in this manner, to produce the arch in the way described. The first point for you to decide is, whether the plaintiff is the first inventor of this improvement.

The letters patent are prima facie evidence of this. If the defendants deny the priority of the invention, they must introduce evidence to rebut the presumption arising from the patent, and in such case, the plaintiff must produce other testimony to establish his priority.

In this case, the plaintiff introduces his patent, dated August 16, 1859. The defendants then prove by witnesses, that in 1853 or 1854, one of the defendants made a sort of model similar to that shown by the plaintiff. One witness saw him, the defendant, whittle one out in Iowa, and another saw it while riding in a wagon with one of the defendants in this state.

The statement of the witness is, in substance, that the form of the model was something like the plaintiff's. The model at this time rested on mere theory. We know nothing further of it until 1857, when Merrifield saw some experiments made by one of the defendants.

No more is heard of the defendants' invention until the issue of their patent in November, 1859, subsequent to that of the plaintiff. They do not account for their delay from 1857 to 1859, so that the defendants' proof to rebut the plaintiff's priority consists in the fact that there was a model made by them in 1853, shown to two witnesses, and that in 1857 they made an experiment with one constructed of wood. It is the right and privilege of a party, when an idea enters his mind in the essential form of an invention,—inasmuch as most inventions are the result of experiment, trial and effort, and few of them are worked out by mere will,—to perfect by experiment and reasonable diligence, his original idea, so as not to be deprived of the fruit of his skill and labor by a prior patent, if he is the first inventor. But there must be what we would consider reasonable diligence, looking at all the facts in the case. The defendants do not

explain their delay from 1853 to 1857, when nothing was done and the models were not reduced to practice. It is necessary, in order to prevent a man from having the benefit of his patent, that another person should first have discovered the thing and reduced it to actual practice. It is not pretended by the defendants that they reduced to actual practice the crude model of 1853. On the part of the plaintiff, we have evidence that in 1855 and 1856 he was making drawings of his invention and a model; that he explained the same to his son in 1857, and that in December, 1858, he actually made a model and casting of the mole; that he was continuously experimenting, and was trying to carry out his plan and reduce it to practice, and that he built and put in use his improvement in the winter and spring of 1859. That is all the proof on both sides as to the novelty. The preponderance of proof should be in favor of the plaintiff, but if they were jointly experimenting and equally meritorious, a doubt should be solved in favor of him who first obtains a patent.

Secondly. You must be satisfied that the invention is a useful one, and of this, slight evidence only is necessary. "Useful," in the patent law, is in contradistinction to "mischievous;" the invention should be of some benefit.

Thirdly. Have the defendants infringed the invention of the plaintiff?

Nos. 1, 2, 3 and 4 are respectively representations of the improvement used by the plaintiff and the defendants.

It is conceded that the defendants' patent does not claim the plaintiff's invention. Have they used it? If so, they have infringed, and the plaintiff is entitled to damages. The question, then, is as to the construction of the defendants' machine; and that resolves itself into the question whether the terra ducts of the two machines are substantially the same. All that is necessary is, that the defendants should use substantially the invention of the plaintiff, and not necessarily the precise form. Is the construction of the defendants' terra ducts substantially the same as in the plaintiff's machine? Do they operate substantially in the same way, and produce substantially the same result? If so, they infringe. You are to judge from the facts as proved, and from the statements of experts. The mere opinions of experts are not entitled to much weight, unless founded on good and satisfactory reasons. In many cases, the testimony of experts is somewhat colored with feelings of a partisan character. The statement of a fact by one who has seen a machine work, is better, if reliable, than the mere opinion of ever so scientific an expert. The question, too, is not whether the defendants' machine works the best, but does it use the plaintiff's invention? If so, the defendants are liable; if not, there is no infringement. If they operate substantially in the same way,—whether the defendants' mole takes up more or less dirt than the plaintiff's, is of no consequence,—it is an infringement.

Fourthly. If you believe the defendants have infringed, the amount of damages is for you to determine.

The rule of damages I shall lay down in this case, as, perhaps, on the whole, being the most equitable under the peculiar facts, is, if you find for the plaintiff, that you should give him whatever profits, whatever benefits the defendants have received from the use of his invention. That is a measure of actual damages unattended with difficulty, because it is restoring to the plaintiff what justly belongs to him, and of which the defendants have deprived him.

The jury found for the plaintiff with $115.00 damages.

COX (HANSON v.). See Case No. 6,040.
COX (HAWKINS v.). See Case No. 6,243.
COX (JENKS v.). See Case No. 7,277.

Case No. 3,303.

COX v. JONES.

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

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

INDORSEMENT BY PAYEE OF NOTE AFTER DISHONOR.

If the payee of a promissory note, payable to order, indorses it after it has been dishonored, he thereby becomes the drawer of a new bill upon the maker in favor of the indorsee, and is not liable to such indorsee without demand and notice; but he cannot set up, against a remote indorsee, an agreement, with his immediate indorsee, not appearing upon the note itself.

At law. Assumpsit, against the indorser of W. S. Radcliffe's note, dated October 9th, 1816, for $120, payable thirty days after date to the defendant or order. Long after the expiration of the thirty days, namely on the 3d of January, 1818, this note was indorsed by the defendant [William Jones] to one Joshua Tennison or order, who indorsed it to the plaintiff's intestate.

The defendant, upon the trial, offered to prove a written separate agreement, between him and Tennison, that he should not be liable as indorser.

THE COURT (nem. con.) rejected the evidence, and said the indorsement became a new bill. The holder was bound to present the note again to Radcliffe for payment; and, if not paid, to give notice to the defendant, of the non-payment. It would be a fraud in the defendant to indorse the note generally, so as to give a new negotiability to the instrument, and then to set up his secret equity against an innocent holder.

Verdict and judgment for plaintiff.

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

COX (MANNING v.). See Case No. 9,042.

Case No. 3,304.

COX v. MURRAY.

[1 Abb. Adm. 340.][1]

District Court, S. D. New York. Nov. Term, 1848.

ADMIRALTY JURISDICTION—BREACH OF EXECUTORY CONTRACT—SERVICE IN PORT.

1. A court of admiralty has no jurisdiction to afford a remedy, either in rem or in personam, for the breach of an executory contract for personal services to be rendered to a vessel in port, in lading or unlading her cargo.

[Cited in Cunningham v. Hall, Case No. 3,481; Scott v. The Ira Chaffee, 2 Fed. 407; Roberts v. The Windermere, Id. 725; The Minna, 11 Fed. 760; Diefenthal v. Hamburg-Amerikanische P. Actien-Gesellschaft, 46 Fed. 399; The Main, 51 Fed. 955.]

2. In order to clothe a contract with the privilege of a remedy in the admiralty courts, the subject-matter of the contract must be maritime in its nature. This is the case only when the matter done, or begun to be done under the contract, regards the fitment of the vessel herself for the voyage,—aid and assistance rendered on board her in prosecuting the voyage,—or the employment of her as the vehicle of a voyage.

[Cited in Paul v. The Ilex, Case No. 10,842; Hubbard v. Roach, 2 Fed. 395; The Canada, 7 Fed. 121; The Wivanhoe, 26 Fed. 928; Withcofsky v. Wier, 32 Fed. 301; The Gilbert Knapp, 37 Fed. 211; The Electron, 48 Fed. 690.]

This was a libel in personam, by Henry Cox against Richard Murray, to recover for services rendered by the libellant to the respondent.

The libellant was a stevedore. The respondent was master of the Gem, a British brig owned in Glasgow. The libel embraced several claims, among which was a demand of $60 for the breach of a contract alleged to have been made by the respondent with the libellant as stevedore, engaging the services of the latter to stow a cargo of corn on board the respondent's vessel for shipment abroad. It was shown, however, that all the demands stated in the libel were satisfied by the respondent, excepting the one for damages for non-performance of that contract; and that no services were rendered by the libellant under the contract to load the vessel, beyond what he had received compensation for. The sole question upon which the case turned was, whether a court of admiralty can take jurisdiction of a suit for damages for the bare breach of a contract for services to be rendered in loading a cargo on board a vessel.

Alanson Nash, for libellant.
J. T. Doyle, for respondent.

BETTS, District Judge. The libellant avers that he was employed by the respondent to load and stow on board the brig Industry, commanded by the latter, a cargo of corn; and that he was afterwards unjustly discharged by the respondent, and prevented from doing the work, whereby he has been damaged to the amount of $60. The respondent contests the amount of damages, and also objects to the jurisdiction of the court over the demand. The inquiry as to the extent of damages sustained will be laid out of view, and the question of jurisdiction will alone be considered.

This being a foreign vessel, the remedy would, ordinarily, be concurrent either in rem against her, or in personam against the owner or master, when the subject-matter is one of maritime jurisdiction. The General Smith, 4 Wheat. [17 U. S.] 438. If that position be not accurate universally,[2] I do not consider the form of action in this case affords the libellant any advantage in respect to the question under consideration.

The decision of the cause does not rest upon the point contested between the advocates of the parties on the hearing—that is, the right of a stevedore to sue in admiralty for services rendered by him in loading or unloading a vessel[3]—but upon a point widely different, viz., the competency of the court to sustain an action or afford a remedy for a mere breach of contract, when no services have been rendered, nor any materials furnished, nor other acts of performance done under it, upon a vessel.

I understand the doctrine of the liability in admiralty, of vessels or their owners to material-men and laborers, is based upon the consideration that the ship has been benefited and aided in her business of navigatin‑ the sea by the supplies or services furnished her. 4 Wash. C. C. 453 [Zane v. The President, Case No. 18,201]. And I am not aware that maritime courts have ever sustained actions for personal services upon the footing of an executory contract merely. It may be a close question, whether a distinction may not exist, in respect to contracts of affreightment and others, which have relation to the use of a vessel in maritime employments, either by the owner or freighter, or to those entered into by mariners, which contemplate performance at sea, and thus assume, in most points, the strong similitude of a maritime character.

But a contract made in port, and intended to be there performed, to fit out, rig, or repair a ship, or to put on board necessary stores for a voyage, is not easily distinguishable in principle from the contract to furnish her a cargo; and I apprehend it would be difficult to fix upon any settled doctrine of maritime law which brings contracts of the latter description within the cognizance of maritime courts.

[1] [Reported by Abbott Brothers, and here reprinted by permission.]

[2] See the case of The Merchant [Case No. 9,434.]

[3] That the services of a stevedore are not the basis of a lien upon the vessel, suable in rem, was decided in this court, in The Amstel [Case No. 339], and in The Bark Joseph Cunard [Case No. 7,535].

If suits can be maintained in admiralty upon contracts where there has been no fulfilment, then, since the right of remedy should be reciprocal, the master or owner might resort to the same tribunal for the violation of agreements to build or repair a vessel, to supply her with stores, or to provide her with a stipulated cargo. The strong current of authority runs against the existence of any such powers in admiralty courts. Willard v. Dorr [Case No. 17,679]; Plummer v. Hill, 4 [Mass.] 380; Pritchard v. The Lady Horatia [Case No. 11,438]; The Orleans v. Phoebus, 11 Pet. [36 U. S.] 175; Andrews v. Wall, 3 How. [44 U. S.] 568; L'Arina v. Manwaring [Case No. 8,089]; Bains v. The James and Catherine [Case No. 756]; The Crusader [Id. 3,456]; Bracket v. The Hercules [Id. 1,762]; Davis v. A New Brig [Id. 3,643]; Thackarey v. The Farmer [Id. 13,852]. Undertakings which are merely personal in their character, or which are preliminary and leading to maritime contracts, do not seem ever to have been recognized as within the jurisdiction of admiralty. Bracket v. The Hercules [supra]; The Tribune [Case No. 14,171]. The subject-matter of the contract—the substantial object and end—must pertain to navigation, or be connected with transactions performed by vessels on the sea, to become maritime in its nature, and be clothed with the privilege of a remedy in admiralty courts; and it appears to me that an agreement acquires this maritime quality only when the matters performed or entered upon under it pertain to the fitment of a vessel for navigation, aid and relief supplied her in preparing for and conducting a voyage, or the freighting or employment of her as the instrument of a voyage. Collateral contracts with or assistance by services or advances to an owner or master, incidentally benefiting a voyage, acquire no special property thereby which renders them maritime.

The loading or stowing a cargo on board does not involve either of these fundamental ingredients of maritime service. This position was taken in the decision rendered in this court in the case of The Amstel, decided in 1831 (since reported [Case No. 339]). The services of a stevedore in stowing or unlading a cargo, were there placed upon the same footing with those of a drayman who hauls it to the vessel or away from her. The stevedore's service is of no higher character, in respect to maritime privilege, than that rendered by any shore laborer who assists in pulling at the falls, or moving the merchandise along the wharf while the vessel is taking in or discharging cargo, or who aids in weighing or measuring it. The engagement entered into by a master with a stevedore, to employ the latter in such service, is of no higher quality than the service itself, and cannot, therefore, afford foundation for an action in admiralty, either in rem or in personam. I therefore pronounce against the jurisdiction of the court over this demand.

Decree accordingly.

Case No. 3,305.

COX v. RAMSDELL et al.

[4 Ban. & A. 326.][1]

Circuit Court, D. Massachusetts. June Term, 1879.

PATENTS—"BOOT-TREES"—VALIDITY—INFRINGEMENT.

Letters patent No. 170,462, dated November 30, 1875, for boot-trees, and letters patent No. 170,980, dated December 14, 1875, for boring-machines, both granted to George W. Badger, *held* valid, and infringed by the defendants.

[This is a suit in equity brought by George P. Cox against Charles Ramsdell and others to restrain infringement of letters patent Nos. 170,462 and 170,980, granted to George W. Badger, November 30, 1875, and December 4, 1875, respectively.]

T. L. Wakefield, for complainant.

T. W. Clarke, for defendants.

LOWELL, Circuit Judge. The plaintiff brings his suit for the infringement by the defendant of two patents; No. 170,462, dated November 30, 1875, is for an improved boot-tree for making india-rubber boots, and the improvement consists in the very simple contrivance of making a rectangular hole for a rectangular nut, instead of undertaking to put a square nut in a round hole, which is proverbially unsatisfactory. Both inventions were made by one Badger, who was in the employ of the plaintiff, and were assigned to him before the patents were issued. The evidence satisfies me that the change is a useful one in the manufacture of this kind of boot-trees. There is some doubt whether it is new with the plaintiff's assignor; but upon the whole evidence, the defendants have failed to satisfy me that it is not. Of the infringement I entertain no doubt.

The other patent is No. 170,980, dated December 14, 1875, for an improvement in machines for boring certain holes needed in the foot part of these boot-trees, one of which is the rectangular hole above mentioned. The machine consists of two parts, and the claims are and must be for combinations, because all the elements of boring machinery used in them are old, and were familiar to mechanics in 1875. The first and third claims are charged to be infringed. The first is for an arrangement or combination for boring the vertical hole in the foot part of the boot-tree, being a continuation of the hole which is bored in the leg part, the two being used for inserting the bolt by which the foot and leg are joined or clamped together during the use of the entire boot-tree in making the india-rubber boot.

Considering the first claim as one for a combination, I think the defendants have succeeded in evading it by omitting the stop "m" from the combination. It is said that

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

the table operates as a stop, which is true in a certain sense; but it is more accurate to say that the arrangement is such that no distinct stop is needed, but the table suffices for the work without a stop.

The third claim is for the combination or arrangement for boring the horizontal hole in which the nut is to be inserted. I have had much doubt whether there was any patentable novelty in this part of the machine, considering the state of the art. But construing it very narrowly as a combination claim, I think it may be sustained, as a slight variation in arrangement from any machine which is proved to have existed before. No doubt the idea of boring this hole by machinery was new; and I think there was a new arrangement of machinery. I consider that the evidence makes out a pretty clear case of infringement, even when the clamp is used, because the clamp appears to be a mere substitute and a known one for the holding device of the third claim. The decree then will be, that patent No. 170,462 is infringed; that the third claim only of patent No. 170,980 is infringed, and for an injunction and an account so far as infringement has been found.

Case No. 3,306.

COX v. SIMMS.

[1 Cranch, C. C. 238.][1]

Circuit Court, District of Columbia. June Term, 1805.

RIGHTS OF HOLDER OF FOREIGN BILL—PROTEST—NOTICE—ACTION—PLEADING AND PROOF.

1. The holder of a bill before protest, is not affected by a settlement between the drawer and payee.

2. In an action upon protest for non-payment, it is, not necessary to show a protest for non-acceptance, nor to give notice of non-acceptance. Reasonableness of notice is to be decided by the jury.

3. In an action by the payee of a bill having two subsequent indorsements in full, it is not necessary for the plaintiff to show a new assignment to himself.

4. If the drawer has no funds in the hands of the drawee he is not entitled to notice of non-payment.

At law. Action of assumpsit. Indorsee against drawer of a foreign bill of exchange for £200 sterling, drawn by Jesse Simms on Stewart, in favor of Fletcher & Otway, and by them indorsed to Cox, dated 10th of September, 1797, at sixty days' sight; presented 14th December, 1797, protested for non-payment 15th February, 1798.

E. J. Lee, for defendant, offered evidence of a settlement between Fletcher & Otway and Simms, subsequent to the date of the bill, but it was rejected by the court; the bill appearing to have been indorsed to the plaintiff before dishonor. Mr. Lee prayed the court to instruct the jury that the plaintiff cannot recover unless he shows a protest for non-acceptance.

THE COURT stopped Mr. Taylor, who was about to reply; and said they had frequently decided the point and overruled the objection on the authority of Brown v. Barry.

Mr. Lee then prayed the court to instruct the jury, that reasonable notice of the non-acceptance ought to be proved.

THE COURT refused to give the instruction.

Mr. Lee required evidence of notice of non-payment.

Mr. Taylor, for plaintiff, produced the defendant's letter, dated 21st August, 1798, promising to pay the bill, and contended that the jury were to decide whether the notice was reasonable. Mackie's Ex'r v. Davis, 2 Wash. [Va.] 231, Judge Carrington's opinion.

Mr. Lee, contra, cited Stott v. Alexander, 1 Wash. [Va.] 331 and Wood v. Luttrel, 1 Call, 232, that the reasonableness of notice was a question of law arising on the facts.

THE COURT decided that the reasonableness of notice was to be decided by the jury. CRANCH, Chief Judge, contra.

Mr. Lee then objected that as the bill is indorsed by Cox (the plaintiff) to Tucker, and by Tucker in full to William Murdock, the plaintiff cannot recover unless he show a new assignment to him (Gorgerat v. McCarty, 2 Dall. [2 U. S.] 144); but the Court overruled the objection.

THE COURT, at the prayer of the plaintiff's counsel, instructed the jury that if they were satisfied, by the evidence, that Simms had no funds in the hands of Stewart, notice of non-payment was not necessary.

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

Case No. 3,307.

COX v. WATKINS.

[3 Cranch, C. C. 629.][1]

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

DISSOLUTION OF ATTACHMENT.

If goods be attached under the Maryland act of 1795, and the defendant be taken on the capias before the return of the attachment, it will be dissolved upon the personal appearance of the defendant in custody being entered.

The marshal had attached certain goods of the defendant under the Maryland act of 1795, c. 56, during his absence. Before the return of the attachment, the defendant was committed upon a criminal charge, so that the marshal was bound to return the capias "cepi," and being brought into court, in custody of the marshal, his appearance in proper person was entered by the clerk.

Mr. Coxe, for defendant, moved that the attached effects should be discharged, as the marshal was bound to take the defendant

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

upon the capias, and the plaintiff had no right to proceed against the goods while he had the body of his debtor in custody.

Mr. Wallach, for plaintiff.

THE COURT being of that opinion, ordered the goods to be discharged.

Case No. 3,308.

COX v. WILDER et al.

[2 Dill. 45;[1] 7 N. B. R. 241; 5 Am. Law. T. Rep. U. S. Cts. 500.]

Circuit Court, E. D. Missouri. 1872.[2]

BANKRUPT ACT—DOWER—HOMESTEAD EXEMPTION—FRAUDULENT CONVEYANCE.

1. As against the assignee in bankruptcy, the wife is not barred or estopped to claim dower, by reason of her having joined her husband in a deed which is fraudulent as to creditors, and which has for this reason been set aside at the instance of the assignee.

[Cited in Re Pratt, Case No. 11,370; McFarland v. Goodman, Id. 8,789.]

2. A similar principle was applied under the statute of Missouri to the homestead exemption right, which, as against the assignee in bankruptcy, was *held* not to be forfeited by the making of a fraudulent conveyance, which was set aside at the instance of the assignee.

[Cited in Bartholomew v. West, Case No. 1,071; Re Richardson, Id. 11,776; Re Detert, Id. 3,829; Market Nat. Bank v. Hofheimer, 23 Fed. 17.]

This is an appeal from a decree of the district court for the eastern district of Missouri. [Case No. 3,309.] Cox is the assignee in bankruptcy of Sauer. Sauer and wife made a conveyance of the farm of Sauer, on which he and his family resided, to Wilder, within six months of the bankruptcy. The district court found that the conveyance was fraudulent as to creditors, and decreed that all of the rights of Wilder, and of Sauer, and of his wife (who were defendants to the bill), be divested out of the defendants, and be vested in the plaintiff as assignee, free and discharged of the homestead claim of Joseph E. (the husband), and the dower right of Mary E. (the wife); from which decree the defendants appeal.

C. C. Whittlesey, for assignee.

Dryden & Dryden, for defendants.

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

DILLON, Circuit Judge. The deed to Wilder was executed by Sauer and wife, and was absolute in form and duly acknowledged. It was intended to secure advances to be made, but which were, in fact, never made, and we agree with his honor below, that, whether regarded as a sale to Wilder, or as security for advances which upon a contingency he promised to make, it was intended to delay creditors, and was, therefore, as to them, fraudulent and void. Not having been recorded, the deed was, after the bankruptcy, surrendered by Wilder to Sauer, and destroyed. The only question in the case is, whether the assignee is entitled to the land free of the dower and homestead rights.

The grounds of the decree below were very fully and ably stated by the district judge in his opinion on a demurrer to the bill, and which is reported in 5 N. B. R. 443 [Cox v. Wilder, Case No. 3,309].

We are unable, however, to concur in the conclusion to which he has arrived respecting the dower. It is a peculiar and favored right; so much favored, indeed, that, according to Lord Bacon, it is "the common by-word in the law, that the law favoreth three things: first, life; second, liberty; third, dower." Dower can only be relinquished in this state (Missouri) by the wife joining with the husband in a deed of the land, acknowledged and certified as required by the statute. Rev. St. 1865, p. 444, § 2. It cannot be released to a stranger. The wife could not have relinquished it by herself to Wilder. It cannot exist as a separate right in him or his grantee, dissociated, so to speak, from the interest or estate of the husband. As against the grantee, she is estopped by her deed to claim dower, but the estoppel cannot operate in favor of or be claimed by a stranger, or third person, under whom the complainant does not derive or claim title: Robinson v. Bates, 3 Metc. (Mass.) 40; Pixley v. Bennett, 11 Mass. 298; Morton v. Noble [57 Ill. 176], and cases cited by Scott, J.; Summers v. Babb, 13 Ill. 483; 1 Washb. Real Prop. 234, pl. 16; Sears v. Hanks, 14 Ohio St. 298. We solve the question here presented as to dower, when we determine under whom the assignee claims and to whose rights he succeeds. The bankrupt act [of 1867 (14 Stat. 522)] among other things, invests him with the right or title to "all the property conveyed by the bankrupt in fraud of his creditors." Section 14.

He claims not under, but adversely, to the deed of Wilder. He succeeds to all the interests of the bankrupt, and represents his creditors so far as to enable him to attack conveyances made by the bankrupt in fraud of their rights. He claims that the deed is void as to creditors, and on this ground alone attacks it, and upon this ground alone has he any right to the property. He says it is void as to creditors because fraudulent, and for this reason asks to be invested with the title which it fraudulently conveyed. He cannot claim under it, and must claim against it. When it is decreed to be fraudulent and void at his instance, how can he set it up to defeat the right of the wife to dower? Such a position involves this inconsistency, viz: that it asks that the same instrument be held void as to creditors, and then in their favor held valid as to the wife. We concur in opinion with those courts which hold, as

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

[2] [Reversing Case No. 3,309.]

in the cases above cited, that the wife is not, under such circumstances, barred of her dower.

When we consider the intimate and confidential relations between husband and wife; the control and influence of the former over the latter in matters of business; the public policy in which the right of dower has its origin and support in the law, namely, a provision for the widow; and that if the fraudulent conveyance had not been made, the dower right would have been beyond the reach of the creditors or the assignee, we find it difficult to resist the conviction that, as between the wife and the assignee, the equity as to the dower right is with her, and that to deprive her of it, is, in substance and effect, to punish her for the intended, but by the decree the court makes, the ineffectual, fraud of the husband.

Similar considerations, in my judgment, apply to the homestead right, although here I have the misfortune to differ not only with his honor below, but with my associate on this appeal. Exempt property does not pass to the assignee (section 14), and the bankrupt law exempts, inter alia, from the operation of the assignment, all such property as was exempt from levy and sale, upon execution by the law of the state, to an amount not exceeding that allowed by the state exemption laws in force in the year 1864. Section 14.

By the act of March 23, 1863 (Laws Mo. 1863, p. 22), it is provided that "there shall be exempt from sale under execution (or other process), when owned by the head of a family, or wife, who shall be a bona fide resident of the state, any of his or her real estate, not exceeding (one hundred and sixty acres, if farming land, or one lot in town or city) in value one thousand dollars at the date of such exemption, to be held and enjoyed by such party as a homestead."

9th. "Where the real estate owned by any head of a family is of greater value than the amount allowed as the value of a homestead to be exempt from sale under the provisions of this act, and is not susceptible of division, such real estate may be sold, and the officer shall pay over to the defendant in such execution the amount or value of a homestead to be exempt under the provisions of this act."

Sec. 11. "Such exemption shall continue after the death of such householder, for the benefit of the widow and family, some or one of them continuing to occupy such homestead," etc.

The homestead is the place where the family reside—the home; and, since the exemption is allowed only to the head of a family it is obvious that the provision is not made solely on account of the husband, but has in view also the wife and children—the family. 1 Am. Law Reg. (N. S.) 645-651. These exemptions, in view of their benevolent and humane character, are entitled to be liberally viewed by the courts (Id.), although, of course, the right must be claimed under the qualifications and conditions prescribed by the statute. Now, by the bankrupt act, the assignee takes "all the property conveyed by the bankrupt in fraud of his creditors" (section 14), that is, takes it as fully and effectually as if the fraudulent conveyance had not been made. As respects the assignee, the property is still the bankrupt's at the date of the bankruptcy, and the assignee takes under or through him.

Except for the deed to Wilder the bankrupt would be entitled to the exemption. But, as we have seen, the assignee does not and cannot claim under that deed, but in hostility to it; and when it is avoided, and the title placed in the assignee, I do not think (in view of the purpose of the exemption) that the husband is estopped, as against the assignee, to claim the right to the homestead, or the value, to the extent given by the statute. This view does not make the estate any less than if the fraudulent conveyance had not been made, while the opposite view gives the creditors a profit out of the attempted fraud, at the expense of the family for whose benefit the exemption is mainly if not wholly provided.

If the law gave to a single man the right to this exemption, it would accord with the natural desire to punish fraud, to visit a penalty upon him; but to denounce a forfeiture of the homestead where there is a family, subverts the policy on which the exemption is provided and allowed. Reversed.

NOTE [from original report]. Construction of Missouri statute on the subject of the homestead exemption: See In re Hook [Case No. 6,671]; Smith v. Kehr [Id. 13,071]. Construction of Nebraska statute on same subject: In re Cross [Id. 3,426]. Construction of constitution of Kansas upon the same subject: Rix v. Capitol Bank [Id. 11,869]; In re Tertelling [Id. 13,842]. Of the statute of Kansas: In re Jones [Id. 7,445]. Generally as to homestead right: 1 Am. Law Reg. (N. S.) 645-651, and cases there cited; Smith v. Kerr [supra].

Case No. 3,309.

COX v. WILDER et al.

[5 N. B. R. 443.] [1]

District Court, E. D. Missouri. 1872. [2]

FRAUDULENT CONVEYANCE—SUIT TO SET ASIDE—PARTIES—DOWER.

1. Where husband and wife join in a deed duly acknowledged so as to release the dower, if the deed be avoided in the hands of a fraudulent grantee as having been executed by the bankrupt with intent to hinder, delay and defraud creditors, the assignee in bankruptcy will be entitled to the land divested of the wife's claim to dower, and the husband's right to a homestead.

2. To a bill brought by the assignee in bankruptcy, to vest the title of the fraudulent grantee in himself, that the land may be sold clear of encumbrances, the bankrupt and his wife are proper parties if they claim homestead and dower.

[1] [Reprinted by permission.]

[2] [Reversed in Case No. 3,308.]

The bill states that Sauer, the bankrupt, made a deed to Wilder to defraud his (Sauer's) creditors, for the nominal consideration of five thousand dollars, but really without any value consideration; that after said deed was executed by him and his wife and duly acknowledged, it was lodged in the proper office for record; that thereupon some of Sauer's creditors sued out attachments on the ground that said deed was made to defraud creditors, and then said deed was withdrawn by the defendants from the recorder's office before it had actually been placed on the records; that said deed has since been destroyed or concealed, and that said Sauer and wife pretend that they have respectively a homestead and a dower interest in said premises. The object of the bill is to have said fraudulent deed adjudged void as to creditors, and the title to the premises vested in the assignee discharged of both dower and homestead interests. The bill in its general features looks to a conveyance by the grantee (Wilder), under the decree of this court, to the assignee, so that the latter may be vested with all the right, title and interest vested in the grantee. Demurrers are interposed by the respective defendants, Wilder for multifariousness, and Sauer and wife for want of equity.

Mr. Whittlesey, for plaintiff.

Dryden & Dryden, for defendants.

TREAT, District Judge. The propositions involved are, admitting, as the demurrers do, that said deed is void as to creditors: First. Whether the inchoate dower of Sauer's wife is still in her. Second. Whether the homestead interest is still in Sauer. Third. As resulting from the foregoing, whether the assignee in bankruptcy can have vested in him the complete title including both homestead and dower interests. At the outset the court is met on each of the propositions with conflicting decisions based mainly on very nice and subtle distinctions as to the nature of the interests and questions involved. In their opinions on the dower question, it is held by some courts that, as the wife, having merely inchoate dower, does not convey by grant, but merely by estoppel, and that, as there is thus sufficient interest only in the grantee to feed the estoppel and he takes accordingly, therefore if the deed be avoided in consequence of the fraudulent acts of the husband, there is left in him no interest whereby the estoppel can be fed; consequently the inchoate dower must remain in her as if no such deed had been executed. Other courts differ, on the ground that as the right was in her to relinquish her inchoate interest in the realty, when she did so, the estate was free from any claim or interest therein that she might otherwise have asserted.

Without reviewing the authorities or commenting in detail on the reasons given for their conflicting conclusions, the opposing views as generally presented may be thus summed up. The deed is valid between the parties, and only void as to creditors. Now if only void as to creditors, the latter, if the deed be adjudged void as to them, can take no greater interest in the premises than they could have had if the deed were never made; consequently they can take no more than was subject to execution, excluding therefore both homestead and dower interests. On this view of the case many intrinsic difficulties arise which the learned opinions do not fully discuss. If the deed is valid between the parties, then except as to the right of creditors, every interest passed to the grantee which the grantors could convey, and where the creditors' rights are enforced the question must still remain, as between grantors and grantee, who has the dower and homestead interest which the creditors could not originally reach? How is it, as some courts maintain, that the dower interest, which the wife has relinquished to the grantee, and which she is estopped from disputing passed to him, is still in her? He may have paid a valuable consideration therefor, and still it is said if her husband's conveyance was in fraud of his creditors, yet her inchoate dower which she relinquished for value does not continue in the grantee, nor pass to the creditors, but remains in herself. The force of such reasoning is not perceived. If the creditors by avoiding the deed were in the same condition as if it had never been made, they could levy on the husband's interest and sell the same, subject, however, under the Missouri statute, to the wife's inchoate right of dower. But as she has parted therewith by a deed valid between her and her grantee, how is the latter divested of the rights he acquired from her and not from her husband, over which her husband had no control, and how are those divested rights restored to her in opposition to her deed? If her conveyance to him operated only by way of estoppel instead of grant, how is she relieved of the estoppel? It cannot be contended that the moment the husband's right to the fee passes from him she has no inchoate dower. The very object of the statute is to prevent that result. If her husband then parts with his right and she with hers, and it is adjudged that her husband's acts were fraudulent and void whereby his interests in the realty remain subject to his creditors' demands, how is it that her relinquishment to her grantee is no longer valid or obligatory? If resort be had to the intrinsic nature of their respective interests, and the right of each to convey or relinquish the same—how can the reinvestiture of his interests in him work against her estoppel a transfer of her rights to her against the will of the grantee. If the reasoning on which the main proposition rests in such cases be correct, then the interest of the wife should be held still to remain in the grantee. There is nothing in the technical distinction between estoppel and grant to change that result. It is immaterial which

way he holds, by estoppel or grant? if he holds by virtue of an act valid as between her and him. If the deed is void only as to her husband's creditors, she is not affected by his acts, for they could not reach her inchoate dower. She had a right to part therewith or not, as she pleased, and having voluntarily parted therewith, how is it that against her estoppel it is restored to her despite the will of the grantee? Can it be said it is so inherent in and inseparable from her husband's estate that it cannot be severed therefrom? If so, how is it that if he make a deed and she does not join therein, his estate passes and her inchoate right does not? Her right of dower in such a case remains severed necessarily, so to speak, from the fee in her husband or is still a charge upon the estate into whomsoever's hands it may pass. If then it is severable, and her acts may pass it, is it contended that it does not pass unless her husband joins, and consequently, when his act in joining is void, hers is also void? If that be so, why is it that her act is made to depend on her unrestrained and voluntary action free from his control or influence—that only her free and uninfluenced conduct suffices to divest her of what otherwise would still be her exclusive interest, and that she is held to be estopped when she thus acts? If the avoiding of the deed by the creditors enables them only to reach such interest in the husband as could have been reached if the deed were never made, then they can sell subject to the dower; but that right in them is far from determining that as between her and the grantee, she is not estopped from denying that the latter is entitled to the value of such dower interest. Indeed, the very course of reasoning employed by those who contend for the doctrine that the dower is still in her should leave the interest in the husband's grantee; for the husband's deed is void not as between him and his grantee, but only as between him and his creditors, and her deed is wholly irrespective of the creditors—takes nothing from them which they could reach, yet estops her. Hence, if the dower interest remains outstanding despite such a fraudulent conveyance when it would have passed by a valid conveyance, and the conveyance is valid as between her and her grantee, in whom is it outstanding? How can it possibly be in her? If in any one must it not remain in the grantee?

Similar questions arise as to the homestead interest of the husband, and in many respects are to be determined on like considerations. On this subject there is also a conflict of decisions. The grantor's homestead is exempt from execution, yet he has a right to convey the same voluntarily. If he does convey all of his interests in his realty, including his homestead interest, and the deed is valid as between him and his grantee, but void as to his creditors, what becomes of the homestead interest? Evidently if the deed were not void, it would be merged in the estate conveyed. If the deed be adjudged void as to creditors, how is it that the homestead interest is severed and revived, so that the creditors take the debtors' original interest charged with the homestead? If they so take, in whom is the homestead, in the grantee or grantor? If the grantee paid a valuable consideration for the fee divested of the homestead, why should the creditors, in avoiding the deed as to them, be in a better condition than if the deed were never made? If it were never made or void as to them ab initio, they could not reach the homestead, the deed being valid as between parties; those claiming under the grantee like the grantee himself could insist that the homestead interest passed and was merged; but the creditors claim adversely to the deed, and therefore are not in a position to demand what the grantee might claim under it. If then, the creditors, by avoiding the deed in invitum, take whatever by law they can take in invitum and no more, where is the homestead interest? By the deed it was merged or extinguished. How is it again revived and severed, and for whose benefit? The grantor has parted with it, and he ought not to claim against his deed. Is it, then, a revived or severed interest outstanding in the grantee? If so, on what legal principle?

The homestead interest in Missouri belongs only to the head of a family, and pertains to premises which he uses as a homestead, those premises being owned by him. When he ceases to own them or use them as his homestead, they cease to be such. One person cannot have a homestead in another man's property. Therefore, so soon as the debtor granted all his title to the property to the grantee, his ownership ceased, and he ceased thereby to have any homestead therein. If the deed be adjudged void as to creditors, and thereby his general ownership remains for the benefit of his creditors, is he necessarily restored to the homestead interest which was not conveyed to escape his creditors because they could not reach it, but which he could thus voluntarily convey? The conveyance of his homestead interest not being prejudicial to his creditors, why should not the grantee thereof hold the same? If the deed were absolutely void as to all the world, then the homestead being in the debtor could not be reached by the creditors. If it were merged in the grantee's estate, and must stand as valid between the grantor and grantee, and if the deed was void only as to creditors, so that they could subject to their demands merely what could have been so subjected if the deed had never been made, then the homestead must remain in the grantee. If under the statute the homestead is set apart in specie out of the premises conveyed, or is sold and the prescribed sum in lieu thereof is paid, to whom should the sum be paid, or for whom

the land set apart? If not to the creditors, should it not be to the grantee instead of the grantor? If the grantee had paid therefor, why should it not be his instead of the grantor's? Without pursuing this mode of analysis farther, which has served to create the conflicting decisions cited, it may be well to seek the solution in clearly established principles easily comprehended. It may be premised that on principle, there can be no distinction fairly drawn between the dower and homestead interests involved, for each belongs to the individual grantors and could not be taken in invitum, yet each had an indisputed legal right to part therewith voluntarily.

The homestead right depends on two elements: First, the ownership of the premises by the head of a family; second, his use of them as a homestead. No one can dispute that the ownership of lands not occupied as a homestead is subject to execution under the Missouri statute, nor can it be successfully contended that abandonment of the premises as a homestead does not leave them subject to creditors' demands—they remain free from creditors' judgments—in other words, only so long as they are homesteads. When, therefore, the owner and occupier voluntarily executes a conveyance therefor, why should not the law raise the presumption that as the possession follows the deed, the homestead is abandoned. When abandoned before a deed is made, a conveyance clearly passes the estate free from a homestead right; and after such abandonment the premises would, before a conveyance, be equally subject to execution. If then a voluntary conveyance of the fee carries with it the homestead, does it not eo instante operate an extinguishment of all homestead interests—work a complete merger of that interest in the fee? Is that not necessarily so? First, from the absence of ownership in the grantor, and, secondly, from absence of his use of the premises for a homestead? The grantee might purchase in order to obtain a homestead for himself, and having become owner and occupier, his own right of homestead would spring therefrom. There could not be an outstanding homestead in another person and an actual homestead in himself at the same time. Hence the deed of the debtor merged, so far as he was concerned, his whole interest in the grantee, and there was from the instant the deed was executed no such interest as the grantor's homestead remaining. The title passed just as free from a homestead interest as if none had ever existed. The debtor having thus fraudulently conveyed to the grantee and extinguished his homestead interest, whatever passed to the grantee remains subject to the creditors' demands. The grantee cannot hold against the adjudged fraud; the grantor cannot reclaim against his grant. The merger of the homestead interest by the grant enures to the benefit of the creditors whom it was sought to defraud, because the abandonment of use and ownership by the deed was an annihilation of the homestead, thereby leaving the premises like any other realty owned by the grantor, to which no pretence of a homestead interest ever obtained. The same course of reasoning must necessarily mark a like result as to the inchoate dower—it was extinguished.

These views are not in accord with the opinions of many able judges; but no other conclusion seems defensible on a well-considered analysis of the many legal principles involved, if the owners of a homestead or of a dower interest can lawfully part therewith by a voluntary conveyance, and if, when they so part with such interest, they are so merged in the fee as to be extinguished—to no longer exist as separate or severable interests—why should they, when their fraud avoids their conveyance as to creditors, recover against their own deeds or estoppels what they have absolutely and solemnly parted with?

And why should the fraudulent grantor be permitted to sever from the fraudulent grant or recreate therefrom interests already merged and extinguished in order to save from the consequences of his fraud some portion of what he sought fraudulently to acquire. The consequences of such merger he must suffer; just as others do in fraudulent confusion of goods or interests. The law will not revive extinguished or merged interests to unravel for his benefit the tangled web of fraud he has woven. He had a right to abandon his homestead and thus subject it to execution and he has done so. The demurrer under the views thus expressed will have to be overruled notwithstanding the court holds that there is no interest remaining in Sauer or his wife, if the allegations of the bill be true. They, it is charged, claim respectively homestead and dower interests, though the deed was fraudulent as to creditors, and therefore they are proper parties. The title which the plaintiff seeks involves their demands and also their acts, and a judgment would not meet the exigencies of the case unless they were concluded thereby. The demurrers are overruled.

As to dower: 1 Scrib. Dower, 610 et seq.; Robinson v. Bates, 3 Metc. [Mass.] 40; 1 Washb. Real Prop. 203; Summers v. Babb, 13 Ill. 483; Rickard v. Talbird, Rice, Eq. 158; Stinson v. Sumner, 9 Mass. 143; Blair v. Harrison, 11 Ill. 384; Woodworth v. Page, 5 Ohio, 70; Manhattan Co. v. Evartson, 6 Paige, 457; Maloney v. Horan, 53 Barb. 29; Meyer v. Moher, 1 Rob. [N. Y.] 333; Stewart v. Johnson, 3 Har. [18 N. J. Law] 87. As to homestead: Castle v. Palmer, 6 Allen, 401; Getzler v. Saroni, 18 Ill. 518; Cassell v. Williams, 12 Ill. 390; Herschfeldt v. George, 6 Mich. 456; Sears v. Hanks, 14 Ohio St. 298; Piper v. Johnston, 12 Minn. 60 [Gil. 27]; Gardner v. Baker, 25 Iowa, 347; Rev. Code Mo. 1865, p. 449, § 1 et seq.

[NOTE. The defendant Wilder appealed to the circuit court, and the holding herein was reversed. Case No. 3,308.]

COX, The JESSE J. See Case No. 7,295.

COXE (EWER v.). See Case No. 4,584.

Case No. 3,310.

COXE et al. v. HALE et al.

[10 Blatchf. 56;[1] 19 Int. Rev. Rec. 30; 8 N. B. R. 562; 21 Pittsb. Leg. J. 77.]

Circuit Court, N. D. New York. June Term, 1872.

BANKRUPTCY—PREFERENCE—FORFEITURE OF RIGHT TO DISTRIBUTION.

1. H. held valid mortgages on land of E., amounting, principal and interest, to more than the value of such land. E. conveyed the land to H., by deed, the wife of E. joining in the deed, the consideration of the conveyance being a sum proved to be the fair value of the land. At that time, H. was a creditor of E. in respect of other matters besides the mortgages, but did not know that E. owed any one but himself, and had no knowledge or suspicion that E. had not property sufficient to pay all that he owed. E., in fact, owed other debts, and was insolvent. H. learned this after receiving the deed, and then offered to the other creditors, to give up any priority and share equally with them. After that, and within four months after the giving of such deed, a petition in bankruptcy was filed against E., on which he was adjudged a bankrupt, and an assignee of his estate was appointed. H. then offered to the assignee to reconvey the land, subject to the mortgages. But the assignee brought suit, to compel H. to convey the land to him discharged of the mortgages. *Held*, that H. obtained no preference, by means of the deed; that it would have been no preference, even if H. had known that E. was insolvent; that the value of the land must be charged against the mortgage debt; and that H. must be permitted to prove, against the estate, the balance due on such debt at the date of the deed, with interest thereon.

2. A creditor, who knows his debtor to be insolvent, may sue him, and proceed to judgment, and take his property, on legal process, in such manner as would operate to give a preference to himself, if carried into full execution, and may then allege these facts as an act of bankruptcy and have the debtor adjudged a bankrupt.

[Cited in Mayer v. Hermann, Case No. 9,344.]

3. A creditor, who is not aware, until after he levies an execution, on the property of his debtor, that the debtor owes other debts, and who, when he learns that fact, offers to the other creditors, to give up his priority and come in on an equal footing with them, and who, after the debtor has been adjudged bankrupt, on the petition of another creditor, because of the levying of such execution, offers to the assignee in bankruptcy to relinquish all priority, and tenders a proof of debt, with a view to share pro rata only in the estate, does not forfeit his right to share in the estate.

4. Bill dismissed, with costs to be paid out of the estate in the hands of the assignee, on the ground that the circumstances were not so clear as to require any imputation on the good faith of the assignee, in prosecuting the suit.

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

[This was a bill in equity by Alfred C. Coxe and others against Nelson B. Hale and others to set aside a conveyance as fraudulent.]

George W. Smith, for plaintiffs.
Isaac S. Newton, for defendants.

WOODRUFF, Circuit Judge. The bill herein is filed to set aside a deed, executed by Eugene Eastman, a bankrupt, to the defendant Hale, his father-in-law, dated January 5th, 1870, (conveying certain real estate upon which the said Hale held three mortgages previously given by Eastman to Hale, and to others who had transferred to Hale), and to compel Hale to convey the premises to the assignee in bankruptcy, free and clear of the mortgage incumbrances; also, to compel Hale to pay over to the assignee all moneys paid to him by Eastman within six months next preceding the filing of the petition in involuntary bankruptcy, whereon Eastman was adjudged bankrupt; also, to vacate, set aside, and annul certain judgments recovered by Hale, in suits commenced against Eastman on the 14th day of January, 1870, and the executions issued thereon, and the levies made by the sheriff upon certain personal property of Eastman; also, to exclude the said Hale from proving, in bankruptcy, against the estate of Eastman, the mortgage debts, or the said judgment debts, or any other debts whereon such payments were made. The ground upon which this relief is prayed is, that the transactions sought to be impeached were done in fraud of the bankrupt law, and with the intent to secure to the said Hale an illegal preference over other creditors of the bankrupt.

The bankrupt, in the year 1866, married the daughter of the defendant Hale. He was possessed of little means, but had a trade, consisting of some department of carriage making. In 1867, he commenced the business of carriage making, at Oneida, but soon after went to Canastota, and purchased a carriage factory, where he continued to manufacture until January, 1870. His father-in-law advanced him $500 when he went to Oneida, and afterwards, from time to time, advanced him money for his business, and, in a few instances, endorsed notes for him, which he also paid for him when due. He received a mortgage from him on the carriage manufactory, and took an assignment of two other mortgages, which were on the same premises, when his son-in-law purchased them. The latter met with a small loss of $200, by fire, at Oneida, but this was not only made up, but largely more than made up, by gifts from the father-in-law, from generosity or out of regard to his daughter, and desire to promote the prosperity of both. For the purchase of the factory, tools, materials and unfinished work, and for the carrying on of the business, the advances of the father-in-law amounted, on the 5th of January, 1870, to a little more than five

thousand dollars, besides the mortgages, and exclusive of the gifts before mentioned; and it is a significant fact, bearing on the question of Hale's belief in his son-in-law's solvency, that he endorsed notes for his son-in-law in November and December, 1869, and January 1st, 1870, in the apparent confidence in his solvency, which, in his testimony, he declares he felt. Hale resided at Norwich, forty or fifty miles from Canastota, and was very rarely at the residence of his son-in-law, and had no acquaintance with the state of his business, except such as was derived from his son-in-law, and the apparent enlargement of his business, for which the advances were made by him. In the summer of 1869, he stated to his son-in-law, that he had advanced more than he could conveniently spare, and desired him to make some repayment; and, on the 9th of July, the son-in-law, having made a sale of cutters, directed the purchaser to pay the price to his father-in-law, which he agreed to do, and subsequently, in August and September, such payment was made, to the amount of $307. On the 5th of January, 1870, Hale went to Canastota, on a visit to his daughter, not having been there before for upwards of a year. At that time, as he explicitly testifies. he did not know of any indebtedness of his son-in-law, except to himself, and upon obligations endorsed by him, and had no knowledge or suspicion that his son-in-law had not property sufficient to pay all that he owed. While there, his son-in-law gave him a partial statement of his affairs, which showed him to be solvent, and which did not show any other indebtedness, except as above mentioned; and, before he left, his son-in-law, who had expressed a desire to reduce his business and had offered the factory for sale, executed and delivered to him the deed thereof mentioned in the bill of complaint. Hale appears, also, to have been dissatisfied with the use his son-in-law made of one of the notes which had been advanced to him, and, as he says, was desirous of collecting something upon the indebtedness. After he left, and on the 14th of January, 1870, Hale directed suits to be brought for that purpose, and, on the 4th of February, two judgments were recovered by him, by default, for an aggregate of over five thousand dollars, and executions were issued and levy made on the property of his son-in-law, which judgments, executions and levy are mentioned in the bill of complaint. On one of the executions the sheriff made some sales, but was stopped by an injunction out of the district court, in proceedings in bankruptcy. In fact, Eastman owed other debts, to a considerable amount, and one or more judgments were recovered against him, on confession, and, when this came to the knowledge of Hale, he immediately offered to the creditors to give up his judgments, and any claim of priority under the same, and come in with all creditors, to share the estate equally. But, the judgment creditor proceeded, by petition in the district court, against Eastman. He was adjudged bankrupt, and the complainants were appointed assignees. Hale, on the demand of the assignees, offered to re-convey the factory, subject to the three mortgages, respecting the bona fides and validity of which no question is made. He presented formal proof of his debts for which judgments had been recovered, and offered to relinquish the judgments and any claim of priority or advantage under the same. He had not, in fact, received anything upon the executions, and certain moneys which the sheriff had received were by the sheriff paid to the complainants, as assignees, and the assignees proceeded to sell, and did sell, the tools, materials, carriages and stock in trade, and all the property of the bankrupt not exempt by law. The assignees then bring this suit against Hale, and seek to compel him to pay over to the assignees the $307 received by him the previous summer, to convey the factory to the assignees freed and discharged of the said mortgages, and to exclude him from any dividend out of the estate, on the mortgage debts or the judgment debts.

The complainants rely, mainly, on the testimony of the bankrupt, and of Hale, the father-in-law, and circumstances disclosed therein in connection with the facts above enumerated, as showing that the transactions between them were a fraud upon the bankrupt law, because they were, on the part of Hale, with intent to secure a preference over other creditors, when he believed, or had reasonable cause to believe, that his son-in-law was insolvent.

Other than the fact that Eastman was insolvent, within the meaning of the term "insolvency," as defined in the law, that is, inability to pay his debts in due course of business, there is little, if anything, in the proofs, to overcome the positive testimony of both Eastman and Hale on the subject; and the testimony of both is positive and explicit, in denial that Hale, at any time down to his discovery that other creditors had recovered a judgment against Eastman, had any knowledge of such insolvency. And, that Hale intended to secure a preference, or accepted any payment, or conveyance, or judgment, for that purpose, or even with knowledge that they would so operate, is not possible, if it be true that he was not aware that Eastman owed any one but himself. I shall not go into the evidence in detail, but its consideration leads me to these conclusions:

First. The payment, for the cutters sold, made to the defendant Hale, by the direction of Eastman, was received by Hale in due course of business, without any belief of Eastman's insolvency, and without any reasonable cause for such belief. Nor was it paid in contemplation of insolvency, by Eastman, nor paid, nor received, with any intent to give or to receive a preference over other creditors. The $307, therefore, was lawfully

received by Hale, and he was entitled to retain it.

Second. The utmost value set upon the factory and the land whereon it stands, by any witness, is $3,000. The complainants furnish no evidence whatever that it was worth any more. The principal sums due upon the three mortgages thereon amount to $2,600, and the unpaid interest at the time of the deed given to Mr. Hale amounted to upwards of $500, making the mortgage lien over $3,-100, which is more than the mortgaged premises were worth. There is no evidence, nor is there any claim, that that mortgage debt was not due in good faith, free from any impeachment, under the bankrupt law or otherwise, or that the mortgage lien was not perfect, for the amount due. The deed, therefore, gave to Hale, (the father-in-law,) no preference. It could give none. He was entitled, by virtue of his lien, to the whole property already. Even more—the gratuitous release of the inchoate right of dower, by the wife of Eastman, was necessary to make the property worth the price, $3,000, at which Hale received it; and, although that right to dower was subordinate to the mortgages, a foreclosure would have been necessary to a compulsory extinguishment of the right. A foreclosure would have involved expense, necessarily reducing the net sum which could be realized on the mortgage-debt. So that, in fact, the conveyance, without foreclosure, operating to release the equity of redemption, so far from resulting in a preference to Hale over other creditors, had the effect of reducing the mortgage-debt to a greater extent than was otherwise possible, and, in that way, tended to the benefit of Eastman and his creditors. If, therefore, Hale had then known that Eastman was insolvent, it would be impossible to say that an acceptance of a conveyance of the equity of redemption, the property being confessedly worth less than the mortgage-debt, could be, or could have been, intended to be a giving, or an acceptance, of a preference over other creditors. Upon such a state of facts, they could derive no benefit from the property, in any event, and the estate of the bankrupt could not be enhanced thereby. The price agreed upon, and at which Hale agreed to take the property, being distinctly proved herein, by the complainants, to be a full and fair price, it should be charged against the mortgage-debt, and the defendant Hale must be permitted to prove against the bankrupt's estate, on account of that debt, only the balance due thereon, at the date of the deed, with the interest thereon.

The good faith of the defendant Hale was testified by his response to the demand of the complainant, that he give up the property. He offered to convey it to the assignee, reserving and retaining his original mortgage lien. Upon the proofs, this would have been of no benefit to the estate, and it was declined; and, by the same proofs, it follows, that Hale got no preference by the deed to him. He was only saved the expense of foreclosure. The complainants, or the creditors for whom they act, manifestly thought, that, upon a harsh application of the doctrine of merger of the lien in the legal title, they could succeed in avoiding the deed, as an illegal preference, and then exclude the defendant from any enforcement of his original mortgage lien, and the mortgage debt from any participation in dividends out of the estate in the hands of the complainants. On the question, whether, had they succeeded in setting aside the deed, it would have followed that the mortgagee must lose his lien, I do not find it necessary to express any opinion.

Third. As to the debts for which the defendant Hale obtained judgments. There is, undoubtedly, room for suspicion, that, before the father-in-law commenced the suits, on the 14th of January, he doubted either the ability or the willingness of his son-in-law to pay what he owed to him. But this is not enough to forfeit his right to share in the estate. A creditor is not compelled to forbear suing his debtor, on pain of losing his right to prove his debt, if the debtor should be adjudged a bankrupt within six months thereafter. Even where the debtor is known to be insolvent, if he has committed no act of bankruptcy, the creditors are not remediless. They are not bound to lie by, instituting no suit, and, as the case may be, see their debtor waste his property. They may sue, and, by proceeding to judgment, compel the debtor himself to apply to be decreed a bankrupt, or, if he do not, but suffers his property to be taken on legal process, in such manner as will operate to give priority or preference even to themselves, if carried into full execution, they may then allege this as an act of bankruptcy, and themselves demand that he be adjudged a bankrupt. It is by no means every recovery of judgment, even against a known insolvent, that amounts to an acceptance of a preference which will bar the proof of the judgment debt. If it were, then, no creditor would be safe in suing his debtor whose solvency he had reason to doubt. He must lie by, wait, in the hope that his debtor will commit some act of bankruptcy, and be remediless until he does so. It is the prosecution with intent to secure a preference, and the using the judgment with that intent, or in such wise that such preference will be the necessary result, which makes the creditor liable to be barred the right to prove his debt in bankruptcy. True, it has often been properly said, that the creditor must be deemed to intend the necessary result of his acts. But, where the creditor believes himself to be the sole creditor, or where he prosecutes suit, and thereby drives the debtor into an act of bankruptcy, this alone works no prejudice to the estate, and is no acceptance of a preference. To sue, recover judgment, and levy an execution, may often be the only means a creditor has of

forcing his debtor into bankruptcy, and of thereby compelling the equal distribution of his property among all creditors, in the very manner the bankrupt law prescribes; and it would be not only absurd, but grossly unjust, to treat this as a forfeiture of the right to share in the estate, and leave the whole to be divided among others less diligent in the endeavor to compel the debtor to do what is just, and what the law makes it his reasonable duty to do without such compulsion.

Notwithstanding the suspicion which is warmly insisted upon by the complainants, the proofs establish, that Hale was not aware, until after his executions were levied, that Eastman owed other debts. If not, then he was not seeking to procure an advantage over other creditors. When he learned that other creditors were pursuing Eastman, he at once offered to give up any apparent advantage gained by his judgments and executions, and come in on an equal footing with others. He went further. Those creditors having compelled Eastman to submit to an adjudication grounded on the very fact that he had suffered his property to be taken on legal process, thus availing themselves of the very act to which Hale, by lawfully prosecuting, had driven the debtor, he went to the assignee and offered to relinquish all claim of priority or advantage under his judgments and executions, and tendered proof of his debts, with a view to share pro rata only in the estate. Even if his prosecution had been, from the beginning, with knowledge that Eastman owed others as well as himself, and was wholly insolvent, he had a right to prosecute his suits to judgment and levy. That would have created an act of bankruptcy on the part of Eastman. This being so, had Hale thereupon become the petitioning creditor, and himself sought the adjudication, it could not be doubted that he would be entitled to share in the estate. This would not be accepting a preference, nor be doing anything to defeat or prevent the operation of the bankrupt law, but the contrary. Other creditors having, notwithstanding his offer to give up all claim of advantage by reason of such judgments and levy, made the latter the ground of an adjudication, as he might have done, he at once did all that was possible, to show that gaining a preference was not his purpose, as it was not the necessary result of what he had thus far done, namely, by offering to the assignees the surrender of all such advantage or apparent advantage. To hold that, under such circumstances, he forfeited his right to share in the estate, would be to hold, in substance, that no creditor can safely sue his debtor, and recover judgment, and levy his execution, although his debtor has until then committed no act of bankruptcy. He must leave his debtor in the uninterrupted enjoyment of his property, however insolvent he may be, in the hope that, bye and bye, he will commit some other act of bankruptcy, upon which he can be proceeded against in the bankrupt court. Such is not the meaning, intent, or effect of the bankrupt law. That law does not discourage vigilance nor activity in forcing debtors to appropriate their property to the payment of what they owe. It is when advantage is accepted or obtained, with a view to preference over other creditors, or in circumstances in which such preference is the result of what the creditor does, or attempts to do, that the act becomes a fraud upon the law.

Dealing with this case, as I must, upon the testimony, I must say, that here the defendant Hale has gained no preference over other creditors, has not sought, or attempted to gain, a preference over other creditors, and has not done anything which deprives him of the right to prove his debts, and share with other creditors in the estate of the bankrupt. The bill of complaint was filed without sufficient cause, when the defendant had offered to do all, and even more, than he was bound in equity to do; but the circumstances were not so clear as to require any imputation upon the good faith of the assignees, in the prosecution of this suit. The bill of complaint must, therefore, be dismissed, with costs to be paid out of the estate in the hands of the assignees.

COXE (MARKOE v.). See Case No. 9,092.

Case No. 3,311.

COXE v. PENNINGTON.

[1 Wash. C. C. 65.][1]

Circuit Court, D. Pennsylvania. April Term, 1803.[2]

INTERNAL REVENUE—DUTY ON SUGAR.

Whether, under the provisions of the act of congress of 5th June, 1794, sugars, remaining in the place in which they were refined, when the law was repealed, were liable to pay the duties.

[See note at end of case.]

This was a feigned action, brought [by Tench Coxe against Edward Pennington] as upon a wager, to try the question whether sugars refined before the 30th day of June, 1802, and then remaining in the house where they had been refined, were subject to the duty of two cents per pound, imposed by the act of 5th June, 1794 [1 Stat. 385]? Demurrer to the declaration.

Mr. Dallas, for plaintiff.

Rawle & Ingersoll, for defendant.

WASHINGTON, Circuit Justice. The act, which passed on the sixth day of April, 1802, for repealing the internal taxes, discontinued the duty upon refined sugars, amongst other

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

[2] [Reversed in Pennington v. Coxe, 2 Cranch (6 U. S.) 33.]

articles, from and after the 30th of June, 1802; and repealed the laws which had imposed them, except as to the recovery of such of the duties, as on that day had accrued and remained outstanding; as to which, the provisions of former laws were left in full force. The question then is, whether upon refined sugars, not sent out of the house where they were manufactured, on or before the 3d of June, the duties had accrued and then remained outstanding?

On the part of the plaintiff it is contended, that the duty accrued upon the sugar, as soon as it was refined, though the payment of it was to depend upon the act of sending out the sugar. On the other side it is insisted, that the duty did not accrue until the refined sugar was actually sent out. There is considerable difficulty in the question; but after the best consideration which I have been able to give it, I am inclined to favour the construction contended for by the plaintiff's counsel.

To decide this question, we must look not only to the fair and legal construction of the law imposing this duty; but it will be useful to take a wider range, and compare it with the general system of duties and excises imposed upon other subjects. The second section of the act of the 5th of June, 1794 (volume 3 of the laws of 1794), declares, that "after such a day, there shall be levied, collected, and paid, upon all sugar refined within the United States, a duty of two cents per pound." In like manner certain duties are imposed by other laws, and to be collected, levied, and paid, upon imported goods, spirits distilled within the United States, upon sales at auction, &c., &c.; in all which cases, an event is fixed upon which the duty accrues, a mode provided for ascertaining the subject on which it is imposed, and a time of payment clearly pointed out. On imported goods, the duty accrues on the importation, and is to be paid at a future day. On sales by auction, the duty accrues on the sale; the amount of the sales, and consequently of the duty, is ascertained by the book of entries and quarterly report, which the auctioneer is required to make; but no time of payment is allowed, because the auctioneer has received the duty before he is called upon to pay it. Upon distilled spirits, the duty accrues upon the spirit the moment it is distilled, and payment is to be secured before it is removed; but the duty is not demandable, until nine months after the date of the bond; and then only upon so much spirit as had been removed within three months after the date of the bond. Here, then, in language nearly the same, and upon a principle precisely parallel, the duty of two per cent. is imposed, and to be collected and paid, upon all refined sugar. Sugar refined within the United States is the subject of the duty. So are spirits distilled within the United States. To ascertain the value and amount of those subjects of taxation, certain cautionary regulations are made. The sugar refiner is to report his house, and the implements employed in his manufactory. He is to enter in a book, to be kept for that purpose, all the sugar which he shall refine from day to day, and also the quantities which he shall send out from time to time. He is also to make reports, quarterly, to the proper officer, of all refined sugar which has been removed from his house during the last preceding three months; producing at the same time, for the inspection of the officer, his book of entries, that it may be compared with his report. Now the removal of the sugar is a mere circumstance, of which the quarterly report and book of entries are the evidence. The report of this circumstance is required, for what purpose? That the duties which had accrued upon the sugars refined, and noted in the entry book, and which having been removed are liable to be demanded, may, when the report is made, either be paid, or secured to be paid, at a future day. What has the circumstance of sending out the sugars, to do with the essence of that which constitutes the subject of the duty? It is important as it respects the time of payment, but is unconnected with the debt before incurred either by the words or spirit of the law. Not by the words, because the second section of the law imposes the duty not on refined sugar sent out, but on all refined sugar. To connect the circumstance of removal with that, which by this section is made the subject of the duty, we must read the second section as if it had declared, that the duty should be collected and paid upon all sugar refined and sent out. Not by the spirit of the law, if it be fair to consider this law as a part of a general system; because throughout that system the subject of the duty on which the obligation to pay arises, is separated from the circumstance, by which the time and mode of payment are prescribed. By construing the law in this way, no violence is done to the words of the legislature, and the same harmony is preserved, which marks the order and arrangement of the different sections and clauses of the law. What reason can be assigned, why the right of the United States to the duty should not attach upon sugar and snuff, as soon as refined or made; and yet in all other cases, it attaches at a period antecedent to that when payment is to be made or secured? With respect to distilled spirits, payment cannot be demanded before removal. But will it be said that the duty has not accrued before the removal, though the time of payment be postponed? The distiller must give bond to secure the payment, before removal. Will it be said that this duty, if not paid on the 30th of June, 1802, was not outstanding, because on that day the spirit might not have been sent out? How does that case differ from this? In that, the bond is given before removal; in this, it is given afterwards. But the law, in the latter case, imposes an obligation as imperious as the bond in the former case. If it be said that the duty, had accrued

in the one case, but not in the other, I would ask, upon what principle could the legislature intend to make the distinction?

It was said at the bar, that as the house containing the sugar might be burnt down, or the sugar might melt, the legislature did not mean to impose the duty whilst it remained liable to those accidents. I ask, are not distilled spirits subject to the same perils? But the conclusive answer is, that though the duty had once accrued, and had become a debt due, yet it cannot be demanded if it be destroyed before removal, because the event, upon which the solvendum is made to depend, can never happen. It was said there were two contingencies, viz., refining and sending out, both of which must happen before the duty accrues. I admit there are two contingencies, on the happening of one of which the duty accrues, to be demanded when the other shall happen. If this construction of the act of 1794 be correct, it furnishes a ready answer to many of the ingenious arguments used by the defendant's counsel. For then the remedy is not gone, but preserved by the repealing law, and of course the right remains. The repealing law, which professes to discontinue the internal taxes, is not, under such a construction, broader than the law which imposed those taxes.

As to the argument, that according to this construction, it would be in the power of the sugar refiners, by keeping on hand a small portion of refined sugar, to impose upon the government the necessity of keeping in office a number of officers, upon salaries, to collect the duties; there are two answers,—First, that the sugar refiners could have no motive for such conduct, and therefore it is not to be presumed; but secondly, the president is authorized to diminish the number of those officers, to any number he may think proper to retain, by consolidating the districts. Judgment for plaintiff.

This case was taken by writ of error to the supreme court of the United States, and the judgment of the circuit court was reversed [Penington v. Coxe] 2 Cranch [6 U. S.] 33 [the court holding, Mr. Chief Justice Marshall delivering the opinion, that sugar sent out of the factory prior to July 1, 1802, but not sold, was not liable to the duty].

COYLE (BRENT v.). See Cases Nos. 1,837 and 1,838.

COYLE (DYER v.). See Case No. 4,223.

Case No. 3,312.

COYLE v. GOZZLER.

[2 Cranch, C. C. 625.][1]

Circuit Court, District of Columbia. Dec. Term, 1825.

ACTION ON NOTE—PLEADING AND PROOF—DEMAND—PROTEST—CUSTOM.

1. A note payable in sixty days, "with interest from date," will not support a declaration upon a note payable in sixty days without interest.

2. If an intermediate indorsement is averred in the declaration, it must be proved at the trial, although the suit is brought for the use of such intermediate indorser.

3. If the notary-public has no memorandum nor recollection of the day of demand and notice, but has a memorandum in his book that demand was made and notice given to the indorsers, and testifies that it was his universal practice to make the demand and give notice on the day after the last day of grace, such testimony is competent evidence for the consideration of the jury.

4. A special custom of the banks and merchants of the county of Washington, to demand payment on the day after the last day of grace, may be given in evidence without being averred in the declaration.

[See Auld v. Mandeville, Case No. 653.]

At law. Assumpsit against the indorser of Stull and Williams's note at sixty days, dated 21 October, 1816.

J. Dunlop, for defendant, at the trial at May term, 1825, objected to the note offered in evidence by the plaintiff, because it had the words, "with interest from date," which words were not in the note described in the declaration; and he contended also that the handwriting of the intermediate indorsement must be proved; as the indorsement was averred in the declaration. He also objected that the testimony of Mr. R. Johns, the notary-public, was not competent to go to the jury. Mr. Johns testified that he did not then recollect, nor had he any minute in his book, of the time when he gave notice to the indorser; but it contains a memorandum that notice was given to the indorsers, as well as a memorandum of the demand. And he further testified that it was his universal practice to give notice on the day on which he made the demand, which was on the 24th of December, which was the day after the last day of grace; and that he believes he gave the notice on that day.

THE COURT decided that his testimony was competent evidence for the consideration of the jury. That as the declaration averred an intermediate indorsement, it must be proved, although it was proved that the indorsement was made after the note had become payable, and that the suit was brought for the use of that intermediate indorser; and that the variance between the note produced in evidence and that described in the declaration, was fatal, as it could not be given in evidence upon that declaration.

A juror was then withdrawn and the plaintiff had leave to amend; and the cause was continued, without costs. MORSELL, Circuit Judge, dissenting as to the continuance.

The cause came on again for trial at the present term, when Mr. Ashton, for plaintiff, offered evidence of the particular custom of the banks and merchants in the county of Washington, to demand payment of the maker, and to protest and give notice to the indorsers, on the day after the last day of grace.

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

Mr. Key, for defendant, objected to such evidence, because there was not, in the declaration, any averment of such a custom, and referred the court to the case of Renner v. Bank of Columbia (in the supreme court of the United States) 9 Wheat. [22 U. S.] 581.

THE COURT (THRUSTON, Circuit Judge, absent) permitted the evidence to be given. The declaration stated the demand and notice to have been made and given on the 24th of December, 1816, which was the day after the last day of grace.

COYLE (LEACH v.). See Case No. 8,156.

Case No. 3,312a.

COYNE v. The ALEXANDER McNEIL.

[20 Int. Rev. Rec. 176.]

District Court, S. D. Georgia. Aug. Term, 1874.

MARITIME LIENS—STEVEDORES.

[Stevedores have no lien on a vessel for stowing or discharging a cargo.]

[In admiralty. Libel by Michael Coyne against the bark Alexander McNeil for wages.]

Mr. Guerard, for libellant.

Jackson Lawton and Mr. Bassenger, for intervenors.

ERSKINE, District Judge. On the 13th of July, 1874, Coyne filed a libel in rem against the bark Alexander McNeil, of New York, then lying in the port of Savannah. The libel states that, the bark being ready to receive cargo, G. W. Leach, her master, made a contract with libellant, as a stevedore, to stow a cargo of cotton and staves, the former at 60 cents per bale, the latter at——per M, on said bark; that he has received for his said labor $298.50, and that there is still due and owing to him by said bark, as stevedore, $940.70; he prays process, and asks that the bark be condemned and forfeited, etc. To this Schuchardt & Sons, of New York, interpose a claim as mortgagees of said bark, alleging that Coyne has shown no lien on her, nor has he any lien, and they pray that as the vessel is about to be sold by order of this court, the proceeds of such sale be adjudged to them to the exclusion of Coyne, etc. Nothing further in the pleadings need be presented. The proofs show that the master of the bark did make a contract with libellant, as stevedore, to stow the cargo at certain named rates; that Coyne performed the work, and received $300 as in part payment, which he credited to the bark. The master admitted the correctness of the account, but said he had no money to pay Coyne, and that he must get it from the vessel.

The constitution of the United States gives the federal judiciary cognizance of "all cases of admiralty and maritime jurisdiction," and the ninth section of the judiciary act of 1789 [1 Stat. 77] vested in the district courts exclusive original cognizance of civil cases in admiralty and maritime jurisdiction. Taking what I have just said as a point of departure, is the libellant properly here? That his claim is meritorious no one can doubt; but can it be asserted by a suit in rem? In other words, is his demand, under the general rules of maritime law, a lien or privilege in the thing,—the vessel,—for, if it is, it will follow the proceeds arising from the sale of the res. Mr. Guerard contended for libellant that the views expressed by Dr. Benedict in his work on admiralty (2d Ed. § 285), that the services performed by stevedores are maritime, and may be enforced by suit in rem, against the vessel, or in personam against the master or owner; that the same principle which allows the sailor, and him that sets up her rigging, or paints her sides, to resort to the admiralty, will also allow the same privilege to stevedores. Ethically speaking, there is much in what the learned author advances, but he presents no authority upholding his theory, and none was referred to by the advocate. And so far as my own information extends, courts of admiralty have hitherto held that stevedores have no lien on the vessel for stowing or discharging her cargo; that they are merely laborers, like the draymen who haul the cargo to or from the ship, or the 'longshoremen who hoist it in or out.

I have but three cases before me on this immediate subject, in each of which it was decided that stevedores have no lien for their services on the vessel. In the case of The Amstel [Case No. 339], which was a libel in rem by a stevedore for his services in discharging her, Betts, J., said: "The libellant has no lien upon the vessel, because his services as a stevedore were not in their nature maritime, and were really performed on land. It is to be remarked that the services consisted of nothing done to the vessel in her repairing or refitment, but of labor expended, partly on board and partly on shore, in discharging her cargo. This description of service has never yet been recognized as of a privileged order. It does not fall within the extensive list of debts privileged by the civil law; nor does it seem to be comprehended within the principle upon which a lien of privilege is allowed." And the rule announced in that case was repeated in the case of The Joseph Cunard [Case No. 7,535]. The third case was that of McDermot v. [The] S. G. Owens [Case No. 8,748], before Mr. Justice Grier, of the supreme court of the United States. The libellant claimed a lien for labor and for services as a stevedore in loading and storing the cargo of the vessel. Grier, J., said: "The argument of the libellant's counsel is ingenious, but it wants the support of authority. No decision or

dictum has been brought to the notice of the court which would justify them in treating this as a maritime service. It does not follow, because sailors once performed those duties, now better executed by landsmen, that therefore they should have the mariner's lien on the vessel."

Those cases would seem to fairly establish the proposition that their employment is essentially distinct and different from navigating or aiding to navigate or benefit the vessel or crew in actual employment. So, as they cannot sue either in rem or in personam for their services, in admiralty, it follows that their contracts, express or implied, are personal with the master or owner, and their remedy must be against those who employed them. Libel dismissed, with costs.

COYNE, The EMMA L. See Case No. 4,466.

Case No. 3,313.

In re COZART.

[3 N. B. R. 508 (Quarto, 126).][1]

District Court, S. D. Georgia. Feb. 7, 1870.

BANKRUPTCY—PROOF OF DEBT.

Creditor had judgment in Georgia against bankrupt in 1858, and sought to prove his claim in bankruptcy. *Held*, he was entitled to no priority on account thereof, no entry having been made in the execution for seven consecutive years subsequent to Oct. 4, 1860, and he had no lien by the laws of Georgia. The bankrupt law recognizes as liens only those that are valid and binding in the state where the property is situated.

[Cited in Re Butler, Case No. 2,236.]

On certificate of register in bankruptcy.

I, Frank S. Hesseltine, register of said court in bankruptcy, do hereby certify that in the course of the proceedings in said cause the following question pertinent to the same arose, and was stated by Lyon de Graffenreid and Irwin, counsel for S. F. Lassiter, a creditor of the said bankrupt: S. F. Lassiter proved a claim against the bankrupt on a judgment obtained in the superior court of Lee county, Georgia, at the March term, 1858. I decided that the said judgment was, by the Code of Georgia, dormant, there being no entry upon the execution for seven consecutive years subsequent to the 4th day of October, 1860. Lassiter, by his counsel, excepted to this decision, and requested that the issue should be certified to your honor for your opinion thereon.

OPINION OF THE REGISTER. The grounds upon which the counsel of Lassiter claim that the said judgment is valid and binding, briefly stated, are: First. That from the year 1860 to 1865, no levy could legally be made, by reason of the stay laws then in force in the state of Georgia. Second. That during the Rebellion, by reason of the same, there was no legal officer in the state of Georgia, to make a return upon the said execution. Third. That from June, 1865, to July, 1868, no levy and return thereof could be made, by reason of military orders and the acts of the constitutional conventions and general assembly of the state of Georgia, prohibiting levies of executions. The last objection is not true, in fact. Military orders and acts, staying the sale of property under execution during some part of the period mentioned, were passed; but a levy of this fieri facias and a return on the same could have been made. If I deemed it incumbent upon me to consider the question, whether by reason of the Rebellion there was during that period a legal officer in the state of Georgia to make a levy and a return upon an execution, I should consider it material, in coming to a conclusion, to have evidence as to whether the plaintiff was, during the Rebellion, a loyal citizen of the United States, or a citizen of the state of Georgia and a participator in the Rebellion. The objection might be well taken by a citizen of one of the loyal states, who, by reason of the Rebellion, was prevented from collecting his debt; while in the other case the legal maxim, "No man shall take advantage of his own wrong," might apply. I, however, decide that this judgment has abated, resting my decision upon section 2863 of the Code and the judgment of the supreme court of Georgia in Battle v. Shivers [39 Ga. 405], rendered August 3, 1869.

The supreme court has given its interpretation upon the statutes of the state which affect this question, and by its decision the lien of all such judgments as this one is lost. The judgments no longer exist as such in the courts of the state. This judgment of Lassiter's having no lien upon the property of the bankrupt enforceable in the state court, no priority will be given to it here in the distribution of the money derived from the sale of the said property. It can stand no better in this court than it does where it was created, and where alone it would have sought to enforce its lien upon the property, if the same had not been brought here. The bankrupt act recognizes as liens those only which are valid and binding by the laws of the state where the property is situated.

ERSKINE, District Judge. I have read and carefully considered the question involved in this case, together with the opinion of the register. I think his decision is clear, and expounds in incontrovertible language the law of the case. I approve and affirm the decision. The clerk will certify this affirmance to Mr. Register Hesseltine.

COZZENS (CREDITORS v.). See Case No. 3,378.

[1] [Reprinted by permission.]

C. P. MOREY, The (MOORE v.). See Case No. 9,756.

CRABB (BANK OF THE UNITED STATES v.). See Case No. 913.

CRABB (EMACK v.). See Case No. 4,432.

Case No. 3,314.

CRABTREE v. CLARK et al.

[1 Spr. 217;[1] 16 Law Rep. 584.]

District Court, D. Massachusetts. Dec. Term, 1853.[2]

CHARTER PARTY—RIGHTS OF THE PARTIES.

1. By charter party, it was covenanted that the charterer should furnish a cargo of salt at Buen Ayre, and that the master should there receive it on board of his vessel, and carry it to Boston. It was further agreed that the master should use the vessel's funds, in the purchase of the salt. *Held*, that the risk of there being salt at Buen Ayre was upon the charterer.

2. The master was not bound to wait for a cargo, when there was no hope of obtaining any, and the delay would have been useless.

3. If other goods could have been obtained at Buen Ayre, on freight, to diminish the loss to the charterer, it would have been the duty of the master to take them. But he was not bound, for that purpose, to purchase cargo at his own risk, or to go to other places to obtain it.

This was a libel for damages in the nature of freight. The libellant [Enoch Crabtree], by a charter-party, agreed with respondents [Arthur P. Clark and others] to receive on board the brig Carniola, of which he was master, at Buen Ayre, a cargo of salt, and to bring it to Boston. The respondents stipulated "to furnish at Buen Ayre, a full cargo of salt," and to pay freight upon it at fourteen cents per bushel. In addition to the above, and the other stipulations usual in such contracts, the charter-party contained the following: "It is further understood and agreed, that the master is to use the vessel's funds in payment for salt, which he is to purchase at the lowest cash price; and on vessel's arrival at Boston, the charterers are to pay the master, or his agent, the invoice cost of salt, export duty, if any, and insurance on amount invested in purchase of salt, from Buen Ayre to Boston, and Boston wharfage, all in addition to the freight." The Carniola went to Buen Ayre, furnished with funds to buy a cargo, but there was no salt there, and after remaining twenty-four hours, she left and proceeded to Boston in ballast. This action was brought to recover damages of the respondents, for their failure to furnish a cargo.

The respondents contended, 1st. That the libellant's engagement to purchase the cargo should be construed as a condition precedent to their own obligation to pay freight. 2d. That assuming that the respondents had contracted, without limitation, to furnish a cargo of salt at Buen Ayre, the libellant should have remained there a reasonable time, for them to perform this contract, and could not otherwise charge them with damages for an alleged non-performance. 3d. That assuming that the libellant was, under the contract, to be regarded as the agent of the respondents for the purchase of salt at Buen Ayre, yet, that failing to find salt there, his agency was enlarged from necessity, and required him to endeavor to buy salt at Curaçoa, or any other place or island, where he conveniently could.

J. C. Dodge, for libellant.

C. B. Goodrich and T. K. Lothrop, for respondents.

SPRAGUE, District Judge, held that the respondents had broken their contract, in failing to furnish a cargo; that the libellant's obligation to invest the vessel's funds in the purchase of a cargo, was not broken by his failure to do so, unless there was salt at Buen Ayre to be purchased; or, in other words, that by the proper construction of the charter-party, the respondents were to be regarded as taking the risk of there being salt at Buen Ayre. That the libellant was not bound to remain at Buen Ayre longer than he did, unless there was some ground to expect that a cargo might be procured by longer delay, and that from the evidence in this case, it was apparent that longer delay would have been useless; that if cargo of any kind could have been obtained at Buen Ayre, to be brought to Boston as freight, the libellant would have been bound to take it, that the proceeds might diminish the damages, for which the respondents were liable; but that he was not bound to purchase a cargo on his own risk, or to go to Curaçoa, or any other port, in pursuit of business, and thus by a deviation, endanger his insurance.

Decree for the libellant, for $1,296.61.

This decision was affirmed, upon appeal to the circuit court. [Clarke v. Crabtree, Case No. 2,847.] See Bailey v. Damon, 3 Gray, 92; Wilson v. Hicks, 40 Eng. Law & Eq. 511.

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

[2] [Affirmed in Case No. 2,847.]

CRABTREE (CLARKE v.). See Case No. 2,847.

Case No. 3,315.

CRABTREE v. NEFF.

[1 Bond, 554.][1]

Circuit Court, S. D. Ohio. June Term, 1863.

CORRECTION OF JUDGMENT—COSTS—TAXATION.

1. Where a judgment was entered for a plaintiff, with costs, the court will not, at a subsequent term, revise or correct it as to the costs; though being for less than $500, the plaintiff was not entitled to such judgment.

2. A retaxation will not be ordered, on the ground that the clerk has not discriminated be-

[1] [Reported by Lewis H. Bond, Esq.]

tween the costs of the plaintiff and those of the defendant.

3. The practice of taxing the entire cost to the losing party, without discrimination, has always prevailed in this court; and, until otherwise provided by law or obligatory rule of court, will not be changed. It is, prescriptively, at least, the law of this court.

[Action by John Crabtree against the executors of William Neff.]

R. M. Corwine, for plaintiff.
M. H. Tilden, for defendants.

OPINION OF THE COURT: This is a motion by the defendants to retax the costs, or in effect to vacate a judgment as to costs, rendered by this court several terms since. The jury, on the trial of the case, returned a verdict in favor of the plaintiff for less than five hundred dollars, and a judgment, including costs, was entered against the defendants. There is no doubt that the judgment against the defendants for costs was erroneous. It was entered inadvertently, and without being noticed by the counsel. The statute is explicit in providing that a judgment for less than five hundred dollars shall not carry costs. And if, at the term at which the judgment was entered, a motion had been made to vacate or amend it, as to the costs, it would have been so ordered.

The question now is, whether, after several terms of the court have intervened since the judgment was entered, it is competent for the court to revise or amend it. There can be no doubt that the judgment, awarding costs to the plaintiff, is a substantial part of the judgment in the case. It has the same legal effect as the judgment on the verdict for the sum returned by the jury. In the case of Bank of U. S. v. Moss, 6 How. [47 U. S.] 31, the supreme court decided that a court can not revise or correct a judgment entered at a prior term, even where the court rendering the judgment had not jurisdiction of the case. This doctrine has been recognized and affirmed by repeated decisions of that court, and is the settled law, not only in the courts of the United States, but in the courts of the states, with perhaps one exception.

But there is another ground on which it is insisted the motion for a retaxation of the costs must be sustained. It is objected to the taxation that it does not discriminate between what are properly the costs of the plaintiff and the defendants' costs. While the theory of taxation contended for by counsel, as sanctioned by the common law, is correct, there is no statute, or rule of court, making it imperative on the court. The practice of taxing the entire cost of the case to the losing party, has prevailed in this court from its organization, unless the judgment provides specially for an apportionment of the costs between the parties. This may now be regarded, prescriptively at least, as the law of this court. It would be attended with great inconvenience now to change a practice so long and so uniformly adopted. Nothing short of direct legislation on the subject, or some rule obligatory on the court, would justify the change. The motion for retaxation is overruled.

CRAEFE (MORRELL v.). See Case No. 9,-819.

Case No. 3,316.

In re CRAFT.

[2 Ben. 214;[1] 1 N. B. R. 378 (Quarto, 89).]

District Court, S. D. New York, March Term, 1868.[2]

CONFESSION OF JUDGMENT—SUFFERING PROPERTY TO BE TAKEN—CONTEMPLATION OF BANKRUPTCY—INSOLVENCY—AMENDMENT.

1. Where a petition in involuntary bankruptcy alleged that the debtor had, "in contemplation of bankruptcy," given a confession of judgment to one of his creditors, on which execution had been issued and his property taken, and that this was done with intent to give a preference to the creditor, and, on the proofs, it appeared that the confession of judgment was given, and the property levied on under execution and sold, and that the debtor was insolvent at the time, but did not contemplate bankruptcy, or know that there was such a law as the bankruptcy law: *Held*, that the facts made out a case against the debtor, under the thirty-ninth section of the bankruptcy act, of suffering his property to be taken on legal process, with intent to give a preference to the creditor in question, the debtor being at the time insolvent.

2. There are four species of acts for which, when done by a person bankrupt or insolvent, or in contemplation of bankruptcy or insolvency, with intent to give a preference to one or more of his creditors, he may be put into bankruptcy, viz: (1) Making a transfer of his property; (2) giving a warrant to confess judgment; (3) procuring his property to be taken on legal process; and (4) suffering his property to be taken on legal process. The first three require affirmative action on the part of the debtor, but the last does not.

[Cited in Re Gallinger, Case No. 5,202; Re Dunkle, Id. 4,160; Re Heller, Id. 6,337; Re Lord, Id. 8,503.]

3. The act of the debtor in this case was not done in contemplation of bankruptcy. As the petition did not allege that the act was done when the debtor was insolvent, an adjudication could not be made upon it as it stood, but, inasmuch as the fact that he was insolvent appeared, and there was no surprise on the debtor, the case was a proper one for an amendment of the petition in that particular.

[Cited in Vogle v. Lathrop, Case No. 16,985.]

[Petition for an adjudication to declare Asa W. Craft an involuntary bankrupt.]

Benedict & Boardman, for creditors.
Edwin James, for debtor.

BLATCHFORD, District Judge. In this case a petition was filed by Hoyt, Carter & Co., August 28th, 1867, praying that Craft be declared a bankrupt. The petition sets forth, as alleged acts of bankruptcy, that Craft

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

[2] [Affirmed in Case No. 3,317.]

"did, in contemplation of bankruptcy, give to one Samuel Jones, one of his creditors, on the 3d day of July, 1867, a confession of judgment, and, on said day, caused a judgment to be entered thereon, for the sum of $7,088, and, on said day, an execution issued thereon, to the sheriff of the city and county of New York;" also, that Craft "did, in contemplation of bankruptcy, give to one Lewis Van Doren, one of his creditors, on the 17th day of August, 1867, a confession of judgment, and, on said day, caused a judgment to be entered thereon for the sum of $548.77, and, on said day, an execution issued thereon to the sheriff of the city and county of New York; that said confessions of judgment, and each of them, were given by said Craft to said creditors, with the intent to give a preference to the said Samuel Jones and Lewis Van Doren, two of the creditors of said Asa W. Craft, and with the intent to defeat or delay the operation of the" bankruptcy act [of 1867 (14 Stat. 517)]; "that the sheriff of the city and county of New York, under and by virtue of said executions, levied on and took the property of the said Asa W. Craft, and has sold the said property to pay and satisfy the said executions in favor of said Jones and Van Doren;" and "that the proceeds of the sale of said property amounted to over the sum of $5,100, which has been paid out by said sheriff to said Samuel Jones, in part satisfaction of said judgment of said Jones against said Asa W. Craft."

On the return of the order to show cause on the petition, the debtor denied the acts of bankruptcy set forth in the petition, and demanded a trial by the court, and thereupon an order was made, under section thirty-eight of the act, referring it to a commissioner of the circuit court to take and certify to the court all such evidence and testimony as should be offered before him on the part of the creditors or debtor in the matter, upon the issues raised by the petition and denial. The commissioner has taken and reported the testimony, and the case has been argued thereon by the counsel for the respective parties.

The testimony consists mainly of copies of the confessions of judgment named in the petition, and of the depositions of the deputy sheriff, who levied on the property of the debtor and sold it under the Jones judgment, of the attorney for Jones, who procured the Jones judgment to be confessed, of Craft, the debtor, and of Jones, the creditor. The confession of judgment in the Jones case is in the usual form, under the laws of New York, of a statement signed and sworn to by Craft, July 3d, 1867, setting forth the consideration of his debt to Jones, and its amount, $7,083, and confessing judgment in favor of Jones for that amount. On this a judgment was entered up on the same day for that amount, and $5 costs, in all $7,088, in the supreme court of New York. On the same day, an execution was issued on the judgment to the sheriff of the city and county of New York, on which he levied on sundry personal property of Craft's, which he afterward sold on the execution. The net proceeds of the sale amounted to $4,517.64, and were applied on the execution. The sheriff could find no other property of Craft's on which to levy, to make the balance of the Jones execution, or to make anything on an execution which was issued to him on the Van Doren judgment. The testimony is full to show that Craft was deeply insolvent when he confessed the Jones judgment, and, that, after the sale of his property under the Jones execution, he had no property whatever with which to pay his debts. The confession of the Jones judgment was made by Craft under pressure from Jones, the debt having been one of long standing, and frequent demands for payment of it having been made by Jones, and legal proceedings on it being threatened by Jones, and he also threatening to foreclose a chattel mortgage which he held on some of Craft's property. The proposal to confess the judgment did not emanate from Craft, but from Jones. Nothing was said between the parties about bankruptcy. Craft did not contemplate bankruptcy, and did not know there was such a law as the bankruptcy law. The debt to Jones was in all respects bona fide and fully due.

These facts make out a case fully within section thirty-nine of the act. Craft, being insolvent, suffered his property to be taken on legal process, with intent to give a preference to Jones, as a creditor. He could have prevented the taking of his property on legal process by going into voluntary bankruptcy; and, being insolvent, it was his duty to do so. By not doing so, and by confessing judgment to Jones, and allowing Jones to take his property on the execution issued on the judgment, Craft suffered his property to be taken on legal process. The result of this was to give a preference to Jones. The presumption of law is, that Craft intended to effect this result. It is for him to rebut that presumption. He has not done so. On the contrary, all the circumstances of the case corroborate it.

The views of this court as to the proper interpretation to be given to the thirty-ninth section of the act, in a case of this kind, have been fully stated in its decision in the recent case of Black v. Secor [Case No. 1,457]. The doctrine, strongly urged on the part of the debtor in this case, on the authority of the cases of Ogden v. Jackson, 1 Johns. 370, Locke v. Winning, 3 Mass. 325, and Phoenix v. Assignees of Ingraham, 5 Johns. 412, has no application to the provisions of the thirty-ninth section of the act of 1867, which are involved in the present case. It has no application to the case of an insolvent's suffering property to be taken on legal process, with intent to prefer a creditor. Those cases were all of them cases under the bankruptcy act of 1800 [2 Stat. 21]. That act required,

in order to make an act of bankruptcy, that the person should, with intent unlawfully to delay or defraud his or her creditors, willingly or fraudulently procure his goods, money, or chattels to be taken in execution. It did not require that the person should be bankrupt or insolvent, or should do the act in contemplation of bankruptcy or insolvency; and it required that there should be a procuring by the debtor, and not merely a suffering. The act of 1841 [5 Stat. 440] required, to make the act of bankruptcy, that the debtor should willingly or fraudulently procure his goods and chattels to be taken in execution. The act of 1867 requires that the debtor, being bankrupt or insolvent, or in contemplation of bankruptcy or insolvency, should procure or suffer his property to be taken on legal process, with intent to give a preference to one or more of his creditors. In Ogden v. Jackson [supra] the court held that the debtor contemplated an act of bankruptcy, thus, in effect, holding that the act of 1800 [2 Stat. 19] required that he should contemplate such an act. In Locke v. Winning [supra] the court held the same view. Chief Justice Parsons, in that case, says: "Until an act of bankruptcy committed, the bankrupt has the exclusive right to dispose of his effects at his pleasure, so that the disposition be bona fide and not fraudulent." This is true; but where the being insolvent, and suffering his property to be taken on legal process, with intent to prefer a creditor, is made the act of bankruptcy on the part of the debtor, there the disposition of the property being, with the attendant circumstances, the act of bankruptcy, he has no right so to dispose of it. In Phoenix v. Assignees of Ingraham, the court held that, though the debtor was insolvent, he did not contemplate bankruptcy, and took the view that, under the act of 1800, an insolvency was no objection to giving a preference, unless it were shown that a bankruptcy was contemplated at the time, on the ground that every man has a right to dispose of his property to whom he pleases, for an adequate consideration, and in satisfaction of his debts, until he commits an act of bankruptcy, or contemplates so to do. The court also held that, even if an act of bankruptcy were contemplated by the debtor, yet if, at the instance and on the application of the creditor, he made payment or assigned property, such payment or assignment was valid. The doctrine of these cases, and of like cases under the act of 1841, and of English cases on provisions like those in the acts of 1800 and 1841, is done away with by the express provisions of the thirty-ninth and thirty-fifth sections of the act of 1867. The cases to which I have referred were cases in reference to the validity of payments and transfers, and the present question concerns the question, what is an act of bankruptcy? But both questions are so interwoven together, in the thirty-ninth and thirty-fifth sections (the committing of an enumerated act of bankruptcy, through a transfer of property by affirmative action, procuration, or sufferance being made a ground for adjudication, as a fraud against the act, and the transfer being also made void, as being such a fraud), that the views on the one question apply very much to the other. There are, indeed, grounds for adjudication of bankruptcy specified in the act of 1867 which cannot involve any question of the transfer of property, as, for instance, departure from the state of which the person is an inhabitant, with intent to defraud creditors, and other grounds. But the general remark is true; and, as the act of 1867 is so different from the acts of 1800 and 1841, in the particulars under consideration, the decisions under the latter two acts, as to the grounds for adjudging a debtor to be a bankrupt, and for setting aside, as void, a previous transfer of property by him, have very little application to the provisions of the act of 1867 in those particulars.

It was strongly urged, on the part of the debtor, that the preference must be voluntary, and that, if there is any pressure by the creditor, it is not voluntary. This may be so as respects an affirmative act of transfer, or of procuration. But it is not so in regard to an act of sufferance. The thirty-ninth section defines four species of acts for which, when done by a person bankrupt or insolvent, or in contemplation of bankruptcy or insolvency. with intent to give a preference to one or more of his creditors, he may be put into bankruptcy. They are: (1) Making a transfer of his property; (2) giving a warrant to confess judgment; (3) procuring his property to be taken on legal process; (4) suffering his property to be taken on legal process. So far as the first, second, and third of these are concerned, the provisions are old, and existed in the former bankruptcy acts, and require affirmative voluntary action by the debtor; and the decisions under the former laws may, perhaps, apply, to the effect that pressure by a creditor deprives the acts of the debtor of their voluntary character. But the act of 1867 adds the fourth act of bankruptcy—suffering property to be taken on legal process. This was added for a purpose and with an intent. To say that there cannot be a suffering where there is pressure by a creditor, is to destroy the plain meaning of the word. To suffer or permit implies pressure and action from without. Pressure being thus an inherent element of sufferance, to say that where there is pressure there can be no sufferance, is to utter a fallacy. Where a person permits what he can prevent, he suffers or allows the thing to be done, whether he is threatened or pressed or not. A debtor who is threatened or pressed can prevent the taking of his property on legal process by going into voluntary bankruptcy. If he does not, he clearly suffers, or allows, or permits the taking. In

Gore v. Lloyd, 12 Mees. & W. 480, it was held, that giving, under pressure, a warrant of attorney to confess a judgment, under which goods were taken on execution, was not procuring, but was suffering the goods to be taken on execution; and, in Gibson v. King, 1 Car. & M. 458, it was held, that allowing a judgment to go by default was suffering goods to be taken in execution which were taken under the judgment, and was not procuring them to be so taken.

With these views nothing would remain but to decree an adjudication of bankruptcy against Craft, but for the fact that the petition of the creditors is defective in its allegations. It sufficiently avers that Craft suffered his property to be taken on legal process, with intent to give a preference to Jones, as a creditor; but it nowhere avers that Craft committed this act of sufferance when he was insolvent, or in contemplation of insolvency. The petition does not aver that he is, or was, insolvent, or contemplated insolvency. It merely avers that he did the acts alleged "in contemplation of bankruptcy." Those words, as used in the bankruptcy act of 1841, were defined by the supreme court, in Buckingham v. McLean, 13 How. [54 U. S.] 150, 167, to mean, in contemplation of committing what was made by the act an act of bankruptcy, or of voluntarily applying to be decreed a bankrupt. I think they have the same meaning as used in the thirty-ninth section of the act of 1867. In such sense, Craft did not commit this act of sufferance in contemplation of bankruptcy. It will not do to say that the act of making a transfer of property, or of procuring or suffering property to be taken on legal process, with the intent named, is an act of bankruptcy, whether the debtor is, or is not, otherwise shown to be bankrupt or insolvent, or to be contemplating bankruptcy or insolvency, on the idea that the act becomes, ipso facto, one in contemplation of bankruptcy, because, it being an act of bankruptcy, and thus being bankruptcy, the doing of it must have been in contemplation of bankruptcy. This is reasoning in a circle, and such a view would not require that the debtor should ever be insolvent or contemplate insolvency, and would virtually strike those words out of the section; for, if it were shown that the debtor had done the act named, with the intent named, the fact that he had done it in contemplation of bankruptcy would follow as an inevitable legal conclusion, and insolvency, or the contemplation of it, would never become an operative prerequisite. The debtor must be shown, aside from the mere doing of the act named, with the intent named, to have done it when bankrupt or insolvent, or in contemplation of bankruptcy or insolvency. The only averment in this regard, in the petition in this case, being that the acts done were done in contemplation of bankruptcy, and that averment not being sustained by proof that they were done in contemplation of bankruptcy, the petition is not sustained. Yet all the facts set forth in the petition are found to be true, except the fact that the acts therein alleged to have been done were done in contemplation of bankruptcy. The additional fact is also found to be true, that those acts were done when the debtor was insolvent. The facts set forth in the petition, and such additional fact, make out a clear case for adjudging the debtor to be a bankrupt, and to have committed an act of bankruptcy before the filing of the petition. The additional fact is not one that takes the debtor by surprise. He was fully examined, without objection on his part, on the taking of the testimony, as to his debts and property, with a view to showing that he was insolvent at the time the acts set forth in the petition were done. The case, therefore, is a proper one to suspend a decision on the issue joined, and allow the petitioners to apply to amend their petition in the particular suggested. The fact that the creditors pursued the line of testimony indicated, without objection from the debtor, shows either that the parties labored under a misapprehension as to what the petition averred, or else were under the belief that the averment of contemplation of bankruptcy was the equivalent of an averment of contemplation of insolvency, and not more restricted. In either view, an amendment of the petition is proper, to prevent a failure of justice.

The decision on the petition and denial is, therefore, suspended to allow the amendment suggested.

[NOTE. On review, the circuit court affirmed the order. Case No. 3,317.]

Case No. 3,317.

In re CRAFT.

[6 Blatchf. 177;[1] 2 N. B. R. 111 (Quarto, 44).]

Circuit Court, S. D. New York. Sept. Term, 1868.[2]

AMENDMENT OF PETITION IN INVOLUNTARY BANKRUPTCY—"CONTEMPLATION OF BANKRUPTCY" DEFINED.

1. Where a petition in involuntary bankruptcy, filed under section 39 of the bankruptcy act of 1867 (14 Stat. 536), alleges the act complained of to have been done by the debtor "in contemplation of bankruptcy," and also states facts showing the debtor to have been insolvent at the time such act was done, and the evidence, on the trial, shows that the debtor was thus insolvent, but did not intend to take the benefit of the act, and such evidence is not objected to, and there can be no surprise to the debtor in allowing the petition to be amended nunc pro tunc, by averring that the act was done by the debtor "while insolvent or in contemplation of insolvency," the court may properly allow such amendment to be made.

2. The words "in contemplation of bankruptcy," in the act, mean, in contemplation of com-

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

[2] [Affirming Case No. 3,316.]

mitting what is made by the act an act of bankruptcy.

3. A substantial amendment, nunc pro tunc, going to the whole foundation of a proceeding under the thirty-ninth section, cannot be allowed, as it would be a violation of the limitation prescribed by the section, as to the time within which the petition must be brought.

This was a petition filed under the second section of the bankruptcy act of 1867 (14 Stat. 518), for the purpose of reviewing an order of the district court [Case No. 3,316], allowing, nunc pro tunc, an amendment of a petition in involuntary bankruptcy, filed by creditors, under the thirty-ninth section of that act.

Edwin James, for bankrupt.
Samuel Boardman, for creditors.

NELSON, Circuit Justice. The petition in bankruptcy, as originally filed, stated, among other things, that Craft, the debtor, in contemplation of bankruptcy, gave to one Jones a confession of judgment, and caused a judgment to be entered thereon, upon which an execution was issued, &c.; and that this confession was entered into with intent to give a preference to Jones, one of his creditors, and to defeat the operation of the bankruptcy act. The petition, also, stated facts showing that the debtor was insolvent. On the return of the order to show cause on the petition, the debtor denied the acts of bankruptcy set forth in the petition, and demanded a trial by the court. The proofs show that Craft was insolvent when he gave the confession of judgment, and that, after the sale on execution under Jones' judgment, he had no property with which to pay his debts. It appears, however, distinctly, that the several acts of the debtor were not done or committed with intent to take the benefit of the bankruptcy act, which was the averment relied on in the petition, as the foundation for proceeding against the debtor in bankruptcy.

The thirty-ninth section provides, among other things, that any person "who, being bankrupt or insolvent, or in contemplation of bankruptcy or insolvency, shall * * * give any warrant to confess judgment, or procure or suffer his property to be taken on legal process, with intent to give a preference to one or more of his creditors, shall be deemed to have committed an act of bankruptcy." It will be observed, that the petition in this case did not aver that the debtor was insolvent or contemplated insolvency, but only that the several acts alleged were done in contemplation of bankruptcy. These latter words, in the bankruptcy act of 1841, were construed to mean, in contemplation of committing what was made by the act an act of bankruptcy. Buckingham v. McLean, 13 How. [54 U. S.] 150. This construction would seem quite applicable to the same language in the present act. The result is, as the proofs show, that the acts of Craft, in giving the confession of judgment to Jones, &c., were not in contemplation of bankruptcy, that the petition against him failed, unless it was competent for the court below to grant the amendment in question, which was, to insert the words, "while insolvent or in contemplation of insolvency," in lieu of the words, "in contemplation of bankruptcy."

The only real objection to an amendment of a petition in bankruptcy, nunc pro tunc, is found in the clause of the thirty-ninth section of the act, which provides, that the petition shall be "brought within six months after the act of bankruptcy shall have been committed." To allow a substantial amendment, that is, one going to the whole foundation of the proceeding, nunc pro tunc, would be a direct violation of this limitation, which is obviously for the benefit of the debtor. But, in the present case, the amendment is little more than formal, as facts are alleged in this petition which, if true, (and the proofs substantiate them,) import that the debtor was insolvent at the time, and committed the acts alleged in contemplation of insolvency. Therefore, this new averment could not have taken the debtor by surprise, as it simply put in form what already appeared in substance, in the petition, and what must have been so understood by him on the trial of the issue before the court, as no objection was taken to the evidence. Order affirmed.

Case No. 3,318.

CRAFT v. LATHROP.

[2 Wall. Jr. 103, 4 Am. Law J. (N. S.) 181.][1]

Circuit Court, E. D. Pennsylvania. May Term, 1851.

EJECTMENT—PENNSYLVANIA STATUTE OF APRIL 13, 1807.

After a question of title to lands in Pennsylvania, has been, in substance, three times before courts of competent jurisdiction, all of which have been of opinion against it—an opinion which this court, also, on understanding it, concurs in—this court will enjoin further proceedings at law, and compel the party claiming under such title to give up the evidences of it, and to make a deed of all his estate derived under them to the party whom he has been vexing. And this though the title alleged in the first suit was not formally the same as that in the second, and though in the third, the plaintiff by suffering a nonsuit prevented a verdict and judgment against him at all. The Pennsylvania statute of April 13, 1807, enacting that "two verdicts" and judgments thereon, in succession for the same party, in ejectment between the same parties, shall "bar the right," was intended to supply a want of equitable power in the Pennsylvania courts, as then constituted; and whatever it may mean, does not prevent this court, which has complete equity powers, from giving complete equity relief in such a case as is above stated.

[Quoted in Dishong v. Finkbiner, 46 Fed. 15.]

In equity. This was a bill of peace to May term, 1851, in which the facts were es-

[1] [Reported by John Wm. Wallace, Esq. 4 Am. Law J. (N. S.) 181, contains only a partial report.]

sentially these: Steele Semple, Esquire, being in debt, died in 1813, the owner of a piece of land. One of his creditors, acting amicably and in concert with his administrator, the Hon. Wm. Wilkins, obtained judgment by consent against his estate, took his piece of land in execution, and in 1815 had it sold. Mr. Wilkins bought it in, taking the sheriff's deed in his own name; no money passing between him and the sheriff; and the purchase being made for the benefit of Semple's family: but no trust being specially declared. In this state of facts, another creditor, the Hon. James Ross, in 1819, obtained judgment against the administrator, and having kept his judgment alive till 1833, levied then on the same piece of land, had it sold, bought it himself in 1834, and sold it to Craft, the present complainant, who had had possession of it since 1837. Afterwards in 1842, a daughter of Semple's claiming under two titles, to wit, as one of her father's heirs, and also as heir to her mother, (Semple's second wife who had had some supposed, independent right in the land), brought ejectment against Craft in a state court, (Mr. Justice Grier at that time presiding there and trying the case), in which a verdict and judgment were given against her. This judgment the supreme court of Pennsylvania affirmed on error (Payne v. Craft, 7 Watts & S. 458, 465), declaring it to be "clear that the sale of the real estate in dispute under the judgment to Mr. Ross, was a good and valid sale, and such as vested him with the right of his debtor thereto at his decease." After this, the heirs of Semple filed a bill in equity against Mr. Wilkins, the administrator, for an account as trustee of another tract of land of Semple's, which Mr. Wilkins had bought in, in the same way as this, and claimed also an account of this tract, the subject of this suit. Mr. Wilkins, in answering that part of the bill which related to this tract, gave an account of Mr. Ross's judgment, and the proceedings under it "since adjudicated," as he answers, "to be regular and valid by the decision of the supreme court of Pennsylvania, the court of last resort upon territorial questions:" and he quotes the language already given from that decision; adding, "As it is thus settled that the title of Mr. Ross relates back to a period beyond any connection of the respondent with the premises, it is manifest that by the said sale, all the relations of the respondent to the property were severed." No exceptions were filed to this answer; and afterwards, in 1847, Mr. Wilkins by deed reciting the purchase of 1815, and that the land then bought by him was held "in trust for the use of the creditors and children of Steele Semple," referring to the bill in equity and his answer and account, and reciting that "it is acknowledged that the said trusts have been satisfactorily and faithfully administered and executed," conveys to Semple's heirs "without recourse or warranty," all Semple's and all his, Wilkins's, right, title, claim and demand of, in and to the said tracts of land, "so far as the same have not been sold."

Being thus clothed with Mr. Wilkins's title, Semple's daughter and the other heirs brought a second ejectment against Craft, in the same state court, where a verdict and judgment were again entered for the defendant. On error to the supreme court of the state in 1848, this judgment was affirmed; only, however, by a bare majority of judges; this majority after having declared a reluctance to regard the matter as open after its former judgment, affirming that judgment so far as it covered the old facts, and deciding that there was nothing in the title derived through Mr. Wilkins, "to defeat the estate otherwise undoubtedly vested in Mr. Craft." Hays v. Heidelberg, 9 Pa. St. 203, 204. Being thus unsuccessful in the state courts, the parties there plaintiff, afterwards sold or conveyed the land to one Lathrop, the defendant, in this case, a citizen of Virginia; and he, in 1848, brought ejectment in this court against Craft, where he set forth essentially the same title as the parties, under whom he held, had shown in the state courts, and where, this court, Mr. Justice Grier now presiding here, having charged against him, he suffered a nonsuit. Being thus out of court, and at liberty to begin anew, the same Lathrop in 1850 brought another ejectment against Craft. His declaration being in the usual form, did not show under what title he now claimed; and nothing appeared otherwise to show that it was essentially different from that already exhibited by him or by those from whom he held.

On these facts, Craft now filed this bill against Lathrop, setting forth his case and submitting "for the consideration of this court whether after the three repeated suits at law by said defendant or those under whom he claims—if he pretends to have any other title than was presented and judicially condemned by the aforesaid courts, or hopes to raise any other or better title under the same rights of heirship or the same deeds, or in any other right or on any other evidence,—he is not bound to set forth the same by schedule or otherwise, so that this court may examine the same and be satisfied that his fourth ejectment has some reasonable grounds upon which future litigation ought to be encouraged;" and praying, "that inasmuch as the same title and possession which, at said former trials, was vested in the complainant, remains in him, that the respondent should be restrained from proceeding in the ejectment commenced here and to pay the costs of that suit and this bill, and enjoined from commencing and prosecuting any other ejectment against the complainant's said lands at any time hereafter so that the complainant may be quieted and undisturbed by the said respondent or any one claiming un-

der him; that the said deed to respondent and all those under which he sets up any title may be delivered into this court to be cancelled or destroyed, and that the said respondent may be compelled to release any title or claim he sets up to the said premises, and that the complainant may receive such further or other relief as to this court may seem meet and equitable."

Without reporting all the special matters of defence, which were essentially a re-investigation of the original case,—which this court regarded as without merits—and an attack on the decisions of the supreme court,—the strong ground against the relief prayed for was a statute of Pennsylvania passed April 13th, 1807, which enacts, that "where two verdicts shall, in any writ of ejectment between the same parties, be given in succession for the plaintiff or defendant, and judgment be rendered thereon, no new ejectment shall be brought; but where there may be verdict against verdict between the same parties and judgment thereon, a third ejectment in such case, and verdict and judgment thereon, shall be final and conclusive, and bar the right."

David Ritchie and T. Williams against the bill. Where there is a statute regulation, equity cannot interfere and set it aside. The statute of limitations must be regarded by the chancellor equally as by the common law judge, although there are cases where the pleading of it is contrary to good conscience. Our statute with regard to ejectments is of the same class. It makes two verdicts and judgments on the same side in an action between the same parties conclusive; but the right of a party to make claim until two verdicts and judgments have been so had, is fairly deducible from the act of assembly, and no fair reasoning can put any other construction on it. There might, it is true, be a case where it could be shown to the chancellor that there was an adverse possession of more than twenty-one years; that the plaintiff in ejectment had no shadow of title, knew that he had none, and brought his action merely to annoy; not to enforce rights he really believed himself to possess. But this is not such a case. Mr. Craft's possession is of about fifteen years only. The property in dispute is claimed by the representatives of Mr. Semple, whose it originally was by the acknowledgment of all parties. The title of Mr. Ross never accrued till twenty years after Semple's death. This land has been taken from Semple's representatives by a process which, to them, appears neither just nor lawful, and they insist upon their absolute right to test the matter in every mode and as long as permitted by law. If it be said the supreme court of Pennsylvania has already decided the matter, the reply is, that court has pronounced one judgment on the title here set up, and that this judgment was by a bare majority of the court, two judges out of five dissenting. It is believed that the supreme court of Pennsylvania will not make a similar decision should the case again be presented. At all events the plaintiffs have a right to two judgments; and the proper time to allege the authority of that court as a bar, will be when it has pronounced two judgments in the same way. The acts of assembly with regard to two verdicts and judgments in ejectment have received a construction in Brown v. Nickle, 6 Pa. St. 390, which goes farther in our way than it would be necessary for us to ask. In an ejectment where the title was really not in question, and the only dispute was the payment of a mortgage, the court held that one verdict and judgment was not conclusive, the bare form of the action entitling the party under our statute to two verdicts and judgments in one way. But whatever injunction this court will grant against proceeding at law or otherwise in the courts of the United States, certainly it will not compel a surrender of our title papers, or, what is worse, a transfer of our estate by which we shall be deprived of our rights in the state courts of Pennsylvania. There, certainly, we are not barred, because there we can be barred only technically and at law under the statute. There have not been "two verdicts in an ejectment between the same parties given in succession for the plaintiff." This court is not so greedy of jurisdiction that in a question of real property, a matter specially subjected to state law, it will snap after a case and clutch it away from the tribunals to which it especially belongs. At furthest, it will use its equity powers only to prevent what it deems an abuse of its law: and not to make void what it deems the unwise or inequitable legislation of the assembly of Pennsylvania. Any injunction must be confined, therefore, to enjoining the respondent from suing again in the federal courts.

Mr. Craft argued the case in person, in favour of his bill.

GRIER, Circuit Justice. It is a maxim of the civil as well as the common law, and a rule absolutely necessary for the maintenance of the public welfare, "that the judgment of a court of competent jurisdiction, while it remains unreversed, is conclusive between the parties and privies thereto, so as to estop them from again litigating a fact once tried or found." If it were otherwise, there would be no end to litigation. This rule is equally applicable to suits which affect the title to real as to those respecting personal property. A verdict and judgment in a writ of entry or a writ of right, were as conclusive in their effects, as they were in actions of debt, trespass or trover. But when the action of ejectment was substituted for real actions, by the ingenious fiction of a lease, entry and ouster, and the recovery of a fictitious term of years, it is plain, that though

in fact the same issue might be tried between the same real parties, yet the record would exhibit an entirely different issue between different parties: so that the verdict and judgment on a lease, entry and ouster of John Doe would not technically be pleaded in bar to another ejectment, where the lease, &c., were to Richard Roe.

From such technical reasoning upon the fictitious forms of the action of ejectment has arisen this anomaly in the common law, and not (as has been sometimes mistakenly asserted) from any distinction made by the common law, in favour of real property. Indeed, no good reason can be given why the solemn judgment of a court of competent juridiction should be conclusive on personal rights valued at millions, and inconclusive when the title to realty, worth but an hundred, is in litigation.

But great as the evils of endless and vexatious litigation thus introduced by means of legal fictions, were, courts of equity were at first slow to interfere; Lord Cowper having, in a celebrated case (Lord Bath v. Sherwin, Finch, Prec. 261, 10 Mod. 1), refused to interfere by injunction, where five several verdicts and judgments in ejectment had been rendered in favour of one party. But this decision was overruled by the house of lords, and a perpetual injunction was decreed. 4 Brown, Parl. Cas. (2d Ed., 1803), 373. The ground of the decision undoubtedly was, that this was the only adequate means of suppressing oppressive litigation, and hindering irreparable mischief. This doctrine has ever since been steadily adhered to by courts of equity: and now wherever a right has been satisfactorily established at law, a court of equity will interfere to prevent further litigation, without inquiring particularly what number of trials in ejectment have taken place. Leighton v. Leighton, Id. 378, and 1 P. Wms. 671–673. See Story, Eq. Jur. § 859.

In Pennsylvania (till lately) they had no courts of general equity jurisdiction, which could give a remedy against vexatious litigation by injunction, or by compelling the transfer or cancellation of an outstanding fraudulent or void deed, which might cast a shadow over the title of the true owner, and be used to his annoyance.

To remedy, in some measure, this evil arising from the want of tribunals with sufficient powers to administer equity, the act of the legislature of April 13th, 1807, was passed, which constitutes the real ground of defense in this case. It is not necessary to criticise the very peculiar language of this act. It has been construed to mean, that two verdicts and judgments between the same parties or privies and on the same title, shall be conclusive of the right, and a bar to any further actions. By thus making two verdicts and judgments in favour of one party, a bar or estoppel which might be pleaded in a court of law to another action between the same parties, a partial remedy was afforded for the evils arising from want of a court of equity. But in this court, which has full powers to give an equitable remedy against oppressive litigation, it by no means follows, that a party can have no other remedy than that given by a court of law under this statute. A litigious claimant of land may annoy the owner forever, and evade the estoppel provided by this act, by pursuing the course which the respondent in this case has seen fit to pursue. He may bring his ejectment, have a full hearing before a court and jury, and when the court has pronounced his title insufficient in law to entitle him to a verdict, he may take a nonsuit, and renew his litigation; speculating on the possible chances of a change of judges or of the law, or hoping to extort from his adversary the price of peace. The act of 1807 was not passed to confer a right of harassing another forever with litigation, provided the party can evade two verdicts and judgments, but to give a legal remedy, defective indeed, but better than none. Equity is a part of the common law of Pennsylvania; but for want of proper tribunals it is often very defectively administered. Hence (till lately) partnership accounts could be settled only in the antiquated action of account-render; there was no mode of compelling a discovery; there was no power to order the delivery or concealment of fraudulent deeds. Specific execution of a contract could not be enforced except by conditional verdicts in actions of covenant and ejectment. Certain of the courts of law have lately been entrusted with powers to remedy some of these defects arising from want of a court of general equity jurisdiction; but as to most of them, equity is still administered with the defective and cumbrous machinery of a court of law. But the courts of the United States, laboring under none of these difficulties, through defect of power, have always administered equity in this state, as fully as in others, and have, therefore, never adopted the practice of the Pennsylvania courts of endeavoring to administer it indirectly and defectively through the forms of legal actions. Hence we decree and compel the specific execution of a contract as a court of chancery, and not by an action of ejectment on an equitable title, or pursuing any of the other special and defective methods of giving equitable remedy, which necessity has compelled the legislature or courts of Pennsylvania to invent or adopt.

Our inquiry in the present case will, therefore, be, not, what remedy the courts of Pennsylvania could give to the complainant, or whether he has shown a statute bar as against the respondent (for then he would have no need to come into a court of equity); but, whether he has shown a case, which entitles him to relief from this court sitting as a court of chancery with full power to administer equity. Or, in other words, has the complainant so satisfactorily established his

title at law, as to entitle him to invoke the aid of this court to suppress and prevent further litigation of the same question? (His honour here went into a minute review of the cases brought in the state courts, and of the ejectment first brought in this court. And while he stated that this court did not feel called upon to enter into argument, to justify the opinions of the supreme court of Pennsylvania affirming the validity of Craft's title, he yet reviewed the facts of those cases minutely, and of the proceedings to account and of the first ejectment in this court, and expressing the entire concurrence of this court in the principles on which these cases were founded, continued as follows:) That the complainant is entitled to the remedy prayed for in his bill, we think, cannot admit of a doubt. His title has, in fact, been three times declared valid by the courts of law as against the claim set up by the respondent. The complainant is now harassed with a fourth ejectment on the desperate speculation, that possibly the courts of the United States may be persuaded to overrule and reverse the decision of the supreme court of Pennsylvania on a question of title to real property depending on the peculiar laws of that state. The purchase and sale of stale and desperate claims for the purpose of speculation and litigation, by persons out of possession, has become so frequent, that we have constant cause for regret, that Pennsylvania has not adopted the ancient doctrine of the common law on the subject of maintenance and champerty.

We are of opinion, therefore, that the complainant is entitled to the relief prayed for,—

1st. Because his title as against that under which the respondent claims, has been thrice tried at law and decided in his favour. Twice by the supreme court of Pennsylvania, and once by this court.

2nd. Because the judgment of the supreme court, affirming the title of complainant, and adjudging the deed of Mr. Wilkins to be void, has been made the foundation of a settlement in a chancery suit and its correctness acknowledged by the administrator and his pretended assignees, under whom the respondent here claims.

3rd. Because Mr. Wilkins after the proceedings we have stated, is estopped from setting up a claim to the land as his own, or affirming the validity of the deed to him; and the respondent in so doing, is making a fraudulent use or rather abuse of the assignment which has been purposely drawn in such form as to show that Mr. Wilkins, the administrator, laid no claim to this property and did not consider himself as transferring any.

4th. Because this court fully concur in the correctness of the decisions at law on the title in question.

And this court doth accordingly hereby order, adjudge and decree: That the ejectment suit now pending on the law side of this court, commenced by the respondent against the complainant, be enjoined, and all further proceedings thereon be stayed, and that said respondent pay all costs incurred in said suit; and that respondent be enjoined from commencing or prosecuting any other action of ejectment against the said complainant, his lessees, alienees or heirs for the tract of land described in said bill of complaint, under any title or pretence of title, vested in complainant at the time of the filing of the bill in this case, or at the time of instituting the action of ejectment hereby enjoined. And further that the respondent do release and convey to the complainant, his heirs and assigns, all right, title, claim or demand whatsoever of said respondent to the land in dispute vested in him by and under the deeds in the bill of complaint stated and described, by a deed duly executed and acknowledged, and to be filed in this court within thirty days from the date of this decree. And that said deed when filed shall be recorded in the recorder's office of Alleghany county. And that in default of the said respondent's executing and filing such deed within thirty days from the filing of this decree, the clerk of this court is hereby appointed master and commissioner of this court to make, execute and acknowledge such a deed of release, and have the same recorded. And that all the costs of this suit, including those of the said releases and recording the same, be paid by the said respondent.

CRAFTON (UNITED STATES v.). See Case No. 14,881.

Case No. 3,319.

CRAGIN v. CARMICHAEL et al.

[2 Dill. 519;[1] 11 N. B. R. 511.]

Circuit Court, D. Iowa. 1873.

BANKRUPT ACT, § 35 — PLEADINGS — VARIANCE— RIGHT OF ASSIGNEE TO AVOID FRAUDULENT CONVEYANCES OF THE BANKRUPT — CHATTEL MORTGAGE—VALIDITY UNDER LAWS OF IOWA.

1. Where the assignee in bankruptcy brings an action under section 35 of the bankrupt act specifically to recover the value of property conveyed by the bankrupt to the defendant by way of illegal preference under the act, and issue is taken thereon, the assignee must recover on the case stated in his declaration, and cannot under such an issue recover on the ground that the conveyance to the defendant was void at common law, or under the statutes of the state.

[Cited in Johnson v. Patterson, Case No. 7,403; Harris v. Exchange Nat. Bank, Id. 6,119; Clark v. Hezekiah, 24 Fed. 667.]

2. The assignee in bankruptcy represents the rights of creditors, and may attack conveyances made by the bankrupt in fraud of his creditors, although the creditors are creditors at large of the bankrupt.

3. The construction of the statutes of the state of Iowa by the supreme court as to the validity of an unrecorded chattel mortgage

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

against creditors with notice thereof, followed in a case where the assignee in bankruptcy, in an action in that state, sought to avoid the mortgage, because invalid under the statutes of the state.

[Cited in Crooks v. Stuart, 7 Fed. 803; Clark v. Hezekiah, 24 Fed. 666; Lyon v. Council Bluffs Sav. Bank, 29 Fed. 574.]

Writ of error to the district court for the district of Iowa. Alonzo Cragin, the defendant in error, is the assignee in bankruptcy of Smith Patterson, lately a merchant at Tama City, Iowa. The plaintiffs in error, Carmichael, Brooks & Co., were bankers at the same place, and held a chattel mortgage upon the stock in trade of Patterson, the validity of which was contested by the assignee. The material facts are these: The action by the assignee in the court below against the defendants was brought under the 35th section of the bankrupt act [of 1867 (14 Stat. 534)], and alleged in substance that the defendants, Carmichael Brooks & Co., on the 15th day of November, 1872, seized upon the greater part of Patterson's stock of hardware with a view to secure a preference, as Patterson was insolvent, and they had reasonable cause to know or believe him to be so. The petition asks to recover the value of the goods so seized, solely on the ground of the alleged preference sought to be gained, contrary to the bankrupt act. It contained no reference to the defendants' mortgage.

The defendants' answer was: (1) In general denial of all the allegations of the petition. (2) A special defence, to the effect that on May 24th, 1872, Patterson being indebted to the defendants, bankers, for advances of money, executed to secure such indebtedness a chattel mortgage on his stock of goods and delivered it to the defendants on that day; that this mortgage being duly acknowledged was recorded October 4th, 1872; that the mortgage was taken by the defendants bona fide, and with no reason to believe Patterson to be insolvent; that on the 15th day of November, 1872, there was due the defendants thereon $3,700, and that the defendants on that day seized the mortgaged property to foreclose the mortgage, and that said mortgage was made and delivered to the defendants more than four months before the filing of the petition in bankruptcy against Patterson. On these issues there was a trial to the jury, and a verdict and judgment for the assignee for $3,792.60. To reverse this judgment for alleged erroneous instructions to the jury, the defendants bring the case to this court by writ of error.

Platt Smith and Fouke & Chapin, for plaintiffs in error.

Shiras, Van Duzee & Henderson, for assignee (defendant in error).

DILLON, Circuit Judge. The chattel mortgage of the bankrupt to the defendants below was executed and delivered to them on May 24th, 1872, more than four months before the filing of the petition in bankruptcy. This mortgage was duly recorded October 4th, 1872, within four months of the bankruptcy. On the 15th day of November, 1872, the defendants below took actual possession under their mortgage, and were in possession when the petition for adjudication of bankruptcy was filed, which was on the 19th day of the same month.

Two errors are assigned, which I proceed to notice. The court below properly instructed the jury that the plaintiff's petition counts solely upon facts which entitle him to recover, under section 35 of the bankrupt act, the exclusive ground of the action being an alleged illegal preference to the defendants under that enactment. And following the views of Chase, C. J., in Re Wynne [Case No. 18,117], the court instructed the jury that the preference, if any was given by the mortgage, was given when that instrument was made and delivered on the 24th day of May, from which period the four months limitation began to run, and not from the period when it was recorded, since the recording was not the act of the bankrupt, but alone the act of the creditor. And accordingly the jury were told that if they found "that the giving of the mortgage was more than four months before the 19th day of November, 1872, [the day the petition in bankruptcy was filed], the plaintiff cannot recover under the bankrupt act on the ground of illegal preference."

As this instruction was in favor of the defendants, the giving of it, even if it was erroneous, cannot be assigned by them as error. But the defendants below claimed that under the pleadings an illegal preference under the bankrupt act was the only ground upon which a recovery was sought, and therefore the instructions which the court gave, to the effect that the answer so far helped the plaintiff's case that it put the validity of the defendants' mortgage as a statutory instrument in issue, and that if this was not valid under the laws of Iowa as against creditors, plaintiff might recover on that ground. In this the court erred. The first count of the answer was a general denial, and this put in issue all the material allegations of the petition, and devolved on plaintiff the necessity of recovering, and of recovering alone, upon the case stated in the petition. The petition could have been so framed as to assail the mortgage, both because it was fraudulent under the bankrupt act and under the common law or statute of the state. But as it was not thus framed, the special affirmative defence set up in the answer could not be relied on by the plaintiff as a separate ground of recovery.

The other error assigned relates to the court's instruction as to effect under the statutes of Iowa of not recording the mort-

gage. On this subject the court charged the jury as follows: "If you find that the mortgage was in fact executed on the 24th day of May, A. D. 1872; that the defendants kept it in their own possession without filing it for record until the 4th day of October, 1872; that debts accrued against the bankrupt in the intervening time, and that the creditors whose debts were so contracted had no notice of the existence of the mortgage; that in the meantime the mortgagor retained possession and control of the mortgaged property; that the defendant seized the property under and by virtue of the mortgage alone, withheld it from the assignee and refused to deliver it on his demand, and that the claims of the creditors intervening between the execution and filing of the mortgage for record remain unsatisfied—then the plaintiff is entitled to a verdict."

The correctness of this instruction must be determined by the statutes of the state respecting chattel mortgages, and the recording thereof; and the question whether the mortgage to the defendants was void as to creditors is just the same as if no assignee in bankruptcy had been appointed, and it had been attacked by attaching or judgment creditors. When a conveyance is attacked for fraud, outside of the bankrupt act, by the assignee in bankruptcy, he represents the rights of general creditors, and may for such fraud avoid the instrument, though he has no specific lien on the property thereby conveyed.

The state statute contains the following provisions applicable to the present inquiry: "No sale or mortgage of personal property, where the vendor or mortgagor retains actual possession thereof, is valid against existing creditors or subsequent purchasers without notice, unless recorded," &c. Revision of 1860, § 2201. Another section (2203) enacts that from the time such mortgage is duly recorded "it shall be deemed complete as to third persons, and shall have the same effect as though it had been accompanied by an actual delivery of the property mortgaged." These provisions have been frequently before the supreme court of the state, and have received a settled construction. Hughes v. Cory, 20 Iowa, 399; Allen v. McCalla, 25 Iowa, 465. These cases settle the law in the state of Iowa to be that an unrecorded mortgage of chattels, where the mortgagor retains possession, is valid against attaching creditors with notice of its existence at any time before levy. Accepting this construction, as I think we must as a rule of decision here, it is clear that the charge of the court below, however correct on common law principles aside from statute regulation, is not consistent with the exposition of the statute by the supreme court of the state.

In this case it will be remembered that the mortgage was recorded nearly six weeks before the petition in bankruptcy was filed, and that at that time the defendants were in actual possession under their mortgage. From the time it was recorded all parties were bound to take notice of it, and from that time it became "complete as to third persons, and had the same effect as though it had been accompanied by an actual delivery of the property mortgaged." Besides, the mortgagee was in actual possession when the bankruptcy proceedings were commenced. If a sheriff, on the 19th day of November, had attached or levied upon the goods for a creditor, he would have been bound to take notice of the mortgagee's rights, and if the mortgage was not fraudulent in fact because made or used to hinder, delay, or defraud creditors, the attachment or levy would be subordinate to the mortgage.

Now, as above observed, the assignee in attacking a conveyance as invalid under the laws of the state, has precisely the rights which an attaching creditor would have had, and no greater; and as to such a creditor the mortgage would not have been invalid merely because his debt was created without notice of it, and before it was recorded. As to the assignee in bankruptcy, he must show something more to defeat a mortgage on record, when the bankruptcy proceedings were commenced, than that debts were created without notice of it before it was recorded.

The judgment below is reversed, and cause remanded for a new trial. Reversed.

NOTE [from original report]. The principal cases construing the statutes of the state as to chattel mortgages, and the effect of mortgagor retaining possession, are Miller v. Bryan, 3 Iowa, 58; Crawford v. Burton, 6 Iowa, 476; McGavran v. Haupt, 9 Iowa, 83; Kuhn v. Graves, 9 Iowa, 303; Campbell v. Leonard, 11 Iowa, 489; Torbert v. Hayden (leading case), 11 Iowa, 435; Hughes v. Cory, 20 Iowa, 399; Allen v. McCalla, 25 Iowa, 464.

CRAGIN (NAZRO v.). See Case No. 10,062.

Case No. 3,320.

CRAGIN v. THOMPSON.

[2 Dill. 513;[1] 12 N. B. R. 81.]

Circuit Court, D. Iowa. 1873.

BANKRUPT ACT—ASSIGNMENT UNDER STATE LAW—RIGHTS AND REMEDIES OF ASSIGNEE IN BANKRUPTCY—LIABILITY OF ASSIGNEE UNDER STATE LAW.

1. An assignment by a debtor, under a state law, of his property for the benefit of his creditors, is an act of bankruptcy.

2. Remedies of the assignee in bankruptcy to recover the property from the assignee under the state law, discussed.

[Cited in Re Pitts, 9 Fed. 544.]

3. Where the assignee, in an assignment made under the state law, qualified and became an officer of the state court, and received possession of the assigned property before the commencement of proceedings in bankruptcy against the debtor, and such state assignee, act-

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

ing in good faith, sold the assigned property under the orders of the state court, and by its direction paid over the proceeds to creditors who proved up under the assignment, and this was done before the assignee in bankruptcy brought suit against him: *Held*, that he was not liable, as in trover, for the value of the property received under the deed of assignment.

[Cited in Wehl v. Wald, 3 Fed. 94.]

This is a writ of error to the district court for the district of Iowa. The plaintiff is the assignee in bankruptcy of the late firm of S. & B. Stern, and the defendant was the assignee in a deed of voluntary assignment made by the said firm before they were proceeded against in bankruptcy. The present action is in the nature of trover for the value of the property assigned to the defendant. In answer, the defendant denied all liability, and set up as a special defence that before the adjudication of bankruptcy the Messrs. Stern made a general assignment of all their property to the defendant for the benefit of all of their creditors under the provisions of the laws of Iowa; that the defendant accepted the trust in good faith, gave bond, and qualified and became an officer of the district court of the state for the county of Dubuque and subject to its orders, and that before this action was brought, the defendant, by the order of said court, had fully administered all of said property and distributed the proceeds among the creditors of the said S. & B. Stern.

A jury was waived and the cause tried to the court. The court below made a special finding of facts and gave judgment for the defendant [case not reported]. The facts specially found are sufficiently referred to in the opinion of the court. To reverse this judgment, the assignee in bankruptcy brings the case here by writ of error.

Shiras, Van Duzee & Henderson, for plaintiff in error.

Griffith & Knight, for defendant in error.

DILLON, Circuit Judge. As this case comes here on a writ of error, only questions of law can be reviewed. The sole question of law presented by the record is, whether, assuming the truth of the facts specially found by the district court, the defendant is personally liable to the assignee in bankruptcy for the value of the property he received from the Messrs. Stern. The material facts are these: The assignment to the defendant under the statute of Iowa, and the defendant's qualification as such assignee by filing in the state court the requisite bond, and his possession of the assigned property under the deed of assignment, all preceded the initiation of proceedings against the assignors under the bankrupt act. After the adjudication the assignee in bankruptcy demanded of the defendant the property, which he refused to surrender. To compel such surrender summary proceedings were instituted in the federal district court, but were subsequently dismissed in order that the present action might be brought, which was commenced therein February 24, 1872. Meanwhile, however, acting under the orders of the state district court, the defendant had sold the property assigned to him, and had distributed the proceeds under the orders of that court. This was before the present action was brought. The fact is expressly found that the defendant acted in good faith, that he had no interest in the assignment and derived no benefit from it, and that he pursued the state law and paid over the proceeds of all property which came to his hands under the orders of the state court to the creditors who proved their debts under the assignment. Under these circumstances the question for decision is, whether the defendant is personally liable to the assignee in bankruptcy for the value of the property assigned to him, or its proceeds.

1. It has been decided in this circuit that a voluntary assignment by a debtor, under state laws, though free from fraud in fact and embracing all of his property, and made for the benefit of all of his creditors, is an act of bankruptcy within the meaning of the bankrupt law [of 1867 (14 Stat. 522)]. In re Burt [Case No. 2,210]; Hobson v. Markson [Id. 6,555]. The assignee in bankruptcy is entitled, as against the assignee under the state law, to the possession and control of the estate. So far there can be no doubt.

2. I am of opinion that while such an assignment is an act of bankruptcy, the assignment itself is not absolutely void ab initio, but only subject to be avoided by proceedings taken under the bankrupt act. If the assignors are adjudicated bankrupts, the property assigned passes to, and becomes vested in, the assignee in bankruptcy, and he is entitled to its possession so that it may be used by him to pay the debts which shall be proved against the estate in the bankruptcy court. The proceedings under the state law which contemplates that creditors shall there prove their debts and receive dividends are inconsistent with the proceedings under the bankrupt act, which requires all assets to be administered and all debts established in the bankruptcy court. There cannot be two concurrent administrations of the same estate, and of course the state enactment must give way in cases where it is brought into collision with the bankrupt act.

If the present action were against the creditors who received dividends under the assignment, there could, as it now seems to me, be little or no doubt as to their liability. But is the defendant liable, since he had no property in his possession when this action was brought, and had, before that time, paid over in good faith all the proceeds of the assigned property under the orders of the state court? It is my judgment that the defendant should not, under these circumstances, be held personally liable. It is not

necessary so to hold in order to prevent the bankrupt act from being evaded or its operation defeated. One plain remedy for the assignee in bankruptcy was to apply to the state court which, down to the adjudication of bankruptcy, at all events, if not afterwards, was rightfully exercising its jurisdiction over the assigned estate, and ask for an order upon the assignee under the state law, to surrender the estate to him. If improperly denied, the assignee in bankruptcy would have a remedy by appeal to the supreme court of the state, whose final judgment, if against him, would be subject to revision by the supreme court of the United States. I do not say, nor in this case is it necessary to affirm, that this would be the only remedy of the assignee in bankruptcy. If the property whose value is sought in this case were still in the hands of the defendant, it may be that he would be liable in respect to it if he should refuse to surrender it to the assignee in bankruptcy. This would depend upon the question, whether, after the adjudication of bankruptcy and the appointment of an assignee (thus superseding the rightfulness in law of any further administration under the state statute), the property assigned was in the custody of the law, i. e. of the state court and its officer, the assignee under the state law.

I have strong doubts, notwithstanding the argument of the district judge, whether property in the hands of an assignee under the state law is in custodia legis after the adjudication of bankruptcy, so as to exempt such assignee from liability to the assignee in bankruptcy or from proceedings in the federal courts to protect the rights of creditors under the bankrupt act. If the state assignee should surrender the property, he ought to be protected in so doing by the state court, but if it denied him such protection he could take the case, if necessary, to the supreme court of the United States. On the other hand, if the mere making of a voluntary assignment under the state laws withdraws the property and the assignee wholly from the operation of the bankrupt act and the machinery it has provided for the collection and distribution of assets under the supervision of the court it has established for that purpose, the bankrupt act would, to this important extent, seem easy of evasion. But I do not need to pursue the subject further or inquire what remedies the assignee in bankruptcy would have under other circumstances. What I hold is, that under the special findings of the district court—which not only exonerated the defendant from bad faith, but affirmatively found that he acted in good faith and under the orders of the state court, whose jurisdiction and right to act were in no way questioned therein by the assignee in bankruptcy —the defendant is not personally liable to the present plaintiff. He must now seek his remedy against those who have received payments from the defendant in contravention of the bankrupt act. Affirmed.

NOTE [from original report]. See Marshal v. Knox (Sup. Ct. U. S. Dec. term, 1872) 16 Wall. [33 U. S. 551]; Johnson v. Bishop [Case No. 7,373]; Peck v. Jenness, 7 How. [48 U. S.] 612.

Case No. 3,321.

Ex parte CRAIG.

[4 Wash. C. C. 710.][1]

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

RESTORATION OF PRISONER'S PROPERTY.

The court, on motion, ordered the magistrate who committed the applicant and bound him over to appear in this court to answer to a charge of forgery of bank notes of the Bank of the United States; to restore to the applicant certain good notes of that bank, which he took from his possession and detains from him.

A rule was granted upon the mayor of the city of Philadelphia, on the motion of the prisoner, to show cause why he should not deliver to the prisoner certain bank notes of the Bank of the United States, alleged to be genuine, to the value and amount of $1,550, which the mayor had taken from the person of the prisoner upon his examination upon a charge of forgery. The mayor appeared by counsel to show cause, and admitted the notes to be genuine; but denied the right of the court to interfere in a summary way in a matter of this kind.

Randall & Philips, for prisoner.

C. J. Ingersoll, for mayor.

WASHINGTON, Circuit Justice. The mayor having appeared to show cause, has admitted the material facts on which this rule was granted, and submits to such order as the court may think itself authorised to make in the case. The facts are, that upon the examination of the prisoner before the mayor, upon a charge of his having been concerned in counterfeiting the notes of the Bank of the United States, true notes of that or of other banks, to the amount of $1,550, were found in his pocket, which the mayor thought his duty required him to detain, until the trial of the prisoner should have taken place. The mayor asserts no claim to this money, nor is it even insinuated that it is not the property of the prisoner. The prisoner was committed by the mayor to take his trial before this court for the alleged offence; and a bill of indictment has accordingly been sent to the grand jury, which they have found to be true. Upon these facts, it can admit of no doubt, but that the prisoner could not fail in an action against the mayor to recover the money so taken from his person and detained by him; and the only question

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

is, whether, in a case like the present, the court can relieve the party in this summary mode of proceeding? No precedent of such a proceeding has been cited by the counsel for the prisoner, but I shall not fear to be the first judge (if I am so), to make the precedent. The notes in question are admitted to be true and genuine, and no accusation of any kind is made against the prisoner in relation to them, nor can they be used as evidence against the prisoner, upon his trial for having counterfeited other notes. They were taken from the person of the prisoner by the mayor, the examining and committing magistrate, by colour of his office, and are detained by him in consequence of the prosecution now depending in this court. Under these circumstances, I consider the money to be constructively in possession of the court, and subject to its order. The constitution, by one of its amendments, has secured to every person under a criminal prosecution, the right to have compulsory process for obtaining witnesses in his favour, and the privilege of having the assistance of counsel to defend him. But what would these securities avail the accused, if a judicial officer, or any other officer of the court may legally deprive him of the means of obtaining his witnesses, and of employing the counsel in whom his confidence is placed; by detaining the money found upon his person, which, in many cases, may be his all? To turn the prisoner over to his ordinary remedy, by suit against the officer, which might not be decided until long after his fate in the criminal prosecution had been fixed, would be a mockery of justice, and a reproach to the law.

The only doubt I felt as to the propriety of affording summary relief to the applicant was, that he had elected his remedy by suit against the mayor. This difficulty, however, may be got over by making the dismission of that suit the condition of making the rule absolute. Rule made absolute as above.

[NOTE. For the subsequent trial and conviction of the prisoner on the charge of forgery, see Case No. 14,883.]

Case No. 3,322.

In re CRAIG.

[3 N. B. R. 100 (Quarto, 26); 3 Ben. 353.][1]

District Court, S. D. New York. Aug. Term, 1869.

EXAMINATION OF BANKRUPT.

Where counsel of creditor put questions to bankrupt upon his examination, touching property of his wife, and his own acts in relation thereto, bankrupt objected that the questions related to matters existing and transpiring prior to the time when the creditor's debt was contracted, and declined to answer unless compelled. *Held*, that the questions were proper, and bankrupt should answer.

[On certificate of register in bankruptcy.

[In the matter of Daniel H. Craig.]

I, Odle Close, one of the registers of said court in bankruptcy, do hereby certify, that in the course of the proceedings in said cause before me, the following questions arose, and were stated and agreed to by the counsel for the opposing parties, to wit: The following is a summary of the evidence upon the point to be submitted to the court:

"Q. Was Hiram Hyde ever connected with you in business in any way. A. Yes. Q. In what way? A. I loaned him money. Q. How much money? A. I do not know; that was before your time; it was before 1856; and under the advice of Mr. Field I decline to answer such questions until somebody compels me to do it. That question goes back to somewhere in the neighborhood of 1849. (Counsel for bankrupt states that he objects to any question going back of 1856, and directs the witness not to answer such questions until they shall have been certified to the court.) Witness.—I decline to answer any question relating to matters previous to 1856, until the decision of the court is obtained. Q. Did your wife have any property when you married her? A. I suppose she had some. Q. How much? (Mr. Ensign objects to the question, and witness declines to answer, for reasons before given.) Q. Do you recollect, approximately, how much she had? A. I decline to answer, subject to the decision of the court. Q. Was any property settled on your wife, at the time of your marriage, by marriage settlement? (Same objection.) Q. Has your wife derived any property since her marriage and prior to 1856, either from you or from any other person, to your knowledge? (Same objection.) Q. If so, state what amounts, from whom, and what property? (Same objection.) Mr. Ensign.—The witness declines, by the advice of his counsel, to answer any question in regard to any transaction in respect either to his own or his wife's property prior to 1856, the date when Mr. Vail's debt was contracted, subject to the decision of the court. Mr. Olmstead.—The counsel for Mr. Vail, the judgment debtor, proposes to ask such questions for the purpose of showing that all or most of the property which is now held in the name of Mrs. Craig, the wife of the bankrupt, was derived from her husband, the bankrupt, without any consideration from her, such questions to be certified by the register to the court. Q. How much property is your wife worth, to the best of your knowledge? (Objected to.) Q. Did your wife ever derive any of her property from you? (Objected to as going back of 1856, and witness declines to answer.) Q. Did you, on or about May 10, 1858, make any agreement with the American Telegraph Company, whereby you, together with your wife, assigned and transferred to the said company the interest of yourself and wife in certain agreements made

[1] [Reprinted from 3 N. B. R. (Quarto, 26), by permission. 3 Ben. 353, contains only a partial report.]

between the Commercial Telegraph Company and John McKinney, Charles Spear, and Wilson G. Hemp, or other parties, or any interest in the said agreements? Look at this paper and see if it is a copy of the paper. (Handing witness paper.) A. I should suppose that was the agreement I have in my mind. Q. Did your wife sign that? A. I suppose she did; that is the paper I have referred to. Mr. Olmstead offers the paper in evidence. Mr. Ensign objects on the ground that the paper is a copy, and no proof has been made that the original is lost. Q. Do you or not know whether any money was paid by the American Telegraph Company, or whether there was any other consideration moving from them for the assignment to them by yourself and wife of May 10, 1858? Mr. Ensign.—I object to any questions with reference to the substance of the papers offered in evidence, on the ground that the originals must be produced. Q. Was any money paid or was there any consideration moving from the American Telegraph Company to yourself and wife on any assignment of any interest to them? (Same objection.) (Answer taken, subject to objection.) Q. What were the matters in which it was supposed you had an interest, and by reason of which you were called upon to execute the assignment to which you have referred? (Objected to that it refers to transactions prior to 1856.) (Answer taken, subject to objection.) Q. Did you make any arrangement with the Telegraph Companies by which you were enabled to have the dispatches sent to you immediately following the dispatches sent to the Associated Press? (Objected to.)"

I am of opinion that the several questions objected to by the petitioner were pertinent and proper, except the question as to whether the petitioner and wife transferred to the American Telegraph Company their interest in certain agreements made between the Commercial Telegraph Company and John McKinney and others, which question is objectionable in so far as it calls for the contents of any such agreement. I am of opinion that the copy paper offered in evidence, purporting to be an assignment to the American Telegraph Company, is not admissible in evidence, on the ground that the same was a copy, as no proof was made that the original was lost, or, if not lost, no notice was given to produce the same.

BLATCHFORD, District Judge. I concur with the register in his views above stated.

NOTE [from original report]. See, also, [Case No. 3,323,] and In re Clark [Id. 2,805]. Where the question relates to property of a stranger, the bankrupt need not answer. In re Van Tuyl [Id. 16,880]. Nor can he be examined as to business done or property acquired after date of filing petition in bankruptcy, unless it can be connected with the bankrupt estate.

[NOTE. For subsequent examinations of the bankrupt and his wife, see Cases Nos. 3,323 and 3,324.]

Case No. 3,323.

In re CRAIG.

[4 N. B. R. (Quarto) 50.][1]

District Court, S. D. New York. 1870.

EXAMINATION OF BANKRUPT.

1. Where the bankrupt on his examination declines answering questions relative to his wife's property, *held*, that the same were pertinent and proper.

2. Where the wife of a bankrupt on examination before a register declines to answer because the matters enquired of are her private business, *held*, that the same were pertinent and proper.

[On certificate of register in bankruptcy. [In the matter of Daniel H. Craig, a bankrupt.

[For a prior decision as to the pertinency of certain questions, see Case No. 3,322.]

I, Odle Close, one of the registers of said court in bankruptcy, do hereby certify that in the course of the proceedings in said cause before me, the following questions arose pertinent to said proceedings, to wit:

Mr. D. H. Olmstead appeared as counsel for Mahlon Vail, a creditor of said bankrupt, and Mr. E. Ensign as counsel for the bankrupt on the examination of said bankrupt at instance of said creditor.

The following is a summary of the evidence upon the points to be submitted to the court: The said bankrupt on his examination testified as follows: "Q. 1042.—Has your wife derived any property since her marriage, and prior to 1856, either from you, or from any other person to your knowledge? Mr. Ensign—I object so far as the question relates to any other person. As far as it relates to himself, the question has been already asked. Q. 1043—If so, state what amounts, from whom and what property? (Same objection.) * * * Q. 1031—Do you know whether your wife has derived any property, real or personal, from any person, since your marriage? (Objection.) Q. 1034—Has she derived any property from you, or any interest in any property since your marriage with her, except such as was necessary for her support? Mr. Ensign—I object to the question on the ground that it is a question of law to decide what amount of property is necessary for her support, and impossible to answer the question as a matter of fact. Q. 1039—What other property than was necessary for the immediate support of your wife and family have you given to her, and when have you given it to her, and in what amounts? (Same objection.) Q. 1040—Has your wife ever held in her own right, any stock, or any interest in any telegraph company, or in any patent connected with a telegraph company, or any other property or estate of any character, which legally or equitably belonged to you? Mr. Ensign—I object to that on the ground that it is hearsay evidence; that is a matter of law, and not within the knowl-

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edge of the witness. (Mr. Olmstead gives notice to the bankrupt that unless the questions are answered, he shall, at the same time that they are certified to the court, make an application to the court that he may be punished for contempt of court in not answering the questions.) * * * Q. 1751—Are the statements contained in this printed circular now shown you in respect to the property correct? (Objected to on the ground that the circular is not in evidence. Mr. Olmstead offers circular in evidence. Mr. Ensign objects to the acceptance of the paper on the ground that it is irrelevant, incompetent, and improper—the object of the examination being the discovery of the bankrupt's property—a printed paper purporting to be a description of the property owned by his wife not proved to have been prepared by him is totally inadmissible.) Q. 1752—Is the property described in this circular the same property now occupied by yourself and wife at Peekskill? (Objected to on the ground that the paper is not in evidence, and the witness has no means of knowing what the property is there described, and that the question is irrelevant and incompetent, and further that there is no proof of any description that any part of the property is owned by Mr. Craig. (Paper marked, for identification, 'F.') * * * Q. 2219—Now please look at a paper purporting to be a contract annexed to the judgment roll, the contract being dated November 3, 1855, and state whether that is your signature to that contract. A.—Yes, sir. Q. 2220—And is that Hiram Hyde's signature to the contract? A.—It looks like it. Q. 2221—Did you execute that paper? A.—That is my signature. Q. 2222—Did you execute it? A.—I signed it; that is all I know about it. Q. 2223—Did you or did you not execute it? Is that a contract made between yourself and Mr. Hyde? A.—I don't know what the contract is; that is my signature. Q. 2224—That is not an answer. A.—I can only say that there is no doubt about the signature. Yes, sir. I recollect that. Q. 2225—That was the contract made betwen you and Mr. Hyde, wasn't it? A.—I recollect the circumstance now. (Counsel for the creditor desires the bankrupt to state whether he did or did not execute the paper referred to.) * * * Q. 3218—Now, what was the particular reason why an assignment of an interest in that company was made to Mrs. Craig rather than to yourself? (Objected to as incompetent and improper.) A.—I can only answer that so far as my own sense of propriety was concerned. Mrs. McKinney signified her willingness and desire to convey to me one-third interest in that line on the ground, as she said, that she knew her husband felt as though I was entitled to it. My answer to Mrs. McKinney was that I had not done anything that Mr. McKinney had originally proposed that I should do to entitle myself to an interest, and that besides this, there were then reasons connected with my relations with the Associated Press, and through that association with the public, which in my judgment rendered it improper for me to hold such interest, and therefore I declined to accept it. Q. 3219—Was not that interest put in Mrs. Craig's name for the express purpose of enabling you to appear to the world only as the agent of the Associated Press, while at the same time you might really have a large interest and control in the Commercial Telegraph Company, over whose lines a large portion of your private despatches and the despatches of the Associated Press were sent? (Mr. Ensign objects to the form of the question as incompetent and improper. To the question whether the property was put in Mrs. Craig's name for the purpose of allowing Mr. Craig to appear only as agent of the Associated Press, I have no objection. The remainder is mere surplusage and argumentative and I ask it to be stricken out. Bankrupt declines to answer under advice of counsel.) Q. 3260—Have you, during the course of this examination, examined a book purporting to be a copy of contracts heretofore in the custody of the American Telegraph Company, and purporting to contain copies of contracts in respect to which you have heretofore testified in this matter? (Objected to: 1st, as irrelevant, incompetent and improper; 2d, that the book referred to is not in evidence; 3d, that not being in evidence it is not within the knowledge of the witness that it contains copies of any particular contracts; 4th, that there is no proof that the contracts in regard to which he has testified are copied in that book. Witness declines to answer.) Q. 3261—Have you examined that book at the office of the Western Union Telegraph Company, since you first saw it produced on this examination, and did you or did you not make a thorough and critical examination of its contents, and was or was not the examination of the book the means of refreshing your memory about the matters therein mentioned in respect to which you have since then testified? (Objected to on the same grounds.) Q. 3262—Did or did not such examination of that book by you induce you to make answer different from what you had made before in respect to the interest and rights of yourself and the various parties in the Commercial and American Telegraph Companies? (Objected to on the same ground, and also on the ground that this question and the previous ones evidently have no other object than to harass, embarrass, and mislead the witness. Witness declines to answer.) Q. 3278—Had you at the commencement of your examination in this matter forgotten Mr. Hyde's connection with the stock? (Objected to on the ground that the question has been fully answered. Witness refers to his former answer on cross-examination on November 6th, in answer to this question. Mr. Olmstead asks counsel to point out question and answer. Objection

withdrawn.) A.—I had forgotten his true condition. Q. 3279—Had you forgotten that he had any connection with this stock? A.—My impression was that he had obtained possession of a certain amount of the 210 shares of stock, but I had quite forgotten the particular circumstances under which he had obtained it. Q. 3280—Question repeated. (Objected to on the ground that the question has been fully answered previous to today; that the witness had testified also previous to today; that Mr. Hyde had some connection with the stock, and that the last answer is a full and responsive answer to the question. Witness declines to answer further by advice of his counsel.) Q. 3281—Would it be possible for you now to remember what your feelings were at the time the advances were made as stated in your answer to question 3176, and at the same time to forget the main features of the transaction? (Question and answer here read to witness, being as follows: 'Q. 3176—In saying that you agreed to pay the assessments on the American Telegraph stock, and did pay those assessments to a certain extent, do you refer to your understanding that the moneys paid by you on the Vail line should be passed to the credit of that stock? A. Yes. I felt at the time that I was advancing money on account of the Vail line; that I was substantially paying the assessments on the 210 shares of stock for which I was responsible through Mr. Hyde, although the money may not have been, and I think was not actually entered on the books of the company to the credit of that stock.' Question 3281 objected to as incompetent, improper, irrelevant and impertinent, and as ambiguous, and as harassing the witness. Witness declines to answer.) * * * Q. 3290—How much was paid to Mr. Croome and Mr. Brown, and when? (Objected to so far as it regards how much was paid, the witness having testified on his cross-examination that about $2,000 was paid to each. Witness declines to answer as to that part.)"

I further certify that in the same proceedings Helena Craig, the wife of said bankrupt, was examined as a witness before me at the instance of said creditor, and that the following is a summary of the evidence upon the points to be submitted to the court: The said Helena Craig on her examination testified as follows: "Q. 3575—Do you mean to say that you paid $6,000 for the entire property (State St. property)? A.—There was a mortgage on the property when I bought the lots. I paid between $12,000 and $13,000 for the property; that includes the mortgage upon the property which I afterwards paid. Q. 3576—Was there any mortgage on the property at the time you procured the subsequent mortgage on the property? (Question objected to. Question to be certified.) Q. 3577—After your purchase of the property, did you give a mortgage upon it? A.—I did. Q. 3578—To whom? (Objected to.) A.—To Mr. Corning for $7,000. Q. 3579—Did you use that money to pay off the first mortgage? A.—No, sir. Q. 3580—What did you use that money for? (Objected to. To be certified.) Q. 3603—Now please state the reason if you know, why the conveyance of this property was first made to your husband and not to yourself? (Question objected to.)"

[NOTE. For the examination of Helena Craig, wife of the bankrupt, see Case No. 3,324, next following.]

Case No. 3,324.

In re CRAIG.

[4 N. B. R. (Quarto) 52.][1]

District Court, S. D. New York. Oct. 18, 1870.

EXAMINATION OF BANKRUPT.

[On certificate of register in bankruptcy.

[In the matter of Daniel H. Craig.

[For prior examinations of the bankrupt, see Cases Nos. 3,322 and 3,323.]

It is understood that all questions objected to on this examination are to be certified to the court, if either party desires.

By Odle Close, Esq., Register in Bankruptcy.

Mrs. Helena Craig, being produced as a witness and sworn on behalf of Mahlon Vail, creditor, testifies as follows: "Q. 3718. How much money was due to you from the American Telegraph Co.? I ask you how much? A. I do not recollect. Q. 3719. Do you recollect approximately? A. I do not know. Q. 3720. Can you state within five thousand dollars? A. I cannot. Q. 3721. Within ten thousand dollars? A. I cannot. Q. 3722. Who paid you the money due you from the American Telegraph Co.? Who paid you these lease monies due from the American Telegraph Co.? (Objected to by Mr. Ensign.) Q. 3723. Did you receive any money at all from the American Telegraph Co. for this lease interest? A. No, sir, not to my recollection. Q. 3724. What became of the third interest that you had in the Commercial Telegraph Line which you say you derived from Mrs. McKinney? A. Sold it to the American Telegraph Co. for stock, or exchanged it. Q. 3725. And did the interest you had in the first American Telegraph Co. go into the second telegraph company? A. Yes, sir. Q. 3726. Did all that interest go in the Western Union Co.? A. I do not know that I have had any interest in the Western Union Co.; not to my knowledge I did not. Q. 3727. What became of the stock which stood in your name in the second American Telegraph Co.? (Objected to by Mr. Ensign.) Q. 3728. Did you sell the stock which you held in the American Telegraph Co. to any one? A. I had it sold. Q. 3729. In what way was it sold? (Objected to by Mr. Ensign.) Q. 3730. To whom was it sold? (Objected to by Mr. Ensign.) Q. 3731. Did you

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know personally what was paid on the sale? A. I do if I understand the question. Q. 3732. Did you personally receive the money? A. Yes, sir, I did. Q. 3733. But you did not receive it you say from the person you bought it from? A. No, sir. Q. 3734. From whom did you receive it? (Objected to by Mr. Ensign.) Q. 3735. Who negotiated the sale? (Objected to by Mr. Ensign.) Q. 3736. Did your husband, to your knowledge, receive or at any time have in his possession any of the proceeds of such sale? A. He had it long enough to bring it home to me; never held it at any other time. Q. 3737. How long did he have it? A. From the time he received it until he delivered it; it might have been in a day or two. Q. 3738. Did he not have some of it longer than a week? A. No, unless he held it to pay some bill or obligation. Q. 3739. Did or did not he hold some of it longer than one week? A. I have answered that. Q. 3740. In what form did he give it to you? (Objected to by Mr. Ensign.) Q. 3741. Did you receive it in the form of bank bills or checks? (Objected to by Mr. Ensign.) Q. 3742. How much did you receive? How much did he give you? (Objected to by Mr. Ensign.) Q. 3743. Did he give it to you in more than one payment at a time? (Objected to by Mr. Ensign.) Q. 3744. Where did he give it to you? (Objected to by Mr. Ensign.) Q. 3745. What did you do with the money after he gave it to you? (Objected to by Mr. Ensign.) Q. 3746. Did you deposit any of the money after he gave it to you? (Objected to by Mr. Ensign.) Q. 3747. Did you pay back the same to him with any of the money after you first received it from him? A. I have loaned him money, but I cannot recollect whether it was that or other monies. Q. 3748. Did you loan him any money subsequent to the time you received this money? A. I do not recollect. Q. 3749. In what year did you receive this money? A. In 1866 or 1867. Q. 3750. Was not all received as late as 1868? A. No, sir. Q. 3751. How did you know that the monies which you say that you received from your husband were the avails of this stock? (Objected to by Mr. Ensign.) Q. 3752. Do you know of any other way except by information received from him? (Objected to by Mr. Ensign as improper and irrelevant.) Q. 3753. Have you had any settlement with your husband for any of the monies you have loaned him? A. I do not understand you. Q. 3754. Have you had any settlement with him? A. No formal settlement. We generally, settled as we went along. When a transaction was accomplished, it needed no further settlement than that. Q. 3755. Did he always repay you the money which you loaned him? A. No, sir. Q. 3756. In what way, then, have you had a settlement with him? A. I considered his services in lieu of the money, and we settled in that way. Q. 3757. What services? A. Acting as my agent in business transactions. Q. 3758. Did you ever have any settlement made by and between you of the various amounts you have loaned him? A. No. Q. 3759. When did you make the last loan of money to him? A. Three or four months ago. Q. 3760. How much? (Objected to by Mr. Ensign as being after the date of filing his petition.) Q. 3761. When was the last loan you made to him prior to December, 1868? A. I don't recollect. Q. 3762. About long previous to that time? A. I don't recollect. Q. 3763. Cannot you tell within five years? A. I loaned him money whenever he wanted it. I cannot tell the time. Q. 3764. Can you not tell within five years prior to December, 1868, when you made the last loan of money to your husband? (Objected to by Mr. Ensign.) Q. 3765. What was the amount of money you last loaned your husband prior to December, 1868? A. I don't recollect. Q. 3766. Can't you state within five thousand dollars? A. I don't recollect. Q. 3767. What amount of money in all have you loaned your husband from 1857 to the 1st of December, 1868? A. About twenty thousand dollars, to the best of my recollection. Q. 3768. Did you ever take from your husband any notes or vouchers for such loans to him? A. No. Q. 3769. Did you ever keep any book of accounts yourself? A. No, merely pencil memorandums. Q. 3770. Have you any of those pencil memorandums now? A. I may and I may not; I probably have not got any. (Mr. Olmstead requested the witness to produce them.) Q. 3771. Who was in the habit of collecting your dividends on stock which you held in the first and second American Telegraph Co.? A. My husband, unless Mr. Eddy brought it to me at the house, which he sometimes did. Q. Was your husband in the habit of bringing your dividends to you? A. Yes, sir. I presume they gave them to him at the office to bring to me. Q. 3772. You were in the habit of receiving them from him, were you not? A. Yes, sir, unless Mr. Eddy brought them to me. Q. 3773. Did or did not your husband know of the sale of the stock which you held in the second American Telegraph Company at the time the sale was made? (Objected to by Mr. Ensign.) Q. 3774. Did your husband not know? A. He knew. Q. 3775. Do you know whether your husband did or did not know from what source you derived the stock which you held in the first and second American Telegraph Company? (Objected to by Mr. Ensign on the grounds of incompetent, improper, and irrelevant.) Q. 3776. Did or did not your husband know what use you made of the proceeds of that stock after its sale? (Objected to by Mr. Ensign.) Q. 3777. In what way did you derive this one-third interest in the Commercial Line from Mrs. McKinney? A. She gave it to me. Q. 3778. Were you acquainted with Mrs. Margaret McKinney? A. Yes, sir. Q. 3779. In her lifetime? A. Yes, sir; an intimate friend. Q. 3780. Is she still alive. O. She is. Q. 3781. Where does she reside? A.

In Scranton, Pennsylvania. Q. 3782. Did she convey that stock to you by any written instrument? A. She did. Q. 3783. Do you recollect on what date? (Objected to by Mr. Ensign.) Q. 3784. Do you recollect about the date? A. She told me formerly, in 1855, she would give it to me, and it was executed in '56 or '57, but I knew it was to be mine two or three years before. Q. 3785. Did you ever pay her anything for the stock for that interest? A. No, sir. Q. 3786. Was she under any moral or legal obligation to convey that interest to you? (Objected to.) Q. 3787. Moral obligation? (Objected to on the ground as a conclusion of law.) A. It was her husband's wish before he died, and she carried out his intentions. Q. 3788. Was there not reason that you know of other than what you have stated here that this interest was assigned to you? A. Mrs. McKinney felt under obligation to my husband, and she gave it to him, and he declined to accept it, and she then offered it to me, and I accepted it. Q. 3789. Have you the instrument making the assignment to you of that interest? A. No, sir. Q. 3790. Did you ever have it? A. Yes, sir. Q. 3791. What did you do with it? A. Gave it to my counsel in another suit. Q. 3792. Who? Please state the counsel's name to whom you gave it. A. Mr. Field. Q. 3793. Which Mr. Field? A. D. D. Field, to the best of my recollection. Q. 3794. When did you give it to him? A. In '56, 7 or 8, along there. I do not recollect the date. Q. 3795. Was the paper which you gave to him an assignment to you from Mrs. Margaret Jane McKinney? A. No, sir. (Objected to.) Q. 3796. What was it? (Objected to. Q. 3797. What instrument did you give to Mr. Field? A. I think it was one from Mrs. Hyde conveying it to me. It was made from Mr. McKinney in the first place, and he conveyed it to me. Q. 3798. Did you ever see the conveyance from Mrs. McKinney to Mr. Hyde? (Objected to as irrelevant.) Q. 3799. Did you ever have possession of the assignment to Hyde from Mrs. McKinney? A. I don't recollect. I had possession of the conveyance from Hyde to me, but to the best of my belief I never had it. Q. 3800. If Mrs. McKinney desired to make the assignment to you, state if you know why it was first made to Hyde? A. At my request. Q. 3801. Why did you request it? A. He had led me to believe that he could sell it to a better advantage than I could. Q. 3802. Was not the assignment from Hiram Hyde to you as late as March, 1858? A. I think not, but I cannot remember the date. I believe I stated '56, 7 or 8. Q. 3803. It may have been as late as '58? A. It may have been, but I think not. Q. 3804. Would you recognize a copy of the assignment from Hyde to you to which you have referred? (Objected to as incompetent and improper.)

"(Paper handed to witness, and marked 'Creditors' Exhibit I, January 20, 1870.' Mr. Ensign withdraws his objection.) A. To the best of my knowledge and belief, it is a copy. Q. 3805. Did you afterwards, together with your husband, make an assignment of this same interest, or any part of it, to the American Telegraph Company? (Objected to.) Q. 3806. If you did, state as near as you can recollect the date of the assignment, and whether it was in writing? (Objected to by Mr. Ensign.) Q. 3807. What amount of consideration, if any, did you receive on such assignment, if the assignment was made? A. I received stock in the American Telegraph Company for the third interest. Q. 3808. Did you receive any money? A. No, sir. Q. 3809. Did your husband, to your knowledge, receive any money on such assignment, money or consideration? A. Not to my knowledge. I don't think he did; I don't believe he did. Q. 3810. How much stock did you receive? A. I answered that question the last time I was here. I answered it before. I received the 210 shares and paid what was due in cash; whatever my interest would not liquidate I paid in money. Q. 3811. How much cash did you pay? A. I don't recollect; a trifling sum, if any. Q. 3812. What reason was there, if any, for your husband joining with you in that assignment to the American Telegraph Company? A. Mr. Eddy requested it, saying that it was customary for the husband to sign when the wife was conveying her interest, and in addition to this Mr. Craig had laid claim to this interest in some difficulty with Mr. Spear and Mrs. McKinney. Q. 3813. Did you never recognize Mr. Craig's claim to this interest? (Objected to as irrelevant.) Q. 3814. Did you, at any time about the year '59, together with your husband, execute a bond to the American Telegraph Company? A. I don't recollect any such transaction. Q. 3815. Was all the stock which you held in the first American Telegraph Co. converted into stock of the second American Telegraph Co.? A. I don't recollect. Q. 3816. Where did you get your stock in the second American Telegraph Company? A. From the stock bought in the first. Q. 3817. And there was a transfer of your interest, was there not, from the first into the second American Telegraph Company? A. Yes, sir. Q. 3818. Did you transfer the stock yourself from one company to the other? A. Mr. Eddy made out the papers and done whatever was necessary. How it was arranged I do not remember precisely. Q. 3819. Do you recollect of assigning any certificates of stock yourself, personally? A. I signed various papers brought by Mr. Eddy, but I cannot recollect what they were. Q. 3820. Was all the business of the transfers conducted through Mr. Eddy? A. To the best of my recollection they were. Q. 3821. You refer to Mr. James Eddy? A. Yes, sir, then manager of the line, and a personal friend. Q. 3822. Was or was not your husband acquainted with all these various transactions about which you have testified in relation to your interest in these various companies? A. I presume he was,

but he might not have known all of the transactions. Q. 3823. Was he acquainted with the transactions? A. I think he was. Q. 3824. Did or did not your husband attend to the business of these various transfers for you? A. Mr. Eddy attended to that matter for me. Q. 3825. I ask whether your husband did. Did not your husband, jointly with Mr. Eddy, attend to it? A. I don't recollect. Q. 3826. Do you know whether your husband knew what became of the proceeds of the American Telegraph Company's stock on its sale by you? A. Which American Company? Q. 3827. The second. (Objected to as asked before and on the previous grounds.) Q. 3828. Did you ever authorize your husband to subscribe for any of the stock of the first American Telegraph Company in your name or for your benefit? A. He subscribed for 210 shares on his own account, and when I transferred my interest in the line there was no other stock of the American Company, all the rest being subscribed for by other parties, and I took that 210 shares for the payment of my interest in the Commercial Line, together with the other things which I have mentioned in answer to question 3712. Q. 3829. Is that the stock Mr. Hyde subscribed for? A. I don't know which subscribed for it, Mr. Hyde or my husband. Q. 3830. Then all that interest which you had in the first American Telegraph Company was transferred, was it not, to the second American Telegraph Company, on the formation of the second American Telegraph Company? A. Yes, sir; but I had more stock in the second than in the first American Telegraph. Q. 3831. How did you happen to have more stock? A. They watered it. Q. 3832. And it was the increase? A. Yes, sir. Q. 3833. How much was that 210 shares watered? A. I cannot tell how much that particular 210 shares was watered. Q. 3834. How much stock was given to you in the second American Telegraph Company prior to any purchase of the Clark and Woodward stock? A. I had no Clark and Woodward stock. Q. 3835. How much exclusive? (Objected to.) Q. 3836. How much stock of the second American Telegraph Company did you receive for your stock in the first company? A. All the stock I had in the first company. Q. 3837. I am speaking all together. A. Between three and four hundred shares. Q. 3838. How much stock did you own all together in the first American Telegraph Company? A. The 210 shares that I had in exchange for my Commercial Line, and I afterwards bought thirty shares at a sheriff's sale, and after that 120 shares at private sale which I subsequently resold; didn't hold any a great length of time. Q. 3839. Who did you sell the 120 shares to? A. It was sold for me. I don't know who purchased it. Q. 3840. Who sold it for you? A. Mr. Stoker or Mr. Craig; I cannot recollect. Q. 3841. For how much was it sold? A. For a large advance on what I paid. Q. 3842. About how much? A. I think I paid in the neighborhood of twelve thousand dollars and I got from five to eight thousand advance, I think; I cannot remember the precise increase; that is as near as I can recollect. Q. 3843. Who did you buy that 120 shares of? A. Mr. Cogswell. Q. 3844. Where did you get the money with which you paid for that 120 shares that you bought of Mr. Cogswell? A. I don't recollect whether I paid for it at the time or whether I paid for it afterwards or not. I recollect that I bought it. Q. 3845. The question is where did you get the money with which you bought that stock? A. From funds in my own possession, of course. Q. 3846. Where did you get these funds? A. From my savings. Q. 3847. From the savings of the money which Mr. Craig had given you? A. I did not pay for the stock, I think, until after I sold it. Q. 3848. How did you get the stock, then, without paying for it? A. Borrowed the money, I remember now; borrowed the money to pay for it, and returning it after I had sold it. Q. 3849. From whom did you borrow the money? A. I recollect now; Mr. Olmstead. I have hypothecated other stock. Q. 3850. Who to? A. I don't know the parties. The loan was negotiated for me. Q. 3851. Who negotiated the loan? (Objected to by Mr. Ensign.) Q. 3852. Did Mr. Stoker negotiate that loan? (Objected to.) Q. 3853. What monies did you use in returning the amount of this loan? A. The money arising from the sale of the stock of the 120 shares of the Cogswell stock. Q. 3854. How long did you have the loan? A. I don't recollect. Q. 3855. About how long? A. I don't recollect. Q. 3856. Can you state the precise amount of the loan? A. Yes, sir, I remember now; I raised fifteen thousand dollars at the time. Q. 3857. Did your husband have anything to do about raising that loan for you, about procuring it? A. I asked him to attend to it for me. Q. 3858. Did he? A. I gave him the stock; I don't know whether he raised the money or any one else. Q. 3859. Did he bring you the money? A. I don't recollect. Q. 3860. Do you recollect in what form the money came to you, which was given to you, whether by bills or by check? (Objected to as irrelevant.) Q. 3861. Do you recollect distinctly having received the money yourself, personally? A. I do not know; it may have been paid directly over for the stock, but I am not positive about it. If they were checks I endorsed them and returned them, but I do not recollect. Q. 3862. What monies did you use in payment for the thirty shares of stock that you have mentioned as purchased at a sheriff's sale? A. A few dollars that I had from my dividends that I had from my other stock; it was but a few dollars any how; I don't remember how much. I wish to amend this by saying I don't know what money I used. Q. 3863. Did you pay the par value for that stock? A. No, sir. I paid a few dollars, I told you before. Q. 3864. In what suit

was that sale made by the sheriff? A. It was known as part of the Hyde stock. Q. 3865. Was the stock sold on a judgment in a suit brought by you? A. I think it was. Q. 3866. Against Mr. Hyde? A. I think it was. Q. 3867. Was the 210 shares and the thirty shares of stock in the first American Telegraph Company all the stock which you held at any time in that company? A. To the best of my recollection it was. Q. 3868. How much stock in the second American Telegraph Company was issued to you for that stock in the first American Telegraph Company? A. Between three and four hundred shares, exclusive of the Cogswell stock. Q. 3869. How much of the Cogswell stock did you own? (Objected to on the ground that the witness has already answered.) Q. 3870. Was that between three and four hundred shares of stock in the second American Telegraph Company which you received for your 210 shares and thirty shares held by you in the first American Telegraph Company all the stock that you had in the second American Telegraph Company during its existence? A. To the best of my recollection it was. Q. 3871. And did you hold all that stock in the second American Telegraph Company until its dissolution, until its merging into the Western Union? A. Yes, sir, I held it until 1866. Q. 3872. And then you sold it? A. Yes, sir. Q. 3873. Was an action ever brought against you to recover any stock which you held in either of the companies? A. Not to my recollection. Q. 3874. In whose name did that stock stand which was sold by the sheriff at the time of the sale; in whose name on the books of the company? (Objected to on the ground that the books will show.) Q. 3875. Did or did you not claim to be the owner of that stock which was sold by the sheriff at the time of the sale? A. I claimed to be the owner of some of the stock which Mr. Hyde wrongfully held, but whether that was a portion of it or not I cannot state. Q. 3876. In what suit was that sale made? (Objected to as being asked before.) Q. 3877. When was it sold by the sheriff, in what year? A. I don't recollect. Q. 3878. Was it about the year 1862? A. I don't recollect. Q. 3879. Was it sold on an execution against your husband? A. There was some of my stock taken and wrongfully held by Clark and Woodward, and I paid three thousand to Clark and Woodward to release that stock. Q. 3880. In what way was it held by Clark and Woodward? A. In a judgment against my husband. Q. 3881. Do you know in what court it was recovered; was it in the superior court of this city? A. I don't recollect. Q. 3882. Did you at any time hypothecate the stock held by you in either of the companies you have mentioned to Wilson G. Hunt for the sum of twenty-five thousand dollars or thereabouts? A. I hypothecated my stock at various times and for various circumstances. Of that particular transaction I cannot recollect. Q. 3883. If a transaction of that magnitude had occurred would you or would you not be likely to remember it? A. I should be likely to remember it if I had a long time to think it over, but for the moment, owing to the state of my health, I cannot think them over. I cannot think of them. Q. 3884. Do you remember receiving about that amount of money at any time from Wilson G. Hunt? A. I cannot recollect. Q. 3885. Did the stock of the first American Telegraph Company during the entire time you held it stand in your name on the books of the company? A. No, it did not. I transferred it at various times and for various purposes, and at one time I transferred the whole amount to my husband, so that he could appear as a large stockholder at the meetings of the company. It was about the formation of the second company. When the new company was formed, instead of reissuing it to me, they reissued it to him, and it stood so, and I did not discover it for a year or more, and then I left the stock with the company and had it reissued to me. Q. 3886. About what year was that? A. 1857 or 1858, to the best of my recollection; perhaps later than that. I have no distinct recollection of the date. Q. 3887. Have you now stated to the best of your recollection all the persons to whom you have hypothecated any of that stock while you held it? (Objected to. Question withdrawn.) Q. 3888. Do you recollect hypothecating any of the stock of the first or second American Telegraph Company to any person while you held it? (Objected to as being answered before. Mr. Olmstead desires Mr. Ensign to point out where.)

"Q. 3889. Did your husband to your knowledge transfer any of your stock to your brother-in-law, Mr. Croome? A. He did at my request. Q. 3890. Was it a sale or hypothecation? A. Hypothecation. Q. 3891. For how much? A. I don't recollect. Q. 3892. Can you state approximately? A. I cannot. Q. 3893. Can you state within five thousand dollars? A. I don't recollect. Q. 3894. Within ten thousand dollars? A. I don't recollect. Q. 3895. Did you ever repay that money to Mr. Croome? A. Yes, sir, I authorized it paid. I do not know that I paid it personally I received the stock back; it was paid for. Q. 3896. But do you not recollect that you paid it yourself? A. I authorized it paid. That is all I can tell you. Q. 3897. Do you know who negotiated that loan for Mr. Croome? A. I requested my husband to attend to my portion of it, and he did so. Q. 3898. Did you ever transfer any of your stock to James B. Brown? A. I think I did. Q. 3899. Do you know how much? Was it an absolute sale or hypothecation? A. Hypothecation. Q. 3900. Can you tell within five thousand dollars how much was received? A. I cannot. Q. 3901. Did you receive the money yourself on the hypothecation? A. I did from my husband. Q. 3902. Did you personally receive it?

A. I think I did on that occasion. Q. 3903. Can you state when it was? A. I cannot. Q. 3904. Can you state the amount of stock transferred? A. I have answered that question. Q. 3905. Can you state the amount which was received? A. I have answered that. Q. 3906. Did you repay Mr. Brown that money yourself personally? A. I did or my husband did at my request. I furnished the money. Q. 3907. Do you know that your husband did pay? A. I have just told you that I do not know whether he paid it or I paid it. I am not quite sure but I did pay it. Q. 3908. Can you now state the name of any person who brought your money from your brother-in-law in California? Your brother-in-law O. W. Craig, in California? A. I cannot; they were personal friends of his, passing through the city. I never had any personal acquaintance with any of them. Q. 3909. Did you furnish any money or outfit for him when he went to California? A. Perhaps my husband and myself might have furnished two or three hundred dollars in that fitting out, which he afterwards repaid. Q. 3910. Did you pay yourself personally any of it? A. I expended a little money in buying things for his personal comfort on his voyage out. Q. 3911. Did you pay the most or your husband for his outfit? A. I cannot say. Q. 3912. Have you any interest in the New York News Room? A. That is my private business; I decline to state. Q. 3913. If you have any interest, from whom did you receive it? A. That is my private business; I decline to state. Q. 3914. Did you receive your interest in that news room directly or indirectly from your husband? A. I did not. Q. 3915. Did he to your knowledge ever have any interest in that news room? A. Not to my knowledge. Q. 3916. If you have any interest in that news room, what is the amount and character? A. I decline to state, as it is my private business. (Question objected to by Mr. Ensign.) Q. 3917. Is Mr. Stoker interested in that news room? (Objected to.) Q. 3918. Did your husband ever receive, to your knowledge, or pay to you, any of the profits of that news room? A. I do not recollect. Q. 3919. If you have an interest in that news room, how long have you had it? (Objected to by Mr. Ensign). Q. 3920. Did your husband, as agent of the Associated Press, have any connection with that news room? A. I suppose he furnished news. Q. 3921. Did he receive news from it? A. I presume so. I don't know; that's his private business, not mine. Q. 3922. Did the news room or the association having that room pay him any monies during the time he was agent for the Associated Press? A. I don't know. Q. 3923. Did you ever pay any monies for any interest in that news room? A. No, not that I recollect. Q. 3924. Do you know whether you did or not? A. To the best of my knowledge and belief I did not. Q. 3925. How did you become a stockholder in that association without paying any money? A. That is my private business; I decline to answer. Q. 3926. Did you ever hold any interest in the Cape Cod Telegraph Line? A. I never owned any. Q. 3927. Did not Mr. Croome, your brother-in-law, furnish money with which to buy an interest in this line for you? A. I don't recollect. Q. 3928. Did you ever have any stock in that line? A. I do not recollect. Q. 3929. Did you ever at any time have any interest or stock in the telegraph line known as the Cape Ann Line? A. No, sir. Q. 3930. Did you ever have any stock or interest in the English cable line or in the Atlantic Telegraph Company? A. I believe I had a little. Q. 3931. How much? A. I think five pounds, somewhere along there, but I cannot recollect how much. Q. 3932. Where did you get it? A. Bought it, I suppose. I have no recollection only that I had it. Q. 3933. Did you ever have any interest in the New York, Newfoundland and London Telegraph Companies? A. Yes, sir. Q. 3934. What amount of interest? A. I had a hundred shares. Q. 3935. What was its value? A. Not a great deal at the time I bought it. Q. 3936. How much per share was it on its par value? A. I don't recollect, I only know that I bought it. Q. 3937. Who did you buy it from? A. Mr. Hyde, I think. Q. 3938. How much did you pay for it? A. I don't recollect. Q. 3939. About how much? A. I don't recollect; I know what it sold for. Q. 3940. Can you state within a thousand dollars what you paid for it? A. I cannot. Q. 3941. Within five thousand dollars? A. I cannot. Q. 3942. Did your husband negotiate the purchase for you? A. I empowered him to buy it. I don't know whether he did or got some one else to do it. Q. 3943. Where did you get the money with which you bought that stock? A. Borrowed it. Q. 3944. From whom? A. Hypothecating other stock. Q. 3945. From whom did you borrow it? A. I do not know. Q. 3946. Did you attend personally in negotiating the loan? A. No, sir. Q. 3947. Was it done by your husband? A. Yes, sir. Q. 3948. Was this stock attached during that controversy that you had with Mr. Hyde? A. I don't recollect. Q. 3949. What became of that stock? A. I had it sold for the benefit of my husband. Q. 3950. What was realized on the sale? A. I think about ten thousand dollars. Q. 3951. Did you give the money to your husband? A. Yes, sir. Q. 3952. How long ago was that? A. I don't recollect that. Q. 3953. About how long? A. I don't recollect how long ago it was. Q. 3954. Within four or five years? A. I cannot say, my head aches so. Q. 3955. Did you ever receive any of the proceeds yourself? A. Yes, sir, he paid some small bills of mine out of it. Q. 3956. Do you know who has that stock now? A. I do not. Q. 3957. Please state what interest you have, if any, in the Redfield and Rice Manufacturing

Company. If so, state from whom you derived the money you put into this company; whether you are a director of the company; how much stock, if any, you own in the company; how much was your original interest, if any, and how much your present interest is, if any. A. I consider that my private business, and decline to answer any, except that my husband has no 'direct' or 'indirect' interest in the matter. Q. 3958. Was any of the money which was put into this company by you derived from the sale, hypothecation, increase, or dividends of either of the American Telegraph Companies? (Objected to as irrelevant by Mr. Ensign.) Adjourned until February 3, 1870."

The counsel for said Mahlon Vail requests that said bankrupt be required to answer the questions above numbered 1042, 1043, 1031, 1034, 1039, 1040, 1751, 1752, 2221, 2225, 3219, 3260, 3261, 3262, 3278, 3279, 3280, 3281, 3290. And said counsel also requests that said Helena Craig be required to answer the questions above numbered 3576, 3580, 3603, 3722, 3727, 3729, 3730, 3734, 3735, 3740, 3741, 3742, 3743, 3744, 3745, 3746, 3751, 3752, 3764, 3773, 3775, 3776, 3783, 3786, 3787, 3798, 3805, 3806, 3813, 3826, 3852, 3860, 3888, 3912, 3913, 3914, 3915, 3916, 3917, 3919, 3925, 3957, 3958. I am of opinion that the several questions were all pertinent and proper.

BLATCHFORD, District Judge. I concur with the register in his opinion. The clerk will certify this decision to the register, Odle Close, Esq.

Case No. 3,325.

CRAIG'S CASE.

[1 Pet. C. C. 1.][1]

Circuit Court, D. New Jersey. April Term, 1803.

PRACTICE.

At an early period, after the organization of the federal courts, the rules of practice, in force in the state courts, which were similar to the English practice, were adopted by the judges of the circuit court. A subsequent change in the practice of the state courts, will not authorise a departure from the rules so adopted in the circuit court. Rule for trial by proviso.

[Cited in Moan v. Wilmarth, Case No. 9,686.]

In an ejectment against Craig, on motion of Mr. Leake for a non pros., unless the cause should be brought to trial at the next term, according to the practice in New Jersey, THE COURT determined that, as at an early period after the organization of the federal courts, the judges of the circuit court had, by a rule, adopted the practice of the state courts, at which time the English practice prevailed, it would be improper to depart from it, in a special case, because the state practice is now changed, without first altering the general rule. According to the English practice, as used before and at the time the general rule was made, the defendant can only move for a rule for trial by proviso.

Mr. Leake then moved, that the plaintiff should file the issue roll, within two months, or to show cause, at the next term, why a non pros. should not be entered.

THE COURT granted the rule, the same being conformable to the English practice.

[1] [Reported by Richard Peters, Jr., Esq.]

Case No. 3,326.

CRAIG v. BROWN.

[Pet. C. C. 139.][1]

Circuit Court, D. Pennsylvania. April Term, 1815.

ACTION ON BILL OF EXCHANGE—PLEADING AND PROOF.

1. In an action where the declaration stated that E. Brown was attached to answer, and proceeded to allege in his declaration, the drawing of a bill of exchange by Elisha Brown; evidence of a bill of exchange signed by Elijah Brown, cannot be given in evidence.

2. The plaintiff was allowed to take off a nonsuit and to amend the declaration, on payment of costs.

The declaration recited that E. Brown was attached to answer the plaintiff; and then proceeded to declare against him, as Elisha Brown, on a protested bill of exchange, drawn by him in favour of the plaintiff. At the trial, the plaintiff offered in evidence to support his declaration, a bill of exchange signed E. Brown, and proved the hand writing to be that of Elijah Brown, as the witness had generally heard him called, and did not recollect ever to have heard him called Elisha Brown. The defendant's counsel objected to this evidence, on account of the variance between the proof and the declaration.

Mr. Shoemaker, for plaintiff.

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

THE COURT sustained the objection; observing that it would be improper to permit a paper to go to the jury, having the signature of the defendant in the suit, unless it is proved to be his signature, by sufficient evidence. This suit is against Elisha Brown, and the bill of exchange offered in evidence is signed by Elijah Brown.

The plaintiff suffered a nonsuit. He afterwards moved to set aside the nonsuit, and to have leave to amend his declaration, which was allowed by THE COURT, upon his paying the costs.

[NOTE. On the trial, plaintiff suffered a nonsuit. Case No. 3,327. Plaintiff thereafter commenced a new action. Judgment was rendered for defendant on demurrer to the replica-

[1] [Reported by Richard Peters, Jr., Esq.]

tion, with leave to plaintiff to amend (Case No. 3,329); and, on the trial of the new action, plaintiff was again nonsuited (Case No. 3,330).

[See, also, the discharge of a rule to show cause why defendant should not be discharged on common bail. Case No. 3,328.]

Case No. 3,327.

CRAIG v. BROWN.

[Pet. C. C. 171.][1]

Circuit Court, D. Pennsylvania. Oct. Term, 1815.

ACTION ON BILL OF EXCHANGE—STRIKING OUT INDORSEMENT—NOTICE.

The bill was drawn by the defendant at New Orleans, on Philadelphia, in favour of the plaintiff, and was by him indorsed, in full, to a third person, and had been regularly protested for non-acceptance and non-payment; but no notice of the dishonour of the bill was proved to have been given to the drawer. The indorsement being in full, cannot be struck out at the time of trial. The want of notice prevents a recovery by the plaintiff.

Action on a bill of exchange, drawn by the defendant [Elijah Brown] at New Orleans, on James Brown and Co. of Philadelphia, dated in July, 1807.

The bill was drawn in favour of Lewis Craig, Esq., and indorsed in full, by Lewis Craig, Junior, but they were proved to be the same person. The bill was regularly protested for non-acceptance, and non-payment. No proof of notice being given, the defendant moved for a nonsuit, on that ground; and because the bill has an indorsement on it, and no proof that the plaintiff had paid the amount to the indorser, or had in any other way become entitled to the bill. As to the second objection, WASHINGTON, Circuit Justice, asked if the plaintiff might not now strike out the indorsement, possession of the bill being prima facie evidence, that the plaintiff had paid the indorser? J. R. Ingersoll and Chauncey, for the defendant, answered; that if the bill had been indorsed in blank, this might have been done, but not where the indorsement is in full, and cited [Gorgerat v. McCarty] 2 Dall. [2 U. S.] 144; [Steinmetz v. Currey] 1 Dall. [1 U. S.] 234.

[For a prior nonsuit, see Case No. 3,326.]

Shoemaker, for plaintiff.

J. R. Ingersoll and Chauncey, for defendant.

THE COURT directed the plaintiff to be called for both the reasons assigned.

Nonsuit.

[NOTE. On the next day, plaintiff instituted a new action, and judgment was rendered for defendant on demurrer to the replication. Case No. 3,329. Plaintiff amended, and was nonsuited on the trial. Case No. 3,330.

[See, also, the discharge of a rule to show cause why defendant should not be discharged on common bail. Case No. 3,328.]

[1] [Reported by Richard Peters, Jr., Esq.]

Case No. 3,328.

CRAIG v. BROWN.

[Pet. C. C. 352.][1]

Circuit Court, D. Pennsylvania. Oct. Term, 1816.

EVIDENCE—LEGISLATIVE AND JUDICIAL PROCEEDINGS—AUTHENTICATION—DISCHARGE ON COMMON BAIL.

1. Form of authenticating the legislative and judicial proceedings of one state, in order to their admission in evidence in other states.

[Cited in U. S. v. Wilson, Case No. 16,730; Bennett v. Bennett, Id. 1,318.]

2. The certificate of the presiding judge of the court of the state of Louisiana, stating that the person whose name is signed to the attestation of a record, is clerk of the court, and that the signature is his own hand writing, is not in conformity with the provisions of the act of congress of 1790 [1 Stat. 122].

[Cited in Taylor v. Carpenter, Case No. 13,785; Trigg v. Conway, Id. 14,172.]

3. A printed pamphlet containing the law of the state of Louisiana, is not admissible in evidence.

4. The attestation of a record of the proceedings of a court, according to the provisions of the act of congress, must be in conformity with the form used in the state from whence the record comes, and the only evidence of this fact is the certificate of the presiding judge of that court.

[Cited in U. S. v. Wilson, Case No. 16,730.]

5. Evidence on which the court will discharge on common bail, ought not to be of a doubtful nature.

[Cited in Parkhurst v. Kinsman, Case No. 10,761.]

Rule to show cause why the defendant [Elijah Brown] should not be discharged on common bail, on the ground of the defendant having been discharged from all his debts under the insolvent law of the state of Louisiana, formerly the territory of Orleans.

The plaintiff [Lewis Craig] showed cause by producing a positive affidavit of the debt, and in answer to the ground of discharge alleged by the defendant, he objected: First, that the law of Orleans, under which these proceedings took place, and the record of the court which granted the discharge, are not properly authenticated. Second, that if they were properly authenticated, still a discharge under an insolvent law in one state, is not a ground of discharge in any other state.

WASHINGTON, Circuit Justice. The objections to the record being offered in evidence, are, that the seal of the court is not affixed to it, nor is it certified by the judge, that the record is authenticated in due form.

The act of congress of the 26th of May, 1790 [1 Stat. 122],—2 Laws [Bior. & D.] 102,—declares that the records and judicial proceedings of the courts of any state, shall be proved or admitted in any other court within the United States by the attestation of the clerk and the seal of the court annexed, if there be a seal, together with a certificate of the judge, &c. that the said attesta-

[1] [Reported by Richard Peters, Jr., Esq.]

tion is in due form. As to the mode of authenticating the legislative acts of the several states, the same law declares, that it shall be by affixing thereto the seal of the respective states.

The record offered in evidence in this case, has the signature of the clerk, with the seal of the late territory of New Orleans, affixed, the clerk certifying, that no seal has yet been provided for the state and the certificate of the presiding judge of the court states, that the person whose name is signed to the attestation, is clerk of the said court, and that the signature is in his own proper hand writing. As to the law of the territory, it is printed in a small pamphlet, in the French and English languages, but has no seal whatever affixed. It is objected to this evidence, first, that it has not the seal of the court; and secondly, that it is not certified as the law directs.

First. Whenever the court whose record is certified has no seal, this fact should appear, either in the certificate of the clerk, or in that of the judge. In this case the seal affixed is stated to be that of the late territory of Orleans, not of the court; and it is further stated that no seal has been provided for the state. But from the impression of the seal, it would seem that it had belonged to the court before the territory was erected into a state; in which case it might well continue to be the seal of the court, under the new form of government, although no new provision for that purpose had been made. There are strong reasons for believing that the circumstance which has given rise to this objection, has proceeded from an inaccuracy of expression in the clerk, and I shall therefore proceed to examine the other objection without giving any decided opinion as to the sufficiency of this.

Second. In answer to this objection it is contended, that the attestation of the clerk appears upon the face of it to be in due form, and that the certificate of the judge, though it does not expressly state it to be so, contains what amounts to such an allegation, and is therefore a substantial compliance with law. I cannot accede to this argument. Each state has a form of its own for authenticating records, prescribed either by positive law, or by practice; and to make those records evidence in the other states, congress has thought proper to declare, that the attestation must be, not according to the form used in the state where it is offered, or to any other form generally observed, but to that of the state or of the court from whence the record comes; and the only evidence of this fact, is the certificate of the presiding judge of that court. I infer that the form intended by the law is that which I have stated, from the circumstance, that congress has prescribed none, and it is not to be supposed that the judge who gives the certificate, should be acquainted with any other form than that of his own state or court.

But it is contended, that although this certificate should be too informal to entitle the record to be given in evidence, upon the trial of the cause, it is nevertheless sufficient upon a question of bail. The answer to this is, that the record in question is not evidence for any purpose, because it is not so authenticated as to entitle it to credit. It is in fact no more than a paper having the signature of a person who stiles himself clerk of the court, but who is not shown by the certificate to be so, inasmuch as it states a fact which the law does not authorise or require the judge to certify; and therefore it is the same thing as if the certificate had been omitted altogether.

As to the law of the territory of Orleans, upon which these proceedings have been founded, it is equally inadmissible; not being authenticated under the seal of the state of Louisiana, as the act of congress requires.

Evidence, on which the court will discharge on common bail, ought not to be of a doubtful nature; since the plaintiff may lose his debt altogether, if it should turn out that he was entitled to demand special bail. A mistake made on the other side may be productive of inconvenience to the defendant, but the consequence will be less serious.

Rule discharged.

[NOTE. For dismissal of the action, see Case No. 3,330.]

Case No. 3,329.

CRAIG v. BROWN.

[Pet. C. C. 443.][1]

Circuit Court, D. Pennsylvania. April Term, 1817.

PLEADING—DUPLICITY.

A replication to the plea of the statute of limitations, which stated that the debt arose on an account between merchant and merchant, and that the plaintiff was beyond sea, is bad for duplicity.

This was an action [by Lewis Craig against Elijah Brown] on a bill of exchange against the drawer. The pleas were non assumpsit, and non assumpsit infra sex annos. Replication to the second plea, that an action for the same debt was brought in this court, in the year 1813, and in 1815 the plaintiff was nonsuited [Cases Nos. 3,326 and 3,327], and that six years had not run since the first nonsuit; that the debt sued for arose upon an account between merchant and merchant; and that the plaintiff was beyond seas when the cause of action arose, viz. at New Orleans, and he has not since been within the state of Pennsylvania. To this plea the defendant demurred, stating for cause, first, that the replication is a departure from the declaration, which states that the cause of action is a bill of exchange; and second, that it is double.

[1] [Reported by Richard Peters, Jr., Esq.]

[For discharge of a rule to show cause why defendant should not be discharged on common bail, see Case No. 3,328.]

WASHINGTON, Circuit Justice. The second cause of demurrer is fatal to the replication. The replication contains three distinct answers to the plea. Judgment must be given for the defendant.

The plaintiff then moved for leave to amend, which was granted.

[NOTE. On the trial the plaintiff was nonsuited. Case No. 3,330.]

Case No. 3,330.

CRAIG v. BROWN.

[3 Wash. C. C. 503.][1]

Circuit Court, E. D. Pennsylvania. Oct. Term, 1819.

LIMITATION OF ACTIONS—NEW PROMISE—PAYMENT WHEN ABLE—EVIDENCE—STATE STATUTE.

1. Action on a bill of exchange, drawn by the defendant, in favour of the plaintiff, at New-Orleans, on J. B. of Philadelphia, in 1807. The declaration contained a special count, on a new promise made by the defendant in 1809, to pay the bill if he should ever be able, with an averment of his ability. To this count the defendant pleaded the statute of limitations.

2. The act of the assembly of Pennsylvania, passed in 1815 [6 Laws, 3, c. 4], authorizing the notarial acts of notaries public to be given in evidence, is not obligatory in the circuit court of the United States.

3. Where a promise has been made to a person, who was not the agent of B., and had no authority from him to pay a debt due to B., in a different manner from the original contract, and B. is not present, and does not accept the promise, B. cannot afterwards institute a suit upon the engagement.

4. Where a promise is made to pay a debt when able, and the creditor does not wait, but proceeds immediately in the original obligation, before the defendant had ability to pay, he cannot afterwards resort to the promise of payment when able.

This was an action [by Lewis Craig against Elijah Brown] on a bill of exchange, dated 11th July, 1807, drawn at New-Orleans, on James Brown & Co. of Philadelphia, at sixty days after sight, by the defendant, Elijah Brown, in favour of the plaintiff. The declaration contains the usual money counts, and also a count, stating a new promise, made by the defendant to the plaintiff in 1809, to pay this bill, if he should ever be able to do so; with an averment that he was able to pay. Pleas, to all the counts, non assumpsit, and to the count on the bill of exchange, non assumpsit within six years. By a written agreement, made between the counsel on each side, a replication to the plea of the act of limitations was dispensed with; and the plaintiff was permitted to give any legal evidence, to prove a new promise, or the inapplicability of the statute of limitations.

Shoemaker, for the plaintiff, in his opening, gave in evidence the bill of exchange, and offered to read the protest; which was objected to by the defendant's counsel, on the ground that this is an inland bill, which requires no protest; and that, therefore, the protest offered in evidence was inadmissible. The plaintiff's counsel acquiesced in this objection, and relied merely on the act of assembly of this state, passed in 1815, authorizing the acts of notaries public and other officers to be given in evidence. But the court was of opinion, that this law did not apply to, nor is it obligatory on, this court. As to the question, whether this is an inland bill or not, the court was not asked to give an opinion, and gave none. No proof was offered by the plaintiff, that this bill was presented to the drawee for acceptance, or that notice of its non-acceptance or non-payment was given to the drawer. The plaintiff further stated, in his opening, that a suit was commenced on this bill, in November, 1813; and a nonsuit was suffered in October, 1815 [Cases Nos. 3,326 and 3,327], and on the next day this suit was instituted.

It was proved by a witness, that in the year 1809, the defendant, speaking of this bill, and of others which he had drawn in the year 1807, on James Brown & Co., and which had been dishonoured, said; that he was not then able to pay them; but that he would do so, if he ever got able. The person to whom this declaration was made, was not the agent of the plaintiff; and had no authority to make any negotiation whatever, with the defendant, respecting this bill. Another witness stated, that the defendant was, in his opinion, able to pay this bill in the year 1816, and afterwards.

The plaintiff having closed his evidence here, the defendant's counsel, Joseph R. Ingersoll, and Chauncey, moved for a nonsuit upon the following grounds—1. That no proof having been given, that this bill was at any time presented for acceptance and payment, and notice of its dishonour given to the defendant, the plaintiff cannot recover on the count on the bill. Neither can he succeed on the count upon the new promise; because, 1. The defendant was no party to it, nor did he ever acquiesce in it; but on the contrary, his first suit was in derogation of it. 2. The suit was brought before the time when the defendant's ability to pay is proved. 3. That there was no existing debt as the consideration of the new promise, on account of the want of presentation of the bill and notice.

On the other side, it was contended, that the drawing of the bill created a moral obligation to pay it, which is a sufficient consideration; and that the subsequent promise amounts to a waiver of the defendant's right, to insist upon proof of a presentation of the bill, and of notice; and is also an answer to the statute of limitations;—that a person for

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

whose benefit a promise is made to a third person, may sue on that promise. He cited Selw. N. P. 51, 52; 1 Bac. Abr. 271; 15 Vin. Abr. 119, pl. 6; 2 Term R. 713; 2 Camp. 188; 5 Johns. 248, 385.

[For judgment for defendant on demurrer to the replication, see Case No. 3,329; and, for the discharge of a rule to show cause why defendant should not be discharged on common bail, see Case No. 3,328.]

Mr. Shoemaker, for plaintiff.

Mr. Chauncey and Joseph R. Ingersoll, for defendant.

WASHINGTON, Circuit Justice, delivered the opinion of the court.

If the plaintiff give any evidence, from which the jury may imply facts sufficient to support the action, the court will never take the case from the jury by directing a nonsuit. But if, after giving the fullest weight to the evidence, the plaintiff is not entitled, in point of law, to a verdict, it would be a mere waste of time to proceed further in the trial; and it is then proper to direct the plaintiff to be called. It is impossible for the plaintiff to succeed upon the count on the bill of exchange, because of the total absence of proof, that it was presented for acceptance; or that if it were presented, notice of its dishonour was at any time given to the defendant.

It is contended, that the subsequent promise of the defendant amounted to an acknowledgment of both these facts, and to a waiver of any advantage which might be taken on account of a want of evidence to prove them. But we take the law to be perfectly clear, that to produce these consequences, the promise must be a valid one; must be clearly made out in proof; must be absolute; and should appear to have been made upon a full knowledge of the facts, which the promise is supposed impliedly to admit. In this case, the promise was not made to the plaintiff nor to his agent;—it was conditional, and might therefore be consistent with a denial of those facts; and there is no evidence whatever, that the facts were known to the defendant; particularly, that of the non-presentation of the bill. The plaintiff's case, therefore, is not relieved from the objections to his recovery on the first count, by his subsequent promise or declaration.

As to the count upon the promise, as constituting a new contract, the objection that the plaintiff was no party to it, is fatal. If it was valid to bind the defendant to pay whatever he should be able, it must have been also obligatory upon the plaintiff, to wait until that event should take place. But this was clearly not so. The declaration was not made to the plaintiff, nor yet to any person authorized by him to assent to it, or, in any respect, to bind him. It was never afterward ratified by the plaintiff, in word or in deed. So far from it, he afforded record proof of his dissent, by instituting his suit at least two years before it is pretended that the defendant was able to pay; and grounding it, not on the new promise, but upon the original cause of action. He cannot now be permitted to avail himself of a promise which he has once refused his assent to, because it will now serve his purpose.

The plaintiff agreed to be called.

Nonsuit.

CRAIG v. CAMPBELL. See Case No. 3,335.

CRAIG v. CONES. See Case No. 3,335.

CRAIG (CORSER v.). See Case No. 3,255.

Case No. 3,331.

CRAIG v. CUMMINGS.

[2 Wash. C. C. 505;[1] 1 Pet. C. C. 431.]

Circuit Court, D. Pennsylvania. Jan., 1811.

JURISDICTION—DIVERSE CITIZENSHIP—ACTION AGAINST JOINT DEBTORS.

1. Action by Craig, a citizen of Kentucky, against J. P., a citizen of New-Orleans, and Cummings, a citizen of Pennsylvania, upon whom only the process was served, and non est inventus returned by the marshal as to J. P. Cummings entered a plea to the jurisdiction, stating that J. P. was not a citizen of Pennsylvania, but was a citizen of New-Orleans; to which there was a general demurrer by the plaintiff.

[Cited in Shute v. Davis, Case No. 12,828; Morrison v. Bennet, Id. 9,843; Nesmith v. Calvert, Id. 10,123; Wiggins v. Railway Co., Id. 17,626.]

2. By the law and practice of Pennsylvania, if the sheriff return non est inventus as to one defendant, and service of the writ on the other, the plaintiff may proceed against the latter on a joint contract, stating in the declaration the return of the writ.

[Cited in Picquet v. Swan, Case No. 11,134.]

3. The defendant who has been served with process, cannot avail himself of the want of jurisdiction in the court, as to a person who is severed from him, and is no longer to be considered a defendant in the cause.

Action by Craig, a citizen of Kentucky, against J. P., a citizen of New-Orleans, and Cummings, a citizen of Pennsylvania. The process was served on Cummings only, and non est inventus as to J. P.; and the declaration is against him only, reciting the writ and the return. Plea to the jurisdiction, stating that J. P. was not and is not a citizen of Pennsylvania, but was and is a citizen of New-Orleans. To this there was a general demurrer.

WASHINGTON, Circuit Justice, delivered the opinion of the court.

If J. P. had been served with process in this case, he might have pleaded to the jurisdiction of the court, because, by the 11th section of the judicial law [of 1789 (1 Stat. 79)], the court

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

cannot entertain the suit, except an alien be a party, or the suit is between a citizen of the state where the suit is brought, and a citizen of another state. But neither Craig nor J. P. is a citizen of this state, where the suit is brought. It is true, that under another clause of this section, it is not necessary that the defendant should be an inhabitant of the state in which the suit is brought, if he be there served with the process; but if he be not an inhabitant of that state, the plaintiff must be, in order to give jurisdiction to that court; and therefore, J. P. might well be sued in the circuit court of Kentucky, where the plaintiff is an inhabitant, if the process were there served upon him.

But the question in this case is, can Cummings avail himself of the want of jurisdiction, in respect to his associate in the writ, but who is not declared against? It is admitted at the bar, that by the law and practice of this state, if the sheriff return non est inventus as to one defendant, and service of the writ on the other, the plaintiff may proceed against the latter singly, though upon a joint contract, stating in his declaration the return on the writ. This being the case, there can exist no good reason why the defendant who is served with the process, should avail himself of the want of jurisdiction in the court, as to the other person named in the writ, who is severed from him, and is no longer to be considered as a defendant in the cause. Demurrer sustained.

Case No. 3,332.

CRAIG et al. v. FISHER.

[2 Sawy. 345;[1] 5 Pac. Law Rep. 52.]

Circuit Court, D. California. Feb. 4, 1873.

VIOLATION OF INJUNCTION—CAUTION.

1. Defendant was injoined from making or selling a patented "hose pipe provided with internal radial plates," designed to straighten the stream of water employed in hydraulic mining so as to throw a solid stream. After the injunction, defendant took the radial plates out of old worn-out machines sold by the patentee, inserted them in new pipes, and sold the machines thus constructed. *Held*, that this constitutes a new machine, and not merely the repair of an old one, and is a violation of the injunction.

2. Parties cautioned against experimenting to see how near they can come to the violation of an injunction, and escape the consequences.

[Cited in Wells v. Oregon Ry. & Nav. Co., 19 Fed. 22.]

Proceeding [by R. R. Craig and others against F. H. Fisher] for contempt in violating an injunction.

M. A. Wheaton and M. M. Estee, for the motion.

B. Morgan, contra.

SAWYER, Circuit Judge. I have examined carefully the affidavits and counter-affidavits presented in this case; also the patent. The affidavits of the defendant do not meet specifically the particular facts alleged in the affidavits of the complainant as to the acts of the party, and from the affidavits of the defendant himself, I am satisfied that he has to some extent manufactured and sold machines embodying the patent. I am not satisfied that even the plates used were plates that were either sold by Craig, or by authority of the party owning the patent, unless possibly it might have been one set. However that may be, I do not think he has any right to take the plates, even if Craig had sold the machine containing them—to take plates from a worn-out machine, and insert them in another pipe to be used again. The patent, it seems to me, is very clear upon the subject. It sets out the nature of the invention, and what the claim of the patent is. It is not for plates without the pipe, or for the pipe without the plates, but the pipes and plates combined; that is the instrument patented for the purpose of straightening the stream of water. The language of the claim in the patent is: "A hose pipe provided with internal radial plates substantially as and for the purpose herein set forth." The plates are nothing, except as used in connection with the pipe. If the pipe is worn out, the machine is gone, so far as that machine is concerned. The pipe with its appliances combined is the thing patented. The plates are fixed to it in the manner described, and for the purposes indicated. I do not think the defendant is entitled to take the old plates and use them in a new pipe, and I am not satisfied, even if it were so, that all of these plates were ever sold or made by the authority of the patentee; possibly one set of them was; it may be that some of the others were, but if they were, it is not satisfactorily shown to be so. The machines made and sold by defendant are essentially new machines—not old ones repaired. I think, clearly, there has been a violation of this injunction, and from the facts that have been here set forth, and the fact that this is a second application, it is evident that the defendant did not intend in good faith to obey the injunction. It at least seems to be so. On the hearing of the former application I discharged the party upon payment of a small fine, because I thought it possible that he had honestly mistaken his rights. I had grounds to suppose so, but he was distinctly admonished that it was not at all safe to experiment with a view of seeing how near he could come to violating the injunction, and not violate it; and I suggested that those who undertake to see how near they can come to doing the prohibited thing without passing the line will be very apt to overstep the bounds, and make themselves amenable to the law. I cautioned and admonished the defendant particularly on that point here before, and I do not think there is any excuse on this occasion for the violation of the in-

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

junction. It may be that the court has erred in issuing the injunction. I do not claim that this court is infallible. If the court has erred, there is a mode provided for correcting the error, but erroneous or not, the judgment and the injunction are valid until reversed or set aside, either by this court or the appellate court, and the process of this court must be respected.

This is, as I said before, a second offense, and I shall, therefore, as I intimated to the defendant on the former occasion, be more severe in punishment than I was then. The punishment then was light, because I thought it likely that the party had not in bad faith intended to violate the injunction; but I am not satisfied that this is the case now; on the contrary, I think it clearly appears that he does not intend in good faith to observe the injunction.

The court, therefore, adjudges the defendant in contempt, as charged in the affidavits; that he pay a fine of $500, and pay to the complainant the costs of this proceeding, to be taxed by the clerk, including $100 as counsel fee, and that he be imprisoned in the county jail of Santa Clara county for the period of five days, and in default of the payment of the fine and costs, said imprisonment to be continued until they are paid, or until the further order of the court.

The counsel for complainant will draw a judgment in accordance with this order.

CRAIG (FISHER v.). See Case No. 4,817.

Case No. 3,333.

CRAIG v. The HARTFORD.

[1 McAll. 91.][1]

Circuit Court, D. California. July Term, 1856.

FINAL DECREE.

A decree final in other respects, is not converted into an interlocutory one because it directs a taxation of costs.

[Cited in Re Place, Case No. 11,201.]

In admiralty. A decree was rendered by the court in this case, on the 25th October, 1856 [case unreported]. No appeal having been perfected within ten days after the decree rendered, execution has been sued out. A motion is now made to stay the said execution, and arrest all proceedings thereon, upon the alleged ground that the said decree was an interlocutory, and not a final one.

John V. Watson, for appellant.

William Barber, for appellee.

McALLISTER, Circuit Judge. Three positions are taken to sustain this motion: 1st. That the decree provides for the entry of a judgment, and does not decree that a judgment be entered; 2nd. That the decree directs a taxation of costs; 3d. That the costs in this case have never been taxed.

The practice of the district court of the United States for this district, and of this court, has invariably been to award execution against stipulators in a bond, without the previous service upon them of a rule nisi. I see no reason to depart from that practice, left, as it seems to be, by the authorities, to the discretion of the court. But it is urged that, whatever may have been the practice of the court on this point, the decree in this case, instead of declaring that judgment is entered, directs that judgment be entered, and therefore the decree is not final. In drafting the decree it certainly would have been proper to have used the word "is," instead of "be." I cannot consider the error such as converts a final into an interlocutory decree. If it has that effect, the appellant has no standing in this court. He has treated the decree of the court below, precisely similar in language, as final, and has appealed from it as such. Its language is, "That a summary judgment be entered against the stipulators." Now, no appeal can be prosecuted from that court to this, save upon a final decree. It is by treating that decree as such, the appellant is in this court; and if the substitution of the word "be" for "is," converts a final decree into an interlocutory one, this appeal must be dismissed. More than ten days having elapsed since this decree was rendered, the party is entitled to execution, unless the decree is to be deemed interlocutory because it directs a taxation of costs. It is contended that such decree does not become final until such taxation shall have been made. The act of congress [of 1803]—2 Stat. 244—prescribes that appeals shall be from all final decrees and judgments, where the matter in dispute exceeds two thousand dollars, exclusive of costs. This excludes the idea of costs forming any portion of the decree appealed from. In fact, costs, as to the amount of them, are not subject to the revision of the supreme court, and are left to the discretion of the court below. Canter v. American Ins. Co., 3 Pet. [28 U. S.] 307.

An appeal which finally disposes of an amount equal to two thousand dollars, would seem to be a final decree that can be carried up without reference to costs. The case of Sizer v. Many, 16 How. [57 U. S.] 102, is applicable to this point. That case was carried to the supreme court; and the judgment had no costs inserted in it. It was treated as a final judgment, for the court acted on it, and it was confirmed; there being a division of opinion in the court. Such division was not, however, on any question as to the final character of the judgment. After the affirmance, a mandate was sent down, and the court below permitted the costs to be inserted nunc pro tunc, as part of the original judgment. From this action of the court, a second writ of error was prosecuted, and a

[1] [Reported by Cutler McAllister, Esq.]

motion made to dismiss the cause for want of jurisdiction on other grounds, and the order of the court below in relation to the costs, was sustained. On this point, the court say, "But as the question raised in this case may often occur in the circuit courts, and it is important that the practice should be uniform, it is proper to say that we consider the decision of the circuit court, allowing those costs to be taxed after the receipt of the mandate from this court, to have been correct and conformable to the general practice of the court." 16 How. [57 U. S.] 104.

The proctor for appellant does not in his brief deny that the supreme court would entertain jurisdiction of an appeal from the decree in this case, which he admits "to be final and appealable in its nature and subject-matter." This admission seems to be conclusive on the point; for, if they would do so, it would be on the ground that the decree was final. They could not do so if the decree were interlocutory.

It is urged that the true and only question is, whether the plaintiff is in a condition to sue out an execution. True; but, so far as the question concerns the character of the decree, it resolves itself into the inquiry, Is the decree final or interlocutory? If final, then the party is not prevented from suing out his execution on the allegation that he has sued it out, or is about doing so, within ten days after the rendition of an interlocutory decree. If he has done so irregularly, by not having given notice of taxation, or by no taxation of costs, such fact cannot change the character of the decree in connection with the appeal. If it was final originally, it does not cease to be so by any irregularity in the mode of issuing the execution. The question, however raised, to "this complexion must come at last." Was the decree in this case interlocutory because it embodied a direction for the taxation of costs, and could not, as alleged, become final until such taxation had taken place? The argument urged is, that a final judgment cannot be deemed to have been rendered unless a previous taxation of costs had taken place. But the supreme court says, in the case previously cited, "The costs are, perhaps, never in fact taxed, until after the judgment is rendered; and, in many cases, cannot be taxed until afterwards."

Now, if the costs are not to be necessarily taxed before judgment, and sometimes have necessarily to be taxed afterwards, the final character of it is not changed by taxation; and surely a direction in the judgment, for a taxation of costs, will not convert it into an interlocutory proceeding. If a judgment rendered before taxation of costs be not final, we must impute usurpation of jurisdiction to the supreme court; for we have seen that they have exercised appellate jurisdiction over a decree which was not final, if the proposition contended for be sustained. It is true, as asserted by proctor for appellant, the chief justice speaks of the omission to insert in the judgment any amount of costs as the result of "oversight" or "mistake;" but if the irregularity had been such as to prevent the court from recognizing the decree as final, they could not have taken jurisdiction, for it depended upon the final character of the decree. A decree is final for the purposes of an appeal when it is in a condition to be executed without further proceedings therein in court. Unlike a reference to a master, referee, or commissioner, whose action must receive the confirmation of the court, the taxation of the costs is a ministerial act, and no proceedings thereon in court are had. If the taxation be erroneous, a retaxation, under the direction of the judge, by the clerk, can be obtained; but the misconduct of the clerk cannot affect the original character of the decree. Considering it final, ten days having elapsed since the rendition of it, the act of congress interposes, and it is out of the power of this court to prevent the plaintiff from suing out his execution.

The third and last ground taken in support of this motion, is, that there has been no taxation of costs. That circumstance cannot convert a final into an interlocutory decree. The appellant might at any time have obtained a taxation; and if one had been irregularly made, he had his remedy. Independently of any written rule, according to the general practice of the court he could have excepted to the taxation. This right, and the manner in which it is to be exercised, is embodied in rule 159 of the district court of the United States for the southern district of New York; the rules of which court are adopted by this, where not inconsistent with its written rules. By that rule, it is provided that if costs be taxed without notice, they shall be subject to retaxation at the cost of the party obtaining the taxation. The failure to obtain taxation cannot operate as a supersedeas. The perfecting of the appeal can alone, under the act of congress, so operate, where the decree is, as in this case, final. The taxation of costs is a step out of court, for the mere purpose of ascertaining the amount. In Jackson v. Varick, 7 Cowen, 412, the court say, "The omission to give notice to tax costs, never affects the regularity of the judgment." "The only consequence of the omission of notice to tax, is a re-taxation at the expense of the party." 2 Wend. 244. In Field v. Partridge, 14 Eng. Law & Eq. 356, a motion had been granted to set aside an execution for the want of notice of taxation of costs. A rule nisi was obtained, to show cause why such order should not be rescinded. All the barons agreed to do so. Pollock, C. B. says, "The omission to give notice of taxation, does not render the judgment and execution irregular." It is admitted that a party may recover a judgment and take out execution for what he has recovered, which shows to that extent the judgment is right. The court

must correct any error that has been introduced; but the execution ought not to be set aside.

In view of foregoing authorities, and of the reason of the thing, I conclude, first, that the decree in this case is final; and, second, that any irregularity in the taxation of the costs, or the omission up to this time of any taxation, can be corrected or supplied before the clerk, under the direction of the judge at chambers, and cannot affect the decree, which, final when rendered, continues so.

The motion made to stay the execution, and arrest all proceedings under it, must be and hereby is denied.

CRAIG (HINES v.). See Case No. 6,518.

Case No. 3,334.

CRAIG et al. v. MAXWELL.

[2 Blatchf. 545.][1]

Circuit Court, S. D. New York. Feb. Term, 1853.

CUSTOMS DUTIES—PROTEST—CONSUL'S CERTIFICATE.

1. Where a protest against the payment of duties claimed a discount on the value in paper currency stated in the invoice, "as per consul's certificate," and the invoice stated the fair market value of the goods, at its date, at the foreign port, in paper currency, and also the correct rate of discount for specie value: *Held*, that the statement in the protest amounted to an averment that a proper consul's certificate was presented to the collector with the invoice, or, at least, that the importer had one, or was able and offered to produce it.

[Cited in Alsop v. Maxwell, Case No. 264.]

2. It is not necessary that such a certificate should be absolutely presented with the invoice when the entry is made; but, if it is not so presented, a bond must be given to produce it.

3. When such a certificate is offered and rejected, or when an offer is made to produce one, and the collector does not exact such bond, it will be presumed that the collector refused to be governed by the certificate if exhibited.

4. Under such circumstances, the importer stands on the same footing as if such a certificate had accompanied his invoice.

This was an action [by William Craig and Charles M. Dutilh against Hugh Maxwell] to recover back an alleged excess of duties paid to the defendant, as collector of the port of New York. A verdict was taken for the plaintiffs, subject to the opinion of the court.

John S. McCulloh, for plaintiffs.

J. Prescott Hall, Dist. Atty., for defendant.

BETTS, District Judge. In September, 1849, the plaintiffs made entry, at the custom-house at New York, of three parcels of goods imported from Trieste. The invoices were all dated at Trieste, July 10th, 1849, and the prices of the goods were stated therein in paper florins, with a discount of 18½ per cent., to bring them to specie value. The same abatement was claimed by the plaintiffs on the entry, but it was refused them at the custom-house, and the collector, on the 24th of September, 1849, exacted and received payment of duties upon the paper valuation of the invoices. The plaintiffs, at the time of payment, made on the entry the following protest, in writing: "We do hereby protest against the payment of duty on 2,939.52 florins, as per entry, claiming a discount of 18½ per cent. on the paper currency, as per consul's certificate. We pay the amount exacted, to gain possession of the goods, claiming to have the difference refunded."

No consular certificates are proved to have accompanied the invoices, nor is it shown that the collector demanded a bond of the plaintiffs for their after production. It was proved on the trial that the invoices stated the fair market prices and value of the goods at Trieste at their date, in paper florins reduced to their specie value, and that the depreciation of the paper currency was then at the rate claimed upon the invoices and entry. It was also proved to be a frequent usage at the custom-house at New York, when an invoice was presented of Austrian goods, charged in paper currency, accompanied by a consular certificate certifying the depreciation of that currency, for the collector to separate the certificate from the invoice, as not admissible nor entitled to any consideration, because the value of the Austrian florin was fixed by law.

I think that the statement in the protest must be understood to be an averment that a proper consular certificate was presented to the collector with the invoices in this case, and that the receipt of the money of the defendants by the collector on such protest, is an implied admission by him that he was cognizant of the certificate. The language of the protest, if not deemed a direct assertion that a consular certificate accompanied the invoices, at least imports that the plaintiffs had one in their possession, or were able and offered to produce it. The instructions from the treasury department do not require a consular certificate to be absolutely presented with the invoice when an entry is made. The instructions of May 14th, 1831, require a certificate by a United States consul of the value of the foreign currency, but do not fix the time of its production. The circular of October 16th, 1832, makes it necessary, in all cases when the invoice is not accompanied by the certificate, to give bond to produce it within eight months, if the goods were imported from any place on this side of the Cape of Good Hope. The injunction to furnish consular certificates in cases wherein they are necessary, is renewed with greater emphasis in the circular of April 4th, 1840. It says, that each invoice in depreciated currency is required to be accompanied by a consular certificate stating the true value of such currency in silver, &c., and that, in default thereof,

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

bond is to be given for its production, according to the instructions of October, 1832. This is in substance repeated in the circular of October 12th, 1849.

When the importer offers a consular certificate, and it is rejected as imperfect and not fulfilling the requirements of the president, or asserts that he will produce one, it is the duty of the collector to take a bond from him to produce one conformable to the demand of the law; and, if such bond is not exacted, it must be presumed that the collector refused to be governed by the consular certificate if exhibited. In such case, the importer ought to be exempted from the expense and delay of obtaining one, it being officially made known to him that the collector will not regard it when produced.

I consider the evidence in this case as amounting to satisfactory proof that the collector refused to make the deduction claimed upon a certificate of the consul showing it to be the true rate of depreciation, and that the plaintiffs stand on the same footing as if a consular certificate to the fact had accompanied their invoices. They are, therefore, entitled to judgment for the difference of duty paid between the silver value of the importations and the prices in paper. The amount is to be adjusted at the custom-house, if not agreed between the parties.

CRAIG (MILLARD v.). See Cases Nos. 9,547 and 9,548.

Case No. 3,335.

CRAIG et al. v. POLLOCK. SAME v. CONES. SAME v. CAMPBELL. CRAIG v. POLLOCK et al.

[5 Dill. 449.][1]

Circuit Court, D. Nebraska. 1879.

REMEDY IN EQUITY AGAINST ILLEGAL TAXATION—REVENUE LAWS OF NEBRASKA.

A court of equity will not cancel a tax-deed where there has been no fraud practiced against the owner of the land, and no substantial injustice done to him, but will ordinarily leave him to his rights and remedies at law; and, therefore, where it appears that the land was taxable, that it had been assessed or valued on oath by the proper officer, and that the taxes had never been paid by the owner, the court will not decree a cancellation of the tax-sale certificates or tax-deeds at the instance of the owner for mere irregularities, especially where the owner makes no offer to pay the amount of taxes justly and equitably due.

Bills in equity [by Craig & Clark against J. W. Pollock, and against Cones and against Campbell, and also by Walter Craig against Pollock & Cones] to cancel tax-sale certificates held by the respective defendants. The bills make no tender of any taxes, but proceed upon the ground that the tax certificates held by the defendants are wholly void, and that the plaintiffs are entitled to a decree annulling them and quieting their title. The defendants answer, admitting that they purchased said lands for taxes and obtained tax-sale certificates, and subsequently tax-deeds, and insist that the sales, certificates, and deeds are regular and valid. The plaintiffs except to the answers for insufficiency, and insist that the facts averred therein, and the exhibits thereto, do not show any title or right in the defendants. On these exceptions the cases were submitted to the court.

The revenue laws of Nebraska provide, in substance, as follows:

"A certificate of purchase is presumptive evidence of the regularity of all prior proceedings." Laws of 1875, § 5, pp. 132, 133.

"And a tax-deed properly made and executed shall be prima facie evidence of the following facts: 1. That the property conveyed was subject to taxation. 2. That the taxes were not paid. 3. That the same had not been redeemed. 4. That the property had been properly listed and assessed. 5. That the taxes were levied according to law. 6. That the property was properly advertised. 7. That the property was sold for taxes, as stated in the deed. 8. That the grantee in the deed was the purchaser. 9. That the sale was properly conducted. 10. That all the prerequisites of the law had been complied with.

"And to defeat said deed, the following must be proved: 1. That the property was not subject to taxation for that year. 2. That the taxes had been paid before sale. 3. That the property was not subject to taxation at date of sale. 4. That the land had never been assessed. 5. That the same had been redeemed.

"No person can question title under tax-deed until he shows that he had title to the land, and that he has paid all the taxes due." Laws of 1875, pp. 95, 96.

Mr. Estabrook, for plaintiffs.

Crawford & McLaughlin, for defendants.

DILLON, Circuit Judge. I have carefully examined the records in these causes, and considered the elaborate printed briefs of the respective counsel. I have no time to give in detail an opinion concerning the many questions argued; nor, in the view I take of the rights of the parties in this suit and form of proceeding, is it necessary to do so.

The bills of complaint do not claim that the property was not subject to taxation for the year in question, or that the taxes thereon were in excess of what were its just and proportionate share of the public burdens; or that the plaintiffs, or any one for them, paid or offered to pay these taxes before the sale, or at any time. But the bills of complaint do claim that the lands in controversy were never assessed for the year for which they were sold to the defendants for the delinquent taxes thereon.

The statutes of Nebraska provide for the

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

listing of taxable property. Rev. St. 894. The county commissioners are to furnish blanks, etc. Section 5. Shall be listed and valued each year. Section 4. Shall embrace all personal and real property. Section 6. Every inhabitant shall list. Section 13. Shall be signed and sworn to by person making it. Section 8. Shall be valued by the assessor. Section 11. All property must go upon this list; if the owner, or his representative, fails or neglects or refuses to make the list, then the assessor must do it. Sections 9-25. Form of oath by lister. Section 8. Assessors to meet as board of equalization on the first Monday of April. Section 26. This board adjusts the relative value of property among the several precincts, etc.

It seems that the plaintiffs, being non-residents, did not list their property; and it is claimed that the assessor made no list and no valuation of the property on oath; but the assessor alleges the contrary. And the exhibits to the answer show that the assessor made a "return of taxable lands in Stanton precinct, in Stanton county, Nebraska, as assessed for the year 1874," which, as respects the plaintiffs' property, is as follows:

Owner.	Part of Section.	Section.	Township.	Range.	Acres.	Value.
Walter Craig and E. Clark	N. E. ¼	1	21	1 E.	159 75/100	479.25

And various other tracts owned by the plaintiffs in the same manner.

Another exhibit to the answer shows that the assessor took the required oath (section 12), and in which he states, inter alia, that "I have diligently, and by the best means in my power, endeavored to ascertain the true amount and value of the property" set forth as above in the assessment roll. And a copy of the tax-list for 1874 shows that the property of the plaintiffs was placed thereon by the same description and valuation set forth in the assessment roll.

I am of opinion that the proceedings of the taxing officers to show that the assessor made an assessment or valuation of the plaintiffs' property on oath, and that they are not entitled to a decree as prayed because the assessor, if such was the fact, did not separately value the property in a list by him prepared.

It is urged that the statute requires the oath of the assessor to be attached to the roll, and that in this case the oath, although taken and in due form, not being shown to have been attached to the roll, the whole assessment is void, and hence there is no assessment, and therefore the entire foundation of the levy and of the right to sell for taxes fails. Whatever may be the effect of a failure to attach the oath to the roll, in an action at law, where the parties stand upon their strict legal rights, I am of opinion that such a failure does not per se entitle the owner to the active aid of a court of equity to cancel the tax certificates and deeds.

It is objected to the legality of the tax, that under the head of "value" there is a failure to prefix a $-mark; that the description is uncertain; and that the notice of sale was not sufficient, etc. The first two are technical and unsubstantial—the valuation, or the assessed value, is plain, and the description certain. If the alleged publication of notice of the tax-sale was defective, as claimed, this is no reason for cancelling the certificates and deeds received by the defendants without an offer to pay the amount of taxes justly due from the plaintiffs. Such is the statute of the state, and such the rule of equity as declared alike by the supreme court of Nebraska (Hallenbeck v. Hahn, 2 Neb. 377), by the supreme court of the United States (State Tax Cases, 92 U. S. 575), and generally elsewhere.

Under the revenue laws of Nebraska, especially, it is a sound principle that where the property is taxable, and has been valued by the proper officer on oath, and no fraud or substantial injustice is shown, mere irregularities in the performance of the duties devolved by law on the taxing officials, unaccompanied with an offer to pay the taxes justly chargeable against the plaintiff's property, are insufficient to call into exercise the active and extraordinary powers of a court of equity, either by way of injunction against the tax-sale or by a decree cancelling the title acquired at such sale. In such cases, equity will ordinarily withhold its aid, and leave the parties to their rights and remedies at law.

Exceptions overruled.

Case No. 3,336.

CRAIG v. REINTZEL.

[2 Cranch, C. C. 128.][1]

Circuit Court, District of Columbia. Dec. Term, 1816.

INTERESTED WITNESS.

A surety in the administration bond is a competent witness for the administrator, plaintiff.

[Cited in Davies v. Davies, Case No. 3,612.]

John Wilson, a surety in the plaintiff's administration bond, was offered as a witness for plaintiff.

Mr. Jones and Mr. Wiley, for defendant, objected that the witness was interested, because if the plaintiff failed to support the action she would be liable for costs, and the witness, also, as her surety.

Mr. Key, for plaintiff.

THE COURT (nem. con.) overruled the objection. If the plaintiff should be liable to costs de bonis propriis, the surety is not liable at all; if de bonis decedentis, the surety will not be liable until a devastavit shall

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

have been established; and that liability is too contingent and too remote to affect the competency of the witness. Davies v. Davies's Ex'x [Case No. 3,612].

Case No. 3,337.

CRAIG v. RICHARDS.

[1 Cranch, C. C. 84.][1]

Circuit Court, District of Columbia. April Term, 1802.

PRODUCTION OF COURT RECORDS.

A subpoena duces tecum will not be ordered to the clerk of a court in Virginia, to bring here original papers filed in his court.

Assumpsit for money had and received.

The defendant was indorser of Robert Alexander's note. Suit had been brought against Alexander in the Dumfries district court in Virginia, and execution returned nulla bona.

Mr. Swann testified that he was counsel for the plaintiff in that suit, and that the original note was by him filed in that cause in the district court at Dumfries. That he was well acquainted with the handwriting of the defendant, and that the indorsement of that note appeared to him to be in the defendant's handwriting.

E. J. Lee, for defendant, contended that a subpoena duces tecum might issue to the clerk of the Dumfries district court to bring in the note.

But THE COURT, being inclined to think that they could not compel the clerk to bring his records out of Virginia, refused to instruct the jury that it was necessary for the plaintiff to produce the original note.

Bill of exceptions taken, but no writ of error was prosecuted.

Case No. 3,338.

CRAIG v. SMITH et al.

[2 Dill. 375.][2]

Circuit Court, D. Kansas. June 5, 1873.

PATENTS—"WELL-TUBE"—VALIDITY.

Plaintiff's patent for improved well-tube, sustained.

[See note at end of case.]

[This was a bill in equity by Samuel F. Craig against Jacob Smith and Hale for the alleged infringement of letters patent No. 65,648, granted to plaintiff June 11, 1867.]

Mr. Ennis, for plaintiff.

Mr. Williams, for defendants.

DILLON, Circuit Judge. On the 11th day of June, 1867, the plaintiff received a patent for an improved well-tube, and files a bill charging the defendants with infringing his patent, and asking an account of profits and an injunction.

The answer denies that the plaintiff was the original and first inventor; states the invention claimed by the plaintiff was previously invented by one Rabbit, and others, and denies the alleged infringement, though the defendants admit that they have used a well-tube of the character they describe.

Upon the evidence before us, the court is not able to say that it has been established that the plaintiff is not the original and first inventor of the combination and arrangement claimed by him to be new.

It seems to us that the value of the plaintiff's invention consists in the wire gauze securely fastened to the outside of the perforated well-tube; and that the tube used by the defendants is made upon substantially the same principle. The use of wire, instead of solder, to fasten or secure the screen or gauze in its place, does not prevent the defendants' tube from being an infringement of the plaintiff's. The principal doubt we have had relates not to the priority or value of the plaintiff's invention, but to the sufficiency of the description of his claim; but we have thought it our duty to resolve the doubt in favor of the patentee. On the whole, we think the plaintiff entitled to an injunction, and to an account of damages and profits.

Ordered accordingly.

[NOTE. There was a reference to a master, who reported December 12, 1873, and on the same day leave was granted to defendants to file a petition for rehearing. This was filed January 21, 1874. On January 24, 1874, a supplemental petition was filed. On April 27, 1874, Craig answered the petition and supplement, and on June 9, 1874, defendants replied, whereupon the court ordered that the petition stand for a bill of review, and that the other pleadings have the same effect as if filed thereon. Thereafter, on the hearing, the bill of review was sustained, the original decree reversed, and the bill dismissed. See Case No. 3,339.]

Case No. 3,339.

CRAIG v. SMITH et al.

[4 Dill. 349;[1] 1 Ban. & A. 556; 2 Cent. Law J. 256.]

Circuit Court, D. Kansas. Nov. Term, 1874.[2]

PATENT DRIVE WELL—COMBINATION—INFRINGEMENT.

The drive well-tube patent issued June 11th, 1867, to the plaintiff, is for a combination, of which the air chamber is part; and the enlarged drill-head, and the application of the wire screen on the outside of the tube, *held* not to be novel; and as the tubes made by the defendant do not contain the air chamber (an essential part of the plaintiff's patented combination), there is no infringement of the plaintiff's patent.

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

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

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

[2] [Affirmed by the supreme court in Craig v. Smith, 100 U. S. 226.]

A decree was entered in this suit at the June term, 1873, sustaining the plaintiff's patent [Case No. 3,338]. A bill of review was filed, and issue taken thereon, and a large amount of additional evidence was produced. In this shape the cause now came before the court.

Martin, Burns & Case and Alfred Ennis, for plaintiff.

Guthrie & Brown, for defendants.

FOSTER, District Judge. The patent of the plaintiff is for "combination and arrangement of the perforated end of the well tube around which the wire screen or gauze is placed; the point secured to the end of the tube forming the chamber and air passage."

The patent is evidently for a combination of devices, not new in themselves (except, perhaps, the chamber and air passage). The plaintiff claims the wire screen on the outside of the perforated tube as new, but the several applications for patents made before plaintiff claims his discovery, show that that device is not new. The claim of Charles Batchelor, filed November 8, 1865, in the patent office, and rejected, embodied this principle of the wire screen, with an enlarged drill-head to protect the screen. The patent of Batchelor, Park & Sherman, of December 12, 1865, had an outside strainer, protected by an outside casing. The patent of J. C. & M. V. Campbell, January 8, 1866, has the strainer or conical plug or point, and the patentees say they do not claim the plug as new, it having been described in the patent to James Suggett, March 29, 1864. The application of George Mallory, July 10, 1865, presented a claim for the wire screen on the outside or inside; the application was rejected. The application of Arthur T. Wilder, August 20, 1866, for outside screen or gauze, was rejected, being anticipated by Batchelor's patent of December 12, 1865. The application of Augustus Harrington, June 29, 1866, among other things, presents the screen and enlarged drill-head. The applications of Dodge, and also Knapp & Pease, present claims for similar screens. These cases abundantly show that the plaintiff's claim of novelty for the screen is not sustained. The defendants are making a similar device to plaintiff's patent, except the chamber and air passage in the drill-head.

The plaintiff's patent being for a combination, two questions arise in the case: 1st. If the plaintiff claims for the wire screen and enlarged drill-head, with the air chamber, is his invention new? 2d. Do the defendants infringe that patent unless they use the whole combination, including the air chamber and passage?

The first question we are compelled to answer in the negative. The rejected application of Batchelor, November 8, 1865, presented substantially the same combination. The applicant says: "The enlargement or shoe B, protecting the strainers from being injured on the descent of the tube." The application of Harrington, June 29, 1866, also included these devices. In the application of Wilder, August 20, 1866, the screen was extended on the outside of the tube from shoulder to shoulder, the lower shoulder being the enlarged drill-head, thus combining the screen and enlarged drill-head. The application of George Dodge, March 13, 1866, presents the screen and enlarged drill-head. From these several cases, to say nothing of the affidavits presented on the application for rehearing, we are led to conclude that the combination of these two principles is not new.

On the second point: The plaintiff's claim, as amended on the suggestion of the commissioners of patents, is for the combination and arrangement of the several parts of his device. Those several parts are three in number, to-wit: The wire screen, the enlarged drill-head, and the air passage. The first two devices being old in severalty and in combination, can the defendants be charged with infringing plaintiff's patent by making use of these without the air passage?

Curtis on Patents (section 111) says: "The combination must be new itself, and must produce a new and useful result, not due to the separate action of any one of the devices used in combination nor attained thereby, but due to the co-operation or reciprocal action of the combined devices. And in such a case any one may lawfully use any one of the old devices separately or in new combinations, or may use some of them in combination and omit others." In the case of Hill v. Thompson, Webst. Pat. Cas. 243, the court, on the subject of combinations, says: "Neither can it be justly said that the use of the separate ingredients, or some of them partially combined, is a use made of the invention in part. * * * Each of the ingredients had before been separately used, and had been used more or less in partial combination." Again, in Barrett v. Hall [Case No. 1,047] (Curt. Pat. § 332), it was held: "When the patent is for the combination alone, it is no infringement to use any of the parts or things which go to make up the combination, provided the combination itself is not used." In Prouty v. Ruggles, 16 Pet. [41 U. S.] 336, the court holds: "The use of any two parts only, or of two combined with a third, which is substantially different in form, or in the manner of its arrangements and connection with the others, is therefore not the thing patented. It is not the same combination if it substantially differs from it in any of its parts." Curt. Pat. § 332. In a late case, Garratt v. Seibert [18 Wall. (85 U. S.) 956], the United States supreme court, at its October term, 1873, held the same doctrine.

The combination of the outside screen and the enlarged drill-head not being new or patentable, if the combination of the plaintiff

were patentable at all, it must have been so by reason of the combination of the air passage with the other devices, or a combination of the whole, as set forth in the specifications. If the plaintiff could or should abandon the claim for the chamber and air passage, he has no patentable combination left. The plaintiff claims that the defendants have made use of an equivalent for his air chamber and passage, that the enlarged drill-head is of itself an equivalent, as by making a hole larger than the tube, it facilitates the drawing up of the same, which was the real purpose of the air passage. If this be true, it would merely prove that the air passage was no improvement on the old drill-head, instead of proving that the old drill-head was an equivalent for the air passage. On the second question, therefore, we are compelled to hold the negative, and that there is no infringement of plaintiff's patent by the defendants in this cause.

DILLON, Circuit Judge. On this bill of review a large amount of additional evidence has been produced, and I am of opinion that the plaintiff's patent is for a combination, and that the air chamber was designed to be part of the combination for which the patent issued. The enlarged drill-head is not new; and the evidence, on the hearing, shows, though it did not on the first hearing, that the application of the gauze or screen to the outside of the perforated tube is not original with the plaintiff. It is admitted that the defendants' tubes do not contain the air chamber, an essential part of the plaintiff's combination, and hence there is no infringement. Judge FOSTER, upon an independent examination of the cause, and of the printed arguments, made at my instance, has reached the same result, and in the conclusions stated by him I concur. The former decree must be reversed, and a decree entered dismissing the bill.

Decree accordingly.

[NOTE. From this decree, complainant appealed, and the decree was affirmed by the supreme court, which, without discussion of the questions of validity or infringement, confined the consideration of the cause to the effect of the introduction of newly-discovered evidence under the bill of review to prove facts in issue on the first hearing. Craig v. Smith, 100 U. S. 226.]

Case No. 3,340.

CRAIG v. UNITED STATES INS. CO.

[1 Pet. C. C. 410.][1]

Circuit Court, D. Pennsylvania. April Term, 1817.

MARINE INSURANCE—WARRANTY.

1. Every warranty in a policy of insurance, whether express or implied, constitutes a condition precedent, and the assured cannot recover from the underwriters, without first averring and proving performance of such stipulations.

2. Sailing under a British license, during the war between the United States and England, was illegal.

3. A contract of insurance, made on a voyage which is opposed to the common, statute or maritime laws of the country where it is effected, is void.

[Cited in Tufts v. Tufts, Case No. 14,233.]

This was an action on a policy of insurance, dated the 8th of January, 1813, on freight of ship Hibernia, at and from Norfolk to Cadiz. Four thousand dollars were underwritten by the defendants at six per cent., the freight valued at eight thousand dollars. "Property warranted free from all claims, in consequence of any restraints that may be imposed by the American government, previous to sailing. The ship has a Sidmouth license on board." The declaration stated the loss to have happened by arrest and detainment of the British squadron in Lynhaven bay, and also in Hampton Roads, whereby the voyage was broken up. The Hibernia sailed from Norfolk, with a cargo of provisions, on the voyage insured, on the 3d of February, 1813; and on the 7th, was brought to in Lynhaven bay, by the British squadron, which had but a few days previous thereto entered the Chesapeake. The captain, who stated that he had a Sidmouth license on board when she sailed, and which continued on board all the time, went on board the admiral's ship with his papers and license, when he was informed that the Chesapeake was then blockaded and that he must return to Norfolk. The ship accordingly returned to Norfolk, and remained there until the 3d of March, when the master made another attempt to get out, but, finding the British squadron in Hampton Roads, he came to anchor, and, on the 16th he was boarded by an officer from the squadron, and again warned not to attempt to go to sea, under pain of capture and condemnation; to which effect the license was indorsed, and he was then ordered to ascend James river, to remain there; which order he complied with. The ship and cargo having been insured in New York, the plaintiff, on the 3d of April, tendered an abandonment of the ship to those insurers, and of the cargo on the 1st of April, both of which were accepted. The master received a letter from the plaintiff, dated the 20th of May, 1813, informing him of the abandonment, and directing him to govern himself by the orders of the assurers, and on the same day another letter was addressed to him by those insurers, directing him to place himself in a safe situation, and to retain the license in case of being boarded by the enemy. By a subsequent order of the same insurers, the cargo was sold at auction on the 25th of November, 1813, the ship remaining in James river.

On the 19th of April, 1813, the plaintiff offered to abandon to the defendants and claimed as for a total loss, which offer was repeated on the 26th of May, and both of

[1] [Reported by Richard Peters, Jr., Esq.]

which were refused. The order of council authorising Lord Sidmouth to issue licenses, and the license granted by him, bearing date the 20th of August, 1812, to continue in force for nine months from the date, were read. The defendants offered no evidence.

The counsel for the defendants, made the following points:—First. That the restraint of the enemy at the time when the abandonment was made, was not such as to warrant the plaintiff in breaking up the voyage, and going for a total loss. The peril was not immediate. No loss had been incurred in consequence of it. The blockade, which could only operate upon neutrals, imposed no obligations upon an enemy, and consequently could no more justify an abandonment on account of the danger which would attend the attempt to prosecute the voyage, than if the sea had been covered with privateers and ships of war. Cases cited: Hadkinson v. Robinson, 3 Bos. & P. 388; Lubbock v. Rowcroft, 5 Esp. N. P. 50; Blackenhagen v. London Assur. Co., 1 Camp. 454; Forster v. Christie, 11 East, 205; Atkinson v. Ritchie, 10 East, 295, 530; Richardson v. Maine Ins. Co., 6 Mass. 102; Cook v. Essex Ins. Co., Id. 122; Amory v. Jones, Id. 318; Lee v. Gray, 7 Mass. 349; King v. Delaware Ins. Co., 6 Cranch [10 U. S.] 71, and the same case in this court; 1 Emerig. Ins. 535, 536, 502; 2 Emerig. Ins. 176. Second. By the abandonment of the vessel to the insurers, the right to the freight followed necessarily, and it became the property of those insurers. The insured, according to the uniform principle of adjustment, received from them the one month's advance of wages to the sailors, and the disbursements for three months provisions. The plaintiff, therefore, can recover nothing from the insurers on the freight. Cases cited: Leatham v. Terry, 3 Bos. & P. 479; Thompson v. Rowcroft, 4 East, 34; Sharp v. Gladstone, 7 East, 24; M'Carthy v. Abel, 5 East, 388. Third. The abandonment was too late. Fourth. The license infected the contract with illegality, and it was of course void. 1 Marsh. Ins. 31. The decisions in the cases of The Julia, The Aurora, The Hiram, and The Ariadne, in the supreme court of the United States. For the plaintiff were cited, first point, Craig v. United States Ins. Co., 6 Johns. 226. Second point, 3 Johns. 49; Livingston v. Columbia Ins. Co., 2 Condy's Marsh. Ins. 602, 608, in the notes. The counsel for defendant admitted, that in the New York courts the law was settled against him. Third point [Chesapeake Ins. Co. v. Stark] 6 Cranch [10 U. S.] 268; 15 East, 13; 4 Bin. 442. Besides, by the policy the insured cannot abandon in less than sixty days after the capture or detention, which brings the offer in this case within time, on the strictest principles.

Fifth. It was contended, that there was no evidence that there was a Sidmouth license on board, or, at all events one that would protect the property, for the following reasons: There is no evidence given of the handwriting of the lord of the council who signs the order, or of Sidmouth's handwriting. Licenses are stricti juris, and must be construed strictly, so that if it be given to one person no other can use it but as his agent. It will not protect a voyage different from that mentioned in the license. This license is granted to Thomas Taylor and others, and no title is derived down to the plaintiff. The license excepts, on the return voyage, her return to a blockaded port; it consequently excepted her egress from a blockaded port, and if so, the license was not operative in this case. Chit. Law Nat. 260, 1; 4 C. Rob. Adm. 8; Edw. Adm. 95; 2 C. Rob. Adm. 116, 162; Chit. 295; Vatt. bk. 3, c. 17, § 267; 12 East, 223; 4 C. Rob. Adm. 216, 280; 12 East, 310; Chit. 285. But admit all these difficulties removed, it was then contended, that this was not a warranty, but a mere representation. That the having of the license was a condition subsequent; and being illegal or repugnant, (if it be so) it is void. 2 Bl. Comm. 156. But to invalidate a contract on the ground of illegality, it must be repugnant to some positive municipal law, or to the moral law, which this is not. This case is not like those decided in the supreme court on the subject of licenses; as this was not to further the views of the enemy. [The Hiram] 1 Wheat. [14 U. S.] 447; [The Julia] 8 Cranch (12 U. S.) 190. The following cases were cited on the subject of the validity of the contract: Petrie v. Hannay, 3 Term R. 418, 424, 5 Term R. 466; The Vanguard, 6 C. Rob. Adm. 207; Maybin v. Coulon, 4 Dall. [4 U. S.] 298, 12 Johns. 287.

WASHINGTON, Circuit Justice, charged the jury. Some important questions have been agitated in this cause. If it were necessary to decide the first and second points which have been argued, their intrinsic difficulty, as well as our respect for the courts of our own country, which have differed from each other in their decisions upon one of the questions, would have determined us to recommend a special verdict, or an agreed case, in order that we might have an opportunity of giving to those questions a very serious examination. But we do not think it necessary at present, to give any opinion upon more than one of the questions which have been argued, and which we think will finally dispose of the cause. That question is, can the plaintiff recover upon a contract of insurance, which obliges him to sail upon the voyage insured, under a license or protection granted by the enemy of the United States? In arguing this point, the plaintiff's counsel have had a very narrow strait to navigate. Scylla on the one hand, and Charybdis on the other. If there was no Sidmouth license on board, they had reason to apprehend being wrecked on the warranty which requires them to have it. If they had it on board, there was equal danger of a

similar fate, on the ground of its infecting the voyage with illegality. If, in this perilous voyage they have failed of success, it is but justice to them to say, that it has not arisen from want of skill in themselves.

The plaintiff's counsel, in the first place deny that there was a Sidmouth license on board, because it is said that the license which they have produced, as that which the captain has sworn he had on board, is not proved to be in the handwriting of Lord Sidmouth. If this be in fact the case, upon the principle that that which does not appear, is to be considered as not existing, then the plaintiff has put himself out of court; inasmuch as he bound himself to have such a license on board, and he must establish that fact before he can expect to recover. But, if the non-existence of such a paper could benefit the plaintiff, instead of destroying his right of recovery, it would not be competent to him to deny that there was such a paper on board, in the face of his own declaration which avers the contrary in the most direct terms. But, admitting there was on board a paper purporting to be a Sidmouth license, it is then contended that it was altogether inoperative as a protection, inasmuch as it was granted to one Taylor and others, and there is no evidence to connect the plaintiff with Taylor, or to show how he derived a right to possess and use it; that as licenses are to be construed strictly, and will protect no voyage unless it be that mentioned in it, and conducted by the party in whose favour it is granted, or by his agents, this license was, in the hands of the plaintiff, of no more consequence than a piece of blank paper. The general principle, as laid down, is correct, and if it were important for the interests of the defendants to urge this argument against the validity of this license, it might come from them with some force, and certainly with no bad grace. But, it appears to come very awkwardly from the plaintiff who had it on board his vessel, who used it successfully for the purpose of protecting his property from capture, and now produces it in court. That he became possessed of it in a proper and legal manner, he ought to be the last man in the world to question.

But, admit the whole force of the argument, then, as in the former case, the plaintiff has put himself out of court; since his warranty, construed upon the foundation of that good faith which emphatically governs contracts of insurance, bound him to have on board, not merely a paper purporting to be a Sidmouth license, but a real operative license to the purpose of protecting his property against hostile capture. This was necessarily implied in the stipulation, as is incontestably proved by the peace premium, for which the defendants were contented to take the risk. To attempt then, to shift them off with a blank piece of paper which would afford no protection against British capture, would savour very strongly of a fraud, which could not receive the countenance of any court. But this whole argument proceeds upon the mistaken supposition, that it is the having of the license on board which invalidates the contract, whereas it is the stipulation in the contract, obliging the insured to have it, which produces this effect, if on the further examination of this question, it should appear that the license rendered the voyage illegal. If, notwithstanding the contract, there be in fact no license on board, then the voyage would not be illegal, although the plaintiff could not recover because he has not complied with his contract. If he has it on board, he gets rid of that objection, but then he exposes himself to the objection, that his voyage is illegal. But, whether he in fact had it on board or not, does in no respect remove the objection to the validity of the contract, which is bottomed upon a stipulation to have it.

But it is contended, that this warranty constitutes a condition subsequent, and therefore, if it be to do an illegal act, it is void, but the other parts of the contract continue in force. It is said to be a condition subsequent, because the license could not operate until the vessel got to sea, which was subsequent to the inception of the voyage when she broke ground. Now admitting that the fact is so, which is certainly going a great way, still the legal consequences would not follow. If it did, then warranties to sail with convoy would be in almost every case conditions subsequent, as the insured very seldom joins the convoy at the place where the inception of the voyage takes place. But it is unquestionable, that every warranty in a policy, whether they be express or implied, constitutes a condition precedent. Not precedent in point of time to the inception of the voyage, but to the plaintiff's right of recovery. That is, he cannot in any instance where he has entered into a warranty, recover against the underwriters without first averring and proving performance of those stipulations.

The next enquiry is, was this an illegal voyage? This question is settled, at least in the courts of the United States, beyond all controversy. The cases of The Julia, 8 Cranch [12 U. S.] 181, The Aurora, Id. 203, The Hiram, 1 Wheat. [14 U. S.] 440, and The Ariadne, 2 Wheat. [15 U. S.] 143, proceed and are decided on that ground. This case is in no respect distinguishable from those, and particularly from that of The Ariadne; certainly it is not in principle. If, then, this voyage was illegal, what is the consequence as to the contract? The rule is, that a contract of insurance made on a voyage which is opposed to the common, statute, or maritime laws of the country, where it is effected, is void. In other words, the courts of that country will assist neither of the parties to enforce it, or to recover damages against

the other for a breach of it. The plaintiff, whether he be the assured to recover the sum insured, or the insurer to recover back the loss in case he has paid it, is turned out of court; not because he is more in fault than the defendants, for they are in pari delicto, but because he is the plaintiff, and the defendant retains what he has received, and repels the claims of the plaintiff altogether, from the adventitious circumstance, that he is the defendant, and potior est conditio possidentis. I wish it to be understood, that I mean not to impute crime, or even intentional impropriety, to either of these parties. I have no doubt that they acted with the most perfect innocence, mistaking the law, as many eminent legal characters did, at a later period than that when this contract was entered into.

Upon the whole, it is the opinion of the court that the plaintiff is not entitled to recover in this action.

The plaintiff suffered a nonsuit.

CRAIG (UNITED STATES v.). See Cases Nos. 14,882 and 14,883.

Case No. 3,341.

CRAIGIE et al. v. McARTHUR.

[4 Dill. 474; 9 Chi. Leg. News, 156; 4 Cent. Law J. 237; 15 Alb. Law J. 121; Syllabi, 115; 23 Int. Rev. Rec. 42.][1]

Circuit Court, D. Minnesota. Dec. Term, 1877.

REMOVAL OF CAUSES—ACT OF MARCH 3, 1875—NATURE OF SUIT—TIME—COURT IN WHICH APPLICATION MUST BE MADE.

1. A contest in regard to the distribution of the estate of a deceased person, where the amount involved is sufficient and the citizenship of parties is such as would confer jurisdiction, is a "controversy" that may be removed from the state to the federal courts under the provisions of act of congress of March 3, 1875 [18 Stat. 470].

2. Such removal, however, must be before trial in the court of original jurisdiction, and cannot be made from a court to which, after hearing, an appeal has been taken.

James G. Craigie died in Otter Tail county, in the state of Minnesota, September 8, 1872, leaving real and personal estate, and on petition of Annie McArthur letters of administration were granted to her March 13, 1876, by the probate court of that county. On May 18, 1876, the administratrix filed a petition for a final accounting, and for distribution of the estate, in which she claimed to be the sole heir at law of said James G. Craigie, deceased, and prayed that a decree be entered assigning to and vesting in her all the real and personal property in her hands or otherwise, belonging to said estate. A citation was issued by the probate court, fixing June 13, 1876, as the day upon which a hearing would be had of the matters contained in the petition, and notice to all parties interested was ordered to be given by publication in a newspaper, to show cause, on that day, why the prayer of the petition should not be granted. Objection was filed in writing, on the day fixed for the hearing, by Barbara Craigie, John Craigie, Charles Craigie, Alexander M. Craigie, Elizabeth Enslie, Ann Clark, and Ellen R. Shephard, and, after the hearing and due consideration of the same, a decree was entered June 14, 1876, which, after reciting the proceedings in the administration of the estate, is as follows: "Now, therefore, it is ordered, adjudged, and decreed that the administration of the estate of said James G. Craigie be and the same is hereby concluded, and that the administratrix of said estate be and she is hereby discharged, and that all and singular the property and estate which was of the said James G. Craigie at the time of his death, and the increase thereof, * * * be and the same are hereby distributed, assigned to, and vested in the said Annie McArthur as the heir, and sole heir at law, of the said James G. Craigie."

On August 9, 1876, all the persons appearing and contesting the matters set up in the petition of Annie McArthur, with the exception of Alexander M. Craigie, took an appeal, by virtue of the statute of the state of Minnesota, to the district court of the seventh judicial district, and the same was perfected, and a certified transcript of all the proceedings had in the matter, and all the papers, petitions, orders, decrees, notices, etc., were filed in the clerk's office October 10, 1876.

A petition was filed for a removal of the suit under act of congress of March 3, 1875, in that behalf, to the United States circuit court for the district of Minnesota, October 18, 1876, setting up: (1) That an action has been commenced and is now pending in the district court of the seventh judicial district, on appeal from the judgment of the probate court, in which the petitioners are appellants, and Annie McArthur respondent. (2) That since the commencement of said action by said appeal in said court, there has been no term at which a trial of said action could be had. (3) That the amount in dispute is over five hundred dollars, exclusive of costs. (4) That at the time of the commencement of said action, all the appellants were and are aliens, and subjects of Victoria, Queen of Great Britain and Ireland, and reside in Scotland. (5) That the respondent is a citizen of the state of Minnesota, and resides therein. The proper bond was executed and the action was transferred, and a return was filed in this court December 8, 1876.

A motion is now made to remand the suit to the state district court, for the reasons: (1) That it is not such an action as the said United States circuit court can acquire juris-

[1] [Reported by Hon. John F. Dillon, Circuit Judge, and here reprinted by permission. 4 Cent. Law J. 237, contains only a partial report.]

diction of under any of the acts of the congress of the United States pertaining to the removal of causes from state courts. (2) That if this court could have jurisdiction of the cause, the petition and bond for its removal should have been presented to and filed in the state court of original jurisdiction, to-wit: the probate court of Otter Tail county, before or at the term of said court at which the cause could first be tried, and that the appellants having submitted themselves, by due appearance [by written objection],[2] to the jurisdiction of the said probate court, and gone to trial there upon the merits, it is too late to first apply for a removal to the United States court after appeal taken from the judgment of said probate court to a higher and appellate state court.

Chas. D. Kerr, for the motion.

Bigelow, Flandrau & Clark and E. E. Corliss, contra.

NELSON, District Judge. Conceding, for the sake of the argument, that the probate of a will and the appointment of an administrator of an intestate's estate are not proper subjects to be determined in the federal courts, yet, when the estate is ready for distribution and a claim is made for the whole of the estate or a portion thereof, and contested, if the necessary conditions exist, I think a removal is authorized on proper application being made. All the essential elements of a controversy exist. There are parties, and a contest in reference to property, and informal pleadings under which the disputed matters are to be settled by a court. The act of congress authorizes a removal from a court of limited or general jurisdiction, and a controversy in a probate court involving the distribution of an estate between parties who appear and submit to the jurisdiction and litigate therein, is certainly a suit of "a civil nature * * * in equity." 45 Me. 571; 4 Pa. St. 301; 22 N. Y. 421; 20 Minn. 247 [Gil. 220]; 19 Wis. 200. The probate court of the state of Minnesota is a constitutional court of record, with a seal, and regular terms fixed by law. Section 1, art. 6, Const. Minn.; 2 Biss. St. Minn. 739; 1 Biss. St. Minn. p. 672, § 169. Its decrees, orders, and judgments are binding upon all persons, and the right of appeal is given to the district court, and finally to the supreme court of the state. Pleadings are not necessary, but all applications made to the court orally or in writing are embodied in its records. At the time when the proceedings in that court assume the form of a controversy between parties, and the conditions requisite exist, the suit is removable. Gaines v. Fuentes, 92 U. S. 14. When, in answer to a notice of the hearing of the matters to be determined in the probate court, the petitioners filed their objection and instituted a contest, the right of removal could have been enforced. It is urged that there is no controversy inter partes in the probate court, and that the appeal is the commencement of a new suit, when, for the first time, it is known who are the parties interested. I do not so understand the situation of such controversies. The notice authorized to be published by the probate court fixed the time when the matters set forth in the petition would be determined by the court, and specified the several questions which would be settled. If no objection is made, a decree in accordance with the prayer of the petition would be conclusive; but opposition being made, a hearing or trial must take place, and all the matters at issue litigated. When the contestants interposed objections, certainly the parties to a controversy were known, and the decree was binding upon them, as well as all others interested. It is too late, after the determination of the litigated matters in the probate court, and an appeal taken to the district court of the state, to initiate steps for a removal. No such right then exists, and to entertain jurisdiction would be an attempt to exercise a revisory power over the judgment of the probate court which is given by law to another tribunal. This court has entertained jurisdiction of the removal of a suit pending in a state court, on an appeal from commissioners appointed by that court to fix the value of private property taken under the right of eminent domain, by an incorporated company—3 Dill. 465 [Patterson v. Mississippi & R. R. Boom Co., Case No. 10,829]—but this appeal is of an entirely different character. In the former case, the appeal was from an appraisement by commissioners authorized under the charter of the company, which provided for an appeal from the award to the district court, and upon the appeal being taken the clerk is authorized to set it down as a cause upon the docket of the court appointing the commissioners. A suit, then, for the first time is instituted in a court. In the case before me, the initiatory proceedings and contest were in a court recognized as one of the judicial tribunals of the state, and the appeal was from a decree of that court. The removal of a suit, under the act of congress of March 3, 1875, must be from the court of original jurisdiction.

DILLON, Circuit Judge. I am of opinion that the removal was not applied for in time, under the act of March 3, 1875, and that the cause should be remanded. Remanded.

[2] [From 9 Chi. Leg. News. 156.]

Case No. 3,342.

CRAIK v. HILTON.

[2 Cranch, C. C. 116.][1]

Circuit Court, District of Columbia. Nov. Term, 1815.

BAIL.

In debt upon a bond of more than twelve years standing, THE COURT (THRUSTON, Circuit Judge, absent) ordered special bail to be given. The plaintiffs [Craik's executors] resided in Virginia.

Mr. Wallach, for plaintiffs.
Mr. Law, for defendant.

Case No. 3,343.

In re CRAM.

[1 Hask. 89;[2] 1 N. B. R. 504 (Quarto, 132); 1 Am. Law T. Rep. Bankr. 65, 120.]

District Court, D. Maine. Dec. Term, 1867.

BANKRUPTCY—PROOF OF DEBT.

1. Proof of debt should be allowed in bankruptcy against the bankrupt's estate for the amount due upon a note indorsed by the bankrupt, without deducting the value of real estate mortgaged by the maker to secure the note, if the mortgage is not foreclosed.

[Cited in Re Holbrook, Case No. 6,588; Re Norris, Id. 10,302, 10,303; Re Anderson, Id. 350; Re May, Id. 9,327; Re Kinne, 5 Fed. 60. Approved in Re Dunkerson, Case No. 4,157.

2. Proof of debt should be reduced, in such case, by indorsing the value of chattels acquired from the maker of the note by a mortgage that had become foreclosed.

In bankruptcy. The Casco National Bank, the holder of certain promissory notes amounting to about $80,000, given by the Portland Shovel Company, indorsed by the bankrupt [Nathaniel O. Cram], and protested for non-payment, sought to prove them in bankruptcy against his estate before Mr. Register Fessenden. The notes were secured by two mortgages from the maker, one upon its real estate not foreclosed, and the other upon its chattels and foreclosed. The creditors objected. The register rejected the proof of the debt until the value of the mortgaged property could be ascertained and applied to its payment. The bank requested that the matter be certified to the court for decision, and it was done.

Hanno W. Gage and Sewall C. Strout, for bank.
Nathan Webb and Thomas Amory Deblois, for creditors.

FOX, District Judge. The liability of the bankrupt, as indorser of the notes of the shovel company, has become absolute, and in such a case, by the 19th section of the act [of 1867 (14 Stat. 525)], a creditor may, ordinarily, prove his claim against such indorser. It is contended that the present case comes within the provisions of the 20th section of the act, the creditor holding mortgages of real and personal estate from the makers of said notes, as security for their payment, and for that cause it cannot be allowed to prove its claim against the bankrupt, prior to the choice of the assignee. The clause of this section is as follows: "When a creditor has a mortgage or pledge of real or personal property of the bankrupt, or a lien thereon for securing the payment of a debt owing to him from the bankrupt, he shall be admitted as a creditor only for the balance of the debt, after deducting the value of such property, to be ascertained by agreement between him and the assignee, or by a sale thereof, to be made in such manner as the court shall direct; or, the creditor may release or convey his claim to the assignee upon such property, and be admitted to prove his whole debt. * * * * * If the property is not so sold * * the creditor shall not be allowed to prove any part of his debt."

As an assignee is requisite to carry out this arrangement, I admit, that when the property, which is to be sold, or is to have its value ascertained, is the property of the bankrupt, the creditor holding a mortgage or pledge of it cannot be allowed to prove his claim prior to the election of the assignee; but such is not the condition of the present case; the bank has not any mortgage or pledge of real or personal estate of the bankrupt, or a lien thereon to secure any debt owing to it from the bankrupt. It is true, that it was in whole or in part mortgage security for the payment of the same notes, which it offers to prove against the estate of the bankrupt; but this property so mortgaged was never the property of the bankrupt, but belonged to an entire stranger to these proceedings, the maker of these notes, who is not shown to be bankrupt, and over whose property, in the present stage of the cause, the district court has no authority or jurisdiction whatever. The case presented is therefore certainly not within the letter of the act, as the bank has not "a mortgage or pledge of real or personal property of the bankrupt, or a lien thereon;" and on a careful examination of the whole act, I do not think it is within its spirit or purpose, or that it should be drawn within its provisions, by any strained and forced construction of the language employed.

What does the act require shall be done with the property so mortgaged or pledged? The creditor must deduct from his claim the value of the property, to be ascertained by agreement with the assignee, or by sale by order of court, or he may release to the assignee his claim upon the property and be admitted to prove his whole debt. Each and all

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

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

of these provisions are supposed to be applicable to the property. It is property, so situated, that either course may be adopted as may be deemed most advisable by the creditors.

Would a court in bankruptcy order a sale of property thus situated, mortgaged by a third party, an entire stranger to the proceedings in bankruptcy? Who would be bound by such a sale, if the court should order it to be made; and what title would a purchaser acquire at such a sale against the mortgagor? What is to be sold, the absolute property? If so, what becomes of the equity of redemption, if the estate is not purchased, and the mortgage debt is not of the full value of the property. No one can claim that the court could thus sell the whole estate, and destroy the mortgagor's right of redemption, which to real estate, by the laws of Maine, continues for three years after the mortgagee has entered for foreclosure for breach of condition of the mortgage. If the note and mortgage should be sold by order of court, leaving unimpaired the right of redemption of the mortgagor, what becomes of the claim of the party against the bankrupt indorser of the note? He has disposed of it by its sale. He has parted with the security and contract, which was the foundation of his claim against the bankrupt estate. He has no longer any debt to prove against the estate. It belongs to the purchaser of the note. Like consequences would result, if he transfers to the assignee his claim on the property. To pass any title of the mortgaged property to the assignee, he must assign his note secured thereby, and the bankrupt would be no longer his debtor.

It is quite manifest therefore, that this mortgagee can neither sell his mortgage, nor assign the same to the assignee, as contemplated by the act. But it is claimed that he may agree with the assignee upon the value of the mortgaged estate, and deduct that amount from his whole claim, and prove the balance against the estate of the bankrupt. I hold, he is not compelled to do this and take the estate at the agreed value. He has his election, which course he will pursue; the statute, I think, intended he should enjoy the privilege of determining whether he would or not take the mortgaged estate; and unless his title is such that he can elect which course he will adopt, I am of opinion his case is not within this provision of the act.

The same section of the act further provides, that "if the value of the property exceeds the sum for which it is so held as security, the assignee may release to the creditor the bankrupt's right of redemption therein on receiving such excess, or he may sell the property, subject to the claim of the creditor thereon; and in either case the assignee and creditor respectively, shall execute all deeds and writings, necessary and proper to consummate the transaction."

What right has the assignee to redeem the property of an entire stranger which he could convey to the claimant, or what interest in such property could the assignee sell subject to the claim of the creditor, and what writings could he execute which could consummate any title, or what would be worth the paper on which they were drawn? Every line of this section, as I think, points most distinctly and directly to property of the bankrupt, and only to property of the bankrupt, which the district court in bankruptcy can deal with; and it never contemplated the sale of the property of third parties, held by the claimant as security for his demand. It would have hardly been possible for congress to have used more precise and positive language, to declare such to have been its intention, than it has employed in this section, whilst, if it was designed to reach security given by third parties, it could have been so declared with equal certainty.

This construction I think is also sustained by the close of the 21st section of the act, allowing double proof when the bankrupt is liable upon a bill or note, or other obligation arising from distinct contracts, as a member of two or more firms, carrying on separate and distinct trade, and having distinct estates to be used up in bankruptcy, or when liable as a sole trader and also as member of a firm. In such case, the creditor may prove against the estates respectively liable upon such contracts, manifesting that the general intent of the act is to allow a claimant the entire security of all parties liable for the debt, and of course the benefit of all collaterals from such parties. This provision of this section is quite important as fixing definitely a point in bankruptcy proceedings, about which a very serious conflict exists in the authorities.

I have examined carefully all the authorities at my command, touching the question in controversy; and so far as I have met with any relating to it, they all concur in this view with the exception of some of the earlier decisions in Massachusetts upon the construction of the clause in the insolvent law of that state, which is quite similar in its provisions to the one now under consideration from the bankrupt act. The first case is Lanckton v. Wolcott, 6 Metc. 305. In this case, Shaw, C. J., held that a party holding a note signed by a principal and two sureties, all of whom were insolvent, could not prove the full amount of his note against the principal, but must deduct the value of a mortgage given to him by one of the sureties, and prove for the residue of his debt. The clause in the insolvent act then under consideration provided, that when any creditor should have any mortgage or pledge of any real or personal estate of the debtor for securing his debt, the property should be sold, and the proceeds should be applied towards the payment of the debt,

and he should be admitted as a creditor for the residue, if any.

The learned chief justice says, "If the term 'debtor' in this sentence is necessarily to be limited to the insolvent debtor, whose estate is in the progress of settlement, then this case is not within the letter of it, because the mortgage was not made by the insolvent; but it is equally consistent with the manifest equity and policy of the statute, to construe it to mean any person liable for the debt. * * * Now it is a general rule of equity, that where a final settlement is to be made, as in cases of bankruptcy or insolvency, all mutual accounts should be balanced; that a pledge of property held as security for a debt shall be deemed in the nature of set off or payment, an extinguishment pro tanto, and the balance only, is the actual amount to which the creditor has trusted to the personal responsibility of the debtor, and it is for that sum only, that he can come in pari passu with other creditors who have relied on the same responsibility. If the debt is reduced and diminished by a pledge thus given by one of the debtors, it is equally reduced, as against the co-debtors; if the creditor holds a mortgage made by either of the debtors, it is within the equity, if not the letter of the statute, and its value must first be deducted." The only authority cited to sustain this doctrine, is Amory v. Francis, 16 Mass. 308, a proceeding against the administrator of an insolvent estate, in which it was decided that a creditor holding a mortgage, given by the deceased debtor as security for the payment of the debt, and of less value than the amount of the debt, could only be allowed to prove against the estate for the difference between his debt and the value of the property mortgaged; a proposition which no one could question, but which had no relevancy to the case then under consideration, as the property was not the property of the insolvent, but of a third party.

This decision in Lanckton v. Wolcott, was followed in Richardson v. Wyman, 4 Gray, 553. There the debt was a joint and several note of three persons, who as tenants in common of a parcel of real estate, had mortgaged it to the holder of the note; one of them was in insolvency, and it was decided, that one third part of the land should be sold and applied in discharge of the note, and the value of the remaining two-thirds part should be ascertained by an assessor, and deducted from the amount due, and the creditor allowed to prove against the insolvent estate for the balance. It was admitted by the court, that the case was not within the letter of the insolvent act, but it was claimed to be within its spirit, and the decision was based on Lanckton v. Wolcott. The learned judge admits, that the statute did not prescribe any mode of ascertaining the amount to be allowed upon the demand for the two third parts of the mortgaged estate not belonging to the insolvent, and he therefore was obliged to devise a scheme of a valuation by an assessor in order to reach it. These cases, without reference to a single English authority in bankruptcy, adopt the conclusion that whatever property the creditor holds as security for his demand, whether from the insolvent or any other party, must be first appropriated to the reduction of the claim, and the balance only admitted against the estate. In Agawam Bank v. Morris, 4 Cush. 99, the court appears to have regarded the letter, rather than the spirit of the act, as it allowed the petitioners as indorsers to prove their whole claim against an insolvent partner on a partnership note, although a prior indorser held collateral security for the payment of the note given to him by the solvent partner, the indorser holding the security, being the president of the bank that held the note, and testifying that the security was deposited for the purpose of making the bank and himself fully secure. [See, also, Richardson v. City Bank, 11 Gray, 263].[2]

It will be seen that the language of the insolvent act of Massachusetts is, "any real or personal estate of the debtor," and that the court has felt itself at liberty to include under the term "debtor," any party liable for the debt. In the bankrupt act, the language is more precise and restricted, "any real or personal property of the bankrupt;" the word "bankrupt" is personal, confined to a single party, and cannot, I apprehend, be reasonably construed as including all others in any way answerable for the same demands.

I have examined numerous English decisions in bankruptcy bearing upon this question, but I can find no support in any of them for the principles laid down by the supreme court of Massachusetts; but on the contrary, the very reverse has been sustained by the highest authority. In 1743, Lord Hardwicke in Ex parte Bennet, 2 Atk. 527, which was a case of proof against a bankrupt estate, said, "If they," bonds which had been given to the creditor as security, "had been joint bonds from the bankrupt and another person to Bennet, he might have come in for his whole debt under the commission without being compelled to deliver up such joint securities."

The rule which universally prevails in bankruptcy in England is, that the creditor must apply all the property of the bankrupt, real or personal, which he holds as security for his claim, in reduction of his demand, and prove only the balance against his estate; but the security will not go in reduction of the claim, unless it is the property of the estate against which the proof is offered.

Parr's Case, 18 Ves. 65, decided by Lord Eldon, I think fully confirms this proposition. In that case, the petitioning creditors held

[2] [From 1 Am. Law T. Rep. Bankr. 65.]

bills of exchange drawn by certain parties in Demerara and accepted by the bankrupts, who were partners with the drawers, but doing business in England, these being distinct firms, carrying on business at Demerara and in Liverpool. The creditors held a mortgage on certain plantations in Demerara, given to them by the drawers as security for these bills. The objection was taken, that the bills could not be proved against the estate of the bankrupts without deducting the value of the mortgages. Lord Eldon ruled, that the creditors could prove for the full amount of the bills without deducting the value of the security, notwithstanding the partnership. [The marginal note of Vesey is full to the point—"Creditor's right in bankruptcy, to prove and avail himself of all collateral securities from third persons, to the extent of twenty shillings in the pound. Bills drawn and accepted by the same persons, constituting distinct firms, proof against the acceptor, without deducting the value of a security from the drawer.] [2]

This decision made in 1811, so far as I can ascertain, has ever since been recognized as the rule in bankruptcy in all the English courts. In Ex parte Goodman, 3 Madd. 373, a creditor was allowed in 1818 to prove his whole debt against a bankrupt, notwithstanding he held an assignment of an interest in certain estates, made to him by third parties at the bankrupt's request as security for the debt. Parr's Case was adopted in Re Plummer, 1 Phil. 56. In that case a creditor whose debt was secured by the joint and several covenants of two parties in trade, and also by a mortgage on part of the joint property, was admitted to prove his debt against the separate estate of each, without surrendering or releasing his mortgage security. Lord Lyndhurst in his opinion says, "What are the principles applicable to cases of this kind? If a creditor of a bankrupt holds a security on a part of the bankrupt's estate, he is not entitled to prove his debt under the commission without giving up, or realizing his security; for the principle of the bankrupt law is, that all creditors are to be put on an equal footing, and therefore if a creditor choose to prove under the commission, he must sell or surrender whatever property he holds belonging to the bankrupt; but if he has a security on the estate of a third person, that principle does not apply; he is in that case entitled to prove for the whole amount of his debt, and also to realize the security, provided he does not altogether receive more than 20s. in the pound. That is the ground on which the principle is established. It is unnecessary to cite authorities. It is too clearly settled to be disputed. In administration under bankruptcy, the joint estate and separate estates are considered as distinct estates, and accordingly it has been held, that a joint creditor, having a security upon the separate estate, is entitled to prove against the joint estate without giving up his security. Now this case is merely the converse of that and the same principle applies to it."

Peacock's Case, 2 Glyn & J. 27, was where a joint creditor held security from one of the joint debtors, and was allowed to prove his debt against the joint estate without surrender or sale of his security.

In Ex parte Adams, 3 Mont. & A. 165, it was decided that the security is not to go in reduction of the claim, unless it is the property of the estate against which the proof is offered. In Ex parte Hedderly, 2 Mont. D. & D. 487, the creditor, holding the estate of the wife of the bankrupt as security for his debt, was allowed to prove for the whole debt.

The English authorities were examined and approved by Mr. Justice Story in Re Babcock [Case No. 696], a case arising under the former bankrupt act. In his opinion that most learned judge says in relation to the point of the creditor's having securities in his hands for the payment of the debt in bankruptcy, "A distinction is taken between the case of a security given to the creditor by the bankrupt himself of his own property, and the case of a security of a third person, transferred to the creditor by the bankrupt or otherwise. In the former case the creditor is not allowed to prove his debt against the bankrupt, unless he surrenders up the security, or it is sold with his consent, and then, he may prove for the residue of his debt which the security when sold does not discharge. In the latter case he may prove his debt in bankruptcy, without surrendering the security of the third person, which he holds, and may notwithstanding such proof proceed to enforce his security against such third person, provided however, he does not take under the bankruptcy and the security, more than the full amount of his debt." In that case an accommodation acceptor of a bill of exchange went into bankruptcy. The holder of the bill attached certain property of the drawer, and also proved his demand against the estate of the acceptor.

Judge Story says, "From the principles which have been stated, admitting the attachment to be a security, and the bankrupt to be a mere accommodation acceptor, it is clear that the creditor has a right to proceed against the bankrupt for his debt in bankruptcy, and also against the other parties to the bill under his attachment, until he has recovered the full amount of his debt; for it is not a security given by the bankrupt of his own property, but is a security obtained by the creditor against other parties to the bill by a proceeding in invitum." This opinion of Mr. Justice Story in Re Babcock [supra] has never been questioned, so far as I am informed, by any circuit court, or in any opinion of the supreme court of the United States; and being in conformity with the

[2] [From 1 Am. Law T. Rep. Bankr. 65.]

whole course of decisions under the English bankrupt acts, should govern in the present case; and I therefore decide that the Casco National Bank was not barred from proving the full amount of the notes in question against the bankrupt's estate, on account of the mortgage of real estate given to the bank by the makers of said notes as security for their payment, said mortgage not being foreclosed, and being merely a security for the debt.

The mortgages of the personal property of the shovel company, held by claimant to secure the payment of these notes, present a further question, entirely independent of that growing out of the mortgage of the real estate to secure the same notes. When chattel mortgages have been foreclosed, and the title to the property covered by them has become absolute in the claimants, and they have since disposed of some of the property, by such a foreclosure the mortgagees, under the laws of Maine, have received payment of a portion of their debt, equivalent to the value of the property mortgaged on the day the title to this property became absolute in the mortgagees by their foreclosure. This value has not yet been in any way determined; but whatever it amounts to should be applied in reduction of the claim, and proof allowed only for the balance of the claim remaining unpaid. It is not enough, that the claimant is willing to endorse on the notes the amount received by it from sale of a portion of the property. The whole value of the property should be endorsed. It became the property of the claimant the moment the title became absolute. It was at its risk from that time. If it had been lost or destroyed or in any way subsequently diminished in value, it would have been at the charge of its owner, the claimant; and so, if it had subsequently increased in value, it would have been its gain and advantage. As the amount to be allowed in reduction of the notes, for the personal property mortgaged to the claimant by the makers of the notes, as security therefor, and of which the claimant became the absolute owner by foreclosure of its chattel mortgage, has not been ascertained and determined, and has not been allowed by the claimant in reduction of its claim on these notes, I think, for the second cause assigned by the register in his certificate, he was correct in his decision not to allow these notes to be proved in this present stage of the cause. When a claim against a bankrupt has been paid in part by the bankrupt or any other party, the balance only is provable against the estate.

The conclusion of the register, that the claimant can only be admitted as a creditor for the balance of its debt after deducting the value of the security given to it by the shovel company, so far as it applies to the mortgage of the real estate which is not foreclosed, is not correct. Such security cannot affect the proof of the claim until foreclosed, and an absolute title to the mortgaged estate is vested in the mortgagee.

Certificate to register to conform to this opinion.

Case No. 3,344.

In re CRAMER.

[Cited in Re Jacobs, Case No. 7,159. Nowhere reported. Opinion not now accessible.]

Case No. 3,345.

In re CRAMER.

[13 N. B. R. 225;[1] 8 Chi. Leg. News, 106.]

District Court, D. Minnesota. Nov., 1875.

BANKRUPTCY—PREFERRED CREDITOR—PROOF OF DEBT.

A preferred creditor cannot prove his debt after the assignee has obtained a judgment against him setting aside the preference.

[Cited in Re Kaufman, Case No. 7,627; Re Reed, 3 Fed. 800; Re Graves, 9 Fed. 820; Re Cadwell, 17 Fed. 694.]

In bankruptcy. Kiefer & Heck, creditors of the bankrupt, made a settlement with him just previous to his bankruptcy, and received in full credit for their account certain merchandise and notes [to the full value of their claim].[2] The assignee in bankruptcy demanded the property from Kiefer & Heck, and upon a refusal to deliver commenced a suit against them, alleging a fraudulent conveyance and preference, contrary to the terms of the bankrupt act [of 1867 (14 Stat. 534)]. Upon a trial before a jury, the assignee recovered a judgment. Kiefer & Heck now seek to prove their claim before the register. Objection is made by the assignee, and the matter comes before the court for settlement.

J. B. & W. H. Sanborn, for claimant.
Rogers & Rogers, for assignee.

NELSON, District Judge. Section 5021 of the Revised Statutes authorizes the recovery by the assignee of all property received by a person having reasonable cause to believe that a debtor was insolvent, and knowing that a fraud on the bankrupt act was intended. Section 5128 defines the fraudulent preferences forbidden by the act; and section 5084 declares under what circumstances and when a creditor who has received a fraudulent preference may prove the claim on account of which the preference is made or given. The latter section forbids proof of a claim on account of which a preference is given until the creditor first surrenders to the assignee all property or advantage received under such preference. I think, in the light of these sections, inasmuch as judgment has been entered in favor of the assignee, in the suit brought against Kiefer & Heck, and

[1] [Reprinted from 13 N. B. R. 225, by permission.]

[2] [From 8 Chi. Leg. News, 106.]

the fraudulent preference clearly established, they are debarred from proving their claim. The assignee has been compelled to seek the aid of the court to recover the advantage sought to be obtained by these creditors; they contested his right to recover, and being defeated have constructively made themselves a party to the fraud, and the locus poenitentiae has passed; the payment of the judgment is not a compliance with the terms of section 5084. Although, in case of actual fraud a preferred creditor might prove for a moiety, he can do so only when he has fulfilled the requirements of section 5084, and made a surrender of the advantage obtained by the preference. In this case there is no actual fraud, and if these claimants had surrendered their advantage before suit, and perhaps before judgment, proof would have been allowed of their whole debt. The right of these creditors to prove a claim represented by a note for seventy-six dollars is not seriously contested. The objection of the assignee is sustained, except to that extent. Ordered accordingly.

Case No. 3,346.

CRAMER v. ALLEN et al.

[5 Blatchf. 248.][1]

Circuit Court, N. D. New York. Aug. Term, 1865.

LOSS OF TOW—DEGREE OF FAULT—APPORTIONMENT—FOREIGN MONEY.

1. Where a tug, in towing a vessel on the Niagara river, was so negligently navigated, that the tow struck some piles, and was separated from the tug and carried down the river over Niagara Falls and lost, and the tow had no anchor on board, and it appeared to be the better opinion, on the proofs, though not certain, that, if she had had one, she might, by casting it, have been held until the tug could come to her relief: *Held*, that the absence of the anchor was a fault on the part of the tow.

2. *Held*, also, that the drifting and loss of the tow was the direct and immediate consequence of the collision with the piles, and that the tug was liable for such loss, notwithstanding the want of an anchor on the tow.

3. The uncertainty as to the degree of fault and its consequences, where both vessels are chargeable with them, brings the case within the reason of the rule of apportionment.

[Cited in The Britannia, 34 Fed. 560.]

4. The injured party, in this case, is entitled, as indemnity for his loss, to the value of his vesssel, at the time and place of her loss, in the currency of the place where the injury happened. But, as the suit is brought in another country, he is entitled to a sum, in the currency of the latter country, which approximates most nearly to that to which he is entitled in the country where the injury occurred.

In admiralty. This was a libel in personam, filed in the district court, by [Richard W. Cramer] the owner of a scow against [William W. Allen and others] the owners of the steam tug Griffen, to recover damages for the loss of the scow. The district court apportioned the damages [case unreported], and the respondents appealed to this court.

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

NELSON, Circuit Justice. The tug was engaged in towing the scow from Buffalo, down the Niagara river, to Port Robinson, on Chippewa creek, Canada. The tug, in entering the mouth of the creek, was so navigated that the scow struck the piles in the "cut" at the entrance, and became separated from another tow to which she was fastened by a hawser, and was carried down the river over Niagara Falls, which were situated some four miles below, and lost. I agree with the court below, that the immediate injury to the scow, by coming in contact with the piles, was occasioned by negligence, or want of proper skill, on the part of the master of the tug, and that the only question in the case is, as to the rule that should govern the damages to be allowed. The scow struck the piles some eight feet inside of the starboard corner of her bow, making a considerable hole in the bow above the water line. Having parted her hawser, she was necessarily carried down the current of the Niagara river, which was of considerable strength there, and passed over the Falls. The scow had no anchor on board, and the better opinion, on the proofs, is, that if she had had one, she might, by casting it, have been held until the tug could come to her relief. The latter, as soon as the accident happened, detached herself, from the other tow, and re-entered the river, to rescue the scow, but the scow had descended it so far as to render relief impossible. I agree, also, with the court below, that the want of a fit and proper anchor on board of the scow was a fault for which her owner is responsible. The owners of the tug had a right to presume that the scow was seaworthy, which includes an anchor as a part of her equipment.

It is urged by the respondents, that, as the total loss of the scow was occasioned by her going over the Falls, and as that might have been prevented if she had had an anchor on board, they should have been held liable only for the damage done to the scow by her coming in contact with the piles; that the subsequent damage or loss is attributable solely to the fault of her owner; and that the collision with the piles was not the proximate cause of this subsequent loss. I am inclined to think, under all the facts and circumstances of the case, that it cannot be said, that the drifting of the scow down the current of the river and over the Falls, after the separation of the hawser which fastened her to the other tow, was not the direct and immediate consequence of the collision, as much so as if the accident had occurred in the middle of the river. Nor can it be said with certainty that the presence of an anchor would have saved her. I agree, that

its absence was a fault, as, by reason of it, all parties concerned were deprived of the benefit of the use of it in the attempt to arrest the drifting of the injured vessel; and it seems to me that this uncertainty as to the degree of fault and its consequences, where both parties are chargeable with them, brings the case within the reason of the rule of apportionment. It is agreed, that this rule is not an exact measure of damages; but, upon the whole, and as a general rule, it is more often just and reasonable in practice than a rule would be which should require the court to divide the damages according to the degree of fault committed by each vessel. I shall concur, therefore, in the judgment of the court below, in the rule adopted as to the measure of damages.

Then, as to the question of currency. The commissioner found the value of the scow, or the damages, which is the same thing, at the time and place of the accident, in Canadian currency. If the suit had been in Canada, the sum so found would have determined the amount of the decree, and to this sum, at the place where the injury happened, the injured party is entitled, as indemnity for the loss. This suit, however, is in another country, and the rule seems to be well settled, and is certainly the just rule, as between the parties, to allow a sum, in the currency of the country where the suit is brought, which approximates most nearly to that to which the party is entitled in the country where the damage occurred. The commissioner found the amount in the currency of that country, and also the difference between that and the currency here, which is forty-nine per centum. That difference was very properly added by the court. If it had been the other way, it should have been deducted.

The decree of the court below is affirmed, with costs.

CRAMER (CLARKE v.). See Case No. 2,848.

Case No. 3,347.

CRAMMER et al. v. The FAIR AMERICAN.

[1 Pet. Adm. 242.][1]

District Court, D. Pennsylvania. 1806.

SEAMEN—EMBEZZLEMENT—FORFEITURE OF WAGES—CONTRIBUTION.

Although part of the embezzlement is fixed on, and paid by, some of the crew, yet all are to contribute to the residue. Master and officers join in this contribution. Sailor absent, not excused.

[Cited in Spurr v. Pearson, Case No. 13,268; Conner v. Levering, Id. 3,114; Edwards v. Sherman, Id. 4,298.]

[In admiralty. Libel by Jonathan Crammer et al. against the ship Fair American, Haga, owner, Fraily, master, for wages.]

Embezzlement was charged on five of the libellants, to repel their claim for wages. A quantity of coffee, four thousand weight was alleged to have been embezzled. It appeared by certificates, admitted by consent, from sundry merchants trading to Amsterdam, where the fact charged was said to have been perpetrated, that the difference between the weight of coffee in America and its produce at the Dutch scales varies between eighteen and twenty-two per cent, though in some cases it has exceeded the latter. The loss was estimated on a difference between twenty-two and twenty-six per cent, on what the whole of the coffee in question should have weighed, occasioning a loss of four thousand weight to the owner. Testimony was produced, which shewed only four hundred pounds to have been actually taken by five delinquents, though suspicion reached much further. No decision was had on the facts, but an intimation was given by the court, that no opinion could be grounded on mere suspicion; and a decree could only extend to the quantity actually proved, either by positive testimony or circumstances, to have been taken.

THE COURT, on a compromise between the parties, ruled, on application for its opinion,

1. That although an embezzlement of part of the goods lost, be fixed on some of the crew, who must pay separately to the amount proved, yet they or the surplus of wages, if forfeited or in the hands of the owner, remain further answerable, in a general contribution, for the balance.[2]

2. That the whole must contribute, according to their respective wages, the captain and officers of the ship included.

3. Nor is any one to be excused from this general contribution, though absent from the ship, and not in a situation to be capable of assisting in the plunder. This point occurred in the case of one of the seamen, entitled to his wages, who was confined in prison, during the period when the transaction happened.—The innocence of an individual is not the question; it turns on the joint obligation of all, to make retribution; it is part of the conditions, upon which they engage in their occupation.

[1] [Reported by Richard Peters, Jr., Esq.]

[2] It has been held, and in some extensive embezzlements, I have so decided, that the actual perpetrator forfeits all right to wages. In most instances, a contribution to the amount, would absorb all the claim to wages. But in petty plunder of esculents, liquor, &c., I have not deemed it right to inflict so rigorous a forfeiture; yet I confess the point of toleration, or punishment, is difficult to ascertain. If the wages of those who actually commit an embezzlement be forfeited, they should be considered, in the hands of the owner, as part payment towards the contribution of the innocent members of the crew, where farther embezzlement than that fixed on individuals, has been committed. On this consideration, the opinion was given, according to the fact, respecting a further contribution by the guilty mariners.

CRAMMOND (PERRY v.). See Case No. 11,-005.

CRAMMOND (PHILIPS v.). See Case No. 11,092.

CRAMMOND (THELLASSON v.). See Case No. 13,877.

CRAMPTON (THRALL v.). See Case No. 14,008.

Case No. 3,348.

CRAMPTON v. VAN NESS.

[4 Cranch, C. C. 350.][1]

Circuit Court, District of Columbia. Nov. Term, 1833.

ACTION FOR RENT.

The want of title in fee in the plaintiff is no bar to an action for rent, upon a lease for seven years, with leave to purchase the fee-simple within that term.

Appeal from the judgment of a justice of the peace who gave judgment for a half year's rent, upon a lease for seven years, with leave to the tenant, within that term to purchase the fee-simple upon payment of $480. Mr. Bradley, for appellant, contended that the defendant [John P. Van Ness] is not bound, in equity, to pay the rent, because the plaintiff [James Crampton] has not a good title in fee. Kirtland v. Pounsett, 2 Taunt. 145; Smith v. Stewart, 6 Johns. 46.

But THE COURT (nem. con.) decided that it is no defence, the defendant not having been evicted.

Case No. 3,349.

CRAMTON v. TARBELL.[2]

District Court. D. Vermont. Jan. 10, 1878.

MORTGAGE TO SECURE FUTURE ADVANCES—FRAUDULENT CONVEYANCE OF PERSONAL PROPERTY — CHANGE OF POSSESSION —LEASE BY MORTGAGEE OUT OF POSSESSION.

[1. A mortgage to secure future advances is operative as to all advances made in good faith more than two months before the filing of a petition in bankruptcy, and as to those made in good faith within that time.]

[2. By the laws of Vermont, a conveyance of personal property will not pass the title, without change of possession, as against creditors.]

[3. A change in the title to real estate on which personalty is situated is insufficient to show a change of possession as to the personalty. There must be some actual, observable change in control.]

[4. A lease by a mortgagee out of possession, having the apparent legal title, creates the relation of landlord and tenant between the mortgagor in possession and the lessee.]

[5. A mortgage to secure, among other things, a loan to a bankrupt, made to enable the mortgagee to get possession of attached goods, and hold them as a preference over other creditors, is void to the extent of such loan, but will not taint the security as to other advances made in good faith.]

[Distinguished in Crampton v. Jerkowski, 2 Fed. 493.]

[In bankruptcy. Action by John W. Cramton, assignee in bankruptcy of Rufus D. Bucklin, against Marshall Tarbell, to set aside alleged fraudulent conveyances.]

WHEELER, District Judge. Upon hearing this cause, it appears that the deed, bond for reconveyance, and bill of sale were all more than two, and in fact more than five, months before the filing the petition in bankruptcy, which was involuntary, and are not, so far as then effective, void by the provisions of the bankrupt law [of 1867 (14 Stat. 517)]. Nothing fraudulent or deceitful about the liabilities which the conveyances were made to secure appears upon the evidence, and it is not found but that they were made in such good faith as to be valid at common law, or under the statute of 13 Eliz. c. 5, as made part of the laws of the state. Gen. St. p. 672, § 32. The deed and bond together amounted to a mere mortgage, and took effect upon the real estate covered immediately, to secure then existing or contemporaneous liabilities, and to secure future advances when they should be made, if operative at all to secure them. As to all made in good faith more than two months before the filing the petition, and as to those made within that time, if they were loans of actual value made in good faith, and it is a security taken in good faith on the occasion of making them, it is operative.

As to the personal property mentioned in the deed as conveyed with the real estate, and that mentioned in the bill of sale as conveyed separately, the conveyances were incomplete to pass the property, as against creditors and those standing in their right, till more had been done than executing the papers. By the laws of the state, continued possession by a vendor of personal property after a sale is conclusive evidence that the sale is fraudulent as to creditors. This is fully settled and well known. This transaction can only stand at all as a sale in respect to the personal property, and the orator stands in the place of and represents the creditors, so that, as to him, there must have been a change of possession good against creditors, or it is not operative at all. As to that mentioned in the bill of sale, there is no pretence of any change till after the 22d day of May, 1877. As to that mentioned in the deed, there is none except the record of the deed, and the transaction with the tenant. Possession of personal property is a fact to be found or not upon the evidence, and a change in the title of real estate on which personal property is situate, made upon the record, is not sufficient to show a change of possession of the personalty. There must be some actual change in the control of it that can be discovered by observation of the property. Flanagan v. Wood, 33 Vt. 332. Here after the papers were executed the defendant was merely a mortgagee out of possession, and the bankrupt was a mortgagor in

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

[2] [Not previously reported.]

possession. The mortgagor leased, and the lessee became his tenant. Then the lease was made in the name of the mortgagee because he had the apparent record title, but according to the understanding of all the parties, as shown by the evidence, the mortgagee did not undertake to, and did not in fact, go into possession then under the mortgage, and make the lease for himself, but the bankrupt was left landlord in fact, and the lessee was in fact his tenant, while the then present circumstances should exist. And he did remain landlord, and the tenant remained his tenant, until on or after the 22d day of May, 1877, as is shown by all the evidence, including that of the defendant as to what he did about and had from the farm. His account of his dealings on account of the farm all commences after that time.

In this view the real conveyances of all the personal property were not accomplished, so as to be effective as such for the purposes of the present enquiry, till on or after that date, which was within the two months limited by the bankrupt law in such cases. By the provisions of that law they cannot stand unless they were taken in good faith to secure loans of actual value; made in good faith on the occasion of making the loans. Act June 22, 1874, § 11 [18 Stat. 180]. The liability as endorser was not a loan of actual value, nor was the security taken on the occasion of incurring it, but long afterwards, so that cannot be covered by the personal property. The advances of $151.17, January 30, 1877; $179.65, February 7, 1877; $246, February 15, 1877; and $165, February 28, 1877, were of actual value, and appear to have been made in good faith. They were made more than two months before the filing the petition, and are covered by the real estate.

The transaction of giving security on the personal property commenced by giving the bill of sale and deed before any of these loans, and continued till after all of them by delivery of and taking possession, so that it covered the occasion of each loan, and it is considered that security so taken was, in effect, taken on the occasion of making each loan. The money advanced on the 22d day of May to Dickerman and to Whitcomb and Atherton may have constituted a loan to the bankrupt, and may have been only a mere purchase by the defendant of their claims; but if it was a loan it was not made to enable the bankrupt to go on with his business in expectation that he would thereby be enabled to pay all his creditors, but to enable the defendant to get possession of the goods attached that he might hold them himself in preference over the rest. This was not in good faith in the eye of the bankrupt law. But this advance was not connected with the others far enough to taint the good faith with which they had been made, nor that with which the security had thus far been taken. And as the other advances had all been previously made on faith in the security, and nothing remained to be done to perfect it but to take possession, it is not considered that it ought to or did taint the possession far enough to defeat the security as to them.

A question was made in argument whether this bill of sale, as it was made giving power of sale and undertaking to cover future purchases, would be valid at all, and if so whether it would be as to the after purchased property. But as the transaction was perfected by delivery of the whole under an agreement covering the whole, it is not necessary to consider what the effect of such a bill of sale would be not so helped out.

The result is that the defendant is entitled, against the orator, to hold the real estate to secure himself against the liability as endorser and for the advances made in good faith, and the personal property to secure the advances, and not otherwise. Therefore, let a decree be entered for an account of the avails of the personal property, and of the rents and profits of the real estate, and of the amount of these advances; and for the delivery of the remainder, if any, of the personal property, and payment of the balance of the avails, after satisfying the advances, to the orator, if any, or, in case the advances are not satisfied, for the delivery of the remainder on satisfying them; and for the conveyance of the interest acquired in the real estate to the orator on relief of the defendant from the liability as endorser and satisfying the advances within some short day to be fixed, and with costs as may be apportioned, on the coming in of the report.

CRANDALL (CROPSEY v.). See Case No. 3,418.

CRANDELL (BURFORD v.). See Case No. 2,150.

CRANDELL (GILPIN v.). See Case No. 5,449.

CRANDELL (UNITED STATES v.). See Cases Nos. 14,884 and 14,885.

Case No. 3,350.

CRANDELL'S TRIAL.

CRIMINAL LIBEL—EVIDENCE.

On an indictment for a seditious libel, in order to show the defendant's intent, the prosecution may give in evidence, any libellous papers subsequently published by the defendant or found, unpublished, in his possession.

[See U. S. v. Crandell, Case No. 14,885.]

[Nowhere reported; opinion not now accessible. The above statement of the point determined was taken from Brightley's Dig. 232.]

Case No. 3,351.

CRANDLE v. LIPPINCOTT.

[The case reported under this title in 1 Pittsb. Leg. J. 9, is the same case as Rich v. Lippincott, Case No. 11,758.]

Case No. 3,352.

In re CRANE et al.

[15 N. B. R. 120;[1] 1 Tex. Law J. 41.]

District Court, W. D. Texas. Sept. 5, 1875.

WITNESS FEES.

1. The clerk's certificate is only prima facie evidence of the number of days that a witness attended before the register. The memoranda or entries made by the register may be used as evidence to prove what proceedings have been had before him.

2. A witness is entitled to fees only for the days of actual attendance, and not for the days on which he was ready to attend.

[On certificate of register in bankruptcy.]

Pursuant to special order made at the April term of this honorable court hereto appended, referring the claim of George G. Baggerly, for seventy-three days' per diem service in attending before the undersigned register as a witness in the above matter, I do hereby certify that in the course of the proceedings in said matter the following question arose and issue made, whether or not the said witness was entitled to receive pay for the whole number of days which he claims; and the following proceedings were had: On the day appointed for the hearing of said claim Horace W. Chilton, Esq., appeared as counsel for said claimant, and Sawnie Robertson, Esq., appeared as counsel for the assignees of said bankrupt estate. The following witnesses were examined, to wit: G. G. Baggerly, in support of his claim, who also introduced two letters, and A. J. Swann and Joseph Elsasser were examined as witnesses on behalf of the estate; the attorney for the assignee also introduced in evidence the memoranda or minutes of the register, copies of which are made a part of the testimony in said matter, in connection with the depositions of the witnesses, which are herewith submitted and made a part of this certificate. Upon review of the testimony, after argument of counsel, I approved and allowed the claim for seven days, at one dollar and fifty cents per day, making the sum of ten dollars and fifty cents ($10.50), to which decision of the register the said claimant Baggerly, by his attorney, excepted, and desired that the question and issue made be certified to this honorable court for review, which is accordingly done. I further certify that the costs of this certificate have not been paid by the party requesting the same; and I would respectfully submit and ask your honor, for my guidance in future, as cases may and will frequently occur, whether or not the register in any case will be required to make a certificate of reference until the cost has been paid. Rule No. 8, General Orders in Bankruptcy, I think, requires the payment of the cost of a certificate to the register before he can be required to make and forward it. S. T. Newton, Register of said District at Tyler.

[1] [Reprinted from 15 N. B. R. 120, by permission.]

By S. T. NEWTON, Register: The issues presented for review by my decision, as shown in the foregoing certificate, involve two principal inquiries:

First. Is the certificate of the clerk of the court of the number of days which the party swears he attended before the register as a witness conclusive evidence of the fact? I think not. The clerk of the court is but a ministerial officer, and is not invested with any power by law to inquire into the truth of any fact stated in it. When a party appears before him as a witness and makes the affidavit required by law, he has no discretion but to issue the certificate embodying the statements of the party as to the number of days, and the distance traveled. The certificate is obtained upon an ex parte affidavit, and I think is only prima facie evidence of the facts stated in it, and I am of the opinion that, when those facts are contested and put in issue, the court may go behind the certificate and investigate the truth of the matter stated in it. Crawford v. Crain, 19 Tex. 146; Gause v. Edminston, 35 Tex. 73.

The second inquiry is, does the testimony in the case entitle the party to receive compensation for the whole number of days which he states in his certificate he attended before the register as a witness? I see nothing in the evidence which in my opinion establishes his right to it. When the certificate was first presented to me for my approval by the claimant, I approved it for two days' attendance only, being governed by the memoranda on my docket, as proof of the number of days which the claimant, George Baggerly, actually attended before me as a witness in said matter. At the hearing pursuant to the special order of this honorable court, these memoranda were offered in evidence by the attorney for the assignee, in proof of the number of days which the claimant attended before the register, and the compensation to which he was entitled by law, to which evidence the attorney for claimant objected, on the ground that these memoranda were not the records of the case, which objection I overruled, and allowed them to be read. (I was not asked by the attorney objecting to certify my ruling upon this question to the court). While I do not hold that the memoranda or entries made by the register form the record of a bankrupt case, I think they may be referred to, for the purpose of enabling him to know and determine what proceedings have been had before him in any particular case. They do not make the whole, but a part of the record in a case, and I think may be used by him as evidence of his own acts in any matter that has come before him judicially. These memoranda, together with the minutes and entries made by the clerk of the court, form and constitute the record.

By section four thousand nine hundred and ninety-eight (Rev. St.) of the bankrupt act of the 2d of March, 1867 [14 Stat. 517], the

register is empowered to make adjudications in bankruptcy, and by section five thousand and thirty-four (Id.) of said act, he is invested with power of appointing assignees in uncontested cases when the creditors fail to elect. In the case of Babbitt v. Walburn & Co., Case No. 695, it was held by the court that these orders were admissible in evidence to establish those facts when put in issue; if, then, the register being empowered by law to make such orders, and they being allowed as proof to establish them, I am unable to see why they should be of less weight, or not be equally valid to prove any other fact which is put in issue before the register judicially in any matter where he is by law authorized to act. The claimant Baggerly in his testimony does not, in any manner, contradict these entries as to the number of days which is shown by them he actually attended as a witness. He says he went up to the register's office on the 21st and 22d days of January, that he inquired of the register on one or two other occasions, and also inquired of the assignee when he would be examined; but these inquiries were made after he had been told by the assignee that if he wanted to examine him he would let him know, and he nowhere states that he attended at the register's office in obedience to the subpoena except on the two days above stated.

The letters introduced in evidence by the claimant, written from Wills Point, purporting to be answers to letters of said claimant which were not shown or offered in evidence, I think, in consideration of this case, are not entitled to much weight; they show a loose correspondence, and no proposition made or accepted by either party; nor does he state that he at any time advised the assignee that the situation he claims to have lost was ever offered to him, nor that he was detained from going by reason of the subpoena. His declarations to others as to his obtaining or getting a situation at that place could not have the effect of making the assignee responsible, or charging the estate of the bankrupt with the loss of it. Further, it is not shown by the testimony of the claimant or by Mr. Elsasser, in whose employment he was at the time, that he lost any time from his employment, not even on the two days that it is shown he actually attended at the office of the register.

The testimony of the assignee, Mr. Swann at whose instance the claimant was subpoenaed, shows that on the next day, or day after the witness was discharged, he met him and told him that if he wanted to examine him he would let him know. This information by the party who subpoenaed him, it seems to me, was sufficient for him not to have given himself further trouble about his examination. The witness, in his testimony, explains, to some extent, what he meant in his affidavit, in procuring his certificate for seventy-three days, that what he meant by attendance on the court was that he was ready to attend. This was but a conclusion, the mere understanding of the witness, which does not in law entitle him to compensation for the days not actually attended. The law allows fees to witnesses who actually, and not speculatively, attend in obedience to her mandate. At the hearing of said matter, and upon a review of the testimony, I allowed the claimant for seven days' attendance, which I thought was authorized by the testimony of the assignee, and it appears to me to be all that he can justly claim. Inasmuch as my official acts form a part of the testimony in this matter, I decline to express any opinion as to the question of taxing the costs occasioned by this appeal from my decision, including the certificate and other costs, which is respectfully submitted to your honor.

DUVAL, District Judge. The proceedings had before Mr. Register Newton, in regard to the claim of George Baggerly for seventy-three days' attendance in the above case as a witness, have been certified to me for revision at the request of said Baggerly. The evidence shows that the witness resided in the city of Tyler, where the register's court was held, and that he was engaged in business very near by. That a short time after the 21st of January, 1875, when the subpoena required him to appear, he was informed by the assignee who had been summoned that when he got ready for his examination he would come over and let him know, etc. These facts, in connection with others, prove conclusively, in my judgment, that the witness cannot be regarded as having been in "attendance" upon the court, in contemplation of law, any time after he was informed by the assignee that he would let him know when he was wanted, or words to that effect. To allow his claim for attendance as a witness for sixty-six days after that period would be wholly unauthorized, and I am surprised, under all the circumstances, that such a claim should be set up and urged.

Having carefully read and considered all the evidence which the register had before him, and the law properly applicable to it, my opinion is that the conclusions arrived at by him are correct. The decision of Mr. Register Newton is therefore affirmed, and the witness Baggerly taxed with all the costs of this proceeding. And it is so ordered and adjudged accordingly. The clerk will enter this order of record and give the usual notice thereof to the parties interested.

Case No. 3,352a.

CRANE v. BOSTON ADVERTISER.

[13 Reporter, 650.][1]

Circuit Court, D. Massachusetts. 1882.

LIBEL—PRIVILEGE—NEWSPAPER DISCUSSION—CONSTRUCTOR OF PROPOSED RAILROAD.

1. The public has a right to discuss in good faith the public conduct and qualifications of

[1] [Reprinted by permission.]

public men, and in such discussions they are not held to prove the exact truth of their statements or the soundness of their inferences, provided they are not actuated by express malice, or there is a reasonable ground for the statements and inferences.

2. The character of one who is the constructor and manager of a proposed railroad is open to public discussion under the above rule.

Action in damages for an alleged libellous publication. A demurrer was interposed which presented the question whether as matter of law the publication was libellous.

LOWELL, District Judge, in delivering the opinion of the court said: For the purpose of deciding this demurrer it must be assumed that the plaintiff had conceived and begun to carry out a plan for making a railroad from Boston to New York by the consolidation of certain shorter lines and otherwise, and that it was a part of his plan to obtain control of the New York and New England Railroad Company by electing directors favorable to his scheme; that the publication of the article complained of interfered with this plan to his prejudice, and that the statements of the article were not true, but were published in good faith, without express malice, and were, upon reasonable inquiry by the defendants, believed by them to be true. The contention then is, on the part of the defendants, that the subject-matter is one in which the public has an interest, and that, in discussing a subject of that sort, a public speaker or writer is not bound at his peril to see that the statements are true, but has a qualified privilege, as it has been called, in respect to such matters. The modern doctrine, as shown by the cases cited for the defendants, appears to be that the pubnc has a right to discuss in good faith the public conduct and qualifications of a public man, such as a judge, an ambassador, etc., with more freedom than they can take with a private matter, or with the private conduct of any one. In such discussions they are not held to prove the exact truth of their statements, and the soundness of their inferences, provided that they are not actuated by express malice, or that there is reasonable ground for their statements or inferences, all of which is for the jury. Some of the affairs of a railroad company are public and some are private. For instance, the honesty of a clerk or servant in the office of the company is a matter for the clerk and the company only. The safety of a bridge on the line is a subject of public moment. The public, in this sense, is a number who are or will be interested, and yet who are at present unascertainable. All the future passengers on the road are the public in respect to the safety of the bridge, and as they cannot be pointed out you may discuss the construction of the bridge in public, though you thereby reflect upon the character of the builder. If this definition of the public is a sound one, the commonwealth, considered as a stockholder, is not the public, for its interests are intrusted to certain officers, who are easily ascertained; nor would the interests of the share-holders become a public matter merely by reason of their number, unless it were proved that it would be virtually impossible to reach them individually.

If, therefore, the question was merely of the effect of the scheme upon the shares of the New York and New England R. R. Co., a corporation already chartered and organized, I should doubt somewhat whether it would be of a public nature. But, inasmuch as the project was one which affected a long line of road, as yet only partly built, and the consolidation of several companies, it assumes public importance. Perhaps the right of legislative interference may be taken as a fair test of the right of public discussion, since they both depend upon the same condition. The legislature cannot interfere in the purely private affairs of a company, but it may control such of them as affect the public. It cannot be doubted, I apprehend, that the legislatures of Massachusetts and Connecticut would have power to permit, or to prohibit, or to modify, a scheme such as is now in question. It interests the public, consisting of the unascertained persons who will be asked to take shares in it and those through whose lands it may pass, or whose business will be helped or hindered by it, that such a line should be well, and even that it should be honestly, laid out, built, and carried through. For this the character of the plaintiff as a constructor and manager of railroads seems to me to be open to public discussion when he comes forward with so great and important a project, affecting many interests besides the share-holders of one road, and that, therefore, the defendants, or any other persons, have the qualified privilege which attaches to the discussion of public affairs. The distinction is that when a railroad is to be built, or a company to build it is to be chartered the question whether it shall be authorized is a public one; when the company is organized, and the stock is issued, anything which merely affects the value of the stock is private. Demurrer overruled.

Case No. 3,353.

CRANE v. COWELL et ux. et al.

[2 Curt. 178.][1]

Circuit Court, D. Rhode Island. Nov. Term, 1854.

CONSTRUCTION OF WILL.

A devise, "if any of my grandchildren should die, leaving no surviving issue, then I give and devise all the estate, both real and personal, herein given to such grandchild, unto the survivor or survivors of such as shall die as aforesaid, and to their heirs and assigns for ever."—*Held*, 1.

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

That the words "herein given" referred to the entire will, and not merely to the particular clause in which those words occurred. 2. That they provided for the contingency of the death of a grandchild without issue, after the decease of the testatrix, and cut down the fee-simple absolute, previously devised, to a fee-simple conditional, or to an estate tail; but to which of these, it was not necessary to decide.

This was a suit in equity [by John Crane against Benjamin Cowell and wife and others], in which the construction of the will of Waite Smith came in question. The will was as follows:

Waite Smith's Will.

"In the name of God, Amen, I, Waite Smith of Providence, widow, although now being in firm health and possessing a sound mind and deposing memory, yet recollecting human mortality, and feeling the importance of that awful truth, 'It is appointed unto all people once to die,' do make, ordain, and establish this my last will and testament, in manner and form following, that is to say, recommending my soul through the merits of our Redeemer to the Great Father of spirits, and my body in decent Christian burial to repose in the bosom of the earth from whence it originated.

"I give and devise, in the first place, to my beloved daughter Martha, wife of Jeremiah Brown Howell, Esq., the use and occupation of all the real estate of which, at the time of my death, I may be seized and possessed, for and during the term of her natural life, to her sole, separate, and individual and particular use, and to the use of no other person whatsoever, hereby authorizing her the said Martha to take, receive, and appropriate, all and singular, the rents and profits thereof for and during all the time aforesaid. And it is further the intent and meaning of this devise, that she, my said daughter, shall have full power and authority to lease any part of the lands aforesaid, for the purpose of building thereon, for and during such term as is usual and customary in such leases in said town of Providence, and by covenant to bind the devisees of said lands to the performance of said lease or leases, so that the rents received thereon be made payable to her, my said daughter, and to her sole use as aforesaid, for and during her life as aforesaid, and to said devisees at the determination thereof. And further, the intent and meaning hereof is, that if her comfortable, decent, and respectable support and maintenance shall render it needful, she, my said daughter, shall, in such case, have full power and authority to sell and convey so much of the estate aforesaid, as will fully answer these purposes, and the avails of such sales to receive and appropriate to her sole use as aforesaid. And all the devises aforesaid, are to her, the said Martha, without impeachment or waste.

"Secondly. I give and devise unto my grandson John Brown Howell, the lot whereon the house of Eveleth & Harding now stands, being fifty foot on the front thereof, and holding the same width one hundred and fifty foot back towards Benefit street, to him, his heirs, and assigns for ever.

"Thirdly. I give and devise unto my grandson Charles Field Howell, the house wherein I now live, and the lot on which it stands, which lot extends south to the last-described lot and a line running from the north-east corner thereof to Benefit street, in the same direction that the north line of said lot runs, to him, his heirs, and assigns for ever. I also give and bequeathe unto my said grandson Charles, on account of his name, a silver tankard and six table-spoons marked C. F.

"Fourthly: I give and devise unto my granddaughter Wait Field Howell, a lot of land whereon I propose to build a house if I should live, measuring as far east and west as I own north and south, to her, her heirs, and assigns for ever. I also give and bequeathe unto my said granddaughter, on account of her name, one silver teapot, one large family Bible, and my best bed and the furniture thereof with white diaper curtains, being the suit I brought from Smithfield, marked No. 3, together with the square mahogany bedstead which I purchased of the said Jeremiah Brown Howell.

"Fifthly. I bequeathe unto my granddaughter, Martha Brown Howell, a silver teapot.

"Sixthly. I give and bequeathe unto my granddaughter Elizabeth Brown Howell, one pair of silver pint cans.

"Seventhly. I give and bequeathe all the residue of my personal estate, in equal shares, unto all my granddaughters.

"Eighthly. I give and devise all the remainder of my real estate unto all my grandchildren, in equal shares, and to their heirs and assigns for ever. And it is hereby provided, and my will is that if any of my grandchildren should die, leaving no surviving issue, then I give and devise all the estate, both real and personal herein given, to such grandchild, unto the survivor or survivors of such as shall die as aforesaid, and to their heirs and assigns for ever. Provided that none of my grandsons shall, in any event, have any of my personal estate, other than the specific legacies herein bequeathed unto them so long as any of my granddaughters, or any of their issue, be living. It is also further provided, and my will is that if all my grandchildren should die leaving no surviving issue, then I give and devise all my estate unto two of the daughters of my uncle Thomas Field, namely, Mary and Sally, and unto two of my said uncle's granddaughters, namely, Mary and Elizabeth Thornton, and to their heirs and assigns for ever.

"My will further is, that my executor hereinafter named fulfil my indenture to James Pink, my indentured mulatto servant, and that they provide for him a flock bed. under straw bed, bolster, and pillows, bedstead,

cord, two pairs of sheets, pillows, and bolster cases, one pair of blankets, and one yarn coverlid, and set off to him a small piece of land most convenient for my devisors, and large enough for a small house and garden, for his own use but not to sell, so that he may have the use and improvement thereof during his natural life, provided he lives in some respectable family after my decease, and faithfully fulfils his indenture to them as he was bound to do to me.

"Lastly. I appoint Isaac Brown and my said daughter executors of this my last will and testament, and I hereby order and direct them to pay all my just debts and funeral charges, and for the purpose of enabling them to do the same, I give them the following power and authority, that is to say, to sell at auction, or at a private sale, my lot of land in the neck adjoining the highway on three sides of it, containing about twenty acres, one other lot of land purchased by me of my son-in-law the said Jeremiah Brown Howell, being the land which descended to him from his mother, also a wood lot situated in Gloucester, containing about one hundred acres, which was my mother's, together with three lots lying east of the Benevolent Congregational meeting-house, purchased by me of that society, and also a thatch bed situated in said Providence, and now improved by me, and having sold said lands, to convey the same by deeds duly executed for that purpose, and provided the moneys arising from the sales aforesaid should not be sufficient to pay the debts and expenses aforesaid, together with the expenses of settling my estate, and completely executing this my last will and testament, then, and in that case, I hereby authorize and empower my said executors to make sale in manner as aforesaid, of so much of my other real estate as may be sufficient to make up that deficiency. And my will is that all deeds of conveyance of the lands aforesaid, sold in manner aforesaid, for said purposes, signed, sealed, and delivered and acknowledged by said executors, shall and may vest in the purchaser a good title thereunto. And I hereby revoke all former wills, and declare this to be my last will and testament.

"In testimony whereof I have hereunto set my hand and seal this fifth day of February, A. D. 1808."

Mr. Jenckes, for complainant.
Mr. Ames and Mr. Bradley, contra.

CURTIS, Circuit Justice. The land in question was specifically devised in the third clause of the will; and the first question is, whether the provisions of the eighth clause, which follow the devise therein made to the grandchildren, are applicable to the land devised to Charles F. Howell by the third clause. We are of opinion that those provisions of the eighth clause are applicable to all the lands devised to each of the two grandchildren, specifically, as well as to the "remainder of my real estate," devised in the eighth clause. The subject-matter in the contemplation of the testatrix, is described to be "all the estate, both real and personal, herein given," &c. The inquiry is, what was meant by the words "herein given." Do they refer solely to what is given by the eighth clause, or to what is given to any grandchild by the will? It is obvious, the former interpretation is not the true one; because the testatrix is dealing with personal as well as real estate, and the eighth clause devises real estate alone. She could not have intended to limit the effect of that provision to what passed under the eighth clause, for she expressly extends it to personalty which did not so pass. Moreover, the proviso which follows, and which only qualifies the effect of the preceding sentence, excepts from its operation specific legacies, made by other parts of the will; which there would have been no occasion to do, if the only property intended to be affected was devised by the eighth clause.

The next question is, whether the third clause, taken in connection with these provisions contained in the eighth clause, gave to Charles F. Howell an absolute estate in fee-simple. That such an estate is given to him by the third clause is clear. What is the effect of the subsequent provisions? Do they cut down the estate in fee-simple absolute, to an estate tail, or to a conditional fee, with an executory devise over; or to state the question less abstractly, does this part of the will provide only for the death of one or more grandchildren without issue, in the lifetime of the testatrix, so that at her decease each grandchild then living took absolutely, or does it provide for the death of one or more grandchildren without issue after the testator's decease, so that upon the death of any one, and the failure of his or her issue either definitely or indefinitely, the property was to go over, by way of executory devise, or by way of remainder after an estate tail? The counsel for the complainant holds the first of these views, and has addressed to the court a learned and ingenious argument in support of it. But we are clearly of opinion that it cannot be maintained. Upon a subject which has been adjudicated on in so many cases, perhaps it would be too much to declare, that any conclusion can be arrived at without some difficulty, and in entire harmony with all the decisions. But a careful examination of them enables us to say, that those relied on to show that the testatrix was simply making provisions for the decease in her lifetime of some of the objects of her bounty, are distinguishable, satisfactorily, from this case. There are numerous cases in which words referring to the death of a legatee, and in that event giving the property over, have

been construed to mean, his death in the lifetime of the testator. A gift to A., and in case of his death to B., is held to confer on A. an absolute interest if he be living at the testator's death. The cases are collected by Mr. Jarman in the second volume of his Treatise on Wills (chapter 48). The courts have proceeded upon the somewhat refined, but perhaps not unsatisfactory reason, that the testator had some contingency in view, and as the event of A.'s death was inevitable, the only contingency which could be supposed to be contemplated was, whether he should die during some particular period of time; and to prevent lapsing, and in favor of vested, rather than contingent interests, they have considered the lifetime of the testator to be that period. But it is manifest, that the whole basis of this reasoning fails, if the will gives the property over, not simply if the legatee die, but if his death is connected with some collateral event, such as dying without issue, which is contingent. In such a case, there is no necessity to seek for a contingency, or for ingrafting on the language of the testator, a limitation of time, during which the event is to happen, to render it contingent. For the testator has himself in terms announced an event which may or may not happen after his decease, as the contingency upon which the property is to go over. And this class of cases may be found collected in 2 Jarm. Wills, c. 40. There is another class of cases in which gifts over have been made upon survivorship among tenants in common, or among a class of persons, in which it has been held that survivorship at the death of the testator was intended. These cases are also set down by Mr. Jarman (volume 2, p. 632 et seq.). But whatever rule may be considered to exist on this subject, it can have no application to a case where the limitation to survivors is to take effect upon a contingency subsequent to the death of the testator. A gift over to survivors, implies that the persons who are to take shall be alive when the gift over takes effect; and if it is to take effect after the death of the testator that they should be alive after his death, and at the time when the contingency shall happen.

Having thus adverted to the rules of construction, it now remains to look at this will, to see if it be within the scope and reason of either and which of those rules. The language is, "My will is, that if any of my grandchildren should die, leaving no surviving issue, then I give and devise all the estate, both real and personal, herein given to such grandchild, unto the survivor or survivors of such as shall die as aforesaid, and to their heirs and assigns for ever." Here the property is given over, not simply on the event of death, but of death leaving no surviving issue, which is a contingency sufficient to satisfy the apparent intent of the testator, to provide for an uncertain event, and rendering it unnecessary to import into the will, a particular period of time, within which the death must happen, to be contingent. Though I do not intend to intimate any doubt of the soundness of the rule of construction, which introduces into a will such a limitation of time, in cases where it is necessary to make a contingency, I feel no disposition to do it when it is not absolutely necessary. Indeed, the hypothesis that a testator, in making a testamentary provision, to take effect only upon and after his decease, really intended to provide for events in his lifetime, is somewhat unnatural and improbable, and has been more than once admitted to be so. Lord Brougham, who reviews many of the cases in Home v. Pillans, 2 Mylne & K. 15, says, this construction has always been adopted with some reluctance, founded as it is upon a supposition, which if not violent, is somewhat strong; which has been called unnatural by one chancellor, and another, Lord Hardwicke, has traced the origin of the term "lapse," to the supposition that the possibility of the legatee dying in his lifetime, escaped the observation of the testator. Ulrich v. Litchfield, 2 Atk. 373. In this case, the basis of this rule of construction failing, and the words of the testatrix fairly importing a dying at any time without surviving issue, I do not feel at liberty to introduce into the will the words "in my lifetime," and thus make the testatrix mean what she certainly has not said, and what I cannot find cause to declare she must have meant. Considering, then, that the estate of each grandchild was to go over in the event of his or her dying without surviving issue at any time after the death of the testatrix, the clause as to survivorship is necessarily controlled thereby, and must be held to refer to those, who shall survive when the event happens, upon which they are to take. Moreover, if the case at bar came within the rules of construction contended for by the complainant, the question between a definite or indefinite failure of issue, which has so often arisen, and has given rise to such diversities of opinion, could in very many cases have been avoided by considering the death, and failure of issue, and survivorship, were all to be referred to the lifetime of the testator. Without undertaking a review of these cases, a few of them may be referred to, which are not distinguishable from the case at bar, so far as respects the application of the rules contended for by the complainant. Thus in Anderson v. Jackson, 16 Johns. 382, there was a devise to A. and B. in fee-simple, and if either of them should die without issue, his share was to go to the survivor, and it was held to be a conditional fee. The same will was twice before the supreme court of the United States (12 Wheat. [25 U. S.] 153, and 1 Pet. [26 U. S.] 570), and the same construction was affirmed. The construction of this will was thus repeatedly examined, with the aid of the most eminent counsel in the country, and I am not aware that it was

ever suggested, that the dying without issue, and the survivorship therein provided for, were events to occur before the decease of the testator. Parker v. Parker, 5 Metc. [Mass.] 134; Hawley v. Northampton, 8 Mass. 3; Morgan v. Morgan, 5 Day, 517; Den v. Schenck, 3 Halst. [8 N. J. Law] 29; and the English cases collected in Lewis, Perp. 311, —all go to prove that this will must be construed to create an estate tail or a conditional fee, and that the effect of the clause under consideration does not merely provide against a lapse.

The result at which the court has arrived is, that the absolue fee-simple estate given by the third clause of the will to Charles F. Howell, was cut down to a conditional fee, or to an estate tail, by the subsequent provision of the will. Which of these two estates he took, it may not be necessary to decide; and as it is a question of difficulty, and may affect the rights of parties not before the court, in the present stage of the cause, it will not be passed upon.

CRANE (ERRETT v.). See Case No. 4,523.

CRANE (HARVEY v.). See Case No. 6,178.

Case No. 3,354.

CRANE v. McCOY et al.

[1 Bond, 422.][1]

Circuit Court, S. D. Ohio. Dec. Term, 1860.

INJUNCTION—REMEDY AT LAW—INTERFERENCE BY SHERIFF WITH MARSHAL—MARSHAL'S RETURN—REPLEVIN — CONCURRENT JURISDICTION — RECEIVER.

1. It is not enough to defeat jurisdiction in equity that there was a remedy at law: the remedy must be complete, prompt, and efficient.

2. A chancellor in the exercise of a just discretion, upon an application for an injunction, may properly take into consideration the existence of an actual conflict or imminent danger of a violent collision between two authorities, in determining the expediency of awarding this preventive process.

3. If the rights of a party can only be enforced at law by long continued, strenuous, and expensive litigation, and those rights can be more promptly and efficiently asserted in equity, a stringent reason is offered for the application of its power.

4. The sheriff of a county has no right to disturb or in any way interfere with the possession of property legally in the possession of an United States marshal.

5. The return of an United States marshal is conclusive of the facts which it sets forth, and its truth can not be collaterally impeached.

6. Property which has been replevied, does not pass into the possession of the plaintiff after he has given a bond which has been accepted by the officer, until there is a formal delivery of the property by the officer.

7. Where there is concurrent jurisdiction in courts, the tribunal first obtaining jurisdiction of the subject or person shall retain it.

[Cited in Bruce v. Manchester & K. R. Co., 19 Fed. 345.]

8. The application for the appointment of a receiver is always addressed to the sound discretion of the court to which it is made. As a general rule, such appointment will be made in all cases where the interests of parties seem to require it.

Lee & Fisher, for complainant. Mr. Probasco, for defendants.

OPINION OF THE COURT. The questions before the court arise on a motion to dissolve the injunction, which has been granted in this case, and to rescind the order for the appointment of a receiver. For obvious reasons it will be improper, in the decision of this motion, to pass on any questions of law or fact directly involving the title to the property in controversy, and which will necessarily come under the consideration of the court on the final hearing.

The bill in chancery in this case was filed on the 4th of January, instant, by David Crane, a citizen of the state of Tennessee. It states, in effect, that on the 1st inst. he purchased twelve hundred and twenty-four barrels of apples, and three hundred and thirty-two barrels of onions of D. Harper & Son, commission and produce merchants of Cincinnati, for the sum of $2,429.31, for which he gave his two negotiable promissory notes for equal amounts, payable in thirty and sixty days; that he was in possession of said articles, and had shipped a part of the apples to Nashville, his place of business, and had sold a few barrels in Cincinnati; that on the 2d of January, W. G. McCoy and Roswell Gould sued out of the superior court of Cincinnati a writ of replevin against D. Harper & Son, upon which the sheriff of Hamilton county took one thousand one hundred and seventy barrels of said apples and delivered them to said McCoy and Gould; that said Crane thereupon sued out of this court a writ of replevin for said applies against said McCoy and Gould, and they were taken by the marshal and were in his possession when Libbeus L. Harding obtained a writ of replevin from said superior court of Cincinnati against said Crane and Lewis W. Sifford, the marshal, and that by the aid of a posse, and by forcible means, the sheriff of Hamilton county intervened to prevent the delivery of said property by the marshal to the said Crane; that a collision had already occurred between the marshal and the sheriff, and that bloodshed was anticipated in the attempt by the marshal to retain possession, and the attempt of the sheriff to deliver the property to said Harding. The bill further alleges, that the purchase by said Crane of Harper & Son was in good faith, and for a full consideration; that said Harding has no just claim to the property and never was in

[1] [Reported by Lewis H. Bond, Esq., and here reprinted by permission.]

actual possession thereof; that said apples are perishable; and in view of the collision which had occurred, the further violence threatened, and the further and endless litigation likely to ensue from the conflict between the marshal and the sheriff, and for the protection of the rights of said Crane, he prays the court to appoint a receiver to take possession of the property, and hold the same subject to the further order of this court, and that an injunction issue restraining the sheriff of Hamilton county, and all other persons from further interference with said property, until the rights of all the parties can be finally settled. The bill is duly verified by the oath of the complainant, Crane, and as to some of the facts, by the affidavit of William M. Manson, the deputy marshal intrusted with the execution of the writ of replevin issued from this court. On the 4th of January, instant, an order for an injunction and the appointment of a receiver was made by the judge of this court. In pursuance of that order an injunction bond in the sum of three thousand dollars has been duly executed and filed by said Crane, and a writ of injunction has been issued and served. The receiver appointed by the court has accepted the appointment and taken the necessary oath, and given bond for the faithful performance of his duties, in the sum of $3,000. He has also filed his first report setting forth that he is in possession of the property, and pursuant to the order of the court, has given public notice that said apples will be offered for sale on the 14th of January, instant. Several affidavits have been filed by the defendants to prove that the complainant, Crane, never had any legal title or claim to the property in question. These affidavits are presented in behalf of L. Harding, who is a defendant in this bill, and who is the plaintiff in the last action of replevin brought in the superior court of Cincinnati to obtain possession of the property. These affidavits show a sale of the apples by D. Harper & Son to McCoy & Co. on the 14th of December last on terms set out in the affidavit of McCoy; and that on the 15th of December, Henry Harper, one of the firm of Harper & Son, for reasons which do not appear, notified McCoy & Co. that he would not abide by the agreement made on the preceding day for the sale of said apples. It also appears that there was a controversy as to the right of property, as between said Harper & Son, and said McCoy & Co.; the latter claiming a right thereto, and the former denying their right, and asserting property in themselves; that while this controversy was pending, the sale of the apples was made by Harper & Son to Crane, and possession given, though the apples still remained in the warehouse of Harper & Son, on Walnut street; that on the 2d of January, McCoy & Co. sued out a writ of replevin from the superior court of Cincinnati, under which the sheriff took the apples, and delivered them to McCoy & Co., who gave a bond, as required by the statute, with J. W. Patrick and L. Harding as their sureties; that McCoy & Co. assigned to said Harding the sheriff's order on Harper & Son for the delivery of said apples; that on the 3d of January the complainant, Crane, sued out his writ of replevin from this court against said McCoy & Co., under which the marshal took the apples still remaining in the warehouse of Harper & Son, and upon the execution of a delivery bond by said Crane was attempting to deliver possession to Crane; that on the same day, January 3, the said Harding claiming possession under an assignment of the delivery order given by the sheriff to McCoy & Co., as already stated, sued out a replevin from the superior court of Cincinnati, in the service of which, by the sheriff, the difficulty or conflict, which will be hereafter noticed, occurred. And at this stage of the proceedings, the complainant, Crane, filed his bill, invoking the aid of this court as a court of chancery.

The defendants have filed their motion to dissolve the injunction, and to rescind the order for the appointment of a receiver. The grounds of this motion are substantially: 1. That the court had no jurisdiction to award an injunction, and appoint a receiver; 2. That there was neither in law nor in fact any conflict between the marshal and the sheriff, rendering the interposition of this court proper or necessary; 3. That the sheriff has lawfully a right of possession, as against the marshal and the complainant Crane. In adverting to these grounds for dissolving this injunction, it will not be necessary, and perhaps would be improper, on this preliminary motion, to attempt minutely to consider all the facts presented to the court by the affidavits and exhibits in the case. The questions presented as to the title to this property will come more properly before the court on the final hearing, and can not now be satisfactorily settled on the ex parte evidence presented by the parties. If the judge, in the just exercises of his powers as a chancellor, had jurisdiction to make the order in question, and a case is made, which, prima facie, justified the allowance of an injunction, and the facts now before the court require, for the purposes of equity, that the injunction should not be dissolved, the present motion can not prevail.

If, as insisted by the defendants' counsel, the judge had no rightful jurisdiction to make the order in question, the injunction must be dissolved. The objection on this ground is that the complainant had an adequate remedy at law, in the action of replevin which was pending, or by an action of trespass against the plaintiff in the action of replevin, and the sheriff who executed the process, if they were wrong-doers. The sixteenth section of the judiciary act of 1789 (1 Stat. 82) prohibits suits in equity where there is a plain, adequate, and complete remedy at law.

The construction of this statute has frequently been under review by the supreme court of the United States. In the case of Boyce's Ex'rs v. Grundy, 3 Pet. [28 U. S.] 210, the court say, in reference to that section, that it had been often and uniformly held, "that it is merely declaratory, making no alteration whatever in the rules of equity on the subject of legal remedy. It is not enough that there is a remedy at law; it must be plain and adequate; or, in other words, as practical and as efficient to the ends of justice, and its prompt administration, as the remedy in equity." It will not be necessary to refer to other cases in that court, in which the same doctrine has been even more broadly recognized and asserted. It is not enough to defeat jurisdiction in equity, that there was a remedy at law. The remedy must be complete, prompt, and efficient. And it requires no argument to show, in reference to the case before the court, that the law did not afford such a remedy to the complainant. In the first place, without noticing specially all facts, it is clear that at the time the order for the injunction issued, a collision had occurred between the marshal and the sheriff. The marshal asserted his rightful possession of the property, and the sheriff insisted on his right to take it from his possession, under the process from the state court, and was prepared to enforce that right by the use of force, if necessary. Now collisions between the federal and state authorities are always unpleasant, and greatly to be regretted, and, when possible, to be avoided. And, it seems to me, the complainant by resorting to the peaceful remedy of an injunction, and thus avoiding further, and possibly violent and bloody conflict, is entitled to commendation rather than censure, and has not thereby injured his standing in a court of equity. It is also clear, that a chancellor in the exercise of a just discretion, upon an application for an injunction, may properly take into consideration the existence of an actual conflict, or imminent danger of a violent collision between the two authorities, in determining the expediency of awarding this preventive process. And so, too, if the rights of a party can only be enforced at law by long continued, strenuous and expensive litigation, and those rights can be more promptly and efficiently asserted in equity, a stringent reason is offered for the application of its power. In reference to the controversy between these parties, it is obvious that there would have been much litigation at law, before their rights could have been finally settled; whereas, by a resort to a court of chancery, all necessary parties being brought in, the rights of all can be fully and satisfactorily adjusted.

But it is further insisted in support of the present motion, that this court had full power, as a court of law, to enforce its own process, and protect its officers in the execution of that process. There is no doubt of the existence of this power in this court. If its officer is obstructed or interfered with in the just exercise of his duties, the court may interpose and punish such unwarranted interference, as a contempt of its authority. But, for many obvious reasons, the exertion of this power is to be avoided, unless there is the most stringent necessity for it. And especially is this true, when the conflict of authority may involve the courts of the Union and the courts of a state in embarrassing and unpleasant collisions.

I will, however, pursue this subject no further. I am clear in the opinion, that in view of the facts of this case, as set forth in the complainant's bill, and as they appear from the affidavits and exhibits in the case, the order for the injunction was a proper exercise of a jurisdiction pertaining to a judge of this court, in the exercise of his powers as a chancellor. And in this connection, I may properly notice the fact, that his honor, Judge McLean, on one occasion within my recollection, strongly stated it as his opinion, that as a general rule in these conflicts of jurisdiction involving the right to the title and possession of property, the remedy afforded by a court of equity is greatly to be preferred to protracted and vexatious litigations at law. The views thus presented, are upon the assumption that the marshal, at the time the sheriff attempted to serve the writ of replevin sued out by Harding against Crane and Sifford, was in the lawful possession of the property in question, and that the sheriff, therefore, had no right to seize it on the process in his hands; and that his attempt to seize it, under the circumstances referred to, and in view of the probable results of his action, presented a state of affairs rendering it proper and necessary for Crane to resort to chancery, and justifying the order of the court made in the case. It is insisted, however, by the counsel for the defendants, that there is nothing in the facts before the court from which the inference can be fairly drawn, that there was any actual conflict as between the marshal and the sheriff. It is argued, that the property, when the sheriff attempted to serve the writ of replevin sued out by Harding, was in the possession of Crane, and not of the marshal, and therefore subject to seizure by the sheriff under the writ in his hands. If this proposition is sustainable, it is clear the sheriff had a right to take the property, and the marshal was wrong in making any opposition to it. If, on the other hand, the property was legally in the possession of the marshal under the writ of replevin issued from this court in the case of Crane against Gould and McCoy, the sheriff had no right to disturb or in any way interfere with the marshal's possession. How stands the fact as to the possession of this property at the time the sheriff attempted to serve the writ of replevin? The return to the writ issued from this court, in the case of Crane against Gould and McCoy,

sets forth, that the marshal by his deputy, pursuant to the command of the writ, took 1,174 barrels of apples, and caused them to be duly appraised; and having taken a delivery bond from the plaintiff, Crane, pursuant to the statute, he commenced the delivery of the property to him, and had delivered seventy-five barrels, when he was obstructed and prevented from delivering the other part by the interference of the sheriff of Hamilton county, and others. He then recites the fact that a receiver had been appointed by this court, who has in possession 1,099 barrels of the apples. This return clearly shows that no more than seventy-five barrels were delivered to Crane, and that the balance remained in the possession of the marshal, and passed from him into the possession of the receiver. This return of the officer is conclusive of the facts which it sets forth, and its truth can not be collaterally impeached. And it proves that as to 1,099 barrels of the apples, the possession was in the marshal, and not in Crane. And being thus in the hands of the marshal, under legal process, the sheriff had no right to take them under the writ of replevin in his hands.

It is insisted, however, that by operation of the statute of Ohio, upon Crane's giving bond to the marshal, the property replevied passed into the possession of Crane, and was therefore subject to the operation of the sheriff's writ of replevin. On this point no authorities were cited, and it may be presumed there are none to sustain the position. In the absence of any authoritative decisions to the contrary, I incline to the opinion that after the bond is given and accepted by the officer, there must be a formal delivery of the property by the officer. The return of the officer before referred to, shows only a delivery of seventy-five barrels of the apples. It is insisted in argument, that this partial delivery by the marshal is by implication to be deemed as a delivery of all the apples to Crane, and that the possession thereby passed to him, and was subject to the action of the writ of replevin sued out by Harding, and it is also contended that the giving the delivery bond by Crane, and its acceptance by the marshal, transferred the possession to Crane. The return of the marshal showing possession in him of all the apples, except the seventy-five barrels delivered to Crane, is to be viewed as conclusive of that fact, and the point referred to is not material in the decision upon the question before the court. It was no doubt competent for the marshal to have delivered the entire quantity of the apples in bulk, as they there remained in the warehouse. But was he bound to make the delivery in this way? It occurs to me, that it was in the discretion of the officer in what manner the delivery should be made, and in the exercise of this discretion he was properly controlled by the circumstances of the case. It appears that Crane was prepared to remove the apples to the river landing for the purpose of shipment, and drays were in readiness to take them. The marshal seems to have thought it was his duty to deliver them on the pavement, in front of the warehouse. I am unable to perceive that there can be any legal objections to this mode of delivery, having regard to the facts existing and known to the marshal. These facts warranted the apprehension, that there might be, and probably would be, some interference in the attempt to give the possession to the claimant of the property.

The doctrine that where there is concurrent jurisdiction in courts, the court first obtaining jurisdiction of the subject or person shall retain it, is not controverted, and is too well settled to be disputed. This doctrine applies clearly to the case under consideration. There was a legal possession in the marshal of that portion of the property in question, of which there had been no actual delivery to Crane. That possession could not be rightfully interfered with or disturbed by process from another court; and the property was subject to any order which the court having it in possession, might deem it proper to make, in accordance with law and the usages of courts. The application for the appointment of a receiver is always addressed to the sound discretion of the court to which it is made. As a general rule, such appointment will be made in all cases where the interests of parties seem to require it. The posture of this controversy, before referred to, a conflict existing, with an apprehended violent collision, and a probability of fierce and long continued litigation at law, was a sufficient reason for the appointment of a receiver, and the order for the injunction. But in addition to this consideration, the perishable nature of the property in contestation could not be overlooked. The apples were liable to rapid decay, and if they were to be the sport of interminable struggles for possession, and cross actions of replevin, before these could be ended, they would be entirely valueless. Hence, it would seem obviously to be for the interest of all concerned, that they should be withdrawn from the operation of such a warfare, and disposed of in a way most advantageous to all. The order for the appointment of a receiver, who has taken an oath for the faithful discharge of his duties, with the superadded security of a bond, amply secures this object. In the meantime, all the questions of title to this property are reserved until there can be a full and final hearing, and a satisfactory decision settling the rights of the parties. The order of the court requires the proceeds of the property to be placed under its order, and it will be paid to those who establish a legal right to it.

Upon the whole, I see no sufficient reason for dissolving the injunction, or vacating the order for the appointment of a receiver. The motion is therefore overruled.

Case No. 3,355.

CRANE v. MORRISON et al.

[4 Sawy. 138;[1] 7 N. B. R. 393.]

District Court, D. California. Dec. 15, 1876.

DISSOLUTION OF PARTNERSHIP—CONVERSION—RIGHTS OF SEPARATE CREDITORS.

Where A. and B., partners in trade, dissolved the partnership, and divided the joint property between them, each partner assuming and agreeing to pay the debts contracted in respect of the property of which he became the separate owner, and subsequently B. entered into a partnership with C., to whom he sold a third interest in his share of the former joint property of A. & B., and the firm of B. & C. contracted debts, and became bankrupt; but before the adjudication their joint property was attached at the suit of an alleged firm creditor of A. & B.: *Held*, that only the balance of the firm property of B. & C., after satisfying the firm debts, and adjusting the accounts between the partners, was subject to the attachment, and that the assignee in bankruptcy was entitled to the possession of the joint property of B. & C., for the benefit of the joint creditors of the firm.

[Suit by Collins Crane, assignee in bankruptcy of Stevens and Marshall, against I. C. Morrison and others, to recover assets of the bankrupt estate.]

W. G. Holmes, for complainants.
Seth Robinson, for defendants.

HOFFMAN, District Judge. In the case of Hyde v. Baker [Case No. 6,965] this court had occasion incidentally to consider what are the rights of a retiring partner who has assigned his interest in the firm assets to a remaining partner upon an agreement by the latter to become responsible for the firm debts. There seemed to be much reason for holding with Mr. J. Allen in Menagh v. Whitwell, 52 N. Y. 157, 158, that even where there was no express stipulation for the application of the joint assets to the payment of the joint debts, the same equity might exist in favor of the retiring partner to compel such application as he would have had as continuing partner. But this equity cannot exist where new rights have attached by reason of the change of interests, as where rights of individual creditors have accrued, or where the continuing partners or the new firm have disposed of the property, or there are creditors of the new firm. 9 Cush. 553; 14 Gray, 534; Dimon v. Hazard, 32 N. Y. 65.

It appears in the case at bar, that on the second of July, 1875, the firm of Jessup & Stevens, composed of William H. Jessup and Russell Stevens, was dissolved by mutual consent, and public notice given thereof by advertisement. The firm property was divided between the partners, Stevens retaining the Cobb Mountain saw-mill property, and Jessup the flour-mill property in Lake county. Each of the partners agreed to assume and pay and save the other harmless from the debts contracted in respect of the property of which he became the separate owner. Stevens having failed to comply with this latter part of the agreement within the time prescribed, Jessup notified him that he had rescinded the contract. In the meantime, and before any default on the part of Stevens to fulfill his contract had occurred, he had entered into a partnership with one Marshall to run the Cobb Mountain saw-mill, and had conveyed to him one-third of that property for $10,000, $1,000 to be paid in cash, and the remainder in the manner specified in the agreement.

On or about the seventeenth September, 1875, the defendant, Morrison, commenced an action against Stevens and Jessup on a promissory note for $600, made by Stevens and indorsed by Jessup. The consideration for this note was the payment (in effect) by Morrison of a firm debt due by the former firm of Stevens & Jessup to one Mills. On the same day, an attachment was levied by Morrison's direction on the property now in dispute. The property seized consisted chiefly of lumber at the Cobb Mountain saw-mill, and claimed by and in the possession of the new firm of Stevens & Marshall. It still remains in the possession of the sheriff (the defendant Ingram), who holds it under that attachment. On the twenty-ninth December, 1876, Stevens & Marshall were adjudged bankrupts, and their assignee brings this suit to recover the property referred to. It does not very clearly appear whether the property was seized as the property of Stevens, or that of Stevens & Jessup, or that of Stevens & Marshall. The right to hold it seems to be defended on three grounds: (1) That by the rescission by Jessup of the contract between him and Stevens the property which had been divided between them and converted into the separate property of each was reconverted into joint property, and became liable for the joint debts of the dissolved firm, of which debts the promissory note signed by Stevens and indorsed by Jessup, was one; (2) That as some of the property was the joint property of the firm of Stevens & Marshall, the separate creditor of Stevens had a right to seize and sell his interest in the firm; i. e., the balance that might be due after payment of the joint debts; (3) That the property was in part at least the separate property of Stevens, and, therefore, liable for his debts.

1. It seems to me unquestionable that the agreement between Stevens and Jessup operated not only a dissolution of the partnership, but a conversion of the firm property assigned to each partner into the separate property of the partner to whom it was assigned. Whatever lien or equity Jessup might have enforced to compel the application by Stevens of his share of the joint assets so converted into his separate property to the payment of those of the joint debts which he had assumed, (a point upon

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which it is unnecessary to express an opinion) it is plain that Jessup would have had no such right as against the creditors of the new firm, or any assignee of Stevens for value. Before default made by Stevens or notice of rescission by Jessup, the latter had sold a third interest in the property to Marshall, with whom he had entered into partnership, the partners holding the whole property as joint assets in the proportion of their respective interests. The adverse and paramount rights of Marshall, and of the creditors of Stevens & Marshall, had therefore attached, and Jessup had no longer any right or lien, equitable or otherwise, upon the property, for the payment of the joint debts of the former firm. A fortiori the property which had thus become the property of the new firm, and primarily liable for its debts, could not be taken to satisfy the claim of a joint creditor of the extinct firm, even admitting Morrison to have been such. On the bankruptcy of the firm of Stevens & Marshall, their joint property passed to the assignee in bankruptcy, to be applied to the satisfaction of their joint debts. The balance (after satisfying those debts and adjusting the accounts between the partners), which may be due to Stevens, would alone be subject to Morrison's attachment. As the firm is admitted to be insolvent, no such balance can be looked for.

2. It is claimed that Morrison, as the separate creditor of Stevens, had a right to seize all the property of the firm of Stevens & Marshall, although he can sell only the defendant partner's interest, and that the sheriff thereby became tenant in common with the other partner. In the case of Osborn v. McBride [Case No. 10,593], this court had occasion to consider a question nearly similar. In that case, several judgments had been obtained against each of two partners, for separate debts, and several executions issued. The interests of both partners in the firm assets had been separately sold on execution, and bought by the defendant in the suit brought by the assignee in bankruptcy of the firm. It was held that "the sale on execution, of either or both of the partners' interests, in satisfaction of a separate debt, gave to the purchaser only an interest in the assets which might remain after the payment of the partnership debts. The fact that he purchased the interests of both the partners, sold on separate executions, can have no effect to enlarge the interest of either, acquired on the separate sale of that interest. He took merely a right to an account, and can now hold the partnership assets only subject to that account, and in entire subordination to the joint creditors." It was further held, that partnership debts have in equity and by the bankrupt act an inherent priority of claim, to be discharged out of partnership property, and as between a firm and its creditors, the title of the former is not divested by any separate transfers to strangers, by one or all of the partners, in payment of their individual debts, on by proceedings against them separately with reference to their individual interests, and when there has been no transfer by the firm, and the property remains in specie and capable of being levied upon, it may be followed in the hands of those claiming by such transfers or proceedings, and may be levied on by a judgment creditor of the firm. Menagh v. Whitwell, 52 N. Y. 149. But even admitting that the rights here attributed to the creditor may be doubtful, and that his remedy is to be sought in equity, there can be no doubt that where the separate creditor of a partner has taken partnership property in execution for his separate debt, the other partners may file their bill against the separate creditor, the debtor partner and the sheriff, praying a general account of the partnership, and the payment of what is due them, and that the debtor and sheriff may be enjoined from proceeding under the execution, and selling the stock and effects; and a court of equity will give relief accordingly, and the same relief is given in favor of the assignees in bankruptcy. Colly. Partn. § 831; Taylor v. Field, 4 Ves. 396; Wats. Partn. p. 100; 15 Ves. 559. And see Osborn v. McBride [supra].

It is urged that Jessup has filed his bill in the fourth district court in this state, against Stevens, Marshall and the defendant, Morrison, praying for an accounting of the copartnership affairs of Jessup & Stevens, and for the appointment of a receiver; and that a receiver has been appointed whose possession cannot now be divested. To this it is a sufficient answer to say, that the receiver is not in possession; the property sued for is in the possession of the sheriff, who holds under the attachment levied in the suit brought by defendant Morrison. On the whole, I am of opinion that the property levied on by Morrison was the firm property of the bankrupts, Stevens & Marshall, and that their assignee is entitled to the possession of it for the purpose of converting it into cash, and satisfying the joint creditors of that firm. The right of Morrison under his attachment to any balance that may be due Stevens, after satisfying the joint creditors, will be duly protected by the court.

CRANE v. The REBECCA. See Cases Nos. 11,618 and 11,619.

Case No. 3,356.

CRANE v. REEDER et al.

[11 West. Jur. (1877) 153; 15 Alb. Law J. 103; 23 Int. Rev. Rec. 65; 1 Cin. Law Bul. 31.]

Circuit Court, E. D. Michigan.

REMOVAL.

Under the act of March 3, 1875 [18 Stat. 470], providing for the removal of causes from the

state to the federal courts, a cause once tried, but pending, ready for retrial, when the act was passed, is removable.

[Cited in Meyer v. Delaware R. Const. Co., 100 U. S. 473.]

Motion to remand cause to state court.

EMMONS, Circuit Judge. The case is an action of ejectment begun several years since in the circuit court for the county of Wayne. Plaintiff was at the time the action was commenced, and still is, a citizen of the state of Michigan, and defendants are and were aliens, subjects of the queen of Great Britian. No proceedings were taken to remove the case to this court under the act of congress of 1789 [1 Stat. 79], and the case was tried two or three times in the circuit court, with verdict for defendants, which judgments were respectively, upon writ of error, reversed by the supreme court of the state of Michigan, and the case sent back to the circuit for retrial. Subsequent to the trials referred to in the last paragraph, an attempt was made to remove the case to this court under an act of congress of 1867 [14 Stat. 558], but this court and the supreme court of the state held that said act of 1867 was not applicable, and the case was remanded. In this condition of the case, after the passage of the act of congress of March 3, 1875, and before the first term after the passage of said act of March 3 at which the case could be tried, defendants file their petition for the removal of said cause to this court. Said petition bases the right to remove, first, upon the ground that the plaintiff was a citizen of Michigan, and defendants aliens; secondly, upon the ground that the case involved federal questions, within the meaning of said act of March 3, 1875. The plaintiff now moves to remand the cause to the circuit court for the county of Wayne, upon the ground that the said act of March 3, 1875, is not applicable. In ordinary circumstances, a case heard as this has been, during severe illness, would not have demanded a statement of the reasons upon which his judgment rested. The extraordinary history of this litigation, the fact that the supreme court of the state had come to the conclusion that the cause was not removable under the act of 1875, imposes upon me the duty, out of respect to that learned tribunal, and the highly respectable counsel who with so much zeal had argued the case before me, of stating briefly the argument upon which I rely for the retention of this cause in this court.

It is conceded that the cause is one removable to this court provided the application is made in time. The meaning of the following clause in the third section of the act is all which is in controversy here. It provides that a petition must be filed "in such state court before or at the term at which said cause could be first tried, and before the trial thereof." It is argued that, as this cause had been several times tried before the passage of the present act, it was a trial within the meaning of this language, and precluded its removal, notwithstanding all the verdicts resulting from those trials had been set aside. The broad ground is assumed that no cause, although within the general language of the act, "now pending" at the time of its passage, is removable, if it had been at all tried anterior to that time. The argument is also made in the plaintiff's brief, but it was not insisted upon at the hearing, that no cause, the right to remove which had lapsed under the former acts, was removable under this. We have frequently had occasion to refer to the deference, which, for the sake of uniformity, the federal coordinate courts ought to extend to each other's judgments where the point in question has been definitely ruled. Although we recognize a limit beyond which we would by no means sacrifice individual judgment to a single or even several adjudications by our circuit and district brethren, we think the condition of judicial opinion upon the point before us is such as to bring the case quite within the rule we have established for ourselves in reference to acquiescence with what has already been decided. We erect in the instance before us no new rule in accepting, as sufficiently authoritative, the judgments already rendered, holding that a cause once tried, but pending, ready for retrial, when the act of 1875 was passed, is removable to the federal court.

The first case which has been called to our attention is that of Andrews' Ex'rs v. Garrett [Case No. 375], decided in the circuit court for the southern district of Ohio, by our very careful and painstaking Brother Swing. The syllabus of the case, sustained by the facts in judgment, is as follows: "1. A suit commenced and actually tried in a state court before the passage of the act of congress of March 3, 1875, but in which a new trial had been granted, and which was pending after the passage of the said act, may be removed from such state court to the circuit court of the United States. 2. The condition of the suit, or the time it had been pending, makes no difference in the jurisdiction." This judgment was approbated by Judge Johnson, in the circuit court for the southern district of New York, in the case of Merchants' & Manufacturers' Bank v. Wheeler [Case No. 9,437]. In this latter case no trial had been had in the state court, but it was contended that the cause must be removed before the first term at which it might be tried in the state tribunal, and, inasmuch as a term had occurred, at which the cause might have been tried, that was an answer to the application, although such period was before the passage of the act. In an argument entirely satisfactory to us, the learned judge shows the act contemplated a term subsequent to the enactment. It is no matter how long the cause may have been pending in the state tribunal, or how many terms in which it might

have been tried have lapsed before the passage of the statute, it is enough if the cause is "now pending," and that no term at which the cause might have been tried has passed since the act of 1875. He quotes with approbation the judgment of Judge Swing, and hints at no distinction between a case where the term has passed before the statute, and where a trial had been had. The statute says the cause must be removed at or before the first term at which it could be tried, and before the trial thereof. The two members of this sentence qualify the same thing. They both refer to an indivisible act, and to hold that a cause may be removed where one clause is applicable, and that it cannot be removed where the other is so, would be to violate every canon of construction, unless there is something growing out of the nature of the case violently constraining it. The judgment of Circuit Judge Sawyer is given in Hoadley v. City of San Francisco [Id. 6,544]. It quotes from and approbates the decision of Judge Swing, and painstakingly argues, and expressly decides, that a cause which had been tried in the state tribunal prior to act of March 3, 1875, carried to the state supreme court, where the judgment was reversed, might, after a remittitur to the court below, in which the cause again stood for trial, be removed to the federal court under this statute. The superior court of Cincinnati, showing by its judgment the point had received its fullest consideration, ruled in the same way, and held that trials and writs of error in the state tribunal anterior to the passage of the act were no objections to a removal, provided the cause came within the general grant of power. Their construction of the act is original, and does not rest upon the federal rulings, although the course of reasoning of the court is in striking conformity with them. With these concurring judgments upon the point, even if conceded doubtful, we should feel constrained to yield our own opinion. With little doubt of what judicial propriety demands we must overrule the motion to remand this cause.

Much discussion was had before us upon the meaning of the words "trial" and "final trial" in the acts of 1866 and 1867. It was contended by the plaintiff that the supreme court, in Home Life Ins. Co. v. Dunn, 19 Wall. [86 U. S.] 214, holding that the act of 1867, by the word "trial," meant only a final trial, and did not include a case where a new trial had been granted, went upon the distinction between the language of that law and the act of 1866 [14 Stat. 307]. From this it was argued that the word "trial" in the present act meant any trial whatever. With this argument we might fully agree, so far as any consequence to be wrought in our judgment is concerned. We do not think it necessary to recur to previous statutes, or their judicial reading, to show that the act of 1875 with entire certainty precludes the removal of a cause if there has been any trial whatever, provided the trial takes place at a term at which according to the practice of the court it might be rightfully tried. This is too plain for argument; because, whether tried or not, the cause is not removable if a term passes at which it might be tried. As a matter of necessity, therefore, what kind of a trial does the statute contemplate, but solely at what time it must have taken place? Does it intend to include trials occurring before 1875, and to preclude the removal of a cause which is "now pending" and standing for trial after the passage of the act? We do not perceive that the consideration of previous judgments under former laws throws any light upon the question before us. Did we perceive the pertinency of this discussion, we should take some pains to set forth the reasons why we should concur substantially in the judgment of Judge Nelson in Minnett v. Milwaukee & St. P. R. Co. [Case No. 9,636]. We think the acts of 1866 and 1867 should have received the same interpretation. The fact that the supreme court, in Home Life Ins. Co. v. Dunn [supra], pursued a line of argument applicable to and sufficient for the case before it, is not persuasive that it would not have ruled in the same way in reference to the act of 1866.

As an abstraction, few generalities are better settled, and have a larger number of respectable authorities to sustain it, than where statutes provide that a citizen is entitled to rehearings, new trials and reviews, as a matter of course and of right, after one or any number of trials named mistrials, or those which had been set aside for either mistake of the court or jury, are never taken into consideration in determining his right. Especially is it well settled in Michigan that, where a party is entitled to successive new trials as a matter of right, the fact that never so many verdicts have been rendered, so as they have been set aside for error, either in fact or law, has no effect whatever upon this privilege. But this learning answers only the naked literal argument of counsel that where the statute uses the word "trial" generally, without defining its nature, it must necessarily mean any trial whatever. This class of judgments constitutes a reply to such a position, by showing in analogous cases, as an almost universal rule, where the word "trial" is used it means a final, effective, and disposing trial, and that abortive mistrials have not been construed to come within the liberal meaning of such enactments. But we have had occasion heretofore very fully to consider this subject, and have said, after much consideration, that we thought these federal enactments were to be read far more in the light of the objects which they have in view, than by readings of analogous statutes in the state practice. It is conceded that wholly new grounds for removal are created by the late act. Causes then pending where there was no right of removal whatever, beyond all controversy, might be

removed under it. It was also fully conceded in argument before us, as of necessity it must have been, that causes which might originally have been removed under the former acts, but where the party had voluntarily suffered such right to lapse by his neglect, as, for instance, where he might have removed it at the time of entering his appearance, also came within the operation of this statute. That the act does unmistakably revive the power of removal in instances where the party had lost it by delay, is entirely clear. The argument, therefore, that the plaintiff in this case had voluntarily tried his case, has no tendency to show that such act took it without the operation of the statute. The only argument which could be effective is a distinction between the act of an abortive trial, and those other steps and omissions which, under the prior statutes, also waived the right of removal. We listened in vain for any reason whatever showing a distinction between the trial of a cause before the passage of this law, and the omission to file a petition when the appearance of the defendant was entered, or the suffering a term to go by without trying a cause when it might have been tried. What there is in an abortive trial so significant, so going to the dignity of the tribunal in which it takes place, as to show from its nature that the statute could by no means contemplate the removal of a cause after such trial, we have been unable to perceive. After the passage of the act quite a different question is presented. It intends to give the citizen one, and only one, opportunity to remove his cause. That opportunity is rationally fixed at a period when, according to the local practice, the averments by both plaintiff and defendant are theoretically supposed to be all upon the record. It is when the cause is ready for trial. Then for the first time the defendant and the plaintiff know the issue to be tried. He can then for the first time intelligently decide which is the more fit and economical tribunal for the determination of his rights. If he suffers this period to pass, whether he tries his cause or not, is immaterial. It is a term at which he might do so at which the power must be exercised. This one opportunity is intended to be secured to the citizen in all cases when the act of 1875 was passed, provided the case was one which stood for trial at any time subsequent to its passage. A case already finally tried, of course, stands upon a different basis, and is excluded from the statute for entirely different reasons.

After a tribunal as learned as that of the supreme court of Michigan has decided differently, it would be indecorous to say we have no doubt of the rectitude of our present ruling. Its judgment, however, in this case, is accompanied by no reasoning whatever. Its unaided authority, and the respect which we most unfeignedly express for its rulings, is all we have before us, so far as adjudication is concerned, to constrain a contrary decision on our part. No court, state or federal, it excepted, has ruled this point differently from the judgments we in this case follow. A large majority of the litigants interested in the determination of the questions involved in this litigation are already in this court by original bills in equity. Upon very full consideration, we have determined they have a right to remain here. We have much confidence in the rectitude of that determination. Another cause, involving precisely the same issues, the Michigan supreme court at the same term decided was rightfully removed to this tribunal. The questions involved are those eminently fit for adjudication by the federal court. If our present judgment results in a usurpation of authority, if in truth we have no jurisdiction, we think there is a speedy and economical remedy preliminary to the trial by which that question can be determined. Even if our doubts were very much greater than they are, these considerations would influence us to decide the matter as we do. The motion to remand the cause is overruled.

Case No. 3,357.

CRANE v. The SAMSON.

[N. Y. Times. Feb. 24, 1855.]

District Court, S. D. New York. Feb. 22, 1855.

ADMIRALTY — COLLISION — FRAUDULENT ATTEMPT TO OVERCHARGE FOR DAMAGES—INTEREST.

[A fraudulent attempt by libelant, for whom a decree has been entered in a collision suit, to charge for repairs in no way made necessary by the collision, should not prevent his recovery of the true amount of his damages, but a court of admiralty may deny interest up to the time when the true amount is fixed by the commissioner's report.]

[In admiralty. Libel by Joseph A. Crane and others against the steamboat Samson, for collision. Decree was entered for libelants (case unreported), and the cause is now heard on exceptions by both parties to the commissioner's report.]

Owen & Morton, for libelants.
Mr. Donohue, for claimants.

Before BETTS, District Judge.

This was a case of collision, brought by the owners of the brig Iola, and tried before Judge Hall, who gave a decree in favor of the libelants, and ordered a reference to a commissioner to compute their damages. The commissioner reported the damages at the sum of $2,150, to which report both parties excepted. An amended report was afterwards made, specifying the particulars of the amount, and the case comes up now on the exceptions to the report. The claimants of the steamboat contend that there was a fraudulent attempt on the part of the libelants to charge the steamboat with amounts no way connected with the collision, and that if any damages are allowed the amount

should be greatly lessened, while the libelants claim that damages should have been allowed to the amount of $4,585.73.

HELD BY THE COURT: That upon the proofs there was strong evidence that whoever conducted the repairs of the brig attempted most unfairly to charge the steamboat with expenses well known to them not to have arisen from the injuries. The pretence under which the attempt was covered—that the underwriters were to pay the expense; and that the charges were put in beyond their just value to screen the owners from their share of contribution—no way lessens the dishonesty of the transaction. That the intention or even attempt of the libelants to practice a fraud upon the claimants, does not, in law, disable them from recovering the real value of the labor and materials bestowed upon the brig in giving her the repairs she required. That the sum of $900 be allowed for the repairs as reported by the commissioner, one witness having offered to make the repairs for that sum. But that it seems befitting in a court, proceeding in a good degree upon the principles of equity, to discountenance the attempt of the libelants to enforce a wrongful account against the steamboat, by denying interest on that sum, until that sum become fixed by the second report of the commissioner, filed December 4, 1854. That the demurrage must be cut down to eight days, as the libelants have left the point upon conflicting statements, when they could easily have rectified the estimate by testimony at their command. Decree, therefore, that the report of the commissioner be corrected in these particulars, and that the libelants have a decree for the sum of $1,121.22.

[NOTE. Both parties appealed from the decree, which was affirmed by the circuit court. The Sampson, Case No. 12,279.]

CRANE (UNION PAPER-BAG MACH. CO. v.). See Case No. 14,388.

CRANE (UNITED STATES v.). See Cases Nos. 14,886-14,888.

CRANE (WALKER v.). See Case No. 17,067.

Case No. 3,358.

CRANE v. WEYMOUTH.

[This is a state case, and is reported in 54 Cal. 476.]

CRANE (WOOSTER v.). See Case No. 18,036.

Case No. 3,359.

CRANMER et al. v. GERNON.

[2 Pet. Adm. 390.][1]

District Court, D. Pennsylvania. 1807.

SEAMEN'S WAGES—CAPTURE OF VESSEL—PORT OF DELIVERY—BLOCKADE.

1. Claim of wages by seamen belonging to a ship which had been captured on her homeward voyage. The port to which a vessel may proceed and land her cargo after being turned off from her port of destination in consequence of its being blockaded, to be considered the port of delivery.

2. When a cargo is purchased at several neighbouring ports and the vessel proceeds to each of them to receive it, the last port of lading is that to which wages should be paid.

[Explained in Thompson v. Faussat, Case No. 13,954. Criticised in Bronde v. Haven, Id. 1,924. Cited in Pitman v. Hooper, Id. 11,186.]

The mariners had shipped to perform a voyage from Philadelphia to the Isle of France and to return to Philadelphia. The Baltic was detained a considerable time at the Isle of France, waiting for a cargo, which she could not obtain in consequence of the intercourse between Bourbon and the Isle of France being interrupted by a British blockading squadron. These difficulties continuing, the Baltic sailed for Bourbon, taking with her a very small part of her outward cargo and also a number of passengers, who with their baggage and a small quantity of sugar supposed to belong to them, were landed at Bourbon. The Baltic there completed her loading and sailed for Philadelphia, but was captured and sent into a British port in the West Indies. The seamen, with the consent of the master of the Baltic, left her and returned to Philadelphia, and now claimed their wages up to half the time the ship was at Bourbon, admitting that the residue would depend on the fate of the Baltic. By the counsel for the owner it was suggested that the voyage from the Isle of France to Bourbon was a consequence of the interruption of the intercourse between these places by the British squadron, and that it is not usual for vessels to proceed to Bourbon, as the produce of that place is, under other circumstances, brought up to the Isle of France in boats, and there put on board the ships destined to receive it. This was urged, with other arguments, to destroy the claims of the seamen to wages after the vessel left the Isle of France. The case was not decided, as the owner requested a postponement, for the purpose of ascertaining from the master of the Baltic, the sums which had been paid to the seamen; but the judge said he had decided that when a vessel bound to a port, which was found on her arrival near it to be blockaded, and therefore the ship had been turned off, and proceeded to another port, though not originally contemplated in the articles under which the seamen shipped, yet if the cargo, or any part, was there delivered, it should be considered as a delivering port as much as if originally so intended. And if the vessel, after leaving that port, was captured or lost, the mariners were entitled to the wages due to the time of arrival at that port, and for half the time of stay there.

It was also the opinion of the judge, and he said he had so decided, that where a cargo,

[1] [Reported by Richard Peters, Jr., Esq.]

or part thereof, was purchased at neighbouring ports or places, and the vessel went to one or more of them for all or part, the last port of lading and departure should be that to which the payment of wages should apply. The seamen must be paid for the time they serve; and it is immaterial whether the ship lay at the port of her original destination, while her cargo was collecting, and brought in drogers or lighters, or go to the ports whereat it was purchased, as part of her cargo for her return voyage.

Afterwards, wages until the time of arrival at Bourbon and for half the time the Baltic remained there, were decreed by the court.

CRANSTON (UNITED STATES v.). See Case No. 14,889.

Case No. 3,360.

CRAPO v. ALLEN.

[1 Spr. 184.][1]

District Court, D. Massachusetts. Oct. Term, 1849.

ACTION FOR PERSONAL INJURY—SURVIVAL IN ADMIRALTY—STATE STATUTE—BREACH OF CONTRACT WITH SEAMAN.

1. Actions in the admiralty, for mere personal torts, do not survive the death of the person injured.

[Cited in American Steamboat Co. v. Chace, 16 Wall. (83 U. S.) 532; The City of Brussels, Case No. 2,745; The Epsilon, Id. 4,506; The Harrisburg, 119 U. S. 206, 7 Sup. Ct. 143. Criticised in The Charles Morgan, Id. 2,618; The Garland, 5 Fed. 926; The Manhasset, 18 Fed. 924.]

2. A state statute will not enable an administrator to maintain an action, in the district court, for such tort committed on the high seas.

[Cited in Re Long Island, etc., Transportation Co., 5 Fed. 608.]

3. Wrongfully withholding suitable medicines from a seaman, or wrongfully setting him ashore in a foreign country, are violations of the contract of hiring.

Clifford & Brigham, for libellant.

T. D. Eliot & Kasson, for respondent.

SPRAGUE, District Judge. This is a libel by the administrator of Peter Brotherson, deceased, alleging that the intestate was one of the crew of the bark Montezuma, of which the respondent was master, on a whaling voyage, and that during such voyage the respondent treated Brotherson with great cruelty, specifying several particulars, and among them, an aggravated assault and battery. The respondent has pleaded, that the causes of action set forth in the libel, do not survive the death of Brotherson, and that the court has not jurisdiction.

The causes of action set forth are maritime, and over them the admiralty has undoubted jurisdiction. So far as they are mere torts, the right of action, by the general maritime law, dies with the person injured. Hall, Adm. Pr. 21; Dunl. Adm. Pr. 87. It is contended, that by the Revised Statutes of Massachusetts (chapter 93, § 7), actions for mere torts survive, and that the right thus created by the local law, should be enforced by the courts of the United States. I am not aware that this precise question has ever been decided. The cases urged as analogous, are those arising under the state laws, creating a lien in favor of material men, on domestic ships, which would not exist by the general maritime law. The admiralty will enforce such liens by process in rem. The Marion [Case No. 9,087]; Read v. Hull of a New Brig [Id. 11,609]; The General Smith, 4 Wheat. [17 U. S.] 442; Peyroux v. Howard, 7 Pet. [32 U. S.] 324; The Chusan [Case No. 2,717]; The Robert Fulton [Id. 11,890]; Davis v. Hull of a New Brig [Id. 3,643]. It is to be observed, that these were all cases of contract, by which not merely a new remedy, but a new right of property, a jus in re, was created, which might be enforced wherever the res should be found. The Mary Anne [Id. 9,195].

The torts set forth in this libel were committed on the high seas; the subject-matter, therefore, is within the jurisdiction of all courts of admiralty. But if a suit were commenced in the district court, sitting in a state where no local statute gave a remedy to the administrator, it could not be maintained. I cannot think, that for a transaction upon the high seas, a personal suit in admiralty may be maintained in one district of the United States, and not in others. By the admiralty rules, established by the supreme court, if a defendant cannot be found, his property, or his goods or credits, may be attached. Suppose this respondent had never come within this state, and was never, therefore, personally within the jurisdiction of this court, but resided within a district where he was liable to no action, can it be that his goods or credits, within this state, could be held, by a suit in the admiralty here? Such an incongruity is inadmissible. I think that those claims in the libel, which rest upon mere personal torts, cannot be sustained. But there are other allegations in the libel, namely, withholding suitable medicines in sickness, and putting the intestate ashore in a foreign country. These may be deemed violations of the contract of hiring, and an action therefor may be maintained by the administrator. See Chamberlain v. Chandler [Case No. 2,575]; Conkl. Adm. Pr. 329. Decree for the libellant for $75 and costs.

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

Case No. 3,361.

CRAPO v. The ARCTIC.

[N. Y. Times, Aug. 2, 1862.]

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

SHIPPING—CHARTER PARTY — FREIGHT — LIEN—RES JUDICATA—ADMIRALTY — QUASI REAL ACTIONS—RIGHTS OF INTERVENER.

[1. A carrier's legal and equitable right to freight is not affected by the outcome of a prior suit, instituted by a third party against the consignee after the termination of the voyage, to determine the ownership of the cargo.]

[2. Cargo is not divested of a lien for freight by merely being discharged into a warehouse, and placed with the consignee, without other evidence of the carrier's intention to waive the lien.]

[3. In a suit for freight under a charter party for the carriage of guano, a claim by an intervener that the guano was tortiously taken from soil whereof the legal title was in the intervener is in substance a quasi real action, not triable in admiralty, and does not affect the carrier's lien for freight.]

[4. A clause in a charter party giving the charterer the right to retain freight moneys in case rival claims should be made thereto cannot be set up in opposition to the carrier's lien for freight by an intervener who has obtained possession of the cargo by an action at law against the consignee.]

[In admiralty. Libel by William W. Crapo, assignee of a charter party, against the cargo of the ship Arctic, to recover freight and expenditures under the charter party. The American Guano Company, charterer, makes no defense, and the hearing is now on the intervention of the United States Guano Company.]

Before BETTS, District Judge.

This was an action upon a charter party made between the owners of the ship Arctic and the American Guano Company. The charter provided for a voyage from Honolulu to New York, including an intervening voyage to Howland's island, where she should land cargo, and then receive a cargo of guano, and transport it thence to New York. The parties bound themselves, and also the vessel and the merchandise to be laden on board, to the faithful performance of the contract. The vessel performed her voyage pursuant to the charter, taking on board and delivering cargo at the places specified, after building certain stipulated fixtures preparatory thereto. The libelant is the assignee of the charter party and bill of lading, and seeks to recover the freights and expenditures in erecting moorings and other conveniences for lading, stipulated by the contract. The charterers make no defence, but the United States Guano Company intervene, and allege that the cargo is free of liability under the charter.

The principal grounds of defence are that the guano was unlawfully taken by the ship from soil owned by the claimants in islands in the Pacific ocean; and that, when the cargo arrived in New York, it was discharged from the vessel and the owners of the vessel voluntarily surrendered the possession of the guano to the American Guano Company, and parted with the possession and control without making any claim of lien upon the same for freight or other cause. Before the commencement of the suit the claimants prosecuted their right to the guano as against the American Guano Company, and had possession of the property delivered over to them by due process of law, and they urged that fact in bar of this action.

THE COURT held substantially that the controversy between the American Guano Company and the United States Guano Company, after the termination of the voyage, concerning the possession of the cargo here, its liability to freight, or its real ownership, is res inter alios acta, and in no way affects the legal or equitable rights of the libelant to the freight. That cargo is not necessarily divested of the lien for freight by merely discharging it from the ship into a warehouse, placing it with the consignees, without other evidence denoting that the carrier intended thereby to remove his lien and rely upon the responsibility of the consignees. No satisfactory evidence of such intention was given. That this cargo, although taken from the ground, and composed wholly of soil, was, after being detached, merchandise, and a subject of freight. It was delivered to the ship by agents of the consignees as their property, and would be legally in custody of the ship until taken from that custody by the consignees in fulfillment of the charter, or by claimants establishing a paramount title in law to it. The claimants allege such, and claim that the property has been forcibly and wrongfully taken from their possession by this transportation, and that they are entitled to have the property restored to them, or to hold it exempt from all liability for the freight and carriage of it away from their possession and use. This right set up consists exclusively in the alleged title to the soil itself as land, and not in the cargo as personal property in their positive possession as such. The inherent right of the owner of the land, no doubt, adhered to the guano as part of his estate, and he might maintain his action at law against trespassers for unlawfully deposing him of it. But whether the act of removing it was tortious, depends upon the legal title to the land from which the guano was dug, and that is not a question triable indirectly in the admiralty in a suit upon a charter party. The admiralty cannot take cognizance of quasi real actions.

The clause in the charter party in respect to the right to retain freight moneys in case rival claims should be made therefor is in favor of the American Guano Company, as against the ship, and can only be set up by them or their legal assignees. No privity of interest therein is conferred on the United States Guano Company, nor does any accrue by presumption of law enabling them to enforce or resist that stipulation. The charter

party having provided that, although portions of the entire cargo were to be discharged at different points of the voyage, the whole freight should be payable at the port of final discharge, the cargo then on board was chargeable to the fulfillments of all the agreements in the contract, and although the maritime law gives no right of lien to a ship for outlays made in the erecting of moorings or other conveniences outside the ship, in aid of lading or housing the cargo, yet it does not interdict an owner of the cargo hypothecating the cargo in guarantee of such disbursements, and security may be furnished under a charter agreement as well as by a separate or special pledge. This charter party, by its terms, operates as an express hypothecation of the property for such outlays, in addition to the freight. The libelant is, therefore, entitled to recover, as against the cargo arrested; the amount due upon the charter must have a reference to ascertain the amount.

CRARY (CHASE v.). See Case No. 2,626.

Case No. 3,362.

CRARY v. The EL DORADO.

[24 How. Pr. 128;[1] 35 Hunt, Mer. Mag. 68.]

District Court, S. D. New York. March Term, 1856.

SALVAGE—ICE IN HARBOR—ASSISTANCE OF TUG.

1. Meritorious services rendered by a steam-tug in our harbors, in saving a vessel beset with ice, cannot be placed on the basis of salvage services, in their proper acceptation. A branch of the employment of steam-tugs, during the season of ice, is to aid vessels in moving their positions to all parts of the harbor. A steam-tug aiding a vessel thus beset, is not regarded in the character of a volunteer governed by impulses of humanity, leaving her own pursuits, and devoting herself to the rescue of another, with no view to compensation, but upon the final success of her efforts. Her services stand essentially on different grounds: 1. They impose no unauthorized or wrongful risks upon their owners. 2. They may have a reward, whether needed or not, and will not necessarily lose it because the services undertaken by them fail of being accomplished. 3. They differ from salvors, because they pursue and solicit the employment, and hold themselves prepared to fulfill a call to it, whenever made. They act notoriously as tow-vessels; as such, bargains made by them to render, for a compensation, services which otherwise might be salvage services, will be upheld, unless the case is clear that the bargain is a means of coercing an exorbitant price. In such case, the court will not permit the fears or weakness or ignorance of a party to be made the occasion of inequitable exactions from him.

2. In an action brought by the tug against a schooner and her cargo, to whom services of a salvage character were rendered by the tug in saving her from the ice by which she was beset, the court dismissed the libel against the cargo, but decreed against the bottom, with costs, for a reasonable compensation.

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

This libel was filed by [Humphrey H. Crary and others] the owners of the steam-tug C. P. Smith, to recover a salvage compensation for services rendered to the schooner. The libellants alleged that [on the 4th of February, 1856][2] the schooner, with a cargo of molasses on board, was lying at anchor in the North river, surrounded by heavy ice, by reason of which she was in great danger, and those on board of her hailed the steam-tug, and agreed to give $1,000 to be towed to a place of safety, which the tug succeeded in doing, suffering great damage herself in the service, and they claimed to recover the sum of $1,000. It was proved that the tug had been employed in towing other vessels, which were near the El Dorado, on that morning; that she was engaged in the service only a few hours, and that the captain of the schooner was not on board, but the mate was, who, as the claimants alleged, could not make any binding agreement in the premises; that the customary compensation to tugs for aid of that description was $20 an hour, and no case was shown where more than $350 had been paid.

D. McMahon, for libellants.

E. C. Benedict, for claimants.

BETTS, District Judge. The recovery in this case cannot be justly placed on the basis of salvage services, in their proper acceptation in law, nor on the footing of a specific bargain, by the person in command of the schooner, to pay $1,000 for the towage undertaken to be performed on the part of the libellants. The libellants' tug was employed in the towage business in this harbor, and out to and in return from the sea; and an essential branch of the employment of steam-tugs on those grounds, during the season of ice, is to aid vessels in moving their positions to all parts of the harbor, and from pier to pier along the docks on each face of the city. The customary rate of compensation to these tugs, for aid of that description, is $20 per hour for the time they are engaged with a vessel and in going to her. The remuneration is enhanced in cases of great peril or extraordinary exertions, but no case was proved on the trial in which more than $350 had been received for this class of services rendered within the harbor. Boats are built and equipped for this special business, and kept engaged in it at all periods of the year. The use of this kind of craft has grown to be one of the necessities of commerce and navigation in this port, and the demand for their services has brought into use a numerous flotilla of steam-tugs, who, like the pilots, are always to be had, to give vessels the advantages of their capacities in every season and under every circumstance in which they can be employed. The constancy of the demand guarantees also, in the average, a remunerative reward for the

[2] [From 35 Hunt, Mer. Mag. 68.]

services they render, if it is not absolutely assured them in each individual case.

It has not as yet been attempted to measure that reward by an absolute scale of charges, it being probably found that the competition in business and the mutual interest of employers and employees will secure to this branch of industry an adequate compensation, and still restrain its exactions within reasonable limits. A change so fundamental in inter-territorial and coast navigation, since the foundation of the principles of maritime jurisprudence, renders those rules defining the relation of helping vessels to those relieved by them in distress, in a great degree, inapplicable. The new condition of things introduced by this modern agency, created for the conveniency and relief of vessels, either found in want of assistance, or in apprehension of needing it, no longer places the relieving vessel in the character of a volunteer, governed by impulses of humanity, leaving her own pursuits, and devoting herself to the rescue of another in peril, with no view to compensation but upon the final success of her efforts, attended with the hazard of sacrificing herself or her voyage in the adventure. The courts apply their powers earnestly to encourage and stimulate salvage services of that grade, by payments for them, not restricted to the amount of benefit actually conferred, but measured also with a view to the meritorious motive of the acts, and considerations of public policy.

Steam-tugs stand essentially on different grounds. They impose no unauthorized or wrongful risks upon their owners. They may have a reward, whether needed or not, and will not necessarily lose it because the service undertaken by them fails being accomplished; and what differs vitally their aid from that of vessels casually coming upon one in distress, is, that the steam-tugs pursue and solicit the employment, or hold themselves prepared to fulfill a call to it whenever made. Those considerations no way detract from their claim to an adequate recompense, nor impair the importance of their services to the interests and safety of navigation; but they demonstrate that the new relationship with other vessels, introduced by the establishment of this class of vessels, no longer entitles them to claim the character of salvors in most instances where it might, by maritime courts, be readily attributed to vessels not devoted to this special pursuit, having become a kind of public calling. They act notoriously as tow vessels. They seek that business, and undertake to assist vessels in that manner. When no other than towage service is performed, there can be no propriety, in respect to that craft, in characterizing and rendering it as a salvage. The courts possess ample authority to adapt the recompense for towage, in extraordinary cases, to their exigencies, or they may, when not restrained by positive law, augment the ordinary amount of pilotage to meet the difficulties and merits of the service, without exalting it to a salvage compensation. Parties, moreover, are free to bargain for themselves, and their agreements will be regarded as fair indicia of what might properly be claimed, when the case is clear of all overreaching or misapprehension, and will, as a common practice, decree in conformity with the agreement. But they will not allow their powers to be used as means of covering the fulfillment of exorbitant or unconscionable bargains, however they may have been obtained. The courts will be governed by the facts in proof, with a disposition always to uphold the agreement of parties, but with inflexible resolution not to permit the fears or weakness or ignorance of a party to be made the occasion of inequitable exactions from him.

I did not go over, on this occasion, the evidence in the cause; but I am satisfied from it, that the demand of $1,000 for the services rendered, whether placed upon the agreement of the master of the schooner or on the worth of the service, is unreasonably beyond what ought to be awarded the tug. When the views of the court are fully expressed, it may be proper to notice the particulars of the transaction, and the reasons conducing to the adoption of the sum now decreed the libellant, differing so widely as it does from what the libellant contends he has proved—a positive contract to pay him, and that which the claimants suppose they establish to be a full recompense for the service. The decree will be, that the libellant recover against the schooner, her tackle, &c., (in this cause,) $350, and his taxed costs. And it is further ordered, that the arrest and attachment of the cargo on board the said schooner be discharged, with costs to the claimants to be taxed against the libellant. Decree accordingly.

CRARY v. HUNTER. See Case No. 15,426.

CRASE (JENNY v.). See Case No. 7,285.

CRAVEN (WILLIAMS v.). See Case No. 17,-719.

Case No. 3,363.

In re CRAWFORD.

[3 N. B. R. 698 (Quarto, 171);[1] 3 Am. Law T. 169; 1 Am. Law T. Rep. Bankr. 210.]

District Court, E. D. Michigan. June, 1870.

BANKRUPTCY—PROVABLE DEBTS.

Is a debt which exists at the time of the actual adjudication of bankruptcy, although not existing at the time of filing the petition for adjudication, provable against the bankrupt's estate? Is a simple contract debt existing at and before the filing of the petition for adjudication of bankruptcy, on which a judgment has been rendered after such filing, the same debt within the meaning of the several provisions of the bankrupt act, relating to the proof of claims against the estates of bankrupts? *Held,*

[1] [Reprinted from 3 N. B. R. 698 (Quarto, 171), by permission.]

it is the intention of the act that such debts, and such only, as existed at the time of the filing the petition for adjudication of bankruptcy are provable against the bankrupt's estate.

[Cited in Re Gallison, Case No. 5,203; Burpee v. First Nat. Bank of Janesville, Id. 2,185; Re Riggs, 8 N. B. R. 92; Re Broich, Case No. 1,921. Overruled in Re Hennocksburgh, Id. 6,367. Approved in Re Nounnan, 7 N. B. R. 22; Re Ward, 12 Fed. 327.]

[On certificate of register in bankruptcy.]

At Detroit, in said district, on the 28th April, 1870. Before Mr. Hovey K. Clarke, Register: I, the above named register, do hereby certify that in the course of proceedings before me at this date, in the above bankruptcy, Milton H. Butler offered his deposition to prove his claim against said bankrupt's estate. The deposition shows that the claim originated in the indorsement to the claimant, by said bankrupt, [Francis Crawford,] of a promissory note which became due on the 23d day of April, 1869; that the bankrupt was duly charged by notice, and that the claimant commenced a suit in the circuit court for the county of Wayne on the 3d day of May, and on the 15th day of September following recovered a judgment against said bankrupt on said liability. The petition for the adjudication of bankruptcy in this case was filed on the 25th day of June, 1869, after the commencement of said suit, and before the rendition of the judgment. The order of adjudication of bankruptcy was not actually entered until the 6th day of April, 1870. The judgment under which the claimant now claims not having been rendered "at or before the filing of the petition" (see form No. 22, prescribed by the general orders of the supreme court), I declined to accept and file proof thereof, on the ground that the debt was not provable under the bankrupt act. The said claimant desiring to take the opinion of the district judge upon the points presented by his offer to prove his claim, I respectively submit a certificate to be signed by the judge, if he approve thereof, as provided by the 6th section of the bankrupt act of 1867 [14 Stat. 520], together with my opinion upon the questions presented. The questions are: First. Is a debt which exists at the time of the actual adjudication of bankruptcy, although not existing at the time of filing the petition for adjudication, provable against the bankrupt's estate? Second. Is a simple contract debt existing at and before the filing of the petition for adjudication of bankruptcy, on which a judgment has been rendered after such filing, the same debt within the meaning of the several provisions of the bankrupt act relating to the proof of claims against the estates of bankrupts?

Opinion of the Register: Section 19 declares what debts "may be proved against the estate of the bankrupt." It specifies several classes of debts, in four of which, time becomes a material question. The words employed in the act to fix the time, which, in the specified cases, becomes material, are—"the time of the adjudication of the bankruptcy"—"after the adjudication of bankruptcy"—"after the proceedings in bankruptcy were commenced," and "up to the time of the bankruptcy." What time is intended by the "commencement of proceeding" is not left to construction. It is expressly declared by section 38 to be "filing of a petition for adjudication in bankruptcy, either by a debtor on his own behalf, or by any creditor against a debtor." Of course, the order of adjudication must, in respect to time, be after the filing of the petition praying for such adjudication, and practically, and especially in involuntary cases, the order may not be made for weeks or months after the commencement of the proceedings. This sometimes occurs also in voluntary cases, when delays arise from the necessity of amending schedules, or from other causes, and it becomes a very serious question, whether it will be consistent with other provisions of the act, to hold that a person for whose adjudication as a bankrupt a petition has been filed, may continue down to the time when the order of adjudication was entered to create debts, which may be proved against his estate. If so, a very striking incongruity results. By section 14 it is enacted, that the instrument of assignment, by which the assignee takes the title to the property of the bankrupt, "shall relate back to the commencement of said proceedings in bankruptcy"—which section 38 declares to be the time of filing the petition, and by the form of the deed, prescribed by the general orders of the supreme court, form No. 18, it is made necessary to specify the particular day with reference to which the conveyance is to take effect. Subsequently acquired property is not within the terms of the deed; and it is supposed to be well settled by repeated adjudications, that it does not pass. To hold that a subsequently created debt—that is, subsequently to the filing of the petition—can be proved against the bankrupt's estate, while property subsequently acquired cannot be reckoned as a part of that estate, would seem to be what the law never could have intended. The uses, not only inequitable in effect, but fraudulent in purpose—which such a construction of the law might serve—are too obvious to require illustration. Other parts of the bankrupt act, moreover, conflict with the theory that a debt may be proved that did not exist at the time of the commencement of the proceedings. Section 32 prescribes in terms the form of the discharge which shall be granted to the bankrupt, namely, that he shall "be forever discharged from all debts and claims which by said act are made provable against his estate, and which existed on the —— day of ——, on which day, the petition for adjudication was filed by or against him." It seems necessary, in view of such express terms as these in the 32d section, to hold that the words, "time of ad-

judication," and "time of the bankruptcy," in the 19th section, must be construed to be equivalent to "the commencement of proceedings"—"at the time of filing the petition;" and a debt which did not exist then cannot be proved. These views, I think, are fully sustained by Patterson's Case [Case No. 10,815], decided by Judge Blatchford, in the southern district of New York.

The remaining question is, whether a judgment rendered against the bankrupt in favor of the claimant, on the 15th day of September, 1869, was either—1st, a debt due and payable on the 25th day of June, 1869, the day when the petition was filed; or 2d, whether it was a debt then existing but not payable until a future day. It must be one or the other to be provable under section 19. The claimant insists that the deposition he offers, shows his debt to belong to the first of these classes; that at the time of filing the petition, the bankrupt was liable to him as the indorser of a promissory note which becomes due April 23; the indorser was duly charged by notice of non-payment—that on the 3d of May, he commenced a suit against the bankrupt, in which he obtained a judgment against him on the 15th day of September. The records and files of this case show that the petition in bankruptcy was filed after the suit was commenced, and before the judgment was obtained. The claimant, to sustain his right to prove his debt, is obliged to insist that the judgment and the note on which the judgment was rendered, are evidences at different stages of its history of the same debt. If he be correct in this, his right to prove his debt is clear. But this position of the claimant is opposed by the principle, that a judgment extinguishes the liability or contract on which it is rendered. This principle is abundantly supported by authority. Judge Campbell, in Bonesteel v. Tood, 9 Mich. 375, referring to a cause where highly equitable considerations existed against his application (namely, where a judgment had been obtained against one only of two joint debtors), says, "this decision was in accordance with an unbroken line of decisions of the common law, whereby a party electing to take a higher security, and thereby put an end to the liability of one debtor upon the contract, deprived himself of any further claim against the other by destroying the only joint demand." That is, the judgment "puts an end to," "destroys" all previous liability. If so, then, in this case, the judgment of September 15, extinguished the liability created by the indorsement of the note of January 20, and in a subsequent case in the supreme court of this state, where the opinion was delivered by Judge Christiancy (Town v. Smith, 14 Mich. 352), when the equities of the plaintiff and the moral obligations of the defendant both urged a departure from the above principle, the court saw "danger of doing more injury by unsettling the law in other cases than by adhering to it in that. It is not easy to measure the possible mischief of disturbing well-settled principles." In the Williams Case [Case No. 17,705], in the district court for the district of Connecticut, where the question presented was the same as that presented here—whether a debt, on which a judgment had been rendered since the adjudication was provable against the bankrupt's estate: "On this point," Judge Shipman says, "the authorities are numerous and decisive, a debt on which a judgment of law is founded, is merged in that judgment, and extinguished by it. The judgment constitutes a new debt from the time of its recovery."

There is, however, a still later case, that of Brown [Id. 1,975], decided by Judge Blatchford in the southern district of New York, expressly dissenting from Judge Shipman's views in the Williams Case [supra]. Between these distinguished authorities I am compelled to choose. Judge Shipman's decision rests upon and is "in accordance with an unbroken line of decisions of the common law." The ground of Judge Blatchford's decision is not so clear. He says: "If the debt in this case existed at the time of the adjudication it is provable, although the judgment is not provable as such, because it did not then exist." True it did so exist at that time of the adjudication, and under the authority of Judge Shipman and the cases cited by him, it had been extinguished, and a new debt created which did not then exist. Judge Blatchford concedes the correctness of this principle "in ordinary cases," but it has "no applicability," he says, "under the bankrupt law." I have looked into his opinion with some care, to ascertain on what grounds he affirms inapplicability of the principle in bankruptcy practice, conceded to be sound in ordinary cases. These grounds seem to be: 1st, repugnance to section 21; and, 2d, hardship to creditors who may not know of the proceedings. I think the supposed repugnancy arises from a misapprehension of section 21; and the hardship is the other way. Section 21 declares that no creditor whose debt is provable under the act, shall be allowed to prosecute his suit to final judgment. What was the object of this prohibition? I suppose it was to prevent a creditor from obtaining, under the well-settled principles already referred to, a new debt which would not be discharged by the final certificate in that case—for that certificate, as has been already mentioned, discharges only such debts as existed on the day of filing the petition. It is true that permission may be obtained, for a single specified purpose, to proceed to judgment, and doubtless in such a case the common-law principle as to the effect of the judgment would be modified—for it would be in the nature of an inquest out of the bankrupt court to determine a disputed point, and is allowed only for that purpose; and not then, unless leave could be specially granted, and the order granting leave could

of course control its effect. It would seem that it was the common-law effect of a judgment, namely, to create a new debt, which was the occasion of that provision in section 21, which forbids a creditor whose debt is provable to proceed to final judgment. So far then from section 21 being rended nugatory by the continued force of the common-law principle, if a party be not allowed to proceed at will to judgment, the regarding of the principle as having "no applicability under the bankrupt act," takes away the most effective motive for obedience to the section in question. So far from the section being rendered nugatory by giving effect to the common-law principle, it is strongly supported by it, and is in the strictest harmony with it.

The other ground of the inapplicability of the common-law doctrine to cases under the bankrupt act, namely, that of hardship to creditors, seems to be equally unfounded. The hardship is thus stated: "A creditor might go on in ignorance of the adjudication, and obtain a judgment for his debt, and find himself deprived of the power of proving either his debt, or his judgment." The cases of such ignorance will probably be very rare, and if they were as remediless as seems to be supposed, it may well be doubted whether it would be wise to give such a construction to the law as will afford protection to the ignorant few, at the same time that it relieves all others from the consequences of a deliberate violation of the law. But there is, indeed, no hardship. A creditor having obtained a judgment, either in ignorance of the proceedings in bankruptcy, or shrewdly aiming to secure some advantage to himself by obtaining a judgment on his claim, notwithstanding the law forbidding it, can always restore himself to the position he was in before he took his judgment, by moving in the court where it was obtained that it be vacated. Such an order, for such a reason as he would offer, would never be refused. But to allow him to retain his judgment and to prove it, or the debt on which it was founded, against the bankrupt's estate, exposes the bankrupt to the hardship of being compelled, in case of his discharge, to move, in the court where the judgment was rendered, for a perpetual stay of execution, on grounds which the provisions of the bankrupt act would probably sustain. But why should the onus of the preparation of the case, on which to found such a motion, and the expense of the employment of counsel to make it, be thrown on the bankrupt who has himself faithfully conformed to the bankrupt act, in order to avoid the consequences to himself which have followed the violation of the bankrupt act by his creditors? It is to be remembered also that the motion of the bankrupt for a stay of execution would be addressed to the discretion of the court, which would add another element of uncertainty as to his rights, against which he has a right to claim the protection which the bankrupt court is fully able to afford, but which it cannot do if it allow a judgment rendered since the proceedings were commenced to be proved against the bankrupt's estate.

It is to be observed also that the only effect of refusing to allow the judgment to be proved will be by compelling the creditor to seek the vacation of his judgment; and then, to prove his debt as it exists at the time of filing the petition will be to lose the costs which accrued in obtaining his judgment. In the Brown Case, decided by Judge Blatchford, above referred to, the creditor expressly waived the claim for costs, and the court held that the debt as it stood before adjudication, only, could be proved. And it would seem clearly inequitable to allow costs which have been made by one creditor in proceedings continued to judgment in violation of the bankrupt act, to be paid out of a fund in which all other creditors are interested; and the recovery of these costs is probably a very considerable motive in this particular case for insisting on proving the judgment as such. It is apparent that there is nothing in this case, nor in any case similar in its facts, to call for the exercise of such general equity powers as are sometimes invoked to prevent a technical merger from working injustice. Justice to all the creditors requires that costs which have been made by one or more, should not be paid out of the fund, at the expense of those who have more scrupulously regarded the bankrupt act. I am obliged to say, therefore, that I can discover no reason, resting either on legal principles or any equitable considerations, for the allowance of proof of the claim offered.

All which is respectfully submitted to the decision of the district judge.

John J. Speed appeared and argued the case in behalf of Mr. Butler.

LONGYEAR, District Judge. Milton H. Butler held the bankrupt's indorsement upon which his liability had become fixed, and a suit in a court of law had been commenced, and was pending at the time the petition for adjudication of bankruptcy was filed. Upwards of eight months intervened between the time of filing the petition and the adjudication, and in the meantime Butler had gone on and taken judgment. He now asks to have his judgment proven against the bankrupt's estate, and makes a full showing of all the facts in relation to his claim as above stated. Two objections are urged to his application: First. That the judgment did not exist at the time the petition for adjudication of bankruptcy was filed. Second. That the original claim is merged in the judgment, and therefore it cannot be proved against the bankrupt's estate.

The register, Mr. H. K. Clarke, after reciting the above facts, certifies that, in his opinion, both objections ought to be sustained, and the debt rejected.

Held, as to the first objection: From a comparison of different provisions of the bankrupt act, I am satisfied that it is the intention of the act that such debts, and such only, as existed at the time of the filing of the petition for adjudication of bankruptcy, are provable against the bankrupt's estate. Any other construction would lead to endless complications and difficulty. The language of section 19, "that all debts due and payable at the time of the adjudication of bankruptcy," may be proved, etc., has reference to the condition of the debt as to its maturity or time of payment. This construction is borne out by the very next sentence, which is as follows: "And all debts then existing, but not payable until a future day," etc. This construction makes the provisions of the act harmonious. In re Patterson [Case No. 10,815].

I, therefore, fully concur with the register in his opinion that a debt not existing at the time of filing the petition for adjudication in bankruptcy, is not provable against the bankrupt's estate. I also fully concur with the register in his opinion that the debt upon which a judgment is founded is merged in the judgment, and that thereafter all remedies and proceedings for the collection of the debt must be based upon the judgment. These propositions are too well settled to admit of dispute, or need any argument to support them. But I entirely dissent from the opinion of the register in the application he would make of this doctrine. And in doing this I must also dissent from the opinion of Judge Shipman, district judge for the district of Connecticut, in Re Williams [Case No. 17,705]. Judge Shipman there says: "The debt, therefore, * * * was extinguished by the judgment." "It no longer existed." "The judgment itself constitutes a debt; but it had no existence at the time of the adjudication of bankruptcy, and is not therefore provable against the bankrupt's estate." The whole difficulty in the application of this doctrine of merger by judgment to a case like the present, originates in a mistaken theory; and that theory is advanced in the first sentence of the language of the learned judge above quoted, viz., that the debt is extinguished by the judgment. The debt is not extinguished. The instrument, contract, or obligation upon which the debt arose is extinguished, but not the debt. The debt remains. If this were not so, the judgment would destroy itself by extinguishing the very foundation upon which it is built. The debt was founded on contract; it is now founded on judgment, but it is nevertheless the same debt. A judgment operates to extinguish a debt only when it produces the fruits of a judgment. See Bank of the Metropolis v. Guttschlick, 14 Pet. [39 U. S.] 19, 32; U. S. v. Hoyt [Case No. 15,409]; Clark v. Rowling, 3 Comst. [N. Y.] 216. The judgment operates as a change of remedy merely. It is a security of a higher nature than before. It is still but a security for the original cause of action. Drake v. Mitchell, 3 East, 258, 259.

Again: It is often permitted in equity, and sometimes at law for particular purposes, to inquire into the claim or debt upon which the judgment is founded, not as a means enforcing the claim anew, but of showing the relations of the judgment and the judgment creditor to other things and persons. For instance, in the case of an attempt to enforce the collection of a judgment against property alleged to have been conveyed in fraud of creditors, the judgment may not have been rendered until after the conveyance, in which case, so far as the judgment shows, the judgment creditor was not a creditor at all at the time of the conveyance, and therefore could not have been defrauded. In such cases the judgment creditor is always allowed to go back of his judgment and prove the claim or debt upon which it is founded; and if it appears that such claim existed at the time of the conveyance, the judgment creditor's relation of creditor will for this equitable purpose be allowed to relate back to that time, although it was anterior to the rendition of the judgment. Here the judgment creditor is allowed to show that the debt upon which the judgment was founded existed at a certain time in order to establish his right to attack the validity of the conveyance as against the judgment, and to have the judgment satisfied out of the property conveyed. So, in the bankruptcy court, a court proceeding upon equitable principles, by parity of reasoning, the judgment creditor, in the absence of fraud or other evil practice in the obtaining of his judgment or in the use he has attempted to make of it, should be permitted to go back of his judgment and show what the claim or debt was upon which it was founded, and if it appears, as it does in this case, that such claim or debt was in existence at the time of filing the petition for adjudication of bankruptcy, his relation of creditor to the bankrupt's estate, although it is by judgment, should on equitable principles be allowed to relate back to that time, notwithstanding it was anterior to the rendition of the judgment; and he should be permitted to prove his judgment against the bankrupt's estate. The criterion is, that the debt existed at the time of filing the petition, no matter whether the security or remedy has been changed or not, or in what form it may exist at the time it is presented; if it, the debt, existed at the proper time, it is provable.

It will be seen that I arrive practically at the same result as the learned district judge of the southern district of New York, in Re Brown [Case No. 1,975], although by a somewhat different route. Judge Blatchford in that case uses the following language: "The judgment as such is not to be proved, but the amount of the debt or claim as it stood * * * is to be proved." In

this I do not concur. The "debt or claim as it stood" at the time of filing the petition, is merged in the judgment, and therefore the judgment must be proved, it anything; and I hold that the judgment is provable, not because it existed at the proper time, but because the debt constituting the foundation, the soul, the essence of the judgment, did exist at that time. By taking this view of the subject, all difficulties vanish; every person will receive what justly and equitably belongs to him, without violating any principle of law or equity, or unsettling or disturbing any established doctrine, or coming in conflict with any of the provisions of the bankrupt act; if the bankrupt receives his final discharge, the judgment being the thing directly acted upon by the bankruptcy proceedings, will be as effectually extinguished as if it were discharged upon the records of the court; and if he does not receive his discharge, the judgment will of course be satisfied to the full extent of the dividends which shall have been paid upon it. The costs, however, which accrued subsequent to the filing of the petition for adjudication of bankruptcy do not stand upon the same footing as the judgment for the debt. Costs are not, like interest, an incident of the debt. They are an incident of the legal proceedings instituted and prosecuted for the collection of the debt; they are for reimbursement merely. Therefore, any costs which may have accrued subsequent to the time of filing the petition cannot be said to constitute a claim or debt existing at that time, and should be excluded in making up the amount upon which dividends are to be made in the bankruptcy proceedings.

Let it be certified accordingly.

Case No. 3,364.

In re CRAWFORD.

[5 N. B. R. 301.][1]

District Court, E. D. Michigan. Jan. 9, 1871.

LIABILITY OF ENDORSER ON DEMAND NOTE.

Where a note payable on demand was not presented for payment, and no demand made within four years, a protest at that time could not fix the liability of the endorser, and a claim of this nature cannot be proved against the estate of a bankrupt endorser.

On questions arising upon the claim of Josiah F. Mann, against the said bankrupt's estate, certified by the register, Hovey K. Clarke, Esq., (together with his opinion that the claim ought to be allowed), the same having been adjourned into court for decision. The claim is against the bankrupt [Francis Crawford] as endorser of a promissory note payable on demand. No demand was made until more than four years after the note was given. Was such demand in time to fix the endorser?

[1] [Reprinted by permission.]

Mr. Ward, for claimant.

Mr. Meddaugh, for assignee.

LONGYEAR, District Judge. I fully concede that there is much force and great weight in the reasoning of the register in his able opinion, and if this were a new question I should be much inclined to concur in his views and conclusions as to the nature and character of a promissory note like the present, on interest, and payable on demand, and the relative rights, liabilities and disabilities of the holder and endorser. But this question is not only not a new one, but I consider the law so well settled in this country by an almost unbroken current of decisions in nearly every state and in some of the federal courts, in opposition to the view so ably expressed by the register, that so far as this court is concerned I can hardly consider the question an open one. I feel the more constrained to follow the current of decisions upon this question, from the fact that the supreme court of this state seems to have adopted it (Carll v. Brown, 2 Mich. 401), deeming it, as I do, of the utmost importance that the law, especially so far as it relates to commercial paper, should be uniform in all the courts within the same jurisdiction. The doctrine, as thus settled, I deem to be, that such a note as is above described must be presented for payment within a reasonable time to charge the endorser. Pars. Notes & B. 263-269, and the numerous cases there cited.

In this case the note was made and endorsed October fourteenth, eighteen hundred and sixty-five, and no demand was made until December twenty-third, eighteen hundred and sixty-nine, more than four years having elapsed. Every one must concede that this was not a demand within a reasonable time so as to charge the endorser under the law as above stated. I must therefore non-concur in the conclusion of the register, and hold that the liability of the bankrupt as endorser never became fixed, and that the said claim must be disallowed.

Case No. 3,365.

CRAWFORD'S CASE.

[2 Cranch, C. C. 454.][1]

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

INSOLVENCY—RENEWAL OF PETITION—PREFERENCE.

1. If a petitioner for the benefit of the insolvent act of the District of Columbia, upon the filing of allegations by his creditor or creditors, charging him with having assigned part of his property, within twelve months next preceding his application for relief, with intent to give a preference to any creditor or surety, withdraws his petition; such withdrawing is no bar to his relief under the act, upon a new

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

petition and application made after the expiration of the twelve months from the time of giving such preference.

2. The judge will not direct interrogatories to be filed nor an issue to be tried upon vague allegations; nor unless the allegations charge the debtor with having conveyed, lessened, or disposed of part of his property, rights or credits, with intent to defraud his creditors; or with having, at one time within twelve months next preceding his application, lost, by gaming, more than $300; or with having, within the said twelve months, assigned or conveyed a part of his property, rights or credits, with intent to give a preference to a creditor or surety.

3. A preference given more than a year before the application for relief is no bar thereto.

Thomas Crawford was a petitioner to the Hon. JAMES S. MORSELL, one of the judges of this court, for the benefit of the insolvent act of the District of Columbia, of the 3d of March, 1803 (2 Stat. 237).

Peter Brady, one of his creditors, appeared by Mr. Wallach, his attorney, and orally objected to the discharge of the debtor, alleging that he had before applied for the benefit of the act, and, upon certain allegations being filed against him, had withdrawn his petition and abandoned his application for relief.

The application was now, on the 22d of April, 1824, made to Judge MORSELL, who was permitted to bring it before the court for the consideration and advice of the judges.

Mr. Jones and Mr. Key, for the petitioner, objected that no allegations can be received unless in writing, and filed, and the judge being of that opinion,

Mr. Wallach filed allegations in writing, charging: (1) That on the 17th of April, 1823, the said Thomas Crawford filed his petition for the benefit of the act, &c., and that certain allegations were then and there filed on the part and behalf of Peter Brady, one of his creditors, charging him, among other things, with having within twelve months before his application for relief conveyed certain goods and chattels the property of the said debtor to certain creditors and sureties, which, among other things will appear by reference to the said allegations, and that after the filing of the said allegations, namely, on the 2d of May, 1823, the said debtor withdrew, or attempted to withdraw his said petition, and did not submit to the trial of the said allegations, whereupon it was ordered by the judge that the jury be discharged and the papers recorded, and subject to any future order in the premises on any future petition of said Crawford. (2) That the said Thomas Crawford did, within twelve months preceding the said 17th of April, 1823, the day of filing his said first petition, &c., convey a certain negro boy, named John, to a certain Jaunaro S. Favre, a creditor or surety of the said Thomas Crawford, with intent to give a preference to the said Jaunaro S. Favre over other creditors or some of them.

There were five other allegations charging him with conveying property to sundry other creditors within twelve months before the 17th of April, 1823, with intent to give them preference; and the said Brady insisted upon the other allegations which he had filed in May, 1823, upon the debtor's first petition; (1) The first of which allegations charged that the said Thomas Crawford, did within a few months, being less than a year before his application for the benefit, &c., "dispose of a part of his furniture with intent to defraud his creditors." (2) That he did, on or about the 8th of April last, "dispose of certain personal property, in trunks sent from Mrs. Sarah Crawford's, with intent to defraud his creditors." (3) That he did, with intent to defraud his creditors, early in the month of April last, "dispose of certain other personal property in trunks and bundles sent away from Georgetown, from the house of a certain John Abbott, and from the city of Washington, from the house of William O'Neal." The fourth, fifth, sixth, seventh, eighth, ninth, and tenth allegations charged him respectively with giving preferences to sundry creditors before the 17th of April, 1823.

The present petition was filed on the 22d of April, 1824; and the 30th was assigned for the hearing.

Mr. Key and Mr. Jones, for petitioner.

The judge can only regard the allegation of some of the matters mentioned in the seventh section of the original act of the 3d of March, 1803, which are (1) the disposing of property to defraud creditors; (2) loss by gaming; and (3) the assigning of property to give a preference to a creditor, within the year. It is contended that no debtor who has withdrawn his petition, or who has been defeated, can ever after be relieved under the act. But even if relief has been once denied because the debtor had given a preference within the year, he may apply again after the year and be relieved. A disposition of property to defraud creditors must be such a disposition as operates at the time of the application for discharge, and actually then deprives the creditors of property then existing: a disposition of property fully complete, and executed, and the property consumed, is not within the meaning of the act. All the allegations which charge fraud are altogether vague and uncertain.

Mr. Hay, for the creditor, contended that the withdrawing of his petition by the debtor, under the circumstances of the case, was a bar to his relief under a subsequent petition. He admitted that the fraud must be a fraud upon creditors existing at the time of the application; but he contended that the allegations need not be more specific than they were; and that the clause of the act which authorized the judge to require the debtor to answer interrogatories upon oath was intended to furnish the means, or to supply the place of precision in the allegations.

MORSELL, Circuit Judge (CRANCH, Chief Judge, concurring, and THRUSTON, Circuit Judge, doubting) was of opinion that the abandonment of the first petition is no bar to his present application. THRUSTON, J., however, concurred in the opinion that if the petitioner be refused a discharge because he had given a preference within a year before his application, it is no bar to his subsequent application after the expiration of the year next after the preference given.

MORSELL, Circuit Judge, also decided that a preference given more than a year preceding his present application for relief, was not a bar thereto. The judges all concurred in deciding that all the allegations of disposing of property with intent to defraud his creditors were too vague, and that the defendant was not bound to plead to them so as to make up an issue thereon. The debtor was then discharged by the judge.

Case No. 3,365a.

CRAWFORD v. The BUFFALO.

[14 Betts, D. C. MS. 85.]

District Court, S. D. New York. Dec. 30, 1848.

CONFLICT OF EVIDENCE.

[Upon a conflict of evidence, where there is no method of testing the facts except the statement of witnesses, and where other things are equal, the greater number of witnesses should prevail.]

[In admiralty. Libel by Hugh Crawford, owner of the schooner Mary, against the steamboat Buffalo, for damages sustained by collision. The libelant died before the hearing, but the suit was continued by his administratrix, Isabella L. Crawford.

[By stipulation between the respective parties, Eli Kellum, master of the schooner, who had also libeled the steamboat for freight, loss of personal property, etc., and with William and Anson Gray, owners of the lost cargo, who had likewise libeled the Buffalo, agreed to abide the result of this suit, which was to be first tried.]

BETTS, District Judge. The result of the collision between the Mary, owned by the intestate, and the Buffalo, at Crown Elbow on the North river on the 15th July, 1847, was the total loss of the schooner and her cargo of coal. The testimony was taken with great precaution by counsel before the court in July last, and the cause has been now critically argued on paper. After re-studying the testimony and examining with careful attention the argument for the libellants, I still feel, as on the hearing, that the court can resort to no criticism by which to determine the controlling fact in contestation other than that of yielding faith to the majority of witnesses. When the two vessels approximated each other, and were in imminent danger of meeting, was the steamer on the east or west shore of the river going down, and was the schooner on the west or east shore going up? The captain and one hand on board the schooner place the steamer on the west shore, and state that she crossed the river and came into the schooner holding a straight course up the east side. That the schooner had no light on her deck and none in sight except one shown a moment by the captain to warn the steamer, which was then extinguished. The pilot and engineer of the steamer, the masters of the three barges in tow by the steamer, and three deck hands on these barges,—in all eight witnesses,—unite in an opposite statement, and substantially concur in asserting that the schooner ran over from the west across the bows of the steamer and her barges, and thus received her fatal wound; and also that she had on her deck when crossing the river, and at the moment of collision, a light burning in a lamp. There are some discordances between some of the statements of these witnesses and also between some of them and statements in the answer, but they do not go to the discredit of the witnesses, nor furnish evidence in behalf of the libellants to aid in support of the action. A like difference is found in the representations of the master of the schooner, and his helmsman, but I do not consider those particulars distracting essentially from the integrity of the several witnesses or their title to the confidence of the court. I perceive no reason to doubt that every man has sworn conscientiously according to his impressions, and where they are of like intelligence and probity, and there is no means supplied for reconciling discordant statements of facts by witnesses, I know of no other way for courts and juries to ascertain the truth than by reposing faith in the greater number. It becomes a point of presumption and probability which on a naked asseveration of a fact inclines always (other considerations being equal) to the side of the majority of witnesses.

When the matters testified are susceptible of being tested and determined independently of the asseverations of the witnesses, tribunals of justice are not to be governed by the consideration of mere numerical preponderance; but this is not that case, and, adopting the sole rule which in my judgment can be applied here, I am bound to pronounce that the allegations of the libel fixing fault on the steamer are disproved on the part of the claimants, and that the action must accordingly be dismissed. I shall exercise the discretion placed in admiralty courts by law, and because the suit is in the name of an administratrix shall not charge her with the costs. Decree accordingly.

[NOTE. This action was tried with two others,—one by Eli Kellum, master of the schooner, to recover for loss of freight, clothing, etc., and the other by William and Anson Gray, owners of the cargo. A stipulation was entered into by the parties libelants, by which it was agreed that this action should be first tried, and that the decision of the other two should depend upon the event of that, except as to the amount of

damages. After the decree the claimants of the Buffalo moved for a decree for costs in the actions by Kellum and the Grays, and the motion was granted. Case No. 2,110.]

Case No. 3,366.

CRAWFORD v. BURNHAM.

[1 Flip. 116;[1] 4 Am. Law T. Rep. U. S. Cts. 228.]

Circuit Court, E. D. Michigan. Nov., 1871.

EJECTMENT—MATTER IN DISPUTE—JURISDICTION—CONSTRUCTION OF SECTION 11, ACT 1789.

The matter in dispute in ejectment suits in the United States courts, within the meaning of section 11, Act 1789 [1 Stat. 78], is the estate which is claimed in the declaration, and in order to give the court jurisdiction the value of the estate must appear in the declaration or by proof.

[Cited in Simon v. House, 46 Fed. 318.]

This was an action of ejectment brought to recover certain lands in the eastern district of Michigan. The plaintiff claimed the title to the same in fee. The declaration claimed $10,000 damages, and was framed under the statute of Michigan (section 4560). The value of the land was not stated therein. Defendants pleaded the general issue, and a jury being waived, the parties proceeded to trial on the issue at June term, 1871.

On the authority of Ex parte Bradstreet, 7 Pet. [32 U. S.] 647, the court permitted the plaintiff to give evidence as to the value of the premises, but that did not show that the property was worth above $500.

The evidence being in and both parties resting, counsel for defendant raised the point that the court could not longer hold jurisdiction, because the premises were not shown in the proof to be of more value than $500. They cited section 11, Judiciary Act 1789 [supra]; 4 Wash. C. C. 624 [Lanning v. Dolph, Case No. 8,073]; [Green v. Liter] 8 Cranch [12 U. S.] 229; 1 Paine, C. C. 486 [Smith v. Jackson, Case No. 13,065]; and [Ex Parte Bradstreet] 7 Pet. [32 U. S.] 634.

Plaintiff's counsel insisted that the damage claimed in the declaration far exceeded $500, and that was sufficient to give the jurisdiction, citing Pet. C. C. 64 [Hartshorn v. Wright, Case No. 6,169].

Henry B. Brown and Mr. Pond, for plaintiff.

Alfred Russell, for defendant.

LONGYEAR, District Judge. Under section 11 of the judiciary act of 1789 (1 Stat. 78), defining the jurisdiction of the circuit court, the existence of the fact that "the matter in dispute exceeds, exclusive of costs, the sum or value of $500," is just as necessary as that "the suit is between a citizen of the state in which the suit is brought and a citizen of another state," or any other jurisdictional fact prescribed by said section. Where the "sum or value" is stated in the declaration jurisdiction will be determined by the amount so stated, and when the amount so stated is sufficient to confer jurisdiction, such jurisdiction will not be affected, even though it should appear upon the trial that such "sum or value" is really less than the required amount. Gordon v. Longest, 16 Pet. [41 U. S.] 97; Hulsecamp v. Teel, 2 Dall. [2 U. S.] 358. Where, however, as in this case, the demand is not for money, and the nature of the declaration does not require the value of the thing demanded to be stated in the declaration, the practice of the United States courts is to allow the value to be given in evidence, as was done in this case. See Ex parte Bradstreet, 7 Pet. [32 U. S.] 634, 647; Green v. Liter, 8 Cranch [12 U. S.] 229; Hartshorn v. Wright [Case No. 6,169]. It is clear, however, by necessary inference from the cases above cited, as well as on principle, that in such cases the value of "the matter in dispute" must be either alleged or proven to exceed the sum of $500, and that in the absence of both such allegation and proof there is no jurisdiction, and the suit must be dismissed.

By the statutes of Michigan, which govern in this case, the action of ejectment is extended and enlarged so as to comprehend and include all cases in which it was formerly necessary to bring a writ of right, which latter writ is abolished. 2 Comp. Laws Mich. p. 1230, §§ 8, 4551, 4741. So that now the plaintiff in this action may set up and put in litigation the fee itself (as the plaintiffs have done in this case), or any less estate, as well as the mere right of present possession; and to this end it is further provided in the same statutes (page 1231, § 4563), that "in every other case," than where the action is brought for the recovery of dower, "the plaintiff shall state" in the declaration whether he claims in fee, or whether he claims for his own life, or the life of another, or for a term of years, or otherwise; specifying such lives or the duration of such term. And the judgment is made conclusive "as to the title established in such action" upon the party against whom the same is rendered, whether plaintiff or defendant of course, and against all persons claiming under such party by title accruing after the commencement of the suit. See page 1236, §§ 4588, 4590.

What then is the thing demanded, "the matter in dispute," in ejectment suits? Clearly, and it seems to me indisputably, it is the estate, title, interest or right in and to the lands in question, set up and claimed in the declaration. It is as to these that the plaintiff is expressly required to be specific in stating what he claims, as to what an issue is joined, and judgment is given. It is true, the action sounds in damages as well. It is to be observed, however, that it sounds in damages only, the recovery of damages not being its original or principal purpose. Damages in such case, under the main issue as to

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

the right, title, or estate, are given only in case of recovery by plaintiff upon that issue, and are for the supposed trespass by the defendant in unlawfully withholding possession from the plaintiff, and have no reference to the value of the land. They are, therefore, merely incidental to, and contingent upon, the result of the main issue. It is to be observed, moreover, that under this issue the damages are, in practice, only nominal. That they were so regarded by the legislature is evident from the fact that in the statutes, before alluded to, such damages are expressly so nominated. 2 Comp. Laws Mich. p. 1231, § 4560. See, also, Lanning v. Dolph [Case No. 8,073]. Formerly, the real damages in such cases could be recovered only in a separate action. Now, they may be recovered in the same suit, but not in or by the verdict and judgment upon the main issue. Such recovery can be had only after such verdict and judgment, and upon a new issue joined upon a suggestion of damages, as required by the statutes before alluded to. 2 Comp. Laws, p. 1237, § 4596 et seq. I hold, therefore, that in the action of ejectment, the land and premises demanded, when claimed by the plaintiff in fee, as in this case, or when a less estate than the fee is claimed, then the estate, title, interest, or right claimed, as set up in the declaration, is "the matter in dispute" within the meaning of section 11 of the judiciary act of 1789; and that in order to confer jurisdiction upon this court in such cases, it must appear by allegation in the declaration, or by proof, that the value of such land and premises, or of such estate, title, interest, or right, so claimed, exceeds $500.

Such not being made to appear in this case, there is no jurisdiction of the subject matter of the suit in this court. The suit must, therefore, be dismissed, with costs to the defendants.

CRAWFORD (BUSH v.). See Case No. 2,-224.

Case No. 3,367.

CRAWFORD v. CRUSE.

[Cited in Letty v. Lowe, Case No. 8,285. Nowhere reported; opinion not now accessible.]

Case No. 3,368.

CRAWFORD v. DEXTER et al.

[5 Sawy. 201.][1]

District Court, D. Nevada. July 9, 1878.

BOND—ALTERATION.

An alteration in the recitals of a bond, made after its execution, by the attorney of the obligee, without any wrongful or fraudulent purpose, which does not in any manner prejudice the obligees or affect their rights or obligations, is immaterial, and will not destroy the bond.

Suit on a bond, the facts being as follows: Dexter being a sub-mail contractor under one Adam E. Smith, made a contract with John S. Ullrick, whose assignee in bankruptcy the plaintiff [Israel Crawford] is, and one H. C. Wright, whose interest was transferred to Ullrick before his bankruptcy, by which contract Dexter agreed to pay Ullrick and Wright eighteen hundred dollars per annum for carrying the mail once a week from Aurora, Nevada, to Independence, California, and back. To secure performance of this contract on Dexter's part, the bond in suit was given. The penalty of it is five thousand dollars, and the condition is in these words: "Whereas, the above bounden T. W. Dexter, has this day entered into a contract with said John S. Ullrick and H. C. Wright, whereby they agree to transport the United States mails from the town of Aurora, Nevada, to Independence, California, and back again, once in each week, commencing on the twentieth day of January, 1872, and ending on the thirtieth day of June, 1874, and for which the said T. W. Dexter has agreed to pay said John S. Ullrick and H. C. Wright the sum of eighteen hundred dollars per annum, payable quarterly, or as the same may be received from the United States, or" (here is a caret after the word "or," and an interlineation of the name "Adam E. Smith,") "by said T. W. Dexter." (Here is another caret, and on the margin of the bond a like mark, with the following clause: "And that said Dexter hereby agrees not to run any stage or conveyance for carrying passengers on said route between the town of Aurora and the town of Independence during the time specified in said contract.") "Now, therefore, the conditions of the above obligation are such that if the said T. W. Dexter shall well and truly pay to said John S. Ullrick and H. C. Wright all sums of money as they become due, according to the terms of said contract, reference to which is hereby made, then this obligation to be void, otherwise to remain in full force." The bond is signed by Dexter and the five sureties now defendants. The alterations above mentioned were made by Judge Boring, an attorney, upon the suggestion of Ullrick, one of the obligees. Ullrick suggested those changes when the bond was read over to him by the attorney, and before it had been signed; but it appears from the testimony of a number of the sureties, that the alterations were not in fact made until after the bond was executed, and that they were made without the consent or knowledge of the obligors. Ullrick's belief was and is now that the alterations were made by Judge Boring before signing, at the time he suggested them. These alterations were made without any wrongful or fraudulent purpose on the part of Ullrick. Judge Boring is admitted to have been a perfectly upright man,

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

but loose in his ways of doing business. Soon after the execution of the bond, the mail service between Aurora and Independence was increased to three times a week, and a new agreement was then made by Dexter to pay Ullrick and Wright so much more for each additional service per week as he had before agreed to pay for the service once a week. The contract was performed by Ullrick and his assignee. Suit is brought to recover on the bond two thousand six hundred and fifty dollars, that being the sum due Ullrick from Dexter for the tri-weekly service for the last quarter of 1873, and the first quarter of 1874. The amount to which he would have been entitled under the first contract for a weekly service is one third of that sum, or eight hundred and eighty-three dollars and thirty-three cents. Other facts are stated in the opinion.

Thomas H. Wells, for plaintiff.

M. A. Murphy and T. W. W. Davies, for defendants.

HILLYER, District Judge. On the argument, counsel for plaintiff admitted that the defendants are not liable on this bond for anything more than eight hundred and eighty-three dollars and thirty-three cents, the amount due from Dexter to Ullrick under the first agreement, for a weekly mail service at eighteen hundred dollars a year. The defendants resist any recovery against them upon two grounds, the first of which is, that at the time the tri-weekly service began there was a new agreement made to which the bond has no reference. The testimony, however, does not support this position. It appears from Ullrick's testimony that the compensation for carrying the mail two times more a week than he had at first contracted to do, was measured by the first agreement; and, as under the first agreement, Ullrick was to receive eighteen hundred dollars per year for one service per week, Dexter further agreed upon Ullrick's undertaking the tri-weekly service to pay him eighteen hundred dollars for each additional trip in excess of one a week. The new contract was not a substitute for the old, but a contract distinct from it, providing for a new mail service at a compensation measured by that provided in the first contract. The sureties, therefore, are not released by Dexter making the further agreement. The second ground is that the sureties are discharged from all liability by reason of the interlineations altering the bond after its execution. The substance of the rule on this point is stated in Smith v. U. S., 2 Wall. [69 U. S.] 219, as follows: "Any variation in the agreement to which the surety has subscribed, which is made without the surety's knowledge or consent, and which may prejudice him, or which may amount to a substitution of a new agreement for the one he subscribed, will discharge the surety." Because he can then well say: "I came not into this contract." If, then, the alterations do not prejudice the defendants, and do not amount to a substitution of a new contract for the old one, the sureties are not thereby relieved from liability. An immaterial alteration, though made by the obligee himself, will not destroy the bond. Both of the alterations occur in the preamble or introductory part of the condition of the bond, in which is stated the terms of the agreement between Dexter, the principal, and Ullrick, the obligee, to secure the due performance of which on Dexter's part, the bond was given. The condition following this recital of the agreement is, that if Dexter "pays all sums of money as they may become due according to the terms of said contract," then the bond shall be void. Whatever the change in the recital of the agreement, the condition remained the same, and hence such change would be immaterial, unless it in some way affected the terms of the contract in respect to the time or manner of the payments to be made by Dexter to Ullrick.

But neither of the interlineations do so affect the contract. They do not in any manner change the rights, duties or obligations of any of the parties under the instrument. The name "Adam E. Smith," as interlined, may seem at first view to change the terms of the contract in respect to the persons from whom Dexter might receive the money. But when we know the situation of the parties when the agreement was made it does not do so. Adam E. Smith was the first or original contractor with the government, Dexter a subcontractor under him, and Ullrick under Dexter. The money to be received by Dexter was the money due from the government for the particular mail service undertaken by Ullrick. Until it came into his hands, whether directly from the United States, or through Adam E. Smith, or any other person whatsoever, neither he nor his sureties could become liable to Ullrick on the bond. Before the name Adam E. Smith was interlined, this recital read that Dexter had agreed to pay the money quarterly, "or as the same may be received from the United States or by said T. W. Dexter." This would include a receipt of the money directly from the United States or from any person, and by the condition the liability attached only when the particular money came into the hands of Dexter. Thus this alteration in no manner prejudiced the makers of the bond or changed the legal effect of that instrument.

The second alteration does not purport to be a recital of any portion of the agreement referred to in the condition of the bond and has no possible effect on the liability of the obligors. It is an independent covenant by Dexter not to put any opposition on Ullrick's mail route, and seems to be an afterthought of Ullrick's which was inserted in the bond by the attorney instead of in the agreement, where it properly belonged. At all events,

so long as the condition of the bond remained unchanged the insertion of this stipulation was immaterial. The condition of the bond refers only to the payment of the money as it fell due by the terms of the contract, and the obligors have no concern with any part of the agreement except that which fixes the time when the money must be paid by Dexter. Clearly no recovery could be had on this bond for any breach of Dexter's contract not to run any stage on the route of Ullrick. There must be judgment for plaintiff.

CRAWFORD (FARRIN v.). See Case No. 4,686.

CRAWFORD (GITTINGS v.). See Case No. 5,465.

Case No. 3,369.

CRAWFORD v. JOHNSON.

[1 Deady, 457.][1]

Circuit Court, D. Oregon. Sept. 14, 1868.

ACTION ON DEPUTY COLLECTOR'S BOND—JURISDICTION.

1. If a deputy collector of internal revenue fails to pay over, to his principal, taxes collected by him, under the proviso in section 67 of the act of July 13, 1866 (4 Stat. 172), the circuit court of the United States has jurisdiction of an action by the collector upon the bond of said deputy to recover the amount of such taxes.

2. A collector of internal revenue is considered as receiving an "injury to his property," on account of an "act by him done," within the meaning of the proviso aforesaid, when a deputy appointed by him embezzles the taxes given him for collection.

This action was commenced on May 13, 1868, and on the 23d of the same month, the defendants [Thomas] Smith and [R. H.] Tapp were duly served with a summons, but the defendant [F. M.] Johnson was not found. On June 11, Smith entered an appearance by his attorneys, and on the 13th of the same month filed a motion to dismiss the action as to him, because "the court has no jurisdiction of the person of the said defendant or of the subject matter of the said action;" and on September 7, the plaintiff [Medorum Crawford] filed a motion "for judgment for want of an answer or other pleading within the time allowed by law and the rules of this court." The two motions were argued together and the former disallowed, on the ground that objection to the jurisdiction cannot be made otherwise than by plea or demurrer, and the latter continued. On September 9, the motion for judgment was allowed as against Tapp, and the defendant Smith had leave to file a demurrer to the complaint, objecting that the court had not jurisdiction of the subject matter of the action, and that the facts stated do not constitute a cause of action, which was then argued and submitted.

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

John H. Mitchell, for plaintiff.

John H. Reed, for defendant, Smith.

DEADY, District Judge. From the complaint it appears, that on and prior to November 1, 1866, and ever since, the plaintiff was and has been collector of internal revenue for the district of Oregon, and that on or about said November 1, the plaintiff appointed the defendant Johnson, deputy collector of internal revenue for the sixth assessment district of Oregon, and that said defendant as principal, with the defendants Tapp and Smith as sureties, on said November 1, executed and delivered to the plaintiff, as collector aforesaid, a bond in the penal sum of $2,000, to be void upon the condition that said Johnson would faithfully perform the duties of deputy collector for the district aforesaid, etc.; and that the defendant Johnson failed to account for the sum of $1,978.42, of taxes placed in his hand for collection, but collected the same by virtue of his said office, and converted the amount to his own use, "for which sum the plaintiff is liable to account for and pay to the United States;" and that said plaintiff by reason of such failure, has been put to $21.58 expense, in addition to the sum aforesaid, for which sum of $2,000 he prays judgment.

A proviso to section 67 of the act of July 13, 1866 (14 Stat. 172), provides: "That if any officer appointed under and by virtue of any act to provide internal revenue, or any person acting under or by authority of any such officer, shall receive any injury to his person or property for or on account of any act by him done, under any law of the United States, for the collection of taxes, he shall be entitled to maintain a suit for damages therefor, in the circuit court of the United States, in the district where the party doing the injury may reside or shall be found." Upon this proviso, counsel for plaintiff rests the jurisdiction of this court. On the argument, counsel for Smith practically abandoned the objection to the jurisdiction of the court. In this respect, the demurrer seems to have interposed upon the impression that the plaintiff relied upon a similar provision in section 2 of the act of March 2, 1833 (4 Stat. 632), concerning "the collection of duties on imports," to support the jurisdiction of this court, and that such provision only applied to the collection of external revenue—duties on imports. But the proviso quoted from the act of 1866, gives the same jurisdiction to this court in cases of actions for injuries arising from acts done under the internal law, as under the laws for the collection of duties on imports.

The objection that the complaint does not state facts sufficient to constitute a cause of action, is, I think, not well taken. True, the complaint only states that the plaintiff is liable to pay the money converted by his deputy, to the United States, and under ordinary circumstances, a mere liability to suf-

fer from the acts or omissions of another, does not give a right of action against such other. Some injury must actually result from such act or omission. A mere liability to be injured is not equivalent to an actual injury. But in this case, I think the plaintiff is more than merely liable to the United States for this money. The law makes him absolutely responsible for the conduct of his deputies, and also charges him with the whole of the taxes contained in the lists delivered to him for collection. Prima facie, the amount of the tax list is a fixed and ascertained indebtedness, for the payment of which he has given bond. This sum collected by Johnson, he is bound to pay. The condition of the bond is to keep the plaintiff harmless from any liability on account of any act or omission of Johnson's. In this respect the complaint follows the terms of the condition, and, so far as the bond is concerned, is a sufficient statement of a cause of action in any view of the matter. But it is doubtful if this court has jurisdiction of an action between these parties for a mere liability upon this bond, because the act of 1866 limits the jurisdiction to cases where the officer or person shall receive an injury to his person or property. Instead of making the allegation of the complaint in the language of the bond, it would have been proper to have averred the fact to be, as it was admitted on the argument, that the plaintiff had already paid over the amount to the United States. If so, he has received an injury to his property to that extent—he has lost so much of it on account of his act in appointing Johnson deputy collector of taxes. But I think it proper, under the circumstances, to hold, that as this amount of taxes was charged to the plaintiff by the government, the money for the time being is to be considered as his own, and therefore taken or embezzled from him by Johnson, to his injury. The demurrer is overruled and judgment must be given for the plaintiff.

CRAWFORD (MARSHALL v.). See Case No. 9,126.

CRAWFORD (MATHUSON v.). See Case No. 9,279.

Case No. 3,370.

CRAWFORD v. MILLIGAN.

[2 Cranch, C. C. 226.][1]

Circuit Court, District of Columbia. April Term, 1821.

PROMISSORY NOTE—DEMAND AND NOTICE.

If a note fall due on Saturday, and payment be demanded of the maker on that day, notice to the indorser, on Monday, is not too late.

Assumpsit against the indorser of a promissory note, which became due on Saturday. Payment was demanded of the maker of the note on that day, and notice of the non-payment by the maker was given to the defendant on the following Monday.

THE COURT (nem. con.) decided that the notice was not too late.

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

Case No. 3,371.

CRAWFORD v. SLYE.

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

Circuit Court, District of Columbia. March Term, 1834.

SLAVERY.

The list of slaves required by the eleventh section of the Maryland act of 1796 (chapter 67) must designate the sex. The name "Jo" does not designate the sex.

Petition for freedom. The importation of the slave (the petitioner [Jos. Crawford]) was alleged to be justified under the 11th section of the Act of Maryland, 1796, c. 67, which requires a list of the slaves so imported, distinguishing their sex. The list merely calls the slave "Jo."

Mr. Key and Mr. Wallach, for petitioner. Marbury & Brent, for defendant.

THE COURT (THRUSTON, Circuit Judge, absent) decided that the list required by the eleventh section must be such as is required by the eighth, and must designate the sex as well as the name; and that the list offered does not designate the sex; and that, therefore, the petitioner is entitled to freedom.

CRAWFORD (SMITH v.). See Case No. 13,030.

CRAWFORD (UNITED STATES v.). See Case No. 14,890.

CRAWFORD (VAN CAMPBUSH v.). See Case No. 2,224.

Case No. 3,372.

CRAWFORD et al. v. The WILLIAM PENN.

[1 Pet. C. C. 106.][2]

Circuit Court, D. New Jersey. April Term, 1815.

ACTION BY ALIEN ENEMY.

1. The general rule of the common law of England is, that an alien enemy cannot maintain an action, in the courts of that country, in his own name, during the war.

2. A person beneficially interested in a suit, if alien enemy, cannot support a suit in the name of his trustee, who is not an alien.

3. It is otherwise, if the contract upon which suit is brought, arises out of a trade licensed by the government in whose courts redress is sought; and enemy interest, will not defeat such a suit.

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

[2] [Reported by Richard Peters, Jr., Esq.]

4. Quere, if such a suit can be maintained in the name of the alien?

5. The rules of the common law, in cases of alien enemy, do not apply in the same rigor, in courts acting under the general laws of nations.

[Cited in Taylor v. Carpenter, Case No. 13,-785.]

6. Nature, character, and privileges of a cartel vessel, and of the persons concerned in her navigation. All contracts made for equipping and fitting a cartel, are to be considered as contracts made between friends, and ought to be enforced in the tribunals having jurisdiction thereof.

This was a libel in the district court, on an hypothecation of this vessel, given at Jamaica, for repairs made on her, and advances for her outfit, to enable her to perform her voyage to the United States. The owner of the ship was admitted to claim; and he pleaded, that the instrument of hypothecation was executed during war; and that the libellants [Crawford and McClean] are alien enemies, residing in Jamaica. The replication stated, that the vessel was employed, by the United States, as a cartel, to bring to the United States, from Jamaica, a number of American prisoners; and having, as such, commenced her voyage, was compelled by stress of weather to put back to refit, and procure provisions; on which account these advances were made, and without which she would not have performed her voyage. To this replication, there was a demurrer and joinder by the libellants. The district court dismissed the libel, from which decision, the cause came by appeal to this court.

McIlvain & Stockton, for the appellants, contended: that alien enemy is not, per se, a bar to a suit, in cases where the reason of the rule, which produced the disability, has ceased; as, if the alien came into the country by license; or, being in the country at the breaking out of the war, is permitted to continue; or, in cases where the trade, on account of which the contract is made, is licensed; and, in this latter case, all the means necessary to effect the end so legitimated, are also protected. That a cartel, divests the vessel, and all parties connected with her, of their hostile character; so that not only are all contracts, made in relation to the service she is engaged in, lawful; but the parties are to be considered, pro hac vice, as friends; at all events, in a court of the law of nations. 11 Johns. 69, 117; 1 Comyn. 387; 3 Rob. Adm. & Pr. (Am. Ed.) 116; 4 C. Rob. Adm. 289; 5 C. Rob. Adm. 183; 6 C. Rob. Adm. 336; 1 C. Rob. Adm. 168; Bynk. 55; 13 East, 332; 1 Ld. Raym. 282; Salk. 42; 3 Burrows, 1734; Doug. 641; 8 Term R. 166; 8 East, 273; 15 East, 419.

Mr. Griffith, for the appellant, argued: that the validity of the contract, does not remove the legal disability of the party to sue; and, that in none of the cases cited, was the suit brought in the name of the alien enemy, unless he was commorant in England, or unless the war was over. The case from 2 Douglass, 641, was overruled in the exchequer chamber, as appears by a note in that book. Anthon v. Fisher, p. 649.

WASHINGTON, Circuit Justice. The general rule of the common law of England is, that an alien enemy cannot maintain an action in the courts of that country, during the war, in his own name. The rule is not founded upon any legal objection to the contract or other ground of the action, but, upon the disability of the party to sue; arising out of the hostile character which the war has impressed upon him. This rule appears to be inflexible, except where the alien enemy is under the protection of the king; as where he comes into the kingdom after the war, by license of the sovereign; or being there at the time of the war, is permitted to continue his domicil. Within the reason upon which the general rule was probably founded, it has been also decided, that, if the person beneficially interested in the subject in dispute, be an alien enemy, the action cannot be supported, even in the name of a British subject, his trustee, any more than it could have been in that of the alien enemy himself. Public policy, which forbids that the property sued for should be carried out of the country to enrich the enemy, would be violated equally in the one case as in the other. But where the reason ceases, upon which this doctrine is founded, which forbids the interest of an alien enemy to be asserted by his trustee, though a subject, the rule does not prevail; and therefore if the contract on which the suit is brought, arise directly or collaterally out of a trade licensed by the sovereign authority of the government, in whose courts redress is sought, enemy interest in the subject in controversy, will not defeat the action depending in the name of the subject as trustee. Thus, it has been held, that action upon an insurance made upon a licensed trade with the enemy for the use of an enemy, may be supported in the common law courts of England, in the name of the agent who effected the insurance, he being a British subject. For all the purposes of this trade, the person for whose benefit the license was granted, is to be regarded, virtually, as an adopted subject of Great Britain; and his trade under such license as British trade:—and, the end being licensed, the ordinary legitimate means of attaining that end, is considered as being also licensed. Usparicha v. Noble, 13 East, 332; Kensington v. Inglis, 8 East, 273, 15 East, 419.

It is clear, therefore, that wherever the trade with an enemy, and consequently a contract founded thereon, are rendered lawful by the license of the sovereign, the objection to the person of the plaintiff, on the ground of his being an alien enemy, is merely technical and stricti juris. Although the reason on which the rule was founded, does not exist in such a case, the court being

bound to support the beneficial interest of such licensed alien enemy; yet it does not appear that any judge of the common law courts of England, has thought himself at liberty to entertain such a suit, if brought in the name of the alien enemy. Yet I know of no case in which it has been decided, upon the point coming directly in judgment, that such an action could not be maintained. In the case of Cornu v. Blackburne, 2 Doug. 641, the action was supported in the name of the alien enemy upon a ransom bond; but no plea was put in to bar the right of the plaintiff to sue; and the cause was decided upon another point. In Anthon v. Fisher, 2 Doug. 649, it was laid down generally, that an alien enemy cannot, by the municipal laws of England, sue for the recovery of a right acquired by him in actual war; but the particular case in which that decision was given, was that of a ransom bond; and of course the decision of the court should be considered as applicable to such a case. But the case of a ransom bond, is very different from that of a contract arising out of a licensed trade. In the former, the hostile character of the obligee is in no respect removed; on the contrary, it is an act of hostility which gives rise to it. In the latter case, the hostile character of the party with whom the contract is made, does not attach either to him or to the contract. "He is to be regarded (in the words of Lord Ellenborough) virtually as an adopted subject of Great Britain, and his trade as British trade." If he is to be so considered, it would seem to follow, that all objection to a suit being maintained in the name of such adopted subject, would be at an end; as much so, as if the plaintiff were, at the time of bringing the suit, personally within the British dominions. It must, nevertheless, be acknowledged, that, in the case of Kensington v. Inglis, 8 East, 273, the court seemed to be of opinion, that, even in the case of a licensed trade, the suit cannot be maintained in the name of the alien enemy. But, as the suit was in the name of a subject, the opinion, as to this point, was not essential to the decision of the cause; and, of course, it ought not to rank higher than an obiter dictum.

This examination of the subject has been intended to show, that, in cases where the contract upon which the suit is brought, arises out of a licensed trade, an objection founded upon the disability of the nominal plaintiff to maintain the action, on the ground of alien enemy, is extremely feeble; and can only be supported by a tenacious adherence to a rigid rule of the common law, notwithstanding the reason of the rule, should, in this particular case, have ceased. The question then is, does this rule apply in all its rigour, to courts acting under the general law of nations, and proceeding according to the civil law? I think it does not. Bynkershoek (Bynk. 55) appears to be very strong upon this subject. He says, that where commerce is permitted amongst enemies, contracts, and actions founded upon them, are permitted; "for who," he asks, "will sell and carry goods to an enemy, without the right of recovering the price of them? and what hope can there be of recovering that price, if one cannot judicially compel payment from his enemy purchaser." In cases of this nature, in courts proceeding according to the civil law, the only question is, has the plaintiff a persona standi in judicio? Can he be heard as a plaintiff in that court? Bynkershoek, in the above quotations, gives the answer. The right to sue, and to compel payment, is a necessary incident to his right to trade and to contract. This doctrine of Bynkershoek, has received the entire approbation of Sir William Scott, in the case of The Hoop, in which he gives the sense of that learned jurist as amounting to this, that the legality of commerce, and the mutual use of courts of justice, are inseparable. 1 C. Rob. Adm. 168.

The distinction which I am endeavouring to maintain, founded upon the peculiar rules which prevail in the courts of common law, and those proceeding by the rules of the civil law, may be illustrated by analogous cases of every day's practice. No rule is more rigidly adhered to by the common law courts of England, than that the assignee of a chose in action cannot maintain a suit in those courts, in his own name, upon common law principles. Neither can a cestui que trust bring an action in his own name; although, in both cases, the court will, for certain purposes, take notice of those equitable interests. But in a court of equity, where the strict rules of the common law courts do not obtain admission, the person having the beneficial interest, is admitted to sue, and to assert his right, in his own name. In like manner, and within the same principle, it would seem reasonable, that where the party is divested of his hostile character, by which he acquires a persona standi in judicio, the technical objection of the common law courts, to his being heard, as plaintiff, ought to be disregarded in courts which proceed by different rules. The only remaining question is, can a contract, made with an alien enemy, by the owner or master of a cartel vessel, in relation to the navigation of that vessel, upon the service in which she is engaged, be enforced in a court proceeding according to the rules of the civil law, and having jurisdiction of the subject matter? What is the character of a cartel vessel, and of the persons concerned in her navigation? The flag of truce which she carries, throws over her and them the mantle of peace. She is, pro hac vice, a neutral licensed vessel; and all persons concerned in her navigation, upon the particular service in which both belligerents have employed her, are neutral, in respect to both, and under the protection of both. She cannot carry on commerce under the protection of her flag, because this was

not the business for which she was employed, and for which the immunities of that flag were granted to her. She is engaged in a special service, to carry prisoners from one place to another; and, whilst so engaged, she is under the protection of both belligerents, in relation to every act necessarily connected with that service. It follows, that all contracts made for equipping and fitting her for this service, are to be considered as contracts made between friends, and consequently ought to be enforced in the tribunals of either belligerents, having jurisdiction of the subject. The agreement of the two nations, by their agents, to make her a cartel, amounts to a license by both, to perform the service in which she is employed, and sanctifies all the means necessary to that end.

Upon these principles, I am of opinion, that the libellants were capable of maintaining this suit; and that the plea of the claimants ought to be overruled. The proceedings have not been regular; but I shall not go further, after reversing the sentence below, than to direct the appellants to answer the libel.

[NOTE. The respondent filed a number of pleas, and, on argument on the pleas and replication, the court, at the request of the parties, granted leave to amend the pleadings. Case No. 3,373.]

Case No. 3,373.

CRAWFORD et al. v. The WILLIAM PENN.

[3 Wash. C. C. 484.][1]

Circuit Court, D. New Jersey. Oct Term, 1819.

PLEADING AND PROOF — VARIANCE — CONTRACTS WITH ALIEN ENEMY—IN ENEMY'S COUNTRY—DEMURRER—BOTTOMRY.

1. A variance in pleading, which would be fatal at common law, may not be so in courts which proceed according to the civil law; as the rules which govern the former courts, are seldom applicable to proceedings in the latter.

2. The court, proceeding under the civil law, will not allow a party to be surprised by evidence, materially variant from the case stated in the pleadings, but will allow an amendment; yet, if the statement of the case be not such, as can mislead the party, the court will proceed to a decree.

[Cited in New Jersey Steam Nav. Co. v. Merchants' Bank, 6 How. (47 U. S.) 434. Approved in The Clement, Case No. 2,879.]

3. Contracts made with an alien enemy, are lawful, if made in a trade carried on under license of the government, whether they arise directly, or collaterally, out of such licensed trade; or, if the enemy with whom the contract is made, be in the hostile country by license of the government; or if the contract be a ransom bond.

4. Contracts made by prisoners of war, in the enemy's country, for subsistence, are binding.

5. A demurrer in a case proceeded on, under the civil law, does not prevent the party, who demurred, controverting the facts confessed in the demurrer, and compelling the opposite party to prove them. Rules of pleading, in courts of common law, how far applicable in courts proceeding according to the civil law.

6. The master of an American vessel, in an enemy's country, may hypothecate the vessel, for money advanced to return to the United States; though the original voyage was broken up by capture and the compulsory sale of the cargo.

[Cited in The Hunter, Case No. 6,904.]

7. In a libel on a bottomry bond, the libellant is always expected to prove, by other evidence than the bond, that the money was lent, and that the repairs were made, and materials were furnished, to the amount claimed; and that they were necessary to enable the vessel to perform the voyage, or for her safety; and that the money could not be otherwise obtained. He should exhibit an account of the items, for which the funds were expended, with the usual proof, that the court may judge of their necessity.

[Cited in The William & Emmeline, Case No. 17,687; The Bridgewater, Id. 1,865; Nippert v. The Williams, 39 Fed. 826.]

In this case, which was heard at April term, 1815, on plea, replication, and demurrer—see Pet. C. C. 106 [Case No. 3,372]—the court overruled the plea, and ordered the respondent to answer the libel. The respondent afterwards filed a number of pleas; but the third gave rise to the principal subject of controversy. This plea stated, that, at the time of the making and executing the said supposed instrument of hypothecation, in the libel mentioned, the libellants were aliens, born in foreign parts, out of the allegiance of the United States, and within the allegiance of a foreign state, viz. the United Kingdom of Great Britain and Ireland, and not citizens of the United States, by naturalization, or otherwise; and that, at the same time, the said claimant, owner of the said ship, was a citizen of the United States, resident within the same; and that the said master was also a citizen of the United States—and that, at the time when the said bond was executed, there existed open and public war between the said United States, and the said United Kingdom of Great Britain and Ireland; and that the said contract being made between alien enemies, the same was void, &c. To this plea, the libellants replied, in substance, the former plea, replication, demurrer, order, and decree of this court; concluding with an averment, that the matters contained in the former plea, and in the said third plea, to which this replication is put in, are the same, and not different; and that, by reason of the proceedings aforesaid, the respondent is barred from denying the validity of the said contract of hypothecation. Upon this plea, and replication, and others of minor importance, the case was argued at the last term, and it was contended by the respondent's counsel:—1. That it now appeared by the evidence, that the William Penn was not employed by the two governments, as a cartel; nor did she sail under a flag of truce. 2. The libel charges, that the hypothecation bond was given for a loan of money upon the ship, her tackle, and freight;

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

whereas it appeared, upon the face of the bond, that it was given on the ship and tackle only; and the evidence shows, that it was not for a loan of money, but for repairs made, and materials furnished, by the libellants, as ship carpenters. These variances, the counsel insisted, were fatal to the plaintiff's recovery. 2 Brown, Civ. & Adm. Law, 361; 1 Burrows, 369. 3. That the admission of the facts stated in the former replication, by the demurrer to it, does not preclude the respondent from now denying them, either by plea or answer. Coop. Eq. Pl. 321; Mitf. Eq. Pl. 239, 240, 244; 3 P. Wms. 94; 1 Atk. 450; 2 Atk. 284; 4. That all contracts with an enemy, in time of war, are void. Marsh. 741, 756; The Hoop, 1 C. Rob. Adm. 165; The Julia, [8 Cranch (12 U. S.) 181], and other cases decided in the supreme court of the United States. 5. That the bond is void, being for advances on a voyage different from the original voyage. To this, it was answered, that the same strict rules of pleading, which govern courts of common law, do not prevail in courts proceeding according to the forms of the civil law; and that variances, unless material to the real justice of the case, are disregarded by the latter courts. 6. That the former admission, that this ship was a cartel, cannot now be retracted. 7. That though she were not a cartel, still this hypothecation was given under such circumstances of necessity, as will render it an exception from the general rule, which renders void all contracts made with an enemy; and the case was resembled to that of a ransom bond. 1 Ld. Raym. 282; 1 Salk. 46; 3 Burrows, 1734; 2 Doug. 698.

R. Stockton and M'Kean, for libellants.
Griffith & Cox, for respondent.

WASHINGTON, Circuit Justice. This is a libel founded upon a bottomry bond, executed on the 13th of April 1813, at Jamaica, by the master of the ship William Penn; on the ship, her tackle, and apparel, for the necessary repairs and outfit of the ship; to enable her to perform her voyage from that island to the United States. The libel states, that the libellants did, on the day above mentioned, at Port Royal, in the island of Jamaica, lend on bottomry, on the said ship, her freight, tackle, and apparel, to the master of the said ship, £1,370 8s. 4d., current money of Jamaica; the said port being a foreign port; and none of the owners of the said ship being at or near the same; the said captain being otherwise unable to procure the necessary moneys, to refit and victual the said ship, to complete his intended voyage, &c. &c.; a copy of which bond is annexed to the libel, as part thereof, &c. To this libel, ten distinct pleas have been filed; some of which, with the replications to them, have given rise to the questions which the court is now called upon to decide; and which may be comprised under the following heads: (1) Whether there is such a variance between the libel and the bottomry bond, as ought to prevent a decree passing in favour of the libellants? (2) Whether the contract, being made with alien enemies, is void? (3) Whether the bond is void, upon the ground that the advances were made, not to enable the master to complete his original voyage, which was to Lisbon, but to return to the United States, under a new contract to bring home American prisoners; as appears from the pleadings and the evidence to have been the case?

1. That the variances pointed out exist, is unquestionable; and in an action at common law, it may be admitted, they would be fatal. But the court cannot so easily admit the application of common law rules, to cases existing in courts proceeding according to the forms of the civil law. To use an expression of Mr. Justice Story, in delivering the opinion of the supreme court, in the case of The Adeline, 9 Cranch [13 U. S.] 285, "no proceedings can be more unlike, than those in the courts of common law and admiralty." In the former, a variance between a written instrument on which the action is founded, as set out in the declaration, and the instrument itself, though a profert of it is made; may be taken advantage of upon oyer, or at the trial. But in the latter, the materiality of the variance to the opposite party, is the only ground upon which an objection can be founded. It is admitted, that the respondent ought to be informed, by the libel, of the nature of the demand to which he is to answer, so as to put it in his power to meet it fairly and fully. If the libel should not state the case with sufficient certainty, the court will not suffer the respondent to be surprised, by a case different from that alleged, but will, as a matter of course, authorize amendments to be made, so as to remove the objection. But if either party has made a mistake in setting out his case, and yet not such as could mislead the other party; the court will proceed to make a decree, notwithstanding the variance. Such is the present case. The libel claims the freight as hypothecated contrary to the tenor of the bond. But then the bond itself is made part of the libel, and is referred to as the foundation of the hypothecation; and by this, the respondent was apprized that the freight was not hypothecated, and could not be demanded; and he must have perceived, that the mention of the freight, was a mistake of the proctor who drew the libel. As to the other variance, it is equally immaterial to the real merits of the controversy; nevertheless, the libellants will be permitted to amend this libel, if they desire it, so as to produce a more exact correspondence between it and the case they mean to prove.

2. This is the important question in the cause. But before we examine it, it will be proper to notice an argument of the libel-

lants' counsel, intended to prove, that the consideration of this point, is precluded by the decision of the court at the former hearing; which overruled the plea of alien enemy, and ordered the defendant to answer the libel. We understand the argument to be, that the demurrer to the replication, which asserted that the William Penn was employed as a cartel, and sailed under the protection of a flag of truce, admitted that fact; and that the respondent is not now at liberty to controvert it, and again to rely upon the plea of alien enemy. To this argument, the court cannot accede, even if that were the case now before it for decision. According to the practice of the civil law courts, a plea, whether dilatory or peremptory, is merely intended to put an end to the cause at an early stage of it; to avoid the expense and delay of going at large into it, if the court should be of opinion, that the matter pleaded is sufficient to produce that effect. But the opinion of the court, upon admissions of facts implied from the pleadings, will not prevent the party thus making the admission, for the purpose of obtaining a decision upon the law arising out of it, from controverting the same fact, and compelling the other party to prove it. This doctrine is exemplified, in the everyday practice of the court of chancery. If the defendant file a plea in bar, and the plaintiff set it down for argument, he necessarily admits the truth of the plea; as much so, as if he had demurred to it; for otherwise, the legal effect of the matter pleaded could not be decided. And yet, if the plea be allowed by the court, the plaintiff may, notwithstanding his implied admission, reply to the plea, and deny the truth of the facts contained in it, and put the defendant to establish them by proof. Solicitor's Guide, 243, 244, 235; Gilb. 184; Coop. Eq. Pl. 232. The reason of the case just stated, applies with equal force to the present. Nothing is more calculated to lead to error, than an indiscriminate application of the rules which prevail in courts of common law, to courts proceeding according to the forms of the civil law. A demurrer, for instance, in the former, is in chief, and is a perpetual bar, if judgment be against the party demurring; but if a defendant in chancery demur, and it is overruled, he may afterwards insist upon the same thing by his answer. Dormer v. Fortescue, 2 Atk. 284. It has been thought proper to make these general observations respecting the practice of the court of equity, that the objection, so much relied upon by the libellants' counsel, may be put to rest. But the present case steers perfectly clear of the objection, and would do so, even in a court of common law. The matter of the plea, which, with the replication, formed the subject of inquiry at the former hearing of this case, was perfectly distinct from that contained in the third plea, now under consideration. That was a dilatory plea, to the disability of the libellants to sue, upon the fact asserted in the plea,—that they were, at the time the suit was brought, and when the plea was filed, alien enemies. This is a plea in bar, founded upon the matter set out in the plea, that, at the time the contract was entered into, the libellants were alien enemies; and, for that reason, the contract was void. The facts stated in the two pleas were, therefore, altogether different. This opinion brings into view the replication of the libellants to the third plea, which asserts the invalidity of the bottomry bond, on the ground that the contract was made with alien enemies. The replication, instead of avoiding the bar, by alleging that the trading was licensed, on account of the sanctity attached to a cartel; or by stating any other facts, to withdraw the case from the operation of the general rule of law, relied upon in the plea; rests altogether upon the effect of the demurrer to the replication, put into the plea originally, and the decision of the court upon it, as sufficient to preclude the defendant from putting in this plea. But, as the court has just decided that the respondent is not precluded from relying upon this plea, it will be incumbent on the libellant, if he would avoid the force of it, to withdraw this replication, and to file another, setting forth such facts as he may think sufficient, in point of law, if they exist, to withdraw the case from the operation of the general rule. Upon the present pleadings, the decree must be in favour of the respondent on the third plea. But the libellant, if he desires it, will be permitted to amend; and as the pleadings on both sides, are drawn without a very strict observance of admiralty practice, it may be best, that the pleadings should be so constructed on both sides, as to present, in the most simple form, the points intended to be controverted. This will probably be most effectually accomplished, by filing a new libel, setting forth the whole case, to which pleas may be filed, stating the objections to the recovery.

Having disposed of these preliminary points, we come to the consideration of the main question,—whether this contract, being made with an enemy, is void? The general rule is admitted, that contracts, made with an alien enemy, are void. Such is the law of nations, and of most, if not of all, the civilized nations of the world. The English and American decisions are positive in the establishment of this doctrine. But to this, as to most general rules, there are exceptions. Contracts, made with an enemy, under the license of the government, are valid; and may, in certain cases, be enforced even during the war; and that too, whether the contract arose directly or collaterally out of such licensed trade. So, if the enemy, with whom the contract is made, be in the hostile country by license of that government. So, a ransom bond, given to an enemy, to procure the discharge of the property and the person of the captured, we hold to be valid. Such was decided to be the law of England, in

the case of Ricord v. Bettenham, 3 Burrows, 1734, and in Cornu v. Blackburne, 2 Doug. 641. Such, too, is the law of other countries on the continent of Europe. We are aware of the decision in the case of Anthon v. Fisher, in the exchequer, which is to the contrary (2 Doug. 649, note); but never having met with a full report of the case, it is not easy to understand what were the particular reasons which led to that decision. How far it may have been influenced by the statute, making it criminal to give a ransom bond, which had passed prior to this decision, but after the ransom, is not clear. At all events, it was a case decided long after our Declaration of Independence, and even after the treaty of peace; and is therefore not to be considered as authority in the courts of this country, so as to overrule the decision in Ricord v. Bettenham, which was made in 1765.

There are other cases, which are considered as exceptions, even in England, where the general rule is upheld with considerable rigour, founded upon the peculiar necessity of the case. The case of The Madonna delle Gracie, 4 C. Rob. Adm. 195, is, to say the least of it, a very liberal relaxation of the general rule. It would seem, from the modern cases, that contracts, made by prisoners of war in the enemy's country, have been supported. In the case of Sparenburgh v. Bannatyne, 1 Bos. & P. 163, Chief Justice Eyre observes, that "modern civilization has introduced great qualifications to soften the rigours of war; and allows a degree of intercourse with enemies, and particularly with prisoners of war; which can hardly be carried on without the aid of our courts of justice." The other judges agree with him. Recoveries at nisi prius, we understand, are common, upon contracts made with the enemy by prisoners of war, upon parol, for their subsistence. Willison v. Patteson (Easter Term, 1817, C. P.) 7 Taunt. 439. The case of Antoine v. Morshead, 6 Taunt. 237, is that of a bill of exchange, drawn on England, in the enemy's country, by one British subject, a prisoner of war, in favour of another British subject, also a prisoner of war, and by him endorsed to an alien enemy; in which case the contract was supported. It is true, that the court seem to rely very much upon the circumstance, that the original contract was between British subjects. But it is impossible not to perceive, that the right of the alien enemy to recover upon such bill, after the return of peace, was founded upon a new contract with an alien enemy, by virtue of the endorsement; and that, if in all cases, a bill drawn by one subject in favour of another, may pass, by endorsement, into the hands of an alien enemy, the general rule of law might be indirectly subverted. We understand this case, therefore, as going the full length of establishing an exception to the general rule, in favour of prisoners of war, in the country of the enemy, contracting for necessaries. Chief Justice Gibbs seems to place it upon this ground; by saying, that, "if the objection could be supported, to its full extent, many of our miserable fellow subjects, detained in France, must have starved." The case of Daubuz v. Morshead, Id. 332, is a case like the former, in principle.

The principle on which this doctrine is founded, is strongly supported by the decision of the supreme court of the United States, in the case of Haller v. Jenks, 3 Cranch [7 U. S.] 210. That was the case of an insurance upon a cargo, purchased at St. Domingo, by the owner of an American vessel, which had been forced into that island by distress, and was compelled by the government to dispose of her outward cargo, with the proceeds of which the cargo insured was purchased. The objection made to the recovery was, that the cargo so insured, was purchased contrary to the express provisions of the non-intercourse law; and that the trade, being therefore illicit, the policy was void. But the supreme court maintained the validity of the contract, upon the ground, that the vessel having been forced into the island by a cause which could not be resisted, and the owner having been compelled by the government of the country to dispose of his cargo, it was not a trading contrary to the spirit of the law, to invest the proceeds in a return cargo. Now, that was the case of a trading, as expressly prohibited by the municipal laws of the United States, as a trading with the enemy is by the law of nations; and found its justification in a necessity, not imperious and irresistible, but one which was induced by a desire to save property. The owner might have avoided a breach of the law, strictly construed, if he had chosen to abandon his property. But the court was of opinion, that he was not bound to do so, notwithstanding the strong and unqualified expressions of the law. It is difficult to discover a difference, in principle, between that case and the present. In both, the vessel was forced into a forbidden port by a vis major—in both, a voluntary trading was forbidden; and in both, the contract, which would have been void, upon general principles of law, was predicated upon a necessity, no otherwise indispensable, than in order to save property. There is, indeed, this difference between the two cases, which, however, is all on the side of the validity of this contract;—in the former, the master might have brought away his vessel and crew, with no other loss than that of the cargo, and that too, from a nation with which the United States were at peace; whereas, in the latter, the departure of both depended upon the contract now objected to, and that from the country of the enemy. We cannot take leave of the case just referred to, without citing certain expressions of the chief justice, applicable to a case precisely like the present. He ob-

serves, that "even if an actual and general war had existed between this country and France, and the plaintiff had been driven into a French port, and a part of his cargo seized, and he had been permitted by the officers of the port to sell the residue, and to purchase a new cargo; I am of opinion, that it would not have been deemed such a traffic with the enemy, as would vitiate the policy upon such new cargo." Had this hypothetical case been the very case before the court, it would have been directly in point, and would have gone on all fours with the present. It corresponds, however, in principle, so precisely with the main case decided, that the opinion of this learned and highly distinguished judge, is entitled to more than ordinary respect. The ground which the court takes in deciding this case is, that the contract grew out of a real necessity, produced by a state of war, and was itself the offspring of an act of hostility. The vessel was captured as prize of war, libelled as such, and on account of her having a British license on board, was acquitted. She was disabled from availing herself of this discharge, and returning to her own country with her crew, without being repaired and victualled. This could no otherwise be effected, than by hypothecating the vessel for those repairs and outfits. In a moral point of view, therefore, it cannot be said, that this was a voluntary contract. The decision in this case, can never be relied on to sanction contracts with the enemy, under cover of a pretended necessity, or in which there is the slightest tincture of fraud, upon the general rule of law. Upon the whole, then, we are of opinion, that this bottomry bond is not void, on the ground of its being a contract made with the enemy.

3. The next objection is, that this bond is void; because the asserted voyage to the United States to bring home prisoners, was a new voyage; and that the master had no authority to take up money on the security of the vessel, unless it had been necessary to enable him to complete his original voyage. In support of this position, the learned counsel referred to no authority which appears to bear upon it; and it is certainly unsupported by reason, or by any general principles of law. The master is the servant of the owner; and from the nature of his station as such, he has authority to enter into contracts for the employment of the vessel, as well as such as relate to the means of employing her. His duty is to obey the orders of his owner, and to act with fidelity to him, and with a view to his interest. He appears in this character to the world, where it can never be known, by those who transact business with him, what may be his private instructions. The consequences to commerce would be disastrous indeed, if the owner, whose ship is repaired and fitted to perform a voyage by means of advances made in a foreign port, could relieve his property from the security given on it by the master; by asserting and showing that the voyage, for the performance of which she was refitted, was not the real voyage which the master was instructed to perform. In this case, the vessel was captured, and carried into the enemy's country; and the original voyage to Lisbon was thereby put an end to, by a compulsory sale of the cargo. The vessel was released, but could not leave Jamaica upon any voyage, without considerable expense in refitting and victualling her. What was the master to do? He could have her refitted, by agreeing to hypothecate her as a security for the advances; but he is told, that he cannot give a valid hypothecation, unless he will agree to go to Lisbon, at great expense, and without an object; or will return empty to the United States; although a freight had been offered him, sufficient, perhaps, to cover all her expenses and outfits. Is it possible, that it can lie in the mouth of the owner, who would alone be the victim of such a doctrine, and is benefited by a rejection of it, to urge this as an objection against the validity of the contract? It can only be necessary to state the case, to refute the argument. The truth is, that the authority of the master to hypothecate, is not restricted to necessaries to enable him to complete his original voyage. It extends to the obtaining of supplies necessary for the safety of the vessel, and to enable him to perform any voyage which he is authorized by law to undertake; there being no collusion between him and the lender to injure the owner. That the master, in this case, was authorized, and that it was his duty to return to the United States, under any legal contract intended for the advantage of his owners, is indubitable.

Another objection was taken by the respondent's counsel, to the sufficiency of the evidence to prove the debt for which this security was given, which need not be examined until the final hearing of the cause. It may be sufficient for the present, to observe, that the libellant, upon a bottomry bond, is always expected to prove, by evidence other than the bond itself, that the money was lent, or the repairs made and materials furnished, to the amount for which the vessel is liable;—that they were necessary to enable her to perform her voyage, or for her safety, and could no otherwise be obtained, &c. He ought to exhibit an account of those items, with the usual proofs to support them, that the court may judge whether they were necessary for those purposes; because, unless they were, the master exceeded his authority as such, to bind the property of his owners.

The parties then asked leave to amend the pleadings, which was granted.

CRAWFORD COUNTY (CULVER v.). See Case No. 3,468.

CRAWFORD COUNTY (FLINT v.). See Case No. 4,871.

CRAWFORD COUNTY (HOWARD v.). See Case No. 6,757.

Case No. 3,374.

CRAY v. HARTFORD FIRE INS. CO.

Circuit Court, D. Connecticut. 1847.

INSURANCE — LIMITATION OF TIME FOR BRINGING SUIT—VALIDITY—CONDITIONS ANNEXED TO POLICY.

[1. The parties to a contract of fire insurance may, by agreement, limit the time for bringing suit to a shorter period than that fixed by the statute of limitations.]

[2. Conditions annexed to a policy of fire insurance are made a part thereof by a clause in the body of the policy declaring it to be made and accepted with reference to them.]

This was a bill in equity by Scott Cray, receiver of the Ocmulgee Bank of Georgia, against the Hartford Fire Insurance Company to recover upon a policy of fire insurance.

JUDSON, District Judge. The present proceeding is founded on a policy of insurance issued by the Hartford Fire Insurance Company to, and for the use of a banking company in Georgia, insuring their banking house against fire. The banking incorporation were proceeded against in a court of equity, in Georgia, and a receiver appointed to take charge of the assets of the banking corporation. The present petitioner, Scott Cray, is that receiver, and in his application the loss is averred, together with all other essential averments essential to the right of the receiver to recover of the defendants the full amount of the policy, on the ground of a total loss. The respondents interpose their answer setting forth the conditions annexed to the policy, and among other things, to wit: "It is further hereby expressly provided, that no suit or action of any kind against said company, for the recovery of any claim upon, under, or by virtue of this policy, shall be sustained in any court of law or chancery, unless such suit or action shall be commenced within the term of 12 months, next after the cause of action shall accrue; and in case any such suit or action shall be commenced against said company after the expiration of 12 months next after the cause of action shall have accrued, the lapse of time shall be taken and deemed as conclusive evidence against the validity of the claim thereby so attempted to be enforced." In further answering, it was alleged that the present petition was not instituted until after the lapse of 12 months from the time when the cause of action accrued. This was admitted on the trial, and the question involved in this controversy is, whether the clause above recited, shall be considered operative, or be deemed a nullity, so far as this application is concerned. The remonstrants claim that the petitioner has outstayed his time—that this proceeding should have been commenced within 12 months next after the cause of action accrued. In behalf of the petitioner it is argued that the clause or article in question is void and inoperative, because the statute of limitations allows the injured party six years to enforce his rights, and that the answer assumes to control public law. In behalf of the respondent it is urged that the clause above quoted is a part of the contract in the nature of a condition. To determine this question it becomes important to look through the contract itself, and each part, or in other words the whole contract must be examined, and the interpretation must be fair. The intention of the parties is to be sought for; therefore we are not to select one portion and discard another. This would be a violation of all known rules of construction.

What then is this contract? Is it an absolute insurance, or is it conditional? The answer given to these questions will decide the controversy. On reading the policy, there are found on its face several conditions, both precedent and subsequent, entering into the nature of the contract, and manifestly controlling or qualifying the rights of the parties. These are some of the conditions precedent, to wit: "Provided always and it is hereby declared that the corporation will not be held to make good any loss occasioned by invasion, insurrection, riot, or civil commotion or military usurpation." "Provided further that a previous insurance, unless notified or mentioned, shall render the policy void." The following conditions subsequent also appear on the face of the policy, to wit: "Another insurance on the property, taken after the policy in question, assent not being obtained of the insured—the property not to be used as a deposit for hazardous articles or goods, unless specially provided for."

Now it matters not whether the condition be precedent or subsequent, provided it be a part of the contract, both will defeat the recovery when sustained by the facts in the case. It cannot be successfully claimed in this case, that the policy in question is absolute, while these conditions appear on its face. This is not all. There may be other conditions annexed, if the parties so contract. There are in fact, annexed to this policy 14 sections, under the following heading, viz.: "Conditions of Insurance Referred to in the Body of the Foregoing Policy." And immediately thereafter follow these 14 sections, in their order, which the parties have seen fit to denominate "Conditions of Insurance." It may be useful to inquire whether these sections or conditions stand on the same footing as those already enumerated appearing on the face of the policy. Take the 2d and 3d articles or sections, which define "goods hazardous," and "trades hazardous;" these have ever been considered and deemed

conditions and parts of the policy. The 10th article regulates the manner of procuring and presenting the preliminary proofs, and no one can doubt, that this is an important condition of the contract, though it is only annexed with others of that list. The 7th article, that an assignment of a policy unless approved and agreed to by the corporation shall render the policy void. This is a condition subsequent, and yet no recovery can be had unless the condition is complied with. But the question still returns, is the 14th article a part of the contract in the nature of a condition? and has it been so stipulated by the parties?

One clause in the body of the policy, will remove all doubt on this point: "And it is moreover declared, that this policy is made and accepted, in reference to the conditions hereto annexed, which are to be used and resorted to in order to explain the rights and obligations of the parties hereto, in all cases not herein otherwise provided for." If this clause fairly embraces the 2d, 3d, 7th and 10th articles of the "Conditions of Insurance" no good reason can be assigned why it shall not equally embrace the 14th article.

It is quite clear that the parties intended that this reference should bring to the policy the whole 14 articles and attach them to the policy, and make them each, a part of that instrument. This referring clause, does in fact incorporate these 14 articles into the spirit and essence of the policy. The 14th article may be deemed a condition annexed to the policy, not regarding the mode of inferring the contract, but as an important element of the contract by which the claim may be rendered void, in the same manner and to the same extent as would either of the other conditions, whether in the body of the policy, or under the heading of the "Conditions of Insurance." One party at least must be supposed to be aware of the danger of fraud and false swearing, should the claim be deferred for a great length of time, and that party will not enter into the contract, unless it shall be made a condition that the claiming party shall prosecute his claim within 12 months. The holders of the policy accede to this condition and accept the contract with that condition annexed. The insurers have a right thus to guard against fraud, and insert such a condition, and when the insured accept such terms their right to damages must be subject to the condition. It is equally for the benefit of the assured—a ready payment of their loss is an important provision for the insured. By this interpretation of the policy, any honest claim cannot be defeated, and it may prevent the prosecution of a claim proceeded in fraud. Suppose the 14th condition had been placed on the face of the policy, next following that clause which provides that the company shall not be responsible for losses by means of invasion, &c., &c., there would seem to remain no doubt as to the construction. Suppose further, this 14th article had been placed on the face of the policy, varied a little in its form of words, so as to read thus: "And provided nevertheless, that this policy is on the condition that if the insured shall fail to prosecute his claim for damages within 12 months next after the cause of action shall accrue, then the foregoing policy shall be void, and no recovery shall be had thereon?" Had this been the language of the body of the policy, the case would have been free of doubt. And yet when the policy is taken together, and has applied to it the usual rules of interpretation, this was the intent of the contracting parties, and this is the fair construction of the contract. It is a conditional contract, and the 14th article is one among other conditions, upon which the liability depends. The rules of interpretation are so well known and so generally understood, that it may be unimportant to cite more than the following: "The construction shall be made on the whole contract, and not on separate parts, that every part, if possible may take effect." 1 Swift, Dig. p. 223, rule 6.

In Worsely v. Wood, 6 Term R. 718, Lord Kenyon says: "The great question here is, whether or not, it was the intention of these parties, that the certificate should precede payment by the insurance office, it seems from the printed proposals that it was their intention that it should precede payment." In the case now under consideration, it appears to me, that it was the intention of the parties that all claims under this policy should be prosecuted within twelve months or be void. As to the propriety of such a condition Lord Kenyon, in the same case (page 719) says, the insurers "knowing how liable we are to be imposed upon, we will among other things, require that the minutes &c., shall certify that they believe that the loss happened by misfortune, and without fraud, otherwise we will not contract with you at all." So in this case, the assurers had a right to provide that if the insured failed or neglected to assert their claim within 12 months, that claim should be void, and the insured was at liberty to accept those terms or not, but if accepted, those terms enter into the contract itself. Grose, J., in giving his opinion in the same case (page 720), says: "Four questions arise on this record. 1st. Whether the printed proposals are to be taken as a part of the policy; 2d, whether the part respecting a certificate creates a condition precedent; 3d, if it does, whether the assured was bound to perform the condition, and 4th, whether they have performed. These are the material points. On the first point the case of Routledge v. Burrell [1 H. Bl. 254] is decisive to show that the printed proposals are to be taken as a part of the policy. The second point also seems to be decided in the case of Oldman v. Bewicke [2 H. Bl. 577, note, 26 Geo. III. C. B.], for though the words in both proposals are not exactly similar, the substance is the same."

I am persuaded that the fair construction of this policy is, that the 14th article annexed to the policy, was intended by the parties as a condition and part of the policy, and not having been performed within the period agreed upon and stipulated, the policy becomes void. Therefore the respondents' answer must be adjudged sufficient.

[NOTE. See Case No. 3,375.]

Case No. 3,375.

CRAY v. HARTFORD FIRE INS. CO.

[1 Blatchf. 280; 1 Liv. Law Mag. 96.][1]

Circuit Court, D. Connecticut. April Term, 1848.

LIMITATION OF ACTIONS BY AGREEMENT—INSURANCE.

1. Where a policy of insurance provided that no action should be sustained against the insurer founded thereon, unless brought within twelve months after the cause of action should accrue, and that the lapse of time, in case of such suit, should be deemed conclusive evidence against the validity of the claim set up: *Held*, that a plea setting up such provision and the lapse of the time specified, in bar of an action on the policy, was a conclusive answer to the suit.

2. The provision is not against law, nor repugnant, nor impossible.

[Cited in Davidson v. Phoenix Ins. Co., Case No. 3,607; Riddlesbarger v. Hartford Ins. Co., 7 Wall. (74 U. S.) 392; Home Ins. Co. v. Stanchfield, Case No. 6,660.]

3. The right to indemnity in case of loss, and the liability of the insurer therefor, do not, under such a provision, become absolute, unless the remedy is sought within the period limited. The stipulation goes to the right as well as to the remedy.

This was a bill in equity [by Scott Cray, receiver of the Ocmulgee Bank of Georgia] to recover the amount of a policy of insurance. The defendants pleaded in bar the following clause in the policy: "14th. It is expressly provided that no suit or action of any kind against said company, for the recovery of any claim upon, under or by virtue of this policy, shall be sustained in any court of law or chancery, unless said suit or action shall be commenced within the term of twelve months next after the cause of action shall accrue; and in case any such suit or action shall be commenced against said company, after the expiration, &c., the lapse of time shall be taken and deemed as conclusive evidence against the validity of the claim thereby so attempted to be enforced." The plea averred that the suit was not commenced within twelve months next after the cause of action accrued.

Roger S. Baldwin, for plaintiff.

1. The plea admits the policy, the loss and proofs, and that a right of action accrued more than twelve months before the suit was brought. It does not rely on the condition to disprove the existence of a right of action on the policy. It simply sets up as a bar the lapse of time since it accrued, as presenting a condition on which, by a prior agreement, it was in effect released before it accrued, the release to take effect a year after it should accrue. It is not a condition precedent to the accruing of a right of action, without the performance of which no right could exist. But it is an attempt by the company, in a court of equity, to avail themselves of a mere lapse of time, during which they were permitted by the indulgence of the plaintiff, to persist in a wrongful withholding of this right, to defeat a claim admitted to be just. The plea admits that, on the 1st of February, 1847, the plaintiff had a good cause of action and a just claim on the company. It sets up no subsequent act done by them to satisfy it, or by the plaintiff to release it; but claims that it has been released since it accrued, simply by the operation of the promise or agreement in the condition of the original policy. When that agreement was made, there was no breach of contract, no loss, no right of action, inchoate or otherwise. That agreement or proviso is not in any manner connected with the accruing of a right of action, or with the claim of the assured to an indemnity. It had no effect on the obligation assumed by the company, which was to pay absolutely. The policy contained stipulations which the parties must then have contemplated that the company would fulfil, on the loss accruing and the proof being made, that is, on the happening of the very things which here appear and are admitted. Every thing which the plaintiff was required to do before it became the duty of the defendants to pay is admitted to have been done. On their refusal to fulfil, a right of action accrued. No act of the assured could make the duty of the company and the right of action more perfect and complete. What then has operated to excuse the company from performance, or to exonerate them from liability to be sued? Nothing but their own neglect of duty, their own persistence in admitted wrong for a year. It is claimed that, in consequence of that continued wrong, the prior agreement operates as a release. But the condition does not, upon the face of it, purport to release the company from its obligation. There is no consideration for such a release, no mutuality; there was nothing for such a release to operate upon when it was made, and, if there had been, public policy would forbid it. For if such an agreement would be valid in a policy, it may equally well be introduced into all contracts. The consideration stipulated on the part of the bank was a contract of indemnity against loss, to be paid in sixty days after proof. For that the premium was paid. A refusal to pay did not enter legitimately into the view of the parties. The redress for the non-per-

[1] [Reported by Samuel Blatchford, Esq., and here reprinted by permission. 1 Liv. Law Mag. 96, contains only a partial report.]

formance of a contract, like the redress for every other injury, is given, not by the act of the parties, but by that of the government. The parties were not stipulating for a right of action, but for a voluntary payment on proof of loss. A right of action is furnished in fulfilment of a duty which the state owes its citizens, to enforce justice. The agreements of the parties have respect to the creation of rights—not rights of action, but rights to the faithful performance of the things stipulated, without action. The action is given by the government to redress a private wrong; and it would be obviously against public policy to allow parties to make and be bound by stipulations not to resort to the appointed tribunals for redress, or to limit the time for such an appeal against wrong to a shorter period than the law allows. The policy of the law is to afford to every citizen such means of redress as shall prevent the necessity of other resort, and it fixes for itself the limit of delay, in view of the many causes which may prevent an immediate resort to its tribunals.

2. Even in courts of law such restrictions on the right of suit, where a cause of action exists, are not allowed to have effect. Thus if a man grant a rent-charge, with clause of distress, and expressly provide that the distress shall be irreplevisable, a court of law will nevertheless allow the party whose goods are distrained to replevy them. For though, in case of a rent-charge, the distress is given by agreement of the party merely, yet, wherever there is a distress, the common law gives a right of replevin. Hence, Lord Coke says (Co. Litt. 145b) that though one grant a rent with a clause of distress, and grant farther that the distresses taken shall be irreplevisable, yet they may be replevied, for such a restraint is against the nature of a distress, and no private man can alter the common course of law. See, also, Coote, Mortg. 22. And the law would be the same if the grant had been that they should be irreplevisable after a certain time. Such too is the case of a mortgage, when it is once established. "Once a mortgage always a mortgage." "An estate cannot at one time be a mortgage and at another time cease to be so, by one and the same deed: and a mortgage can no more be irredeemable, than a distress for a rent-charge can be irrepleviable. The law itself will control that express agreement of the party; and, by the same reason, equity will let a man loose from his agreement, and will against his agreement admit him to redeem a mortgage." Howard v. Harris, 1 Vern. 192. If a man should stipulate in his mortgage deed that it should be irredeemable if he did not bring a bill to redeem within six months after forfeiture, such an agreement would have no effect in impairing his rights. So, if the parties covenant at the time of making their contract, whether it be a policy or any other contract, that in case of dispute no suit shall be brought, but resort shall be had to arbitration, such a stipulation will not be regarded by a court either of law or of equity. Kyd, Awards, 14; Street v. Rigby, 6 Ves. 815; Kill v. Hollister, 1 Wils. 129; Thompson v. Charnock, 8 Term R. 139; Wellington v. Mackintosh, 2 Atk. 569; Tattersall v. Groote, 2 Bos. & P. 131; Astley v. Weldon, Id. 346; Goldstone v. Osborn, 2 Car. & P. 551. In regard to those stipulations a compliance with which is a condition precedent to a cause of action arising or a duty being created, the case is different. Whenever the right and duty are once ascertained and are of instant obligation, all are agreements in the contract itself beforehand to forego the aid of the courts to enforce them, are against policy and void. They tend to encourage the party bound, to refuse to perform. Suppose the party has bound himself, in case of violation, to sue in a particular court, for example a state court; would that oust this court of jurisdiction? An action supposes the right to be complete before it is instituted, and the defendant to be wrongfully violating that right. Just so long as the wrong continues, short of the limitation fixed by law, the courts are, from motives of public policy, open to redress it. It is obviously the policy of the law to promote, as it is its duty to compel, the faithful performance of contracts. But, if the principal urged here shall be established as law, there will be a temptation to delay the performance of every contract. If an agreement to delay for a year is valid, it is equally so for a month or a day, or even to forego suit altogether; and there is here no saving clause for accident or incompetency.

3. This contract is not set up as an executory agreement, for the non-performance of which damages are asked, or as an agreement to affect the right to indemnity; but the defendants are seeking to use it as a release. But a release or grant cannot be made of that which has no existence at the time of the grant and subsequently arises. It was not intended here to release the contract, so as to prevent a right of action from accruing. The plea admits that a good cause of action arose subsequently to the making of the policy and the agreement relied on; and that the cause of action was perfect, and unaffected by the previous stipulation, for a year after it accrued. It is not pretended that there has been any payment, accord, or other act, by which the right of action has been since extinguished. It exists then, unless there was, in effect, a release before it accrued, to take effect a year afterwards. But a cause of action cannot be released before it accrues, in any other way than by a release of the obligation of the contract by force of which it would otherwise accrue. It cannot be released by an instrument which contemplates that it will subsequently accrue, and yet continue as a perfect obligation. A right to an indemnity by the insured, and an obligation to pay that indemnity, were the objects of

the stipulation; not a right of action, which could only arise by a wrongful refusal by the insurer to perform that which was the object of the stipulation. A contract to release the right of action and not the obligation of the contract or the duty to perform it, or a contract to change the rules of evidence in case the contract should be violated and a suit be brought, could not be regarded by the court. A nomine poenae waiting upon a rent cannot be released till the rent is behind, as the non-payment of the rent makes the nomine poenae a duty. Yelv. 215. But the rent might be released and of course the nomine poenae would go with it. A party cannot release all causes of action, that may arise or accrue after the execution of the release. But he may release the covenant or policy, and then no cause of action can arise. That, however, is not done here. A release, to be effectual, if made before the cause of action accrues, must prevent it from ever accruing. If, notwithstanding the instrument claimed to be a release, a cause of action does afterwards accrue, that cause of action can only be released by some subsequent act of the party or of the law. There is no other known way of extinguishing a cause of action once accrued. And the parties can no more change, by prior agreement, the rules of evidence, by which the courts will be governed, than they can release a right of action which shall subsequently accrue by reason of a wrong subsequently done. Suppose that, at the time of giving a mortgage, there should be a stipulation that if it were not redeemed in six months it should be evidence of no right to redeem; would such a stipulation avail to prevent a redemption?

4. But we are in a court of equity, pursuing an equitable claim. The cause of action accrued to the plaintiff by the furnishing of the proofs in 1845. It is pursued in behalf of the creditors of the bank, by the receiver to whom it accrued. What has he done to release this equitable right, which was perfect in him from the time he exhibited the proofs? Nothing. The Ocmulgee Bank, which alone could bring an action at law on the policy, had become incapable. Its assets were transferred to a person acting under a public appointment, to whom a cause of action in equity subsequently accrued. To bar that right by reason of the mere lapse of time, through the persistence in a wrong too long indulged, would be manifestly inequitable and unjust.

5. But it is the every day practice of a court of equity to relieve against forfeitures by lapse of time; especially where it can see that it has not been of the slightest injury to the party seeking to avail himself of it. More especially will this be the case when that party is himself in the wrong. Against a condition subsequent, or a forfeiture sought to be enforced against equity under a preexisting agreement, equity will, on its ordinary principles, relieve. As to conditions subsequent, says Maddock, "where the court can in any case compensate the party in damages for the 'non-precise performance of the condition,' equity will relieve." 1 Madd. Ch. 36. It will never allow an improvident contract, before action accrued, to deprive it of jurisdiction.

Isaac Toucey and Thomas C. Perkins, for defendants.

NELSON, Circuit Justice. 1. The fourteenth condition of the policy, providing that no action shall be sustained against the company founded thereon, unless brought within the term of twelve months after the cause of action shall have accrued, affords, in our judgment, a conclusive answer to the bill of complaint. The bringing of the suit within this period is made a condition subsequent to the right of the insured to recover the loss. The policy was entered into and the risk assumed with express reference to this among other conditions; all which must, therefore, be regarded in expounding the rights and obligations of the parties under the contract. It stands upon the footing of the other conditions to be found therein; such as giving notice of the loss, delivering a particular account of the same, properly verified, producing books of account, &c. It is not against law, nor repugnant, nor impossible, and may be very material to the rights and interests of the party in whose favor it is made. We have been referred to no statute or principle of the common law forbidding such a condition. Originally, there was no limitation to actions. Blackmore v. Tidderley, 2 Ld. Raym. 1099; People v. Gilbert, 18 Johns. 228; Perham v. Raynal, 2 Bing. 306; Wilk. Lim. 2 et seq. The act of 21 Jac. I. (1623) the first general statute on the subject, provided that suits should be brought within six years after the cause of action had accrued, "and not after." But there is nothing in this act forbidding a limitation short of this period, by the stipulation of the parties. It only prohibits the suit after the six years. The common law gave to the party an indefinite time to bring an action. The act simply limited the time to the given period. There might be some force in the argument, that an agreement to extend the time beyond the statutory limit was against law and void, but there is none as respects a limitation short of it. Even in the former case it has been held, notwithstanding the positive terms of the act, namely, that suits should be brought within six years and not after, that the benefit of the provision may be waived by the act of the parties. Wilk. Lim. 52, 53, and cases there cited. This may be done during the running of the statute, or after the limitation has attached. Why not, then, by a stipulation in the contract itself? And, why may not the limitation be restrained in the same way? We cannot doubt that, before St. 21 Jac. I. it was competent for the parties, by a clause

in their contract, to limit the time within which, in case of a breach, an action should be brought. As the period was then indefinite, there could be no limit, unless it was thus fixed. There is nothing in the act, necessarily or by fair construction, taking away this right. The case of an agreement to refer to arbitration is not analogous. That is deemed inoperative on the ground of an attempt to oust the jurisdiction of the courts. Kill v. Hollister, 1 Wils. 129; Halfhide v. Fenning, 2 Brown, Ch. 336; Wats. Arb. 4, 7, 8. And even that case was at first a matter of contradictory decision. The same may be said of the case referred to of an agreement that a distress for a rent-charge shall be irreplevisable. It is an attempt to take away all remedy for a right that is regarded as incident to the distress, and inseparable from it. Co. Litt. 145b, 282b; Brac. lib. 4, p. 233a, 233b. These observations are also applicable to the case of an agreement that a mortgage shall be irredeemable. In the case before us there is no attempt to oust the jurisdiction of the courts or to take from the party his appropriate remedy. The condition simply requires vigilance in the pursuit of the remedy, beyond the requirement of the law. The jurisdiction of the court to administer justice in the given case is not interfered with.

2. But the true ground, we are inclined to think, upon which the clause rests and is maintainable, is, that by the contract of the parties, the right to indemnity in case of loss, and the liability of the company therefor, do not become absolute, unless the remedy is sought within the year. The stipulation goes to the right as well as to the remedy. Indeed the time within which the remedy is to be enforced is prescribed for the purpose of reaching and regulating the rights of the insured under the contract. Although the condition is subsequent, it is, if lawful, as operative and binding as a condition precedent; and that it is lawful, as well as a very essential part of the contract, we cannot doubt. The clause contemplates a loss about which a controversy may arise between the insured and the company, and in respect to which the right to indemnity may be denied. The object was not to foreclose it and prevent a resort to the proper tribunal; but to compel a speedy resort, and a termination of the controversy, while the facts were fresh in the recollection of the parties and witnesses, and the proofs accessible. While it is not perceived to be at all injurious to the rights of the insured, it is manifestly beneficial to the company, who stand on the defensive and are obliged to await the movements of the adversary party. We are of opinion, therefore, that the plea is a good answer to the bill.

After this decision the bill was amended, by setting out reasons for the delay in bringing the suit, and the case was re-argued, but the reasons were held insufficient. Meantime the plaintiff died, and no receiver having been appointed in his place, the case has proceeded no further.

[NOTE. See Case No. 3,374.]

Case No. 3,376.

CREASE v. PARKER.

[1 Cranch, C. C. 448.][1]

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

EVIDENCE OF ACCOUNT—CONTRACT OF SLAVE.

1. The plaintiff will not be permitted to read to the jury his own statement of his account current, as a statement of the particular items of his claim. Nor will the court permit the jury to take minutes of the items of which no evidence is offered.

2. The promise of a slave does not bind him when free, although it be to pay for money borrowed, by which he obtained his freedom.

Assumpsit against a negro for the money lent and advanced by the plaintiff to the defendant to enable him to purchase his freedom, the defendant having thereby obtained a deed of emancipation.

Mr. Swann, for defendant, prayed the court to instruct the jury, in effect, that the defendant, being a slave when the money was advanced, is not answerable in this action unless the defendant has since promised upon that consideration, and that those facts may be given in evidence and avail the defendant upon the plea of non assumpsit.

Mr. Youngs, for plaintiff, offered to read, as a memorandum of the particular items of the plaintiff's claim, a written statement of his account of debits and credits; which THE COURT refused. He then prayed that the jury might be permitted to take minutes of those items of which the plaintiff produced no evidence; which THE COURT also refused, but permitted them to take a minute of the amount of the balance which the plaintiff claimed.

Mr. Swann and Mr. Herbert, for defendant, contended that a slave cannot contract an obligation, nor make a valid promise, and that the advance of the money to him while a slave cannot create an obligation in law. A subsequent acknowledgment cannot revive what never before existed. If there were an express promise it would be a new and independent cause of action which must be declared upon. A promise made since the suit brought, cannot support this action. The act of Virginia, of December 17, 1792 (chapter 103, § 36, p. 191), expressly discharges every emancipated slave from the performance of any contract entered into during servitude. A void promise cannot support a subsequent promise, for it is no consideration; but, if voidable only, it may. An infant may make a voidable promise, and subsequent assent will make it good; but if the infant executes a bond, it is a void act, and no subsequent

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

promise, at full age, to pay it, will bind the infant. A promise by a slave is absolutely void. If the slave gains money or property it belongs to his master.

Mr. Youngs, contra. There is no law which deprives the slave of the power of contracting. If there were no law to prevent a feme covert or an infant, they could contract. All persons may, prima facie, contract. The defendant must show the law which prevents a slave from contracting. The consideration of freedom is as valuable as that of necessaries for an infant. Villains in England were capable of contracting with everybody except their master; they could also transfer property; they might be sued, and their property unless seized by the lord, was liable to be taken in execution. Before the act of assembly, slaves were considered as real estate and descended with the land, like the villains in England. If a slave purchases and sells property, the master cannot claim it in the hands of the third person, although he might have seized it while in the hands of the slave. A slave may be sued, although not held to bail. This court, under the act of congress, gives a slave the same mode of trial for crimes as a free man, and this court said, a few days ago, (in Milly Rhodes's Case [Case No. 16,152]), that they could impose a fine upon a slave; although a slave cannot be taken on a capias ad satisfaciendum, his goods may be taken on a fieri facias, goods which the slave has a right to hold until the master has seized them to his own use. In England you could not serve a ca. sa. on a villain, but you might a fi. fa. on his goods. The act of Virginia applies only to contracts made with the former master or mistress. But if the slave could contract with a third person, the legislature did not mean to put it in the power of the master to release the slave from any such contract with a third person. The consideration was good in conscience and morality, and will support a promise or acknowledgment made after he became free.

THE COURT (CRANCH, Chief Judge, contra) instructed the jury, as stated in the bill of exceptions; the substance of which is that if they should be of opinion, from the evidence, that the claim of the plaintiff (if he has any) arose in consequence of money advanced by the plaintiff to the defendant, (who was then a slave) to purchase his freedom, and that he was afterwards manumitted by his master before the institution of this suit, and that the defendant, after the institution of this suit, acknowledged the debt in the presence of Harris, a witness, the plaintiff could not support the present action.

CRANCH, C. J., dissented, because he was of opinion that the defendant might make a valid promise, (subsequent to his emancipation) grounded upon the consideration of the money advanced while the defendant was a slave, and still this claim would be in consequence of such advance of the money, and that such promise would become a new contract made subsequent to his manumission, and therefore not within the act of assembly. He also inclined to the opinion that the acknowledgment to Harris was a fact from which the jury might infer an express promise by the defendant subsequent to his emancipation, and before the suit brought. See Williams v. Brown, 3 Bos. & P. 72, Heath, J.'s, opinion.

[NOTE. On a special verdict found, the court gave judgment for the defendant. See Case No. 3,377, next following.]

Case No. 3,377.

CREASE v. PARKER.

[1 Cranch, C. C. 506.][1]

Circuit Court, District of Columbia. July Term, 1808.

CONTRACT OF SLAVE.

Money advanced to a slave to enable him to purchase his freedom, cannot be recovered of him after his emancipation, although he acknowledge the debt after suit brought.

This cause was tried at November term, 1807,—1 Cranch, 448 [Case No. 3,376],—when a special verdict was found. It was an action brought against a free negro for money lent to him while a slave, to enable him to purchase his freedom. The verdict was in these words: "We of the jury find that the sum stated in the declaration was, previous to the defendant's emancipation from slavery, advanced by plaintiff to defendant who was then a slave, and who was manumitted in due form of law on the 30th of March, 1803. The said money was so advanced for the purpose of enabling defendant to purchase his freedom, and defendant did, in the month of November, 1806, subsequent to the commencement of this suit, acknowledge to a certain James Harris, that he, the defendant, was indebted to the plaintiff in the sum of £24, and would be able to pay it by the time a judgment was rendered against him. Therefore we find for the plaintiff $84.80 damages, should the law be in his favor. Should it not, we find for the defendant."

The case was argued by Mr. Youngs, for plaintiff, who cited Esp. N. P. 163; and by

H. Herbert and Mr. Swann, for defendant, who cited Co. Litt. 118, 119b; Laws Va. 17th Dec. 1792, § 36, p. 191; Esp. N. P. 158; and 2 Esp. Cas. 628.

THE COURT gave judgment for the defendant upon the special verdict.

CRANCH, Chief Judge, was of opinion that the judgment could not be given for the plaintiff on this verdict, but was rather inclined to think that there ought to be a

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

venire de novo, as the jury had found an acknowledgment which would be evidence of an express promise.

CREASE (SMITH v.). See Case No. 13,031.

CREDIT MOBILIER (HAZZARD v.). See Case No. 6,289.

CREDIT MOBILIER (McCOMB v.). See Case No. 8,709.

Case No. 3,378.

CREDITORS v. COZZENS et al.

[3 N. B. R. 281 (Quarto, 73);[1] 2 West. Jur. 349; 16 Pittsb. Leg. J. 236.]

District Court, E. D. Missouri. 1869.

BANKRUPTCY—RESTRAINING ORDER.

No judgment can be rendered against a third person, for contempt in disobeying an injunction issued in aid of the writ of bankruptcy, without proper proceedings taken against him, distinct from those against the bankrupt.

[Cited in Re Moses, Case No. 9,869; Re Marter, Id. 9,143.]

The creditors of Cozzens & Hall filed their petition, praying that the debtors might be adjudged bankrupts, setting forth several and distinct acts of bankruptcy, and in their petition they also alleged that the debtors had fraudulently transferred and conveyed goods to one McCreery, who had them in possession, and was disposing of them in fraud of the creditors; and praying an injunction against McCreery to restrain him from making any transfer or disposition of the goods so conveyed. The injunction was granted upon notice, and McCreery subsequently appeared and denied all the acts of bankruptcy charged against the debtors, as well as the acts charged against himself. Being charged with a contempt in violating the restraining order, the matter was referred to a commissioner to take and report testimony, and upon the coming in of the report, the parties submitted the case upon the merits, as well as the question of contempt. The debtors had been adjudged bankrupts pending the proceedings for contempt.

TREAT, District Judge. The matter of the contempt committed by McCreery, as well as the merits of the case as between himself and the assignee of Cozzens & Hall, are submitted upon the papers, and the mass of evidence reported by the commissioner. But before passing upon the merits of the case, as between the assignee and McCreery, it is necessary to examine the issues presented by the pleadings, and upon looking at the papers there are no pleadings. The restraining order, issued against a person other than the debtors, by virtue of section 40 of the bankrupt act of 1867 [14 Stat. 536], at the commencement of the proceedings, is temporary only, and is intended to restrain the disposition of the goods and property of the debtor until an adjudication can be had, and an assignee appointed to take charge of the assets for the benefit of the creditors. The order is in aid of the writ; if the property is in the possession of the debtor, upon the adjudication of bankruptcy, the warrant issues to the marshal to take the property as assets of the debtor; if it is in the hands of a person other than the debtor, and any relief is sought against him, the proper proceedings must be instituted, either by suit at law or bill in equity, so that the court may pass upon the matters, either by a judgment or decree, according to the nature of the case.

In this case, the assignee has not brought any suit against McCreery; the only proceeding against him is one for contempt in violating the injunction ordered upon the original petition filed against the debtors, with which McCreery had nothing to do; for it was a matter immaterial to him whether the debtors were adjudged to be bankrupt or not, and as a bill in equity the petition would be multifarious. The court, therefore, will take no action upon the case until the proper issues are made up between the parties, so that the court can make either a decree upon bill and answer, or submit the issues of fact to a jury, if relief be sought at law. By the present rules, when a restraining order is asked for at the commencement of the proceedings, against any person other than the debtor, separate petition must be filed, so that the proceedings upon the injunction need not be complicated with those praying the adjudication of bankruptcy.

[1] [Reprinted from 3 N. B. R. 281 (Quarto, 73), by permission.]

Case No. 3,379.

CREDITORS v. WILLIAMS.

[4 N. B. R. 579 (Quarto, 187).][1]

Circuit Court, D. Texas. 1870.

BANKRUPTCY—POWER OF ATTORNEY BY CREDITOR—OPPOSING DISCHARGE.

1. A power of attorney, in accordance with form No. 26, in which the concluding words are "and with like powers to attend and vote at any other meeting or meetings of creditors, or setting or sittings of the court, which may be holden therein, for any of the purposes aforesaid, or for the declaration of dividend, or for any other purpose in my interest whatever," does not authorize the filing of an opposition to the bankrupt's discharge by the attorney to whom the letter is given.

2. The claim that a power to attend and vote at meetings, and accept the appointment of assignee for his principal, gives the attorney authority to involve his principal in such a controversy as arises in opposition to the discharge of a bankrupt, is a misconception of the scope and purposes of the power.

3. The filing of an opposition to a bankrupt's discharge is the commencement of an individual proceeding on the part of the creditor against the bankrupt.

[Cited in Re Hyman, Case No. 6,985.]

[1] [Reprinted by permission.]

[In bankruptcy.]

WOODS, Circuit Judge. This is a petition addressed to the supervisory jurisdiction of the circuit court, asking a review of a decision of the district court. W. H. & Q. H. Williams, as partners and individually, having filed their petition in bankruptcy, such proceedings were had that W. H. Williams, was discharged, and on the 30th day of December, 1868, the said Q. H. Williams applied for his discharge. The attorneys of one Joseph Sauters, who was a creditor, opposed the discharge, and within the time allowed by the court filed specifications in opposition to the discharge of the bankrupt. It seems that the attorneys of other creditors had, as a matter of convenience, made an arrangement with the attorneys of Sauters, that the opposition to the discharge of the bankrupt and the specifications should be made in his name, but for the benefit of said other creditors, by whom all the expenses should be borne; and that the attorneys of Sauters and the other creditors should render mutual service in reference to said respective claims. Sauters, without notice to his own attorneys, or to the attorneys of said other creditors, on the 5th day of April, 1869, filed in the court a disclaimer of his opposition to the discharge of the bankrupt, alleging that said opposition was made without his authority, and prayed that the said opposition might be dismissed, and the costs charged to whomsoever instituted the opposition. On the 16th of April 1869, before any action had been taken by the court on the said disclaimer and prayer for the dismissal of the opposition filed by said Sauters, the said other creditors, who are his petitioners in this proceeding, filed an application in the district court, setting forth the agreement between their attorneys and the attorneys of said Sauters, and praying that their names might be substituted in said specification, by way of amendment, in the stead of the name of said Sauters, to which, on the same day, the bankrupt filed exceptions. On August 6, 1869, said bankrupt filed a motion to dismiss said opposition of Sauters. On the 24th of January, 1870, the district court decreed that the said other creditors had no right to be made parties to the said opposition and specifications filed in the name of said Sauters, and that all costs accrued since the 16th day of April, 1869, should be paid by petitioners, and that a discharge be granted to said bankrupt.

It is charged that the court erred, first, in holding that the agreement made between the attorneys of Sauters and the attorneys of petitioners was not binding on Sauters, and that he could abandon the same to the prejudice of the rights of petitioners. Second, in holding that said specifications could be dismissed by the action of said Sauters alone, without any action of the court; and, third, in deciding that the court had no authority to hear petitioners in the opposition to the discharge of said bankrupt, in giving judgment against petitioners for costs, and in discharging said bankrupt. In my opinion the whole case turns on the authority held by gentlemen acting as the attorneys of Sauters. It seems that Sauters had placed his claims in the hands of League & Tucker, attorneys in Galveston, on the 14th of January, 1868. These gentlemen inclosed the claims to Messrs. Robards & Jackson, for collection, inclosing also the deposition to the claims, and requesting Messrs. Robards & Jackson to do with the claims as to them might seem best. In the same month of January, 1868, on what day does not appear, he executes a letter of attorney to Messrs. Robards & Jackson, in pursuance of form 26, which, it is probable, was transmitted to Robards & Jackson by League & Tucker. Sauters does not appear to have had any connection with Robards & Jackson, on the subject of his claims. It seems very clear that whatever authority Robards & Jackson had in the premises, was based on the letter of attorney. That is the only act of Sauters which gave them any power to act for him; whatever that authorized them to do, they could do, what was not authorized by it, was done without his authority. The letter of League & Tucker was no authority binding on Sauters, even if it authorized them to anything more than receive dividends. We must look, then, to the letter of attorneys to ascertain what powers were conferred by Sauters on Robards & Jackson. It is obvious that there is nothing in this power of attorney which could authorize the filing of an opposition to, and specifications against, the bankrupt's discharge, unless it is found in the concluding words, to wit: "and with like powers to attend and vote at any other meeting or meetings of creditors, or setting or sittings of the court which may be holden therein, for any of the purposes aforesaid, or for the declaration of dividend, or for any other purpose in my interest whatever." To hold that these words authorize the filing of an opposition to the bankrupt's discharge appears to be clearly a misconception of the language of the power. The authority granted is to attend and vote at every meeting of the creditors or sittings of the court, which meeting or sitting may be held for any of the purposes aforesaid, or held for the declaration of a dividend, or held for any other purposes in the intent of the creditor signing the power. No authority whatever is here given save only the authority to attend and vote. There are no general words in this power. Throughout the whole instrument there are only three things authorized to be done by the attorneys: first, to attend meeting or sittings; second, to vote at the same; and third, to accept for the signer of the letter of attorneys the appointment of assignee. No other power is granted, no

other act is specified to do which authority is given, and there are no general words whatever which will include any other act.

The filing of an opposition to a bankrupt's discharge is a very different thing. It is the commencement of an individual proceeding on the part of the creditor against the bankrupt. It is in fact a suit arising in the course of the bankrupt proceedings. It involves pleadings, costs, attorney's fees; it may involve a trial by jury. The question of discharge may linger in the court for years, and in every case involve more or less expense and costs. The claim that a power to attend and vote at meetings and accept the appointment of assignee for his principal gives the attorney authority to involve his principal in such a controversy as arises in opposition to the discharge of a bankrupt, is certainly a misconception of the scope and purpose of the power. I am of opinion, then, that Messrs. Robards & Jackson misapprehended their authority under the letter of attorney; that it did not extend to the making of an opposition to the discharge of the bankrupt, so that the case stands precisely, so far as this question before the court is concerned, as if no power of attorney or other authority had been given to Messrs. Robards & Jackson. They could not then make any opposition to the discharge of Williams on behalf of his creditor, Sauters. They could not use his name for that purpose themselves, and a fortiori they could make no contract by which it might be used for the benefit of others. Such a contract was absolutely null and void, being made without authority. The opposition to the discharge was utterly ineffectual, and no rights could spring up under it; and when it was discharged, the result was the same in all respects as if it had never been made. If Messrs. Robards & Jackson had made opposition in behalf of a party for whom they were not attorneys at all, and after the fact of their want of authority had been brought to the notice of the court the opposition had been dismissed, no effect certainly could be claimed for the opposition. This case is in precisely that predicament, for in the matter of making opposition to discharge they are not the attorneys of Sauters or anybody else. It is perhaps unnecessary to say that no reflection in any degree is intended on these gentlemen. It was a natural mistake into which they fell, and the court entertains no doubt that everything done by them was done in good faith, and under what they supposed was the authority of Sauters.

These petitioning creditors, then, can derive no advantage from the opposition of Sauters. They are in the same case as if no such opposition had been made. The question then for decision takes this form: Did the court err in refusing permission to file specifications in opposition after the time allowed by the court for filing specifications had passed, and when no opposition had been entered on the day when the creditors were required to show cause? To hold the affirmative of this proposition is to repeal entirely rule 24, which this court has no power to do. In cases of involuntary bankruptcy, where fraud is the ground on which the petition is based, the courts sometimes look into the record to see whether the bankrupt should have his discharge; but in voluntary cases I know of no instance where the court has overturned rule 24, and allowed opposition to be made after the day on which creditors are required to show cause has passed, and after the time limited for filing specification has elapsed. And as the bankrupt court has been assimilated to a court of equity, yet even a court of equity must be controlled by its own rules. They are the law which regulates its discretion. I am of the opinion, then, that the rulings of the district court were correct. They are therefore affirmed at the cost of petitioner.

The cause being then remanded to the district court, the following order was passed: In this cause it appearing from the record that on the 22d day of January, A. D. 1869, upon the consideration of the motion of W. L. Robards, Esq., as attorney for Joseph A. Sauters, creditor of said bankrupt, to dismiss the petition of the bankrupt for a certificate of discharge in bankruptcy, said motion was overruled, and upon the application of said attorney for time to file specifications of opposition to the discharge of said bankrupt, an order was entered by the court extending the time to the said creditor until the 1st day of March, 1869, to file specifications; and the said specifications having been filed on the said 1st day of March, 1869, by attorneys representing themselves as having authority from the said Sauters to file the same; and the said Sauters having filed on the 5th day of April, 1869, his disclaimer of said opposition and all authority to make the same; and other creditors of said bankrupt having, on the 16th day of April, 1869, appeared and claimed to be substituted in the place of the said Sauters, and this court having allowed them to do so; and on the 24th day of January, 1870, this court having ordered and adjudged that said other creditors could not oppose the discharge of the said bankrupt, not having appeared as required by the law, and not having filed their specifications as required by rule 24; and the said creditors, having upon petition obtained the supervisory action of the circuit judge, Hon. W. B. Wood, presiding at this term of court, and the decision of the circuit judge being that the action of the attorneys purporting to represent Sauters was wholly without authority and null, this court, in accordance with the said decision, doth now order that a certificate of discharge do now issue to the said John H. Williams, bankrupt, as of date, January 22d, 1869, in accordance with the law.

CREDITORS OF BAILEY, Ex parte. See Cases Nos. 726–729.

CREENE (BERNHARD v.). See Case No. 1,-349.

Case No. 3,380.

Ex parte CREGG.

[2 Curt. 98;[1] 3 Liv. Law Mag. 141; 17 Law Rep. 491.]

Circuit Court, D. Massachusetts. Oct. Term, 1854.

NATURALIZATION.

A court of record, without any clerk or prothonotary, or other recording officer, distinct from the judge of such court, is not competent, under the act of April 14, 1802 (2 Stat. 153), to receive an alien's preliminary declaration of his intention to become naturalized.

[Cited in U. S. v. Power, Case No. 16,080; Ex parte Tweedy, 22 Fed. 85.]

B. S. Treanor, for petitioner, ex parte.

CURTIS, Circuit Justice. This is an application by Michael Cregg, an alien, to be naturalized. To show a compliance with the requirement of the act of congress to make a previous declaration of intention to become naturalized, he produces a paper which purports to be a copy of a declaration made by him in the police court of the city of Lynn, in the state of Massachusetts. It is admitted by the petitioner that T. B. Newell, Esq., who signed this paper as clerk, was also the judge of that police court, and that there was no other judge or clerk thereof at the time when the petitioner's declaration was made. The question is, whether the police court of Lynn was competent in point of law to receive this declaration. This question depends on the act of congress of April 14, 1802 (2 Stat. 153), which prescribes the conditions upon which aliens may be admitted to be citizens of the United States. The first of those conditions allows the preliminary declaration to be made on oath or affirmation, before the supreme, superior, district, or circuit court of some one of the states. And the third section of the act is as follows: "And whereas doubts have arisen whether certain courts of record in some of the states, are included within the description of district or circuit courts; be it further enacted, that any court of record in any individual state having common law jurisdiction, and a seal and clerk or prothonotary, shall be considered as a district court within the meaning of this act."

In Ex parte Gladhill, 8 Metc. 168, the supreme court of Massachusetts decided, that the police court of Lowell was a court of record having common law jurisdiction. The police court of Lynn, which was established by St. 1849, c. 86, is so far identical with the police court of Lowell, in respect to its presiding justice, the mode of his appointment, the tenure of his office, the jurisdiction of the court, and the record of its proceedings, that we are satisfied that decision applies to those particulars in this case, and we see no sound reason to doubt that the police court of Lynn was a court of record, having a common law jurisdiction. But two questions still remain, —whether that court had a clerk and a seal, In the act for organizing the court (section 7), the justice is directed to keep a fair record of all proceedings therein. In the case of Ex parte Gladhill, the chief justice says: "It might be argued that the act of congress intended to limit the power to a court having a separate recording officer, whose act should authenticate its doings, and that the signature of a separate recording officer might add something to the credit due to an authenticated transcript. On the other hand, it might be urged with some plausibility, that if the judge is specially vested by law with the clerical authority, the court has a clerk within the letter and equity of the statute." This question that court had not occasion to decide; and did not attempt to decide; because by another act (St. 1838, c. 147, § 2), the police court of Lowell was authorized to appoint, and had in fact appointed a clerk, before the declaration then in question was made. We are of opinion, that the police court of Lynn, in which the justice was the recording officer, was not a court having a clerk, within the meaning of the act of congress. Certainly, it does not come within the terms of that act, which clearly imply that there may be courts of record having a seal and common law jurisdiction, but no clerk or prothonotary, and that such courts are not included by the act. Yet how could this be, if it were enough that the presiding justice should himself record the proceedings? A court of record necessarily requires some duly authorized person to record the proceedings. When the act speaks of courts of record, it speaks of courts whose proceedings are duly recorded by authorized persons; and when it says, "having a clerk or prothonotary," it superadds the requirement, that those proceedings shall be recorded by one of those officers. Unless the act be so construed, the requirement of a clerk or prothonotary would have no meaning. The act would have the same construction as if it were stricken out; because the words, court of record, would carry with them the necessity of having the proceedings recorded by some one by authority of law. Nor do we consider it a vain and useless precaution, to confine the power to naturalize aliens, to courts in which one of those officers is found.

In Spratt v. Spratt, 4 Pet. [29 U. S.] 393, it was declared by the supreme court, that the various acts on the subject of naturalization submit the right of aliens to courts of record. They are to receive testimony, to compare it with the law, and to judge on both law and fact. If their judgment is entered on record in legal form, it closes all inquiry, and, like-

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

any other judgment of a court having jurisdiction, is complete evidence of its own validity. The importance and value of this privilege of citizenship, which is conclusively and finally bestowed by the act of the court having jurisdiction, should prevent us from allowing less than its full weight, to any requirement by congress which tends to restrict this power, to those tribunals which may be supposed most competent to exercise it. And certainly, there would seem to be no propriety in intrusting to a court, which, in the exercise of its common law jurisdiction, cannot pass finally on any matter of law or fact, affecting property to the amount of one dollar, to make a final decision upon all questions of law or fact involved in an application for this great right, so as to make an absolute and unimpeachable grant of it. Now it is generally true, that a court of record, which is without a clerk or prothonotary, is not only a subordinate tribunal, but one to which a very narrow and comparatively unimportant jurisdiction is intrusted. It is also true that there is more security, that its proceedings will be correctly recorded and certified, if it has such an officer charged with those particular duties. Congress might well have had both these things in view, when it required the court to have such an officer. And we are of opinion, that a court not having such an officer, does not possess the authority conferred by the act.

As to the other question, respecting the seal, we do not find it necessary to determine it. The transcript produced, says it is under the seal of the court, but the paper bears no seal. Whether the court has, in point of fact, adopted a seal, we do not know. Whether if it has done so, it can be deemed a court having a seal, that is, a general seal, forming one of the legal means of authenticating its proceedings, within the meaning of this act of congress, we give no opinion.

The district judge concurs in this decision, and the application for naturalization must be denied.

Case No. 3,381.

CREHORE v. NORTON.

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

INFRINGEMENT OF PATENT—POWER—IMPROVEMENTS.

1. When a power is necessary for working a machine, the inventor or proprietor has a right to make his selection of any description of power known to the mechanic arts. It is of no importance whether such power is hand, steam, horse power, electricity, or any other power. The substitution and use of one power, as electricity, in the place of another, as hand power, does not make the machine different, or prevent its infringing on another. The one is but an equivalent of the other.

2. There may be an improvement upon a useful machine, which entitles the party making it to a patent; but the fact of having made an improvement on an old machine, does not absorb the original machine, nor give any right to the use of it.

3. The original inventor has no right to use the improvement without the license of the inventor; neither has the inventor of the improvement a right to use the original machine.

[Nowhere reported; opinion not now accessible. The foregoing paragraphs are from Laws Patent Digest, pp. 276, 356, and 363.]

Case No. 3,382.

CREIGHTON v. The GEORGE'S CREEK.

[5 Pittsb. Leg. J. 13.]

Circuit Court, D. Maryland. 1857.

SHIPPING—CARRIAGE OF CORN—LIABILITY FOR SHORTAGE.

A vessel giving a clean bill of lading for a specified number of bushels of corn is liable for any deficiency, although she proves that she delivered all she received.

A decision of interest to merchants has just been made by Chief Justice TANEY, of the U. S. circuit court, Maryland, in the case of William Creighton, president of the Corn and Flour Exchange, vs. the Steamer George's Creek. Some time in April, 1855, says the Baltimore Patriot, of Friday, a lot of 9,137½ bushels of corn were shipped from that port to N. Y., for which a clean bill of lading was received. The steamer arrived safely, and the corn was lightered to the point of delivery, but when it was measured fell short 240½ bushels. Suit for damages was brought in the U. S. district court[1] and Judge GRIER [GILES] decided against the plaintiff. An appeal was taken, and the case came up before Judge TANEY. The defendants proved that they had delivered all the corn they had received, and that in New York grain was sold by weight. The complainant contended that formed no answer, as the difference might have been taken without knowledge of the officers or crew of the boat.

THE COURT [TANEY, Circuit Justice] decided that it was necessary to deliver the same number of bushels in New York that were received in Baltimore. Judgment for plaintiff for $265 and costs.

CREIGHTON (HARGRAVE v.). See Case No. 6,064.

Case No. 3,383.

CREMER v. HIGGINSON et al.

[1 Mason, 323.][2]

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

GUARANTY—DISCHARGE OF GUARANTOR—APPLICATION OF PAYMENT.

1. Upon a letter containing this clause, "the object of the present letter is to request you if convenient, to furnish them, (Messrs. Stephen

[1] [Case unreported.]

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

and Henry Higginson,) with any sum they may want, as far as fifty thousand dollars; say fifty thousand dollars. They will reimburse you the amount, together with interest, as soon as arrangements can be made to do it; and as our embargo cannot be continued much longer, we apprehend there will be no difficulty in this. We shall hold ourselves answerable to you for the amount." *Held*, that this was not an absolute original undertaking, but a guaranty; that it covered advances only to Stephen and Henry Higginson, (who were then partners) on partnership account; and could not be applied to cover advances to either of the partners separately, on his separate account; that the authority of guaranty was revoked by a dissolution of the partnership, and no subsequent advances made by the party after a full notice of such dissolution were within the reach of the guaranty; that the letter did not import to be a continuing guaranty for money advanced toties quoties from time to time, to the amount of fifty thousand dollars, but for a single advance of money to that amount; and that when once advances were made to fifty thousand dollars, no subsequent advances were within the guaranty; although at the time of such farther advances, the sum actually advanced had been reduced below fifty thousand dollars, by reimbursements of the debtors.

[Cited in Whetmore v. Murdock, Case No. 17,510; National Bank v. Hall, 101 U. S. 51.]

2. When a debtor owing several debts, makes a payment to a creditor, the debtor has a right to apply it to what debt he pleases; if he makes no specific assignation, the creditor may apply it as he pleases; and where neither party appropriates it the law will apply it according to its own notion of the intrinsic justice and equity of the case.

3. Where money is advanced to a partnership under a guaranty, and the partnership is dissolved, and the debt is then carried, at the request of the debtors, to their separate accounts, according to their proportion of interest in the partnership; and the creditor gives the partners separately, a credit for such proportion, and discharges the partnership account, by carrying it to such separate account, and no notice is given thereof to the guarantor, the latter is discharged from all responsibility.

[Cited in Gelpcke v. Quentell, 74 N. Y. 601.]

4. If upon a letter of guaranty addressed to a particular person, advances are made upon the faith of the guaranty, it is the duty of the person so making the advances, to give notice thereof within a reasonable time to the guarantor, otherwise he will be discharged from all liability for such advances.

[Cited in Wildes v. Savage, Case No. 17,653; Bell v. Bruen, 1 How. (42 U. S.) 185.]

This was an action of assumpsit, brought by the plaintiff as surviving partner of Thomas Theodore Cremer of Rotterdam, who had carried on business there, under the firm of Thomas and Adrian Cremer, against Stephen Higginson and Samuel G. Perkins, surviving partners of George Higginson of Boston, who had transacted business in Boston, under the firm of Stephen Higginson and Co. upon a letter of guaranty, bearing date December 15, 1808, and given by Stephen Higginson and Co. to Stephen Higginson, Jr., and Henry Higginson, merchants of Boston; and at that time partners, under the firm of Stephen and Henry Higginson, and addressed to Messrs. T. and A. Cremer. The letter was admitted by the defendants to have been written by Stephen Higginson and Co. and is as follows: "Boston, December 15th, 1808. Messrs. Thomas and Adrian Cremer, Rotterdam. Our friends and connexions, Messrs. Stephen and Henry Higginson, contemplate, under certain circumstances, making a considerable purchase of goods on the continent, and for that purpose are about to send an agent to Europe. They wished to obtain a letter of credit from us to increase their means, and to be used or not as circumstances may require. As we are now indebted to you, and have no funds on the continent of Europe, we told them we could not give a positive letter of credit for any sum, but that we had no doubt you would be disposed to furnish them with funds under our guarantee. The object of the present letter, is therefore to request you, if convenient, to furnish them with any sum they may want, as far as fifty thousand dollars; say fifty thousand dollars. They will reimburse you the amount they receive, together with interest, as soon as arrangements can be made to do it; and as our embargo cannot be continued much longer, we apprehend there will be no difficulty in this. We shall hold ourselves answerable to you for the amount, and are, with great regard, gentlemen, your friends and servants, Stephen Higginson and Co. Signature of S. V. S. Wilder."

It was proved in the cause that Mr. S. V. S. Wilder, the agent referred to in said letter of guaranty, shortly after the date of it, went to Europe, having a general letter of credit from Stephen and Henry Higginson; and on or about June 10, 1809, he forwarded the letter of guaranty to Messrs. T. and A. Cremer, who acknowledged the receipt of it, June 19, 1809, in letters written by them to Stephen Higginson and Co., Stephen and Henry Higginson, and to Mr. Wilder, in which they agreed to give to Stephen and Henry Higginson, the credit asked for under the guaranty. These letters were severally received by the respective parties, to whom they were addressed. The letter of guaranty was written during the existence of the embargo in the United States; but before it was received by Messrs. Cremer, the embargo was removed, and the commercial intercourse with Europe was restored, and large shipments of colonial produce were made to Holland. Among others, there was a large shipment of ashes made by Stephen and Henry Higginson, to T. and A. Cremer, and received by them before any use was made of the letter of guaranty by Mr. Wilder. On April 1st, 1809, Stephen and Henry Higginson dissolved their copartnership, of the intention to do which, they had previously given public notice in the newspapers in Boston, as early as May 8th, 1809, and at different times after that. After this period, on September 14, 1809, Mr. Wilder wrote from Paris to T. and A. Cremer, that he had caused insurance to be effected at Hamburg to the amount of 60,000 f. on goods ordered to

be shipped from Tonningen for account of Stephen and Henry Higginson, and asks Messrs. T. and A. Cremer to inform him, whether it will be most for the interest of Stephen and Henry Higginson, that they, T. and A. Cremer, should remit to Hamburg; or that the agent there, Mr. Thornton, should draw on them. This letter is answered September 19th, and T. and A. Cremer agree to accept drafts drawn on them to the amount requested, and desire Mr. Wilder to specify the names of the persons, for whose use the money is to be paid. The receipt of this letter is acknowledged by Mr. Wilder, September 25, 1809, in a letter of that date to T. and A. Cremer, and after agreeing that Thornton had better draw on them, he writes thus: "That a part of the goods are consigned to Messrs. Higginson and Dodge, New York; and a part to Messrs. Stephen and Henry Higginson, Boston, but in consequence of the dissolution of partnership of those firms, on or after the 1st of September present, you will please to consider the advances for account of Stephen Higginson, Jr., in whose name the business is hereafter to be conducted; and in charging him with these advances, you will of course pass to his credit, a sufficient amount of the proceeds from the sales of the ashes now at your disposition, for account of Messrs. Stephen and Henry Higginson, for your reimbursement." And on the 30th of the same month, before receiving an answer from T. and A. Cremer, he writes them again, saying he has authorized Messrs. Von der Leyen, of Crefeld, to draw on them for $1307.15 for charges on goods forwarded to Tonningen, for account of Messrs. Stephen and Henry Higginson, and Higginson and Dodge; and he says, "which draft you will please to duly honor, and charge the amount to account of Mr. Stephen Higginson, Jr., Boston, whom I shall advise accordingly." On September 29th, T. and A. Cremer answered Wilder's letter of September 25th; and after observing that they do not know Higginson and Dodge, they request Mr. Wilder to write a letter saying "that the insurance was for Stephen and Henry Higginson, and that you desire us to pay the same on their account by virtue of their letter of credit." This letter is answered by Wilder, October 14th, who says: "In conformity to your desire, when I receive Mr. Thornton's account, I will advise you to pay it for account of Messrs. Stephen and Henry Higginson, by virtue of a letter of credit in my favor from Messrs. Stephen Higginson and Co., dated Boston, December 16, 1808;" and by virtue of the same credit, and for account of Stephen and Henry Higginson, he requests them to honor Von der Leyen's draft as per letter of advice of 30th ult.; and these drafts Messrs. Cremer duly paid. On the 6th of September, 1809, Stephen Higginson, Jr., wrote to Messrs. Cremer, informing them of the dissolution of his copartnership with his brother Henry, who had established himself in London, and requests them to advance Mr. Wilder funds on his account, and states, that he has shipped on board the Golden Age, 79 bbls. ashes consigned to the supercargo, and then says, "who is ordered to remit the proceeds to your orders for account of the late firm of Stephen and Henry Higginson, presuming that a balance may yet be due to you; if not, please to hold it to order of Henry Higginson, London." And on November 1st, 1809, Stephen Higginson, Jr., writes again to T. and A. Cremer, and requests them to advance Mr. Wilder funds to the amount of $100,000, and points out certain modes of reimbursement. Early in September, 1809, Henry Higginson established himself as a commission merchant in London, and T. and A. Cremer, in a letter to him, of October 4th, 1809, acknowledge the receipt of a letter from him of September 8, 1809; which letter they did not produce, in which they say: "We received your favor of September 8th, and circular letter. We congratulate you on the new establishment, not doubting, but an entire success will attend it; to which we shall be happy to contribute as much as lies in our power." On the 16th of December, 1809, T. and A. Cremer acknowledge the receipt of Stephen Higginson, Jr.'s letter of September 6th, and say, "We shall advance funds on your account to Mr. Wilder, when he requires it;" and then say they have already advanced him some sums; and also, "We accepted Mr. Wilder's draft for 6318.1 f. at thirty days' date on the 8th inst., for which we shall debit you on the 7th January next." On the 6th of January, 1810, T. and A. Cremer wrote to Henry Higginson, saying, they had received Stephen Higginson, Jr.'s letter of November 1st, in which he requests the advance to Mr. Wilder of $100,000; and they tell him they have no objection to grant it, not doubting that he will guaranty the same; and on the 8th January, 1810, they write Stephen Higginson, Jr., acknowledging the receipt of his letter of November 1st; and say they have no objection to granting the credit, but as their object in making advances is to have shipments made them for the same; and as the bare interest is a poor compensation for advances made for an unlimited time, and as there is little probability, that he will be able to reimburse them by shipments, they must leave it to his equity to make them such a compensation as will be due them; and as Wilder then wanted the funds, they would go on to furnish them; and on the same day, they also wrote Stephen Higginson and Co. saying: "We had letters from Mr. Stephen Higginson, Jr., requesting us to extend the credit to Mr. Wilder unto $100,000. We have made no difficulty to grant this, not doubting but you will also approve of it, and warrant us the same, the credit opened by you in favor of Stephen and Henry Higginson, being only of $50,000." This letter did not reach Messrs. Stephen Higginson and Co. until the

month of June following, and was not answered by them. The letter of January 6, 1810, to Henry Higginson not being answered, T. and A. Cremer wrote again to him on February 12, 1810, stating, that the credit was so large, which Stephen Higginson Jr. wished them to open with Mr. Wilder for his account, that they must insist on having his (Henry Higginson's) guaranty for the same; and on March 3, 1810, Henry Higginson in answer, agrees to become responsible to them. Previous to this period, on the 10th of October, 1809, Henry Higginson opened a credit with T. and A. Cremer, in favor of Mr. Wilder for 50,000 f., which was independent of the other credits. Between the 4th of October, 1809, and the 25th of August, 1810, Mr. Wilder drew, and authorized drafts to be drawn, on T. and A. Cremer for various sums of money, and T. and A. Cremer also, during that period, remitted to Mr. Wilder various bills of exchange; the whole of which sums so drawn and remitted, amounted to 242,092.7 f., equal to $96,836.94; and prior to and during said period, T. and A. Cremer received remittances from Stephen Higginson, Jr., to the amount of 152,927 f., equal to $61,170.80, but no direction was specifically given by Stephen Higginson, Jr., in what manner said remittances should be credited. Of the sums composing the 242,092.7 f., 67,175.13.8 f. in different sums, was stated in the correspondence to be advanced under the guaranty of Stephen Higginson and Co.; 44,361.14.8 f., in different sums, were stated to be under Henry Higginson's guaranty of 50,000 f. and 130,554.19 f.. in different sums, was advanced without any guaranty being specified. Again, of this sum of 242,092.7 f. two sums advanced in October, 1809, amounting to 19,426.18 f., were stated to be for account of Stephen and Henry Higginson; 8,910.6 f. was advanced without any mention on whose account; and all the residue was specifically stated to be for account of Stephen Higginson, Jr.

On an exhibit of sundry extracts from the books of T. and A. Cremer, it appeared also, that two entries, in the year 1809, were made to the debit of Stephen and Henry Higginson; but these charges, at the close of the year, were carried to the debit of Stephen Higginson, Jr., and all the subsequent advances were charged to the account of Stephen Higginson, Jr. Although the names of Stephen and Henry Higginson, in that connexion, never appeared in the ledger of T. and A. Cremer, yet, in an account current book kept by them, they stated an account current with Stephen and Henry Higginson; charged them with the several advances made as aforementioned in the year 1809, and carried the balance of that account at foot to the debit of Stephen and Henry Higginson; and in July or August, 1810, they remitted an account current with Stephen and Henry Higginson for the year 1809, to Henry Higginson in London. On receiving it, Henry Higginson wrote them word, that his partnership with Stephen Higginson, Jr., had been dissolved a twelvemonth, and that certain charges (which he enumerated) in the account, ought to be carried to the separate account of Stephen Higginson, Jr.; and certain charges, amounting to upwards of $10,000, to his separate account; and that this would make no difference to T. and A. Cremer, as he and his brother were mutually responsible for each other's engagements. On receiving this letter, Messrs. T. and A. Cremer, in the month of September, 1810, made out new accounts current, charging Stephen Higginson, Jr., with the items specified by Henry Higginson, and debiting Henry Higginson, with the other items. The balance thus due from Henry Higginson was paid by him at the end of the year 1810; and he, at different times, authorized T. and A. Cremer to draw on him for moneys due them from Stephen Higginson, Jr., but they did not. From this period Henry Higginson continued in perfect credit, and doing a large business until the last of October, 1811, when he stopped payment, and was, at that time, indebted in a small sum to T. and A. Cremer, which debt they afterwards proved under the commission of bankruptcy against him, and received their dividends. Early in the year 1812, Stephen Higginson, Jr., stopped payment, and in May, 1812, T. and A. Cremer, who did not appear to be informed of it, though they expressed great fears, that it would happen, by letter informed Col. T. H. Perkins, who was then in Europe, that they had made great advances to Mr. Stephen Higginson, Jr., and wished him to aid them in obtaining security, but requested him to keep this communication an entire secret from Stephen Higginson & Co. It was also proved, that an active correspondence was carried on between T. and A. Cremer and Stephen Higginson & Co. during the years 1809, 1810, 1811, in which upwards of forty letters were written by the former to the latter. Yet they never gave any notice to Stephen Higginson & Co., either that they were making, or afterwards that they had made, advances to Stephen and Henry Higginson or to Stephen Higginson, Jr., nor did they give them any notice on the subject, till the close of the year 1813, long after the parties had become insolvent.

This case turned principally on the facts introduced in evidence, and was argued at great length to the jury. The questions of law, that arose, related to the construction to be put upon the letter of guaranty; the effect of the dissolution of copartnership between Stephen Higginson, Jr., and Henry Higginson; and the necessity of proving a notice to the defendants of the advances made by the plaintiffs.

On these points, Hubbard & Prescott, for defendants, contended: (1) That the guar-

anty of the defendants was a conditional one. That guaranties were to be construed and explained according to the true intent and meaning of the parties; which intention could only be collected from a consideration of the object, to which the guaranty related, and the circumstances under which it was given. That this guaranty was clearly limited, as to its object, amount, and duration. That its object was to enable Stephen and Henry Higginson to raise funds on the continent during the embargo then existing in this country, which prevented them from shipping goods there for that purpose. That the amount specified was the sum of $50,000, and the means and mode of payment pointed out plainly indicated the intention of the guarantors, that it should not be considered a continuing guaranty, but applicable only to the first $50,000 advanced. And that it ought to be construed, as limited in its duration, to the continuance of those peculiar circumstances, under which it originated. (2) That it was given for advances to be made to the firm of Stephen and Henry Higginson only; and, therefore, no advances made to either of those individuals after the dissolution of their copartnership, could be covered by it. (3) That it was the duty of the plaintiffs to give notice to the defendants, within a reasonable time, of the advances they had made under the guaranty; and that their neglecting to do this discharged the defendants from all responsibility.

Blake & Webster, for plaintiffs, assented to the rules adopted by the defendant's counsel, for construing the guaranty; but as to the inferences to be drawn from them, they differed widely. They contended: (1) That the situation of the parties, and the commercial objects of Stephen and Henry Higginson totally disproved the argument, that this was a conditional guaranty, and limited to the continuance of the embargo. That nothing expressed in the guaranty itself supported such a construction, and it could not be taken up upon conjecture merely. (2) That from the express terms of the guaranty, and the extensive commercial operations contemplated by Stephen and Henry Higginson at the time it was given, it was evidently intended to be a continuing guaranty. That Wilder, the agent of Stephen and Henry Higginson, was sent on to the continent for the express purpose of increasing their means, and was to act according to circumstances, and at his own discretion. It was important that an extensive credit should be obtained there; and the guaranty must have contemplated a course of dealings, and not a single transaction. That under such circumstances it could not have been the intention of the parties to cover the first $50,000 only, that were advanced, when the advances were, from time to time, to be paid off by remittances; but to cover the $50,000, in which Stephen and Henry Higginson should be indebted to the plaintiffs at one time, and upon a balance of their accounts. That the defendants would themselves have loaned Stephen and Henry Higginson $50,000, if they could have readily commanded such a sum at the time it was wanted, but not being able to do so, they were willing to give their guaranty for that amount to any other person, who would advance it. That the greatest restriction, therefore, that could possibly be put upon the terms of this guaranty was, that after a debt had been run up to the full amount of $50,000 all payments made on the general account should be applied to its discharge. In other words, that, if Wilder could open a negotiation with the plaintiffs, and obtain from them advances for the purpose of carrying on the contemplated speculations on the continent, the defendants would be answerable for such advances to the extent of $50,000. Mason v. Pritchard, 2 Camp. 436, 12 East, 227; Merle v. Wells, 2 Camp. 413; Bastow v. Bennett, 3 Camp. 220; Sturgis v. Robbins, 7 Mass. 301.

STORY, Circuit Justice (after stating the facts). There are several questions of law in this case, upon which it is now my duty to instruct you.

The first point is, what is the true construction of the letters of the defendants to the plaintiffs, of the 15th of December, 1808, which is the main hinge of the whole of this controversy? I am clearly of opinion, that, in point of law, it is not an absolute undertaking for the payment, in the first instance, of all advances made to Stephen and Henry Higginson, not exceeding 50,000 dollars. It is in fact an original collateral undertaking to guaranty the payment of such advances; and consequently the debt is properly the debt of Stephen and Henry Higginson, and the defendants are liable only upon their default, and to the extent of the guaranty. It has been asserted, that the guaranty is conditional, having reference to the then state of our commerce; and that the embargo being removed, the implied condition, upon which the advances were to be made, viz. the impracticability of Stephen and Henry Higginson's remitting funds to Europe, was completely done away before any advances were made; and that the defendants are, therefore, absolved from all responsibility. There is nothing in this argument. The letter contains no such implied condition; and it would be extremely dangerous for courts of law to indulge themselves in searching after such hidden and conjectural meanings in such an instrument. It is sufficient for us, that the language of the letter speaks not in such ambiguous or hypothetical terms. As little ground is there for the argument, that the plaintiffs were, by the terms of the letter, bound to look to the application of the funds, advanced by them to the agent of Messrs. Stephen and Henry Higginson, under

the guaranty. The plaintiffs were not bound to see, whether the agent properly applied the advances or not; or whether he purchased with them French goods, or any other goods. He was to act solely under the instructions of his principals, with which the plaintiffs had nothing to do; and the defendants are liable for all advances, bona fide made under the guaranty, even though the agent may have applied them contrary to the instructions of his principals.

Having thus fixed the interpretation of the letter on this point, that it is a mere guaranty of the debt of third persons, the next question upon its construction is, to whom are the advances to be made. If there be any thing clear in this cause, it is, that the advances are to be made to Stephen Higginson, Jr., and Henry Higginson, then copartners in trade under the firm of S. & H. Higginson. It follows, therefore, that it covers only advances made to them jointly on their joint credit, and not advances made to them severally upon their several credit. Unless then it shall be completely established, that the advances were made on the joint account of the firm, there is an end of the plaintiffs' case.

Another question upon the construction of this letter is, whether it contains a limited or a continuing guaranty; in other words, whether it be a guaranty for advances made to the amount of 50,000 dollars, and when that sum is once advanced, it is exhausted; or, whether it covers any further advances, made from time to time, after the 50,000 dollars have been once advanced, provided, at the time of such advances, the balance then due to the plaintiffs, does not, with such advances, equal the stipulated sum of 50,000 dollars. Upon examining the terms of this letter I am of opinion, that it is a guaranty limited to a single advance of 50,000 dollars; and that when once this sum is advanced, the guarantors are no longer liable for any future advances, whatever may be the state of the accounts between the parties. The language of a letter should be very strong, that would justify a court in holding the guaranty to be a continuing guaranty, which is to cover advances, from time to time, to the stipulated amount, toties quoties, until the guarantor shall give notice to the contrary. I see nothing in this letter to justify such a conclusion; and in every doubtful case, I think, that the presumption ought to be against it. If, therefore, in the present case the advances to Stephen and Henry Higginson ever equalled 50,000 dollars, all subsequent advances, although the debt of Stephen and Henry Higginson may have been, at the time, diminished by payments, so as to be far within that sum, are beyond the reach of the guaranty.

The next point in the cause, is, as to the effect of the dissolution of the partnership of Stephen and Henry Higginson. From the moment that dissolution was made known to the plaintiffs, all right to make future advances upon the credit of the firm was completely done away. To be sure, the plaintiffs, by agreeing to make the stipulated advance of 50,000 dollars, and specifying that in writing to Mr. Wilder, and agreeing to accept his bills to that amount, might have rendered themselves liable to pay to a third person, who should take the bills upon the credit of that written agreement, to the full amount. And in relation to contracts actually made by Mr. Wilder upon the footing of that agreement, and advances made, or agreed to be made by the plaintiffs to satisfy such contracts, before notice of the dissolution, the plaintiffs would be entitled to hold the defendants liable under the guaranty, if the contracts were made with third persons upon the faith and credit of the plaintiffs' acceptance. But as to all other future advances, notice of the dissolution of the partnership was a complete revocation of all authority to make such advances, at least so far as respects the defendants. The dissolution was publicly announced in May, 1809, in the newspapers in Boston, to take place on the first day of September of the same year. The defendants had due notice of such dissolution, and had a right to consider, that all advances made by the plaintiffs, after a knowledge of such dissolution, were advances made on the credit of the partners severally, and not on the partnership account, or on the credit of the guaranty of the defendants. And even if there was a secret understanding between Stephen Higginson, Jr., and Henry Higginson, after such dissolution, that the shipments made by Mr. Wilder, and the advances made by the plaintiffs for the payment thereof, should be considered as made for their joint interest, in the same manner as if the partnership were not dissolved, and the plaintiffs upon the supposition of such joint interest actually made such advances, still if this was unknown to the defendants, and they never had notice of such understanding, they are not bound by their guaranty for the payment of such advances.

As to the manner in which the payments and remittances, made by Stephen and Henry Higginson, or by Stephen Higginson, Jr., to the plaintiffs are to be applied, the law is perfectly clear. Where a debtor owing several debts, makes any payment to a creditor, he has a right to apply it to what debt he pleases. If he makes no specific appropriation, the creditor may apply it as he pleases: And where neither party appropriates it, the law will apply it according to its own notion of the intrinsic equity and justice of the case. In the present case, the plaintiffs had a guaranty of the defendants for the advances to the amount of 50,000 dollars, and a guaranty of Henry Higginson for advances to the amount of 50,000 florins; and they further agreed, at least as early as the 8th of January, 1809, to give to Stephen Higginson, Jr., on his own account an additional credit

of 50,000 dollars. Now, where a creditor holds several funds, or, what is the same thing, has agreed to advance money upon the footing of several distinct credits, he is bound to state at the time of the advance, upon which credit it is actually made. At least, if he does designate in his books or correspondence the particular credit, upon which particular advances are made, he is not at liberty to change the credit afterwards upon any new occurrence, which may materially affect the rights of third persons.

In the present case, the plaintiff has charged certain advances, as made on the credit of the guaranty of the defendants, and others, as on the guaranty of Henry Higginson; and others are without any specific statement of any guaranty, on which they were made. As to the two former advances the plaintiffs are bound by their original charges, and cannot now transfer them from the one guaranty to another. And as to the last, they must be deemed, under the peculiar circumstances of this case, to have been made on the several credit of Stephen Higginson, Jr., to whom they are charged.

There is another point in this cause, which, if it were alone, would, in my judgment, be conclusive against the plaintiffs. Assuming that all the advances of the plaintiffs were actually made upon the credit of the partnership of Stephen and Henry Higginson; yet it appears, that in August, 1810, the plaintiffs, at the request of Henry Higginson, and with the implied assent of Stephen Higginson, Jr., and upon a statement, that the partnership had been dissolved for a whole year before that time, did actually transfer the partnership balance, then due, in certain proportions, to the several and separate accounts of Stephen Higginson, Jr., and Henry Higginson, and gave credit to them severally for their respective shares of such balance, until after they both became insolvent (more than three years afterwards) without the facts having been in any way communicated to the defendants. In my judgment, this giving a new and unlimited credit to them severally, upon their several accounts, for that balance, without any communication with, or assent by the defendants, was a complete discharge of the defendants from their original guaranty. It was in the highest degree injurious to them, and must be considered, so far as respects the defendants, as an agreement by the plaintiffs to hold that balance upon the sole credit of the partners themselves in the proportions with which they were charged in their separate accounts. If a creditor will undertake to give a new credit to his debtor, and thereby materially to change the situation of a surety, and a fortiori of a guarantor, the latter is absolved from all responsibility, unless he has notice of, and becomes party to, the new transactions.

The last point of law, which it is necessary to consider, is, whether any notice was necessary to have been given of the amount of the advances made by the plaintiffs to the defendants. It appears that the plaintiffs did inform the defendants of their readiness to make the stipulated advance of $50,000, as soon after their receipt of the letter of guaranty as was practicable; so that the point is narrowed to the consideration of the question, whether notice was necessary of the amount of the advances, after they were actually made. And I am most distinctly of opinion, that it was the duty of the plaintiffs, within a reasonable time after the advances were actually made, to give notice thereof to the defendants, and that reliance was placed upon their guaranty to insure the repayment. And if notice was not given in a reasonable time, nor until after a material change in the circumstances of the debtors, such laches of the plaintiffs was a complete discharge of the defendants from their guaranty. The first notice given to the defendants of any advances in the present case, was not until near the close of the year 1813, more than three years after all the advances were made, and when both of the debtors had become insolvent. During this period an active correspondence was kept up between the plaintiffs and the defendants, nearly fifty letters having passed between them, in which not one syllable is to be found relative to any advances to Stephen and Henry Higginson, or either of them. Nor is this extraordinary silence imputable to any accident or mistake. It appears from a letter of the plaintiffs to Col. Perkins (a witness in the case) that it was studied and intentional. Under these circumstances I am bound to declare, that the law holds the plaintiffs guilty of such laches, as discharges the defendants from all liability for the advances actually made. Verdict for the defendants.

Case No. 3,384.

The CRENSHAW.

[Blatchf. Pr. Cas. 631.][1]

Circuit Court, S. D. New York. Nov. 18, 1861.

PRIZE—DISPOSITION OF CARGO PENDING APPEAL.

In this case the cargo of the prize vessel, consisting of tobacco, was suffering damage from exposure to the weather and from confinement in the hold of the vessel, and the price of the article had increased since the capture. The cargo having been condemned in the district court, the claimants, after appealing to this court, applied to this court for the delivery of the cargo to them on the usual stipulation. The court denied this application, but appointed commissioners to appraise the cargo, and ordered it to be sold and the proceeds to be brought into court.

NELSON, Circuit Justice. This is a motion on behalf of J. and J. K. Caskie, claimants of 180 hogsheads and 47 half-hogsheads of tobacco, on board of the schooner Crenshaw, lying at the wharf of the Union stores, in the city of Brooklyn, for an order for the delivery of the tobacco to the claimants,

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

upon their stipulation to account for the proceeds in the case of a decree against them on the final hearing, or for such other order or relief in the premises as the court may see fit to grant. The vessel and cargo were seized and libelled in the district court for an alleged attempt to violate the blockade of one of the ports of the state of Virginia. A decree was rendered in that court, condemning the vessel and part of the cargo, as lawful prize, including the tobacco in question [The Hiawatha, Case No. 6,451]; and the case is now pending in this court, on an appeal from that decree. The ground upon which this motion is placed is, that the tobacco is suffering damage and deterioration in value from exposure to the weather, and also from confinement in the hold of the vessel; and the claimants have been obliged to keep a person constantly employed, at their own expense, in guarding and taking care of it, so as to prevent, as far as possible, further injury and damage. The government, the captors, object to the delivery of the property to the claimants on stipulation, but do not deny that the facts set forth furnish proper ground for an interlocutory order of sale, the proceeds to be brought into the registry of the court, to abide the event of the suit. It further appears upon the papers upon which the motion is founded, that the price of the article has greatly increased since the capture, and that it would for the interest of all parties concerned that the same disposition should be made of it by which a sale can take place in the present market. As the property has been condemned as lawful prize, in the court below, the appellate court would not, except in extreme and very special cases, deliver it to the claimants upon the usual stipulation. It might be otherwise if the decree had been in their favor. But being against them, an enhanced interest exists, in the behalf of the captors, that the property the subject of the litigation, should be preserved with all reasonable security, to abide the result.

I therefore direct an order of sale to be entered, and appoint Morris Franklin and Frederick W. Welchman, Esquires, commissioners, to enter the vessel (now in the custody of the court, through its marshal) and examine and appraise the value of the 180 hogsheads and 47 half-hogsheads of tobacco, and order that, after such appraisal, a public sale of the same be made by the marshal, under the direction of the commissioners, and at such time and place as they shall direct, giving at least three days' notice of the sale, to be given in such papers as they shall designate, and that the proceeds of the sale be brought into this court, to be placed or invested by the clerk according to the directions of the court.

[NOTE. For subsequent proceedings relating to the condemnation of this vessel and her cargo, see note at the end of The Hiawatha, Case No. 6,451.]

CRENSHAW, The. See Cases Nos. 6,450–6,452.

CRENSHAW (BOTTS v.). See Case No. 1,690.

CREOLE, The (M'AFEE v.). See Case No. 8,655.

CREOLE, The (SMITH v.). See Cases Nos. 13,032 and 13,033.

Case No. 3,385.

CRERAR v. MONTREAL OCEAN STEAMSHIP CO.

[Cited in Donaldson v. McDowell, Case No. 3,985. Nowhere reported; opinion not now accessible.]

Case No. 3,386.

The CRESCENT.

[Cited in The J. F. Spencer, Case No. 7,316. Nowhere reported; opinion not now accessible.]

CRESCENT CITY, The (SEAMAN v.). See Case No. 12,581.

Case No. 3,387.

CRESCENT CITY ICE CO. v. STAFFORD.

[3 Woods, 94.][1]

Circuit Court, D. Louisiana. Nov. Term, 1877.

DECEDENT'S ESTATES—RIGHTS OF ADMINISTRATOR.

1. A court of probate cannot authorize an administrator to take possession of any property of which the title or right of possession is not in the estate of the intestate.

2. The title of property belonging to the estate of a decedent vested in an administrator appointed by the court of the domicile of the decedent, is not divested by the transportation of the property to another state to be sold in its markets.

3. An administrator appointed in such other state is not entitled to the possession of such property so transported thereto for sale.

In equity. Heard upon motion for an injunction pendente lite. The substance of the bill was that the complainants were a commercial association, a partnership doing business under the name and style of the Crescent City Ice Co., in the city of New Orleans, whose members were composed of citizens of several states of the United States other than the state of Illinois; that the respondent was a citizen of the state of Illinois; that the firm of Hess & Reid, of Illinois, were the owners of three barges laden with ice, and that on February 24, 1877, they sold the cargoes of ice laden on the three barges to one Bowles, who paid in cash therefor the sum of $849.25, and agreed to pay, upon the delivery of the ice in New Orleans, the freight thereon, which amounted to about $58; that after the contract of

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

purchase had been entered into, and while the ice was thus laden on board of these barges, and remained within the state of Illinois, the said Bowles departed this life. Two citizens of Illinois, to wit, Summers and Turner, were appointed administrators of her estate by the proper mortuary court having jurisdiction over the same within the state of Illinois; that they were duly qualified and entered upon their duties as administrators; that said Summers and Turner, as such administrators, finding that the value of the ice, upon its delivery in New Orleans, would not more than equal the freight contracted to be paid, sold the same to the complainants for the amount of the freight, to wit, $58, which was paid to the said Hess & Reid, to whom the same was due; that the respondent, without any right or color of title, was interfering with the possession of complainants; that he was insolvent, and they prayed that he, his servants and agents, be enjoined from further interference with their possession of the ice.

The "Exhibit A" annexed to the bill, was the contract of sale of the ice, and showed that the ice was in the first instance sold by Hess & Reid to Miss Bowles for the sum of $849.25. It provided that the vendors should cause the barges to be towed from Quincy, Illinois, to the city of New Orleans. As the consideration for the use of said barges, and the towing of the same, Mrs. Bowles agreed to pay to Hess & Reid the further sum of $58 as soon as the barges, or either of them, should land at New Orleans, and upon notification by telegram of the fact; the money for this payment having been deposited by Bowles in Ricker's bank at Quincy, Illinois. The contract contained an authorization to Ricker to pay the said sum upon the receipt of said telegram. The contract further provided that if all of the barges were sunk, Hess & Reid were to repay to Bowles the $849.25, or if any of them were sunk, proportionately for the same. The exhibits further showed the payment of $58 to Capt. Sawyer, who received the same for Hess & Reid. The affidavits on behalf of the respondent showed that he has been appointed provisional administrator of the estate of Bowles in the state of Louisiana, and as such administrator, and under the order of the mortuary court in Louisiana, claimed the right to possess and dispose of said ice, and a denial in the most emphatic manner that the Illinois administrators had reduced said ice to possession within the state of Louisiana.

J. Ad. Rosier, John Finney, and H. C. Miller for complainants.

T. A. Bartlett, for defendant.

BILLINGS, District Judge. The point was urged with great force by the solicitor for defendant, that there was a conflict of jurisdiction between the courts, and that the mortuary court which appointed the defendant administrator was seized of jurisdiction, over this property. There is no conflict of jurisdiction, nor can there be in this case. It was not in the power of the mortuary court of Louisiana, by virtue of any order, to give the defendant authority to possess any property which did not belong to the estate of the decedent, and which the estate was not also entitled to possess. If any party has a better title or a better right to possess, he cannot be divested by any order of the mortuary court, and the question as to whether the property belongs to the estate of the decedent, and whether such estate was entitled to its possession, is open to all courts in which the same may be put at issue.

The only question I need consider is, whether the complainants show that they are entitled to the possession of the ice. This question carries with it the whole matter which is now before me. It is not necessary to determine the validity of the sale to the complainants, or whether it was in accordance with the laws of Illinois. The undisputed facts are, that the personal property which belonged to the estate of the deceased was in Illinois at the time of her death, laden on board barges, bound for New Orleans under a contract which necessitated that it should be brought here charged with the freight; that the amount of freight equaled the value of the property, and that the money with which the decedent agreed to pay freight was in Illinois. Under these circumstances, Illinois being the domicile of the decedent at the time of her death, I think that the administrators were certainly authorized to make provision for the payment of the freight. It is not merely the case of personal property passing from the territorial limits of the state of a deceased person to another jurisdiction, but of property which had been destined and consigned under certain conditions for a market merely for sale, subject to an incumbrance which would consume the property, and might leave a residuary liability. It is the case of property shipped from the domicile of the decedent after her death to another place, merely as a place of market. It seems to me, under these circumstances, that property, vested in the administrators in Illinois, which is merely shipped into another state to be sold, does not pass out of the administrators merely by crossing the state line. It is to all intents and purposes localized, so far at least as to allow the administrators of the place of the domicile to dispose of it. Whether they have disposed of it by a valid sale, it is not necessary now to say. They certainly had the right to authorize the complainants to pay the freight, and by their paying the freight they became subrogated to the rights of the carriers, one of which is to hold the property until they are repaid. It is not the case of property merely passing

into this state, but it comes destined here by the decedent as a market, and charged with a burden which, unless met by some one, would necessitate its sale by the carriers, or from the nature of the locality its destruction by the semi-tropical heat.

Justice Story, in his Conflict of Laws (§ 520) says: "Indeed, according to the common course of commercial business, ships and cargoes, and the proceeds thereof, locally situated in a foreign country at the time of the death of the owner, always proceed on their voyages and return to the home point, without any suspicion that all the parties concerned are not legally entitled so to act, and they are taken possession of and administered by the administrator of the forum domicilii, with the constant persuasion that he may not only rightfully do so, but that he is bound to administer them as part of the funds appropriately in his hands." See also Embry v. Millar, 1 A. K. Marsh, 300.

I need not consider whether the restrictions created by the statute of Illinois as to sales by executors apply to property shipped elsewhere for market, nor need I consider the claim of the administrator appointed in Louisiana with reference to the regularity of his appointment, or with reference to his right to the custody of property found here, which was a part of the estate of the decedent, and which was not sent here for market, and not burdened with the lien for freight up to its value, and possibly of not sufficient value unless immediately disposed of to discharge the obligation of the estate for the freight. It is enough for the purposes of this application to say, that this property is in the hands of the complainants, and has been put in their hands by the administrators of the deceased, who had the right to deal with it, certainly to the extent of providing for the payment of the freight, and the payment by the complainants of this freight gives them the right to hold this property, certainly until they are indemnified.

Let, therefore, the injunction issue upon the complainants giving bond, with good and sufficient security, in the sum of $5,000.

CRESCENT CITY LIVE-STOCK LANDING & SLAUGHTERHOUSE CO. (LIVE-STOCK DEALERS' & BUTCHERS' ASS'N v.). See Case No. 8,408.

Case No. 3,388.

CRESSLER v. CUSTER.

[1 MacA. Pat. Cas. 216.]

Circuit Court, District of Columbia. April Term, 1853.

INTERESTED WITNESS.

[An assignee of a patent, who understands that he has acquired the right to use an improvement thereto, is interested, and therefore incompetent to testify for the patentee on an interference to which the latter is a party, and which involves priority of invention of the improvement in question.]

On appeal from the commissioner of patents.

A. B. Stoughton, for appellant.

MORSELL, Circuit Judge. The commissioner's decision is dated the 10th of December, 1851, and states that "whereas, upon the appointed day of hearing, of which due notice had been given to the parties, it appeared upon the testimony of James Campbell that Daniel Custer, one of the parties in this interference, described to the said witness in the month of July, 1850, the feeding-wheel marked H, the principal device in this interference, and also described and represented the gauge-tube used in connection with the wheel; and whereas it did not appear from the evidence before this office that the said William Cressler did invent the above two devices involved in this interference earlier than the date of his application for a patent: therefore it is hereby declared, according to the evidence before this office, that Daniel Custer is the first inventor of the feeding-wheel and gauge-tube involved in this interference." It appears to be understood that the only question that I am called upon at present to decide upon the reasons of appeal and the ground of the commissioner's decision is as to the competency of James Campbell, the witness on the part of Daniel Custer, on the ground of interest in the witness. The usual test in such cases is whether the witness is interested in the event of the suit or issue—whether he is to lose or gain by the event; that is, whether he has an interest, legal or equitable, (if real,) which will be secured or continued to him in the event of success, or lost in the event of non-success, of the party in whose favor he is called as a witness. The report states "that in the year 1849 Daniel Custer patented a seed-planter. In the following spring he entered into some business arrangements with William Cressler for disposing of the machines. In the meantime a modified seed-planter was invented by one or both of the parties, each claiming to be sole inventor, and each applied to the patent office for a patent—Daniel Custer on the 26th March, 1851, and William Cressler on the 18th March, 1851. Each applied for a patent for the same improvement in said planters, namely, for a certain seed-distributing wheel or pinion-feeding wheel, together with a tube called a gauge-tube for sewing wheat," &c. In another part the commissioner says: "It should be also stated that the said Daniel Custer had patented a seed-planter November 13th, 1849, and that he had sold rights in sections of territory to different individuals. James Campbell the witness, held in that patent an assigned right." The assignment to the witness is referred to, and is to be found among the

papers on the face of which it does not appear that the said improvement was assigned; but the witness in his deposition says: "The reason I put some of their improvements into my drills, I got them off their patterns to try them. I got off their tubes a couple of sets. I also got them wheels off their patterns. The fact is, I got all the castings off their patterns. I used the wheel marked H from July, 1850, with Mr. Jenkins' permission and with Custer's permission. I supposed that the wheel H was patented when I bought the right from Israel" (agent of Daniel Custer). Although, as I said before, it does not appear from the face of the assignment that the witness bought the improvement, yet he seems to have understood that the use of it formed a part of the consideration; and the use of it, with the consent and permission of Custer, creates an equitable right. If, then, Custer succeeds in defeating Cressler in this case, the witness certainly had a right to expect that the use would be continued to him. On the other hand, if Cressler succeeded, the right would be withdrawn.

I am of opinion, therefore, and do so decide, that the said James Campbell was an interested and incompetent witness, and that his testimony ought to be rejected.

Case No. 3,389.

CRESSON v. CRESSON.

[6 Am. Law Reg. 42; 5 Pa. Law J. Rep. 431.]

Circuit Court, E. D. Pennsylvania. May Term, 1857.

CONSTRUCTION OF WILL—CHARITABLE USE.

1. Testator, domiciled at Philadelphia, devised certain lands in Pennsylvania to twelve trustees "in trust for the formation and support of a home for the aged, infirm or invalid gentlemen and merchants, where they may enjoy the comforts of an asylum—not eleemosynary, but, as far as may be, by the addition of their own means, and by reference to the Prytaneum of ancient Athens, an honorable home—with the hope that it may be perpetuated and enlarged by the bequests of its grateful inmates, until it shall become worthy of the city of Penn, and a blessing to a class whose wants have hitherto been overlooked; leaving to my trustees full power to conduct and carry out this institution on the best possible plan, and to provide for its permanent usefulness in or near my native city."

2. On bill filed and claim made by the residuary devisees under the will, and by the heirs at law of the testator, to have the devise declared invalid, inoperative and void: *Held*, that the devise was good under the laws of Pennsylvania, and was valid as a charitable use.

3. Whether independent of the charitable character of the devise it could be sustained as a trust, quaere?

St. Geo. T. Campbell, Junkin, Parsons & Bell, for residuary devisees and heirs at law.

E. K. Price and J. B. Townsend, for trustees.

KANE, District Judge. The testator, Mr. Elliott Cresson, a resident citizen of Philadelphia, made the following provision by his last will and testament: "I give and bequeath to my friends, Joseph R. Ingersoll, Eli K. Price, John W. Claghorn, E. F. Rivinus, Frederick Fraley, William Parker Foulke, Thomas S. Mitchell, Dr. Kirkbride, Joseph Harrison, and my executors hereinafter named, my lands in Clinton county, Pennsylvania, or the proceeds thereof, if sold during my lifetime, in trust for the foundation and support of a home for aged, infirm, or invalid gentlemen and merchants, where they may enjoy the comforts of an asylum,—not eleemosynary,—but, as far as may be, by the addition of their own means, and by reference to the Prytaneum of ancient Athens, an honorable home,—with the hope that it may be perpetuated and enlarged by the bequests of its grateful inmates, until it shall become worthy of the city of Penn, and a blessing to a class whose wants have hitherto been overlooked, leaving to my said trustee full power to conduct and carry out this institution on the best possible plan, and to provide for its permanent usefulness in or near my native city."

The legal validity of this provision is the only subject of controversy in the present suit. I may be misled, perhaps, by a desire to establish such a trust as I think this was intended to be; but the question has not seemed to me at any time a doubtful one under the established law of Pennsylvania. It is by reference to this law that it must be considered and decided,—a law, in some respects, more liberal and wiser than that of England,—though not dissonant from it in principle,—the law, under which charities have taken root and borne fruit among us beyond any example to be found in those states that have yielded to a less enlightened policy. Yet, I would by no means be understood as implying, that such a charity as this would not commend itself to the guardianship of the English chancery. There is not, so far as I have read, and never has been, an objection, statutory or judicial, to the recognition of a purely charitable use, where the donee was not a corporation. The inhibition in Magna Charta referred only to lands given to religious houses; and so did the statutes that followed it. There never was a time, as both the argument and the judgment in Vidal v. Mayor, etc., 2 How. [43 U. S.] 128, justify me in affirming, when a grant or a devise to an individual for an adequately expressed use, not superstitious, was without protection in England. Moreover, in determining what uses were adequately expressed, the English chancellors have been ingenious even to astuteness on the side of charity. The cases that were cited in the discussion before us show this sufficiently, but there are a few others equally if not more striking. Among them is that of Townsend v. Carus, 3 Hare, 257, where the trust was "to pay, divide, dispose unto and for the benefit or advancement of such socie-

ties, subscriptions, or purposes, having regard to the glory of God in the spiritual welfare of his creatures, as the trustees in their discretion shall see fit." Another, not less marked, is that of Whicker v. Hume (decided in 1852) 10 Eng. Law & Eq. 217, where a bequest was sustained upon trust "to apply and appropriate in such manner as the trustees in their absolute and uncontrolled discretion think proper and expedient for the benefit and advancement and propagation of education and learning in every part of the world." This reminds one of the language of Mr. Smithson, "an establishment for the increase and diffusion of knowledge among men;" but it is not the broadest of the cases in the modern books. I think the bequest in Nightingale v. Gouldbourn, 2 Phill. 594, to the chancellor of the exchequer, "to be appropriated to the benefit and advantage of my beloved country, Great Britain," which was sustained as a charity, may claim a still greater latitude of application; and the trust for "the increase and encouragement of good servants," (public, it might be argued, as well as domestic,) devolves an equally large discretion on the trustees. Loscombe v. Wintringham, 13 Beav. 87. But the case which struck me most forcibly, as it is the latest, is one decided by the master of the rolls in November last, to which I have been guided by the learned annotator of the forthcoming edition of Hill on Trustees. It is that of University of London v. Yarrow, 26 L. J. Ch. 70. The bequest there was for "founding, establishing, and upholding an institution for investigating, studying, and, without charge beyond immediate expenses, endeavoring to cure maladies, distempers and injuries, any quadrupeds or birds, useful to man, may be found subject to;" and to pay a salary to a "superintendent or professor of the institution and its business," who shall "annually give on the business of the said institution at least five lectures in English and free to the public:"—a sort of barnyard sanitarium, held valid as a charity under the statute of Elizabeth.

So much as to the law of England. But the immediate question is as to our own. And here we may begin by remarking, that however our courts may have at any time differed in their theories as to charitable uses, their controlling aim throughout all the decisions has been to guard against the failure of a charity. We know now, that the statute of 43 Elizabeth was only remedial, as indeed its words import, and that the policy it sought to vindicate was part and parcel of the more ancient English law. But when Pennsylvania was settled, this truth had not yet been developed by the researches of legal antiquaries; and more than a century later, Lord Loughborough, commenting on Porter's Case in 1 Coke, 16, doubted whether his court could have established a charity before the statute. Attorney General v. Bowles, 2 Ves. Sr. 546. The men who founded this commonwealth in 1682 were probably no better read in the mysteries of jurisprudence than the lawyers they left in the old country; but they brought with them principles of civil polity, matured in suffering, that determined easily and wisely what was that law of England which approved itself to their circumstances. They founded no church establishment, for they held that Almighty God is the sovereign lord of conscience; and they repudiated the whole absurdity of superstitious dissent,—if for no better reason,—because it had been the offensive stigma of their own religious opinions, and they had fled to the wilderness to escape from it. They instituted no poor-rates; but they knew that the poor must be always with them, and their sectarian usages had taught them to distinguish between the silent beneficence of a brotherhood and the ostentatious, degrading charity of an almshouse. It is the questionable wisdom of much later times that rejoices in disseminating corporate immunities. William Penn's associates held their church lands, and endowed their schools, and managed their charities, without them; and so did their successors for four-fifths of a century. How could the doctrine of charitable uses, the exceptional corrective of a system that sought to regulate conscience by law, and that denounced ecclesiastical endowments, find a place in the common law of such a people?

We incline therefore to the opinion so ably enforced by Judge Baldwin in the case of Zane's Will. 1 Brightly, N. P. 350, note, that as there never was a superstitious use in Pennsylvania, to be extruded by the law, so there was no need of the devise of a charitable use to save a trust which sound policy commended. But, whether so or not, the case of Witman v. Lex, 17 Serg. & R. 93, has placed our Pennsylvania charities on a perfectly safe basis. "It is sufficient to say," in the words of Chief Justice Gibson, "that it is immaterial whether the person to take be in esse or not; or whether the legatee were at the time of the bequest a corporation capable of taking or not; or how uncertain the objects may be, provided there be a discretionary power vested anywhere over the application of the testator's bounty to those objects; or whether the corporate designation has been mistaken; if the intention sufficiently appears in the bequest, it is to be held valid." "We certainly," he adds, in Pickering v. Shotwell, 10 Barr [10 Pa. St.] 25, "will not let a charitable bequest fail, where there is a discretion or an option given to trustee; and if he cannot apply it to all the contemplated objects, it will be sufficient if he can apply it to any of them; nor need the power to act at discretion be expressly given, if it can be implied from the nature of the trust."

Taking this then as the law of the state, let us turn to the disposition in Mr. Cresson's will. It is in trust, as we read it, with scarce a change except of punctuation, "for the

foundation and support of a home for aged, infirm or invalid gentlemen and merchants, where they may enjoy the comforts of an asylum;" this asylum not to be "eleemosynary," but sustained by the inmates, "as far as may be, by the addition of their own means;" and its character, "by reference to the Prytaneum of ancient Athens," that of "an honorable home." Words follow expressive of the testator's hope that the institution may prosper and be enlarged by endowments from its inmates; and then the trustees are fully empowered to "conduct and carry it out on the best possible plan." It is said this is equivocal—first, as to the beneficiaries, and second, as to the scheme of beneficence. It is asked, who is a gentleman and who a merchant? I do not propose to answer the question ex cathedrâ. There is no language so precise, that a judge can safely pass upon its import, till time and contingency present the occasion for interpreting it. Who are "the poor"? Witman v. Lex [supra], and other cases innumerable. Who, "the blind, the lame"? Com. v. Elliott [case unreported]. Who, the "orphans"? Vidal v. Mayor, etc., [supra]. No doubt these are adequate designations in a charitable bequest. Yet "poverty" is only a relative term; the absolutely blind and lame are understood not to be within the provision of the Wills legacy, but only those whose infirmity may be susceptible of cure; and the Girard College was organized for several years before its officers, though assisted by all the critics, could determine which one of three definitions was the appropriate one to be given to Mr. Girard's language. I am not aware that either of these bequests, abundantly litigated as they were in their day, was ever assailed for uncertainty of its terms. "Gentleman" and "merchant" may be words to which the different lines of a dictionary attach different meanings; as they do indeed, to almost all the words of our language; but they are words defined—good English words; and when occasion requires, it may be hoped that the trustees or a court will be able to understand them. It is not enough to impeach a charitable use, or any use whatever, that men are not undivided as to the meaning of its phrases. How often are our courts occupied in the interpretation of wills of all sorts, and how often does a revisory tribunal instruct them that their interpretation has been wrong!

Is there a fatal ambiguity in the scheme of beneficence, the nature of the charity? Let us look at the language of the trust, referring ourselves, step by step, to the standards of lexicography. It proposes to establish "a home," a dwelling place,—not "eleesmosynary," not living upon alms, not depending upon charity,—for the inmates are to contribute from "their private means;" and it is to be accounted "an honorable home," admission to it being "a token of honor," by analogous reference to the Prytaneum of Athens; "in which the liberty of eating was one of the highest marks of honor." See Johnson's Dictionary, and the Encyclopaedia Americana, tit. "Prytaneum." The persons to be admitted are "gentlemen" and "merchants." The latter of these terms has been defined judicially and by statute, over and over again, as every one conversant with the bankrupt law knows. Whether the same definition is the appropriate one in this case, may be gravely doubted; but it is enough for our purpose, that, in the absence of a better, it ascertains for us who may be the beneficiaries under Mr. Cresson's will. A "gentleman," according to Dr. Johnson, is 1st, "a man of birth, of extraction, but not noble," in which sense the term does not belong to the language of our country; but 2nd, it also describes "a man raised above the vulgar by his character or post,"—the very man, in this sense, for whom all would solicit an honorable home. And, finally, the inmates of this "asylum" or place of retreat, are to be "aged, infirm, or invalid," old or feeble, or disabled by sickness. I have gone through all the words, with the aid of Johnson's quarto. The interpretation they suggest has struck me from the first as the natural and obvious intent of the testator. It is easy to travesty his meaning; to define a gentleman as one almost noble by birthright, a merchant as an importer of foreign goods, or a dealer in tape and pins,—and to laugh at an American Prytaneum, as a place where laws are to be digested or wheat stored. And it might be ably argued, that the institution could not be a charity, because it is described as "not eleemosynary."

But by what right should we so negative the objects of the bequest? Our law books may tell us that "eleemosynary" is contradistinguished to "civil," and that it imports something "constituted for the perpetual distribution of the alms or bounty of the founder" (2 Kent, Comm. 274),—a definition, by the way, that invites many qualifications to make it applicable to the very law it purports to illustrate. But Mr. Cresson was not a lawyer; he no doubt thought that he had defined his own meaning of the term, when he said that his inmates should contribute, if practicable, something towards their own support; for he may have reasoned, that a man who ministers to his wants from his own means, and is looked to as one who may endow the home in which he is living, cannot properly be said to be "living upon alms" or entirely "dependent on charity," which, according to Dr. Johnson, is the characteristic of "eleemosynary" life.

It would hardly be argued, that a foundation, such as we have supposed was within this testator's view, is not in law and in fact a charity. It would be against the spirit of the age to withhold from it this title, simply because the inmates were expected to help the institution that helped them, or because the just sensibilities of the founder had taken

pains to distinguish it from a poorhouse. It would be to rule out all our best charities from the category, our hospitals, colleges and churches among the rest. It is the beautiful characteristic of our Christian charities, that they do not wait for penury and pauperism to invoke their benevolence. They know that in our country absolute destitution is the almost certain badge of profligacy; and they seek to maintain even among the poorest, the honest pride which revolts at the idea of a confessed dependence upon alms. The religious society to which Mr. Cresson belonged has always been remarkable for the cautious secrecy with which it makes provision for its poor. I have never heard of a Quaker pauper; and I believe there are very few, even among those who contribute most largely to the liberal assessments of the sect, who know to what individuals or in what measure their charity is dispensed. I believe, too, it is the fact, that their beneficiaries, except the very infirm, do something or appear to do something towards their own maintenance.

We have considered the case thus far, as presenting the question of a charitable use. It was easiest so to consider it. But the court is not to be understood as expressing a formed opinion that the devise might not be supported upon the basis of an ordinary trust. The donees are designated by name; they are competent to take and hold, and their estate is defined; and the cestuy que trusts, the character and extent of their several interests, and the circumstances and manner in which the fund is to be applied to their benefit, might seem adequately set out by reference to the discretion vested in the trustees; "id certum quod certum reddi potest." The leading object of the trust ascertained; they have "full power to conduct and carry out the institution on the best possible plan, and to provide for its permanent usefulness." Meanwhile, as has been intimated already, this court does not undertake to define for them the terms of Mr. Cresson's charity. It is enough that we see how it can be established without violence to his words. We need not transmute a Roman Catholic priest into the congregation before which he officiates, nor masses for the dead into an easement for the living, as was done in McGirr v. Aaron, 1 Pen & W. 49; nor are we called on to explore for a general intent, more lawful than the particular intent that was in the view of the testator. We find nothing unlawful in the objects of this will, no ambiguity as to the trustees who are to take, no want of competency in them to hold and administer, no embarrassing doubt as to the class of beneficiaries or the character of the bounty. If ever we shall be called on by the trustees to advise them, or by some third party to control them, it will be time enough for us to revise our present understanding of the words of the trust. For the present, we need only say, in the language of Chief Justice Taney (Fontaine v. Ravenel, 17 How. [17 U. S.] 396), that we see nothing in "the object of this bequest so indefinite or so vaguely described, that it could not be supported as an ordinary trust;" but we do find "a bequest to persons capable of taking, and beneficiaries under the devise sufficiently certain and defined to be made the recipients of such a gift,"—which therefore "a court of chancery, in the exercise of its regular and inherent jurisdiction in relation to trusts, would establish and protect, even if the objects thereof were somewhat vague in their character, and although such devise contained a charity." Per Daniel, J., Id. 397.

PER CURIAM. The bill must be dismissed.

Case No. 3,390.

In re CRETIEW.

[5 N. B. R. 423.][1]

District Court, N. D. New York. Sept. 30, 1871.

DISCHARGE OF BANKRUPT.

1. A specification filed in opposition to a bankrupt's discharge will not be stricken out because all the transactions therein alleged as the grounds of opposition occurred long before the passage of the bankrupt act [of 1867 (14 Stat. 517)].

[Cited in Re Seeley, Case No. 12,628; Re Wolfskill, Id. 17,930.]

2. There is nothing in the language of the twenty-ninth section of said act which indicates an intention to confine the operations of its provisions to transactions occurring after the passage of the act. In re Rosenfeld [Case No. 12,058], considered and overruled.

[Cited in Re Signer, 20 Fed. 237.]

W. L. Jones, for opposing creditor.
George Gorham, for bankrupts.

HALL, District Judge. This is a motion to strike out the second and third specifications filed by a creditor in opposition to the bankrupt's discharge. The first specification sets forth, among other things, that in eighteen hundred and sixty-nine, the opposing creditor recovered a judgment in the supreme court of this state for seven thousand four hundred and seventy-five dollars and upwards, upon an administration bond which the bankrupt had before then signed as surety. This first specification is referred to in the second specification, which sets forth in substance, (among other things,) that the bankrupt, after he had executed such administration bond in the penalty of twelve thousand dollars, and had become liable to pay a large amount by reason thereof, well knowing his liability, and being insolvent and in contemplation of becoming bankrupt, and the owner at the time of two certain described stores and premises in the city of Buffalo, of about the value of eighteen thou-

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sand dollars, and having previously thereto executed a mortgage on said stores and premises for the sum of three thousand dollars to one John Hutchinson, he, (the said bankrupt) on or about the nineteenth day of October, eighteen hundred and sixty-four, did cause the mortgage to be assigned and passed to one James M. Baker, and had the said Baker thereafter commence an action thereon to foreclose such mortgage and have said property sold by virtue of a judgment on said mortgage; that said property was so sold December tenth, eighteen hundred and sixty-four, for two thousand nine hundred dollars, and the title thereto taken by Joseph Borke, a son-in-law of the bankrupt; that the bankrupt, in contemplation of becoming bankrupt and being insolvent, had the title to said property taken and held by Borke; that said mortgage was made and executed, and said foreclosure instituted and judgment and sale thereunder had, and the title to said property taken in the name of said Borke and held by him as a fraudulent gift, transfer and conveyance, and for the purpose of preventing the same from going into the hands of an assignee and being equally distributed among all of the bankrupt's creditors, and merely as a cover and to prevent such property from being taken on account of any liability of said bankrupt on said administration bond, and with the intent to enable the bankrupt to retain, as he has ever since done, the control and management of said property; that he now occupies one of the said stores and lives in or over one of them; that the bankrupt, during all the time aforesaid, was insolvent and in contemplation of becoming bankrupt, and that the said sale or pretended sale of such property was fraudulent and void. It does not allege any concealment of his property or any willful false swearing by the bankrupt. The third specification alleges that the bankrupt's assets are not equal to fifty per cent. of the claims proved against his estate, upon which he was liable as principal debtor, and which debts were contracted subsequent to December, eighteen hundred and sixty-eight; but it does not allege that the consent of a majority in number and value of his creditors holding his said last mentioned debts was not filed before or at the hearing upon the order to show cause against his discharge. It is therefore insufficient, and must be stricken out. But this question may be presented by the opposing creditor, or any other creditor, upon the hearing before the register on the reference, under rule sixty, of the general question whether the bankrupt is entitled to his discharge. It is insisted that the second specification should be stricken out because all the transactions therein alleged as the grounds of opposition to the bankrupt's discharge occurred long before the passage of the bankrupt act. By the twenty-ninth section of that act it is provided that "no discharge shall be granted to the bankrupt if he has given any fraudulent preference contrary to the provisions of that act, or made any fraudulent payment, gift, transfer, conveyance or assignment of any part of his property; * * * or if he has, in contemplation of becoming bankrupt, made any pledge, payment, transfer, assignment or conveyance of any part of his property, directly or indirectly, absolutely or conditionally, * * * for the purpose of preventing the property from coming into the hands of the assignee, or of being distributed under the act in satisfaction of his debts;" and the question is whether the second specification sufficiently alleges any bar to the bankrupt's discharge under these provisions. There is nothing in the language of the section which contains these provisions which clearly expresses or plainly indicates an intention to confine the operation of these provisions to transactions occurring after the passage of the bankrupt act. In respect to other fraudulent or prohibited acts mentioned in the same section, such intention is clearly expressed, or necessarily to be inferred, but such is not the case in respect to the provisions under consideration, and clear or strong proof of legislative intention should be required before deciding that congress intended that an act equally fraudulent and dishonest in its character and purpose before and after the passage of the bankrupt act should bar a discharge if done the day after its passage, and not bar it if done the day before it became a law. In order to present in the clearest and fullest manner the language upon which this question of interpretation or construction arises, the twenty-ninth section of the bankrupt act will be copied in full. It is as follows:

"Section 29. And be it further enacted, that at any time after the expiration of six months from the adjudication of bankruptcy, or if no debts have been proven against the bankrupt, or if no assets have come to the hands of the assignee, at any time after the expiration of sixty days, and within one year from the adjudication of bankruptcy, the bankrupt may apply to the court for a discharge from his debts; and the court shall thereupon order notice to be given by mail to all creditors who have proved their debts, and by publication at least once a week in such newspapers as the court shall designate, due regard being had to the general circulation of the same in the district, or in that portion of the district in which the bankrupt and his creditors shall reside, to appear on a day appointed for that purpose, and show cause why a discharge should not be granted to the bankrupt.

"No discharge shall be granted, or, if granted, be valid: (1) If the bankrupt has wilfully sworn falsely in his affidavit annexed to his petition, schedule or inventory, or upon any examination in the course of the proceedings in bankruptcy, in relation to any material fact concerning his estate or his

debts, or to any other material fact; or (2) if he has concealed any part of his estate or effects, or any books or writings relating thereto; or (3) if he has been guilty of any fraud or negligence in the care, custody or delivery to the assignee of the property belonging to him at the time of the presentation of his petition and inventory, excepting such property as he is permitted to retain under the provisions of this act; or (4) if he has caused, permitted or suffered any loss, waste or destruction thereof; or (5) if, within four months before the commencement of such proceedings, he has procured his lands, goods, money or chattels to be attached, sequestered, or seized on execution; or (6) if, since the passage of this act, he has destroyed, mutilated, altered or falsified any of his books, documents, papers, writings or securities; or (7) has made or been privy to the making of any false or fraudulent entry in any book of account or other document with intent to defraud his creditors; or (8) has removed, or caused to be removed, any part of his property from the district with intent to defraud his creditors; or (9) if he has given any fraudulent preference contrary to the provisions of this act, or made any fraudulent payment, gift, transfer, conveyance or assignment of any part of his property; or (10) has lost any part thereof in gaming; or (11) has admitted a false or fictitious debt against his estate; or (12) if having knowledge that any person has proved such false or fictitious debt, he has not disclosed the same to his assignee within one month after such knowledge; or (13) if being a merchant or tradesman, he has not, subsequently to the passage of this act, kept proper books of account; or (14) if he, or any person in his behalf, has procured the assent of any creditor to the discharge; or (15) influenced the action of any creditor at any stage of the proceedings by any pecuniary consideration or obligation; or (16) if he has, in contemplation of becoming bankrupt, made any pledge, payment, transfer, assignment or conveyance of any part of his property, directly or indirectly, absolutely or conditionally, for the purpose of preferring any creditor or person having a claim against him, or who is or may be under liability for him, or for the purpose of preventing the property from coming into the hands of the assignee; or (17) of being distributed under this act in satisfaction of his debts; or (18) if he has been convicted of any misdemeanor under this act; or (19) has been guilty of any fraud whatever contrary to the true intent of this act; and before any discharge is granted, the bankrupt shall take and subscribe an oath to the effect that he has not done, suffered, or been privy to any act, matter, or thing specified in this act as a ground for withholding such discharge, or as invalidating such discharge if granted."

In regard to the first four of the numbered clauses of this section it may be conceded that the character of the acts therein described requires that they should have been committed after the passage of the bankrupt act. In the fifth clause there is an express limitation of time which only requires that the acts therein described should have been committed within four months before the commencement of the proceedings in bankruptcy, and as a petition could have been filed at the end of three months after the passage of the act, it can hardly be said that the acts referred to in this clause must have been committed after the passage of the bankruptcy act in order to bring the bankrupt within the prohibition of this section. The next clause, by its express terms, is limited to acts committed since the passage of the act, and as the succeeding clauses (the seventh and eighth) are only connected with it by the disjunctive conjunction "or," the same may be said in regard to those clauses. This actual and distinct expression of a limitation, in the clauses first alluded to, to acts committed after the passing of the act would seem to evidence an intention on the part of the legislature that the clauses in which there was no such limitation, either expressed or necessarily to be inferred, should not be so limited. In the next or ninth clause, there is a change of phraseology, which was not necessary unless it was intended to disconnect its provisions from the limitation of time contained in the three next preceding clauses. If not so intended, the connection with the sixth, seventh and eighth clauses would have been made by the use of the word "or" alone, as in the seventh and eighth clauses, but the words "if he" are inserted, apparently ex industria, to so far disconnect this clause from those immediately preceding as to remove it from the limitation of time expressed in the sixth clause. The subsequent insertion in the thirteenth clause, which contains the provision in regard to the omission to keep proper books of account of the words "subsequently to the passage of this act," is also a significant indication that the legislature intended no such or similar limitation to the clauses where no limitation was expressed or necessarily to be implied from the nature or character of the acts described; and in the clauses numbered fourteen and sixteen, the words "if he" are inserted as indicating a partial but distinct separation of these clauses from the preceding one (as was done in the commencement of the sixth clause,) so as to disconnect them from any limitation of time contained in the preceding clauses. I shall therefore hold that there is no such limitation in respect to the acts relied upon in said second specification. It was strongly urged that the intents imputed to the bankrupt by this second specification could not possibly have existed so long prior to the passage of the bankrupt act.

This is deemed a question of fact and not

one of law, and the court cannot say that the intents alleged, and which must be proved to invalidate the discharge, could not have existed prior to the passage of the bankrupt act as alleged, more especially as it appears by the Congressional Globe, that on the twelfth day of December, eighteen hundred and sixty-four, a bill to establish a uniform system of bankruptcy throughout the United States, which had been postponed from the then last session, was taken up on motion of Mr. Jenckes, was on his motion amended by striking out the words "first September, eighteen hundred and sixty-four," as the time when the act should take effect and inserting in lieu thereof "first of June, eighteen hundred and sixty-five," and was then passed by the house; that it was the next day sent to the senate for concurrence, when it was immediately read twice and referred to the committee on the judiciary. Indeed, from May twenty-third, eighteen hundred and sixty-two, when a bankrupt act was introduced into the senate of the United States by Mr. Foster, of Connecticut, to the passage of the bankrupt act of eighteen hundred and sixty-seven, the contemplation of becoming bankrupt may not unfrequently have been the happy or unhappy condition and occupation of the minds of many hopeless insolvents, and some of them, even in eighteen hundred and sixty-two, may have hastened to make secret and fraudulent dispositions of their property to prevent its distribution in bankruptcy and secure it for the future use of themselves and their families. Contemplation of bankruptcy within the intent of the bankrupt act, includes not only the contemplation of proceedings to be carried on in the bankruptcy court under the eleventh or thirty-ninth sections of that act, but also the contemplation of the commission of such acts as are by the bankrupt act declared to be sufficient to authorize an adjudication of bankruptcy against the party by whom they have been committed. In re Freeman [Case No. 5,082]. And an intent to prevent the distribution of his property under the bankrupt act might well exist in a case where a fraudulent disposition of a debtor's property was made in anticipation of the expected early passage of a bankrupt act. Taken in connection with such of the allegations of the first specification as it refers to and substantially adopts, and considering the allegations of fraud, and as to the continued use and possession by the bankrupt of the store and premises described—In re Moore [Id. 9,749]—I am of the opinion the second specification is sufficient, and the motion to strike it out is accordingly denied.

I am aware that in Re Rosenfeld [Id. 12,-058], it was held that such fraudulent acts must have been committed after the passage of the bankrupt act in order to bar a discharge. It is with much regret that I feel constrained to adopt a construction of the provisions in question, adverse to that adopted by the learned and excellent judge, now deceased, who decided that case, but I cannot approve his reasoning or adopt his conclusions, so far as they affect the principle questions in this case. I cannot agree that the acts enumerated in section twenty-nine "are in the nature of offences created and defined by the bankrupt law, the penalty for the commission of which, by the bankrupt, is the forfeiture of his right to a discharge," or that to hold "that acts committed before its passage were offences against the bankrupt law, would be to make that law, if not an ex post facto law, in the strict sense of the term, yet at least a law retroactive or retrospective in its character," if he meant that the bankruptcy courts, by the mere withholding of a discharge by reason of these provisions, necessarily constituted or considered these acts such offences against the bankrupt law. The bankrupt act was intended to operate, and has uniformly been held to operate upon and provide for the discharge of debts created before as well as after its passage, and in respect to debts contracted before its passage it is clearly a restrospective and retroactive law so far as it authorizes the discharge of such prior debts. Prior to the passage of the act the debtor had no right to a discharge from such debts, and he now has no right to such discharge except in the cases provided for and upon the conditions prescribed in the act.

The provisions under consideration create no "offence" and there is no forfeiture of an existing right denounced as the penalty for a newly created offence for the simple and obvious reason that a right to a discharge in the cases provided for did not exist when the act was passed and therefore the provisions now under consideration are not retroactive or retrospective in the offensive or proper sense of those terms. The act gives a debtor a right to a discharge of a debt contracted prior to its passage, provided he fully complies with its provisions and is not brought within the limitations, exceptions or prohibitory provisions of the act, and as this right only exists by virtue of the provisions of the bankrupt act, (which provisions, as has been stated, are retroactive and retrospective as to debts contracted before its passage,) the provisions which Judge Field considered retroactive or retrospective in their application to acts done before the passage of the act, are not in fact so, but only exceptions in restriction or limitation of the grant of power to the bankruptcy court, under which grant alone a debtor could, in a case not excepted from its operation, assert a right to a discharge. These exceptions and limitation, are, therefore, so far as this case is concerned, in restraint of a retrospective and retroactive law, and the considerations which require courts not to give such construction to a statute as to make it retroactive in its effects should operate in favor

of and not against a creditor whose debt, as in this case, accrued before the passage of the bankrupt act, and if it be true, as stated by the learned judge, that "as a general rule, it is a very objectionable feature in any law," to give it a retrospective operation, and that "an intention on the part of the legislature to give a law such a character, will never be presumed in the absence of express words to that effect," words of exception or limitation which even partially remove such objectionable features should be liberally construed and made effective for that purpose, when it can be done consistently with the language of its provisions.

The learned judge who decided In re Rosenfeld [supra], supposed that the words "subsequently to the passage of this act" in the clause which relates to the keeping of proper books of account were inserted because of the difference of meaning between the word "subsequently" in that provision and the word "since" when used in the same connection in the sixth clause. His acute and discriminating criticism upon the distinguishing difference in the meanings of these words is doubtless accurate and just, but it may well be doubted whether such nice distinctions, and such refined, exact and scholarly criticism should be much relied on in the interpretation or construction of legislative enactments. Webster, whose authority is properly invoked by the learned judge, gives, "after, from the time that," as the primary signification of "since." He also says that the proper signification of "since" is "after," and its appropriate sense includes the whole period between an event and the present time, but after giving citations as examples of its use, he further says: "'Since,' then, denotes during the whole time after an event or at any particular time during that period." By lawyers and legislatures most words not technical in their character, are used in their general and popular sense without nice discrimination in respect to their more exact critical meaning, and for this reason the substitution of the word "subsequently" for the word "since" in the second of the phrases above referred to is not considered as affecting in any considerable degree the question of interpretation involved in this case. If such nice and critical discrimination, and such learning, care and perfect accuracy of expression, as it has been supposed was exercised in this substitution of "subsequently" for "since," had been exercised in the selection and use of the precise words and exact forms of the sentences necessary to express the legislative intention in the fullest, clearest and most perfect manner throughout the whole of this act, it would have reduced the labors of the profession and of the courts, greatly to the advantage of both debtors and creditors.

CRIBBS (RISON v.). See Case No. 11,860.

Case No. 3,391.

CRIPPS v. MUDD.

[1 Hayw. & H. 50.][1]

Circuit Court, District of Columbia. Dec. 15, 1841.

TRUSTS.

A testator bequeathed certain negroes to the complainants, and afterwards by a bill of sale to the father of said complainants conveyed the same with other negroes, but no delivery was made of said negroes to the said father. Parol evidence was permitted to be given to show that the conveyance was made for the purpose of more fully providing for the said complainants, and the father was required by decree to transfer the property held by him, to trustees, for their benefit as tenants in common.

In equity. This bill is brought by the complainants [John H. Mudd and Emily Mudd], through their next friend [Wm. McL. Cripps], and prays that the defendant [Ignatius Mudd] be ordered to execute a conveyance of certain negroes in trust for the benefit of the complainants, and for other relief.

Brent & Brent, for complainants.
Defendant, in his proper person.

The complainants allege, that their maternal uncle Benedict Jemison made his last will and testament, in which he bequeathed as follows: "I give and bequeath to my nephew John H. Mudd, and my niece Emily Mudd, children of my sister Mary Mudd, Baptist, Elias, Henry, his wife and four children, and Nancy, for the use and benefit of my sister Mary Mudd, during her life." That the testator supposing he had not sufficiently provided in his will for the said complainants executed a bill of sale conveying to the said defendant absolutely fourteen negro slaves; among said slaves were some of those left to the complainants in the will. That the said bill of sale was not intended by the said testator to transfer the negroes for the benefit of the said defendant, but rather for the benefit of Mary Mudd during her life, and after her death for the benefit of these complainants. That this understanding was to have been reduced to form by a conveyance of trust to secure the title to said negroes to Mary Mudd and at her death to the complainants. This the defendant has failed to do. The testator died, the will was duly probated and recorded, and is unrevoked except so far as it might be revoked by the said bill of sale. The complainants further allege, that the defendant is in embarrassed circumstances, and that he has in his possession six of the negroes mentioned in the bill of sale. The defendant is the father and guardian of the complainants. He admits the allegations in the bill, and states, that certain other legatees under the will of the said Benedict Jemison combined to prevent him, the said defendant, from taking possession of the negroes mentioned in the bill

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

of sale, alleging that some of said negroes were bequeathed to them, the said legatees, in said will mentioned. That the defendant had forfeited the right he had in the negroes by letting the said negroes remain in the possession of said Benedict during the said Benedict's life. The defendant states further that to avoid a family quarrel he compromised with the said legatees and received five of the negroes. That he holds one of the negroes as guardian under the will. That he sold one of the negroes that he received under the compromise, but he intended at the time to substitute in the negro's stead another of equal value and considered the substitute as the property of the complainants. That he submits the matter to the court alleging that his affairs are embarrassed and the rights of the infants are endangered and has heretofore hesitated as to what course he should pursue. That he is ready to abide by the decree of the court.

The above cause being by consent of parties submitted for hearing and final decree upon the bill, answer, and exhibits it is ordered, adjudged and decreed that the defendant do execute and deliver to William McL. Cripps a good and sufficient conveyance of the six negroes mentioned in the bill, including the negro held as a substitute for the one sold by the defendant, to have and to hold the said negroes in trust as follows, that is to say, in trust for the sole and separate use of Mary Mudd, wife of the defendant, free and discharged from all and every liability for the debts of said Ignatius Mudd, and after the death of said Mary Mudd, in trust for the use and benefit and disposal of the complainants, as tenants in common, and upon the further trust that the said Cripps shall, after the arrival of the said complainants at their legal age, convey the said negroes to such uses and purposes as they may direct, provided their said mother, Mary Mudd, if she be alive, shall assent to the same by an instrument of writing witnessed by one witness. And it is further adjudged that the complainants be quieted in their title to said negroes against the said defendant and all persons claiming under, or by him.

CRIM (BAILEY v.). See Case No. 734.

CRISCUOLA (MARTIN v.). See Case No. 9,159.

Case No. 3,392.

CRISP et al. v. PROUD.

[4 Hughes, 57;[1] 24 Int. Rev. Rec. 340.]

Circuit Court, D. Maryland. Oct. 19, 1878.

RETAIL SALES BY CIGAR MANUFACTURER.

1. A manufacturer of cigars cannot, even though he has paid the special tax required to be paid by retail dealers in cigars, sell cigars at retail at the place of manufacture.

2. By complying with section 3387, Rev. St., and designating a place as a cigar factory, the manufacturer has dedicated it to that purpose and can only use it under the restrictions prescribed by law with regard to it; among those restrictions is the one (section 3397) that no cigars can be removed from any place where cigars are made without being packed in boxes as required by law.

3. In this connection section 3236, allowing more than one business to be carried on in the same place, must be construed to mean any other business which does not render it impossible for the manufacturer to comply with the law respecting cigar factories. It cannot be held to work a repeal of those provisions which congress considered necessary restrictions upon the use of the place as a cigar factory.

Bill [by Joseph Crisp and others against Robert M. Proud, United States collector of internal revenue for the district of Maryland] to restrain the collector from making seizures.

BOND, Circuit Judge. This is a bill filed by Joseph Crisp and others alleging that they are cigar manufacturers in the city of Baltimore, and are engaged in selling the same at retail at the place of manufacture, together with manufactured tobacco, pipes and smoking conveniences. It charges that while engaged in this business the collector of internal revenue for this district, R. M. Proud, seized and carried away their goods as forfeit to the United States because, as the collector claims, the complainants have no right to manufacture cigars and sell them at retail at the place of manufacture. The bill prays that the collector may be enjoined from making any further seizures of complainants' property and from selling that he has already taken. Whether we should grant the prayer of the bill or refuse it depends upon the answer we must give to the question whether or not the retail of cigars at the place of their manufacture is forbidden by statute. This is the gist of the matter in controversy between the parties. It has been well said by counsel for the complainants that unless the statutes of the United States prohibit a cigar manufacturer from retailing the cigars of his making, he has the natural right to do so at any place whatever. We must find in the statutes something to prohibit this class of persons from doing in this particular place what every other person has the right to do with his wares wherever he may be.

To become a cigar manufacturer the person must first comply with section 3387, Rev. St. This section prescribes, among other formalities, that he shall under oath set forth a description of the place of his manufacture and the number of the street where it is located, and it requires him to give bond that he will comply with all the laws respecting the manufacture of cigars. When the intended manufacturer has complied with the provisions of this section, has located and de-

[1] [Reported by Robt. M. Hughes, Esq.]

scribed the place of his proposed operations, and has given the required bond, he has dedicated that particular place or portion of his premises it may be, to such uses under all the statutory limitations the national legislature has thrown around it and encumbered it with. He must put up a sign where it can be distinctly seen, a sign whose letters are three or more inches long, giving his full name and business. The sign must be either painted or gilded. To cut it in stone or scratch it on glass, as other citizens may do, is forbidden to him. Section 3388. He must allow no tobacco to go into this place without recording its weight or quantity in a book kept for that purpose. This particular place so set apart by the owner cannot be used as he may use his other estate. The moment the incipient manufacturer calls it his factory it is dedicated to that purpose, and it is deprived of many of the uses which its possession gave to its owner prior to its designation as a cigar factory. Among other things strictly prohibited in this place now so set apart is, that the manufacturer shall neither sell nor deliver or offer for sale in this place cigars in any other form than in boxes properly stamped containing not less than twenty-five cigars to the box. To this each manufacturer agrees when he gives his bond. Unquestionably this is a strict prohibition of the sale and delivery of cigars by retail in this particular place.

But section 3397 expressly forfeits to the United States all cigars which are removed from a manufactory not in boxes containing the prescribed numbers properly stamped, and punishes as a felon the party removing them. Unless, then, we can find a statute that removes the disabilities of the manufacturer in this dedicated place, he cannot retail cigars there. The party who purchased and removed them would be a felon and the manufacturer who sold them would forfeit his bond. There are two sections which are supposed to afford this relief. Section 3235 provides that no special tax shall be required of any manufacturer for the sale of his manufactured product at the place of manufacture. The construction of this section must plainly be that no tax shall be imposed upon him for selling his cigars in the way prescribed by law. He has been prohibited from allowing any of his manufactured articles to leave his factory except in stamped boxes containing not less than twenty-five cigars. He is allowed to sell without paying a special tax, provided he can comply with this requirement. And section 3236 prescribes that the manufacturer of cigars may carry on any other business he is disposed to engage in at his manufactory by paying the tax on the new business. The argument is that the retailing of cigars is a new business, and that by paying the special tax he may carry that on in his factory also. But it seems to me that this permission is given to him qua manufacturer, and that the section must be construed with that which places the disabilities upon the place of cigar making. It means that he may carry on any other business there which does not interfere with his solemn obligations to obey the law respecting cigar factories. It is not a repeal of those sections above referred to which make it necessary that he should record daily in a book the quantity of tobacco which enters the factory and prohibit any cigars from being thence removed unless in boxes containing not less than twenty-five cigars each. It would, it seems to me, be annulling a statute rather than construing it, to say that after congress had provided with the utmost care how a certain business might be carried on in a particular, designated place, and then gave the party a right to conduct any other business he pleased there, that by the last act congress meant to abolish all the restrictions placed around the first employment. It is a much fairer view of the meaning of these sections to understand them as providing that the cigar manufacturer may carry on any other business in his factory not inconsistent with his obligation already assumed as a cigar manufacturer. To retail cigars in his factory would violate all such obligations, and would destroy the place as a cigar manufactory as known to the law, which is a place laboring under the disabilities and conducted with regard to the provisions of section 3387. It is not necessary with these views to discuss the power of the commissioner of internal revenue under section 3396. The prayer for permanent injunction is refused and the bill dismissed with cost.

Case No. 3,393.

In re CRITTENDEN. UNITED STATES v. LANDRUM. SAME v. JOHNSON. SAME v. GRIMES. SAME v. BRISTOW. SAME v. HOWARD. SAME v. GALLAGHER. SAME v. PARKS. SAME v. FAULBREE. SAME v. YOUNG. SAME v. ROBERTS. SAME v. SALLY. SAME v. TOLBEE.

[2 Flip. 212.][1]

Circuit Court, D. Kentucky. July 10, 1878.

MARSHAL'S FEES — CONSTRUCTION OF REVISED STATUTE, SECTION 829 — DEFINITION OF WORD "RETURN"—COMMISSIONER'S POWER—MARSHAL —BAILIFF — FEES OF MARSHAL FOR ATTENDING EXAMINATIONS, BRINGING IN, ETC. — ACTUAL TRAVELING EXPENSES—COSTS OF TRANSPORTING GUARDS—COSTS OF TRANSPORTATION OF GUARDS ALLOWED, EVEN WHEN WITNESSES — WRONG PERSON ARRESTED — WRONG DESCRIPTION OF PERSON'S CHRISTIAN NAME — ARREST IN THE WRONG STATE—CHARGE FOR TIME EMPLOYED IN ENDEAVORING TO ARREST — NOT TRAVELING BY USUAL ROUTE—THE STATUTES OF 1853 AND 1875 REVIEWED—DUTIES OF MARSHAL.

1. "Travel" or "mileage" is to be computed from the place where the process is returned to the place of service.

2. The very term "return" implies that the process is taken back to the place whence it issued.

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

3. The commissioner has no power to direct the warrant to be returned before another commissioner.

4. The marshal may appoint a bailiff and authorize him to perform a particular act or duty. He then becomes a special deputy.

5. Section 829, Rev. St., allows the marshal, for attending examinations before a commissioner, and bringing in, guarding and returning prisoners charged with crimes, two dollars a day, and for each deputy, not exceeding two, necessarily attending, two dollars a day.

6. When the marshal serves warrants on different parties at same place, he may demand mileage in each case. The only limitation is where there are more than two warrants served in favor of the same parties against the same defendants.

7. The expenses allowed for "traveling" must be actually proven by the marshal, deputy or bailiff who incurred the expenses, and should be referred to specifically.

8. The costs of transporting a guard should be allowed only where it is shown that he is necessary, and, if practicable, the certificate of the commissioner before whom the prisoner was taken, should accompany the affidavit.

9. The marshal should be allowed for transportation of guards, even if such guards be summoned as witnesses and be paid for mileage.

10. Where the wrong person is arrested the marshal can be allowed no fees of any kind.

11. Where the Christian name of the person arrested is wrongly given by the person making the affidavit and accompanying the officer who makes the arrest, transportation fees should, nevertheless, be allowed.

12. Where the marshal, acting in good faith, arrests a person in Tennessee, believing at the time that the place of arrest is within the state of Kentucky, no fees can be allowed for such illegal arrest.

13. Where the deputy marshal demands compensation for eight days' service in, as he alleges, endeavoring to arrest through a special bailiff, and the same is not supported by proof of such last-named officer, it must be refused. The bailiff should also explain in his affidavit when charges are made for more days than are absolutely necessary, why he was so employed, and why the arrest was not made sooner. Only two days are allowed in such cases, in the absence of the regular proof.

14. Where the marshal, in transporting a prisoner, does not travel by the usual route, he should be allowed mileage only for the route usually traveled.

15. Notwithstanding the statutes of 1853 and 1875, section 829, Rev. St., will be adhered to as the rule governing the computation of mileage.

16. As to misconduct of deputies, observed upon.

[Crittenden, marshal of the district of Kentucky, presented his accounts for approval in the several cases hereinbefore specified.] The facts are fully detailed in each case.

BALLARD, District Judge. In the case of U. S. v. Landrum, the warrant was issued at Louisville by a commissioner there, and it came to the hands of the marshal there. It directed the arrest of Landrum and the return of the warrant before another commissioner at London, in this state. It is not disputed that the marshal actually traveled to execute the warrant, the number of miles charged in this account, and it is not questioned that had the warrant been returned before the commissioner who issued it, the mileage charged would not be excessive; but it is insisted that "travel" or "mileage" is, by the terms of section 829 of the Revised Statutes, to be computed "from the place where the process is returned to the place of service;" that, as the prisoner was arrested near London and taken by command of the warrant before the commissioner in London, the warrant was, in contemplation of law, "returned" to him, and that the marshal can charge for going to serve the warrant for travel of only ten miles, this being the distance from the place where, under this view, the process was "returned" to the place of service. If the provisions of section 7 of the act of February 22, 1875 [18 Stat. 334], apply to this case, it is clear that the charge of the marshal is not excessive. He asks no allowance for travel in going to serve the warrant, which was not actually and necessarily performed. But, as I am strongly inclined to think that the act of 1875 does not alter the mode of computing the mileage of marshals on process executed within the judicial district in which such process is issued, I proceed to consider the question as if it depended entirely on the proper construction of section 829.

I am of the opinion that the commissioner in Louisville had no authority to make the warrant issued by him returnable before the commissioner in London, or before any other commissioner than himself. If it is conceded that he might direct the marshal to take the person before any other commissioner for examination, I suppose the process should be finally returned to himself. Every process which is issued by a court must be returned, unless some special statute otherwise provides, to the court which issues it. This is essential in order, first, that the court may know that its order has been obeyed: and, second, that the records of the court may be complete. The very term "return" implies that the process is taken back to the place whence it is issued. A thing delivered by one person to another is not "returned" when it is delivered to a stranger, and at a place other than the place of original delivery. I am of the opinion, therefore, that, in contemplation of the statutes, every process is to be returned to the court or commissioner which issued it, and that for the purpose of computing the mileage of the marshal, the place of return is the place of issue.

Any other construction would enable commissioners to enlarge or lessen the fees of marshals at pleasure, and thus defeat the policy of the statute. Unquestionably the statute intends, as far as practicable, to furnish fixed rules for ascertaining the fees of marshals. Hence it has declared that his "travel, in going * * * to serve any process

* * * shall be not the actual distance traveled, but the distance from one fixed point to another fixed point; that is, the distance from the place of service to the place whence the process was issued, or, which is the same thing, the place of return. But, if the commissioner can direct the warrant to be returned before another commissioner, he may direct it to be returned before a commissioner most remote from the "place of service," and thus make the marshal's fees for mileage ten or more times as much as tuey would be if the process were returnable before himself; if, indeed, for the purpose of computing mileage, we are not confined to the distance from the "place of service" to the place whence the process issued—that is, unless we regard the place of issue and place of return of process as one and the same place. I am of the opinion, therefore, that the objection taken by the attorney to the charge of the marshal in the case of Landrum, and in other similar cases, is not well taken.

The second exception raises the question whether the marshal can charge a fee for attending, by a "special bailiff, examinations before a commissioner, and bringing in, guarding and returning prisoners charged with crime," etc. I am of the opinion that he may. I have heretofore decided, in case of Ex parte Roberts [Case No. 15,463], that a marshal may appoint a bailiff, and authorize him to perform a particular act or duty. When the bailiff is appointed and engaged in the performance of the act authorized he is the deputy of the marshal; not the general deputy, it is true, but the special deputy. He is deputied by the marshal to do a particular thing, and is, therefore, in fact, as well as in law, his deputy. Section 829 of the Revised Statutes allows the marshal "for attending examinations before a commissioner, and bringing in, guarding and returning prisoners charged with crime, two dollars a day, and for each deputy, not exceeding two, necessarily attending, two dollars a day."

Third—It is objected that the marshal has charged mileage for going to execute a warrant in the case of U. S. v. Tolbee, and also a warrant in the case of U. S. v. Sally, although both warrants were placed in his hands at the same time, and although both of the defendants reside at the same place, and were in fact arrested there. I am of the opinion that the objection is not well taken. Section 829 allows the marshal for "travel in going to serve any warrant * * * six cents a mile, to be computed," etc. If this were all of the statute, it would be obvious enough that he is entitled to mileage on each and every warrant which is served, but the remainder of the section limits the charge when more than two writs of any kind, required to be served in behalf of the same party on the same person, might be served at the same time. In such case the marshal is entitled to compensation for travel on only two of such writs. If the meaning of the former part of the section were at all doubtful, this limitation, by the plainest implication, gives him compensation for travel in going to serve any number of writs, provided they are in behalf of different plaintiffs or against different defendants. Here the warrants, although in behalf of the same plaintiffs, are against different defendants. Nor do I think that the provisions of section 7 of the act of 1875 affect the claim. I have already intimated that I am inclined to the opinion that the fees of the marshal for serving process issued in his own district are not modified by the act of 1875; but conceding that it does in some respects modify them, I am clear it does not exclude a charge for travel in going at the same time to serve two or more writs in behalf of different plaintiffs or against different defendants. The provision is that "no such officer shall * * * become entitled to any allowance for mileage or travel not actually and necessarily performed, under the provisions of the existing law." In my opinion this provision was intended to cut off constructive mileage only—that is, mileage allowed by section 829, to marshals, on writs coming into their hands from districts other than their own; but if it applies to writs issued and served in the same district, it changes only the mode of computing mileage. Certainly the marshal does actually and necessarily travel to serve every process placed in his hands; and, if he does so travel, he is, by the terms of section 829, and by implication of the act of 1875, entitled to charge for travel in going to serve each process to be computed by the miles actually traveled, or the distance from the place of service to the place of return, according as the act of 1875 or section 829 shall be held to furnish the rule. There is nothing in the act of 1875 to indicate that it was intended to take away from the marshal allowance for travel actually performed to which he was entitled under existing laws. This will, I think, be made plain by bringing together the provisions of the original and amendatory law.

The original act provides that the marshal shall be allowed, "For travel, in going only, to serve any process * * * six cents a mile, to be computed from the place where the process is returned to the place of service. * * * But, when more than two writs of any kind required to be served in behalf of the same party on the same person might be served at the same time, the marshal shall be entitled to compensation on only two of such writs." The amendatory act provides that "from and after the first day of January, 1875, no such officer * * * shall become entitled to any allowance for mileage or travel not actually and necessarily performed."

The last act does not in terms repeal the first, and consequently it can not be held to repeal it, except so far as the provisions of the two acts are inconsistent. Now, under

the first act, as a consequence of the rule there presented for computing "travel," the marshal was occasionally entitled to an allowance for travel not actually performed. For example, when process was sent to him from a district other than his own he was entitled to mileage to be computed not from the place where the process was received to the place of service, but from the place of service to the place of return. It was to remedy this that the amendatory act was passed. The object was to limit the allowance for travel to the miles actually traveled and not to modify the compensation for travel actually performed. The amendatory act leaves wholly unrepealed and unaffected so much of the former act as gives the marshal mileage on all process which he necessarily and actually travels to execute and which he does execute, and which are issued on behalf of different plaintiffs or different defendants.

There are several items of charge in the bill of the marshal for "actual traveling expenses." Section 829 of the Revised Statutes provides that "in all cases where mileage is allowed to the marshal he may elect to receive the same or his actual traveling expenses, to be proved on his oath to the satisfaction of the court." None of these items are proved by the oath of the marshal himself, and many of them are not proven by the oath of the bailiff who incurred the expenses. They are simply verified by the general affidavit of the deputy, in whose account they are included, to the effect that his account is correct. This proof is not satisfactory to the court. My construction of the statute is that all charges for actual traveling expenses must be proven by the oath of the marshal, deputy or bailiff who incurs such alleged expenses, and who alone can know of or be heard to testify of them, and that no deputy can be heard to testify in respect to expenses incurred by another deputy or bailiff of which he knows nothing. I am also of opinion that if these expenses can be proven otherwise than by oath in open court; if they can be proven by affidavit, the affidavit should be specific, referring to the charges particularly, and, when practicable, the proper vouchers should accompany the proof.

All items in the account not supported by this proof must be stricken out, and in lieu thereof the marshal may charge mileage. In the account of W. M. Adair, there is a charge for transporting three prisoners, Mark Gallagher, T. W. Wilson and Buck Gallagher, from Adair county to Louisville. The prisoners were arrested by different deputies or bailiffs, but they were all transported together. Still, each bailiff supplied himself with a guard, and there is a charge for his transportation.

The statute allows the marshal, for transporting criminals, ten cents a mile for himself and for each prisoner and necessary guard. The term criminals has always been construed to include prisoners arrested, charged with crime; and the term marshal has always been held to include deputy or bailiff. But there is no proof that these guards were necessary, and judging from the facts before me, I think they were unnecessary. I think three officers were sufficient to guard three ordinary prisoners.

I concede that, in this matter, much must be left to the good faith and judgment of the officer. Sitting here, I cannot ordinarily tell whether a guard is necessary or not; but I wish to say that, in respect to a privilege which is so liable to abuse, in which the officer is constantly tempted to act in his own interest, and not in the interest of the government, I shall be inclined to reject all charges for transporting guards unless I can perceive from the nature of the service that a guard was necessary, or unless the necessity for a guard be otherwise satisfactorily shown. The proof should be made by the officer employing the guard. It should also show who the guard was, and the necessity for having him, and it should, when practicable, be accompanied by the certificate of the commissioner before whom the prisoner was taken, of the presence of the guard. In case of U. S. v. Young, and Same v. Faulbree, and Same v. Roberts, the district attorney objects that the guards, for whom transportation is charged, were witnesses for the United States in said cases, who had been summoned and were paid for their mileage and attendance as witnesses, and he insists that the marshal should not be allowed for the transportation of them as guards. I am of the opinion that the objection is not well taken.

It is not disputed that the guards were necessary, and by the express terms of the statute the marshal is allowed for transporting criminals, himself and guard, ten cents each. It matters not whether the marshal pays the guard anything for his service, or whether he pays anything for transportation, he is allowed, under any and all circumstances, for transporting criminals, himself and necessary guard, a certain arbitrary, fixed fee. In the case of U. S. v. Parks, the marshal arrested one Jeree M. Parks, but he was not the person charged with the crime mentioned on the warrant, nor the person whom the United States desired to be arrested. The marshal acted in good faith, believing the person arrested to be the person whom he was directed to arrest. I am of the opinion that none of the fees charged, growing out of the arrest, can be allowed. The prisoner arrested was falsely arrested, and no lawful fee can be based on or grow out of a false imprisonment. In the case of U. S. v. Gallagher, it appears that the person who made the affidavit on which the warrant was founded did not know the Christian name of the offender, but supposed it to be "Buck;" that the name of the person whom he really accused and charged with crime is John

Gallagher; that the name "Buck" was thus by mistake inserted in both the affidavit and warrant; that the person who made the affidavit accompanied the officer to the place of arrest and pointed out to the officer John Gallagher as the person charged and as the person mentioned in the warrant.

The district attorney objects that as the warrant did not specifically direct the arrest of John Gallagher, the charges made for his arrest, transportation, etc., cannot be allowed. I am inclined to the opinion that the objection is not well taken. I think the case the converse, or very nearly, of the case last stated. I think that John Gallagher, when brought before the commissioner, could not claim his discharge on the sole ground that his name was not correctly spelt or given in the warrant. Being the person actually accused, he could not, I think, complain of a false arrest or a false imprisonment. In the case of U. S. v. Bristow, the person was arrested in the state of Tennessee, only a few yards beyond the Kentucky line. The officer acted in good faith, believing that he was in Kentucky, and that he was making the arrest in this state. I am of the opinion that the original arrest was illegal, and that the prisoner could not lawfully be held after he was brought into this state. Hooper v. Lane, 6 H. L. Cas. 443. I am of opinion, therefore, that none of the fees growing out of or connected with this arrest can be allowed. In the case of U. S. v. Howard, the marshal claims that his deputy was employed eight days in endeavoring to arrest the prisoner, and he charges for expenses while so employed two dollars per day—in all, sixteen dollars. It appears that the prisoner resided only thirty miles from the place whence the process issued, and that the bailiff was actually employed eight days "in endeavoring to arrest" is not shown by the oath or affidavit of the bailiff who made the alleged endeavor, but by the affidavit of the general deputy in whose account the charge is found, to the effect that his account is correct. I do not think this charge is sufficiently proven. It should be proven by the oath or affidavit of the bailiff who made the endeavor, and he should, when he charges for more days of endeavor than are obviously necessary, explain in his affidavit why he was employed the number of days charged, what endeavor he was making, and why the arrest was not made sooner. It is precisely in respect to these charges, where something must be left to the good faith of the officer, that there is the greatest danger of abuse. The officer is constantly tempted to charge for service which he does not perform, and the court and district attorney are limited in the opportunities to expose its error. I think, therefore, full and strict proof of all such charges should be required.

In this case I shall allow for only two days endeavor to arrest; and, consequently, will reduce the item of $16 to $4. In the case of U. S. v. Grimes, the charge is transporting himself, prisoner and guard from Columbia to Louisville, 140 miles, $42. By the route traveled the distance was actually 140 miles; but by the usual route between Columbia and Louisville the distance is only 107 miles. The route taken was by way of South Danville, and from the latter place to Louisville by railroad. The route usually taken is by way of Lebanon, and thence by railroad. The first route is often taken, and is in some respects the most comfortable and convenient, but it is not the usual one. I am of the opinion that the mileage must be computed by the route usually traveled. All the foregoing questions might and would have been decided, just as they have been, whether the rule for computing mileage on process issued and served in this district remains as fixed by the act of 1853, and section 829 of the Revised Statutes, or as is to be found in the act of 1875; but now a case has arisen in which it has become absolutely necessary to determine which statute furnishes the rule. In case of U. S. v. Johnson, the warrant was issued at Louisville and returned there. The defendant resided at Lexington. The marshal actually traveled to Lexington, ninety-three miles, to execute the warrant. There he learned the defendant had gone to Mt. Sterling—where he would probably remain two days; so, to execute the warrant, he traveled from Lexington to Mt. Sterling—Thirty-four miles. When he reached Mt. Sterling he learned that the prisoner had gone to Paris, and he followed him there, traveling eighteen miles. There he learned the prisoner had returned home. He then returned to Lexington, traveling eighteen miles, and there served the process. If the mileage is to be computed by the rule prescribed in section 829 the allowance will be limited to ninety-three miles; but if the act of 1875 furnishes the rule, then as the number of miles actually and necessarily traveled to serve the process is 163, the allowance must be for 163 miles.

Now, I think the act of 1875 was not intended to increase the mileage of marshals, but to diminish it. The complaint was not that the act of 1853 and section 829 did not allow enough mileage—the complaint was that they allowed too much. The complaint was that they allowed for mileage not traveled, and the object was to cut off all allowance for travel not performed, not to give an allowance for travel though actually performed, if it exceeded the distance from the place of return to the place of service. I have already shown that process must, unless otherwise provided by statute, be returned to the court which issues it. All process is ordinarily placed in the hands of the marshal at the place of its issue. The consequence is that a marshal can rarely, if ever, travel, in going to serve any process issued in the district in which it is served, less than

the distance "from the place of return to the place of service," but he may and often will have to travel more. The consequence is that if the act of 1875 furnishes the rule for computing mileage on process issued and executed in the same district, it has signally failed to accomplish the end intended. It has not decreased allowance for mileage, but has provided for a largely increased allowance. The act of 1853, and section 829, Revised Statutes, made an allowance for mileage not actually traveled. It allowed a marshal, who served process coming from districts other than his own, mileage to be computed "from the place of return to the place of service," though this distance might be hundreds or thousands of miles, and though he had not actually traveled to serve the process more than one mile. It was to remedy this, and this only, that in my opinion the provision found in the act of 1875 was made. It was not made to change that of which there was no complaint. But the objection that the act of 1875 should not be so construed as to alter the rule for computing mileage prescribed by section 829, on process issued and executed in the same district, does not rest solely on the ground that the evil which it was intended to remedy, so far from being cured, would be made worse. It rests also on the more rational ground that there is no express repeal of any of the provisions of the old law, and that the negative language of the act of 1875 is scarcely appropriate to an increase, but rather to a decrease of allowance for mileage.

Moreover, the policy of all the statutes of the United States regulating the fees of officers, has been to prescribe certain fixed fees easily ascertainable, leaving nothing to the discretion of the officer, as little as possible to his integrity, and as little as possible to depend on proofs. If the construction of the act of 1875 contended for be admitted; if the marshal is entitled on every process executed by him an allowance for the miles actually and necessarily traveled, then on every process served, the question will arise, what was the number of miles actually and necessarily traveled? and the court thus have much of its time consumed in determining unpleasant squabbles over fees in which the complaining party can rarely obtain any relief, since, at last, the officer making the charge will ordinarily be the only witness who will know the facts.

I shrink from such labor and from such investigations, and I shall not undertake them unless congress shall clearly impose them upon me. In all the investigations which I have ever made of the fees of marshals, I have rarely found anything wrong in those matters which are definitely fixed by statute, or are easily ascertainable by the court without reference to the oath of the officer. In almost every instance in which I have found a charge either wholly false or partially erroneous, it has depended for its verification on the discretion and good faith of the officer. So strong is the temptation to the officer to consult his own interests and to disregard that of him whom he serves; so strong is this temptation—when he may adopt without exposure either of two courses—to adopt the course which will yield him most that, in my opinion, he should, if possible, never be subjected to such temptation. His fees should, as far as possible, be fixed and definite, and not depend, except in cases which cannot be otherwise regulated, either on his discretion or integrity, or on facts which can be known to himself only. So far as this court is concerned, I shall adhere to the rule prescribed in section 829 for computing mileage on all process issued and served in this district, without reference to the number of miles actually traveled to execute it, until congress shall manifest a more certain intention to alter it than is to be found in the act of 1875.

To avoid misconception, I deem it proper to say that none of the charges which have been found to be erroneous are connected with any service rendered by the marshal himself. They all relate to service alleged to have been performed by his deputies or by bailiffs appointed by them, generally to service alleged to have been returned by the latter. The marshal himself did not suspect that any of the accounts rendered to him were incorrect. I acquit him of all blame, but in the future I shall expect him to examine and scrutinize every account before it is presented to the court, and to eliminate every item which he may deem incorrect or not proven, as required by the law as expressed in this opinion. Moreover, I shall expect him to dismiss from office every deputy who shall render to him a false account, or who shall abuse his authority by appointing bailiffs, or who shall, in any way, manifest a stronger desire to make fees than to serve the public. So many criminals attempt to avoid arrest by flight or concealment, whenever the marshal comes into their neighborhood, that it is no doubt often necessary for him to avail himself of the services of a special bailiff. I would not, therefore, restrict his authority to appoint special bailiffs; but so universal has become the practice of deputy marshals to appoint bailiffs, and the fees of the marshal have thereby been so enormously increased to the apparent gain of such deputies, that I cannot but suspect their incentive to such appointments is to make fees rather than to perform their duty. The marshal should hold every deputy to a strict account for every bailiff appointed by him.

Case No. 3,393a.

Ex parte CRITTENDEN.

[Hempst. 176.][1]

Superior Court, D. Arkansas. July Term, 1832.

SESSION OF GRAND JURY—PRESENCE OF ATTORNEY FOR GOVERNMENT.

1. The attorney for the government has a right to be present during the sitting of the grand jury, to conduct the evidence and confer with them.

2. But he has no right to give opinion, as to whether there shall be a bill or not, unless his opinion is requested on a matter of law by the grand jury.

Motion determined before JOHNSON, ESKRIDGE, and CROSS, Judges.

Robert Crittenden, an attorney of the court, moved that Samuel C. Roane, the United States attorney for Arkansas territory, be prohibited from being and conferring with the grand jury, during the deliberation of that body; but THE COURT denied the motion giving it as their opinion, that it was legal and proper for him to do so, whenever he might deem it necessary. Motion overruled.[2]

A grand jury must consist of twelve at least, and may contain any greater number, not exceeding twenty-three, in order that twelve may form a majority of the jurors. There must be twelve at least, because the concurrence of that number is absolutely necessary to put a defendant on trial; and there must not be more than twenty-three, because otherwise there might be an equal division or two full juries might differ in opinion. 2 Burrows, 1088; 2 Hale, P. C. 151; 1 Chit. Crim. Law, 306. The usual practice is to summon twenty-three; and there is a propriety in it, resulting from the known fact that there is more safety in large than small bodies of men, and less probability of hatred and ill-will infusing their pernicious influences into public prosecutions. A few men may feel a disposition to hunt down a victim, when a greater number would not engage in the disreputable business. Impartial, intelligent, discreet, respectable men, good and upright citizens, and "gentlemen of the best figure in the county" (4 Bl. Comm. 302), should always be returned as jurors, because the vast authority which attached to them in that capacity ought not, and indeed cannot, be intrusted to those who are ignorant, corrupt, or incompetent, without the utmost danger to life, liberty, and property. Upon juries depend life, liberty, and reputation, in criminal, and the dearest right of property, in civil cases; and hence they should possess the intelligence to discern justice, and the integrity to maintain it.

The legislation of congress indicates that jurors should be summoned from such parts of the district as shall be most favorable to an impartial trial, but so as not to incur unnecessary expense, nor unduly burden the citizens of any part of the district with such services. 1 Stat. 88. The act of 1789 also provides as follows: "Writs of venire facias, when directed by the court, shall issue from the clerk's office, and shall be served and returned by the marshal in his proper person, or by his deputy, or in case the marshal or his deputy is not an indifferent person, or is interested in the event of the cause, by such fit person as the court shall specially appoint for that purpose, to whom shall be administered an oath or affirmation that he will truly and impartially serve and return such writ. And when, from challenges or otherwise, there shall not be a jury to determine any civil or criminal cause, the marshal or his deputy shall, by order of the court, where such defect of jurors shall happen, return jurymen de talibus circumstantibus, sufficient to complete the panel; and when the marshal or his deputy are disqualified as aforesaid, jurors may be returned by such disinterested person as the court shall appoint." 1 Stat. 88.

Persons exempted from serving on juries by the laws of the United States: All artificers and workmen employed in the arsenals and armories of the United States. 2 Stat. 62. Assistant postmasters and clerks regularly employed and engaged in post-offices. 5 Stat. 88. By the laws of Arkansas, the following persons are exempted: Persons exercising the functions of a clergyman; practitioners of physic; practising attorneys at law; clerks; all officers of courts; ferry keepers; overseers of roads; constables; keepers of grist-mills whose names are recorded as such; patrols, during the time they may continue to perform their duties as such; persons over the age of sixty years; members of the Little Rock Fire Company. Dig. 631, 744, 770; Act Dec. 5, 1846, p. 141.

When the duty of summoning jurors is devolved on the marshal, or any one appointed for that purpose, he ought to return "good and lawful men," avoiding persons of ill fame, or under the influence of parties (Dig. 631), or persons convicted of any infamous crime (1 Chit. Crim. Law, 307), idiots, lunatics, persons exempted from serving on juries, relatives of parties, and those who have formed or expressed decided opinions as to the matter in hand (1 Burr's Trial, 357; Armistead v. Com., 11 Leigh, 657); those who are actuated by hostile feelings towards, or have a strong bias for or against, the parties (2 Hawk. P. C. c. 43, § 28; Whart. Crim. Law, 612, 613); and, in a capital case, those who have conscientious scruples as to punishing the accused under any proof, however strong. U. S. v. Cornell [Case No. 14,868];

[1] [Reported by Samuel H. Hempstead, Esq.]

[2] See disquisition of the "office and duty of grand jurors," in Davis' Precedents of Indictment, pages 18–23, where the existence and the reason for the exercise of this right are fully shown. Chitty says it is usual to permit the prosecutor to be present during the sitting of the grand jury, to conduct the evidence on the part of the crown. 1 Chit. Crim. Law, 317; Kelyng, 8.

Com. v. Lesher, 17 Serg. & R. 155. By the laws of Arkansas, every grand juror must be a free white male citizen of the state, over the age of twenty-one years, resident of the county, a householder or freeholder, and otherwise qualified according to law (Dig. 629); by which is meant, I take it, that idiots, lunatics, and like persons, would not be competent jurors. Petit jurors must have the same qualifications, except they need not be householders nor freeholders; but no person can serve as a petit juror who is related to either party to a suit within the fourth degree of consanguinity or affinity. Dig. 630.

Qualifications of jurors in the courts of the United States, and mode of summoning the same: The act of congress of July 20, 1840, provides as follows: "That jurors, to serve in the courts of the United States in each state respectively, shall have the like qualifications, and be entitled to the like exemptions, as jurors of the highest court of law of such state now have and are entitled to, and shall hereafter from time to time have and be entitled to, and shall be designated by ballot, lot, or otherwise, according to the mode of forming such juries now practised and hereafter to be practised therein, in so far as such mode may be practicable by the courts of the United States or the officers thereof; and for this purpose, the said courts shall have the designation and impanelling of juries, in substance, to the laws and usages now in force in such state; and further, shall have power, by rule or order, from time to time, to conform the same to any change in these respects which may be hereafter adopted by the legislatures of the respective states for the state courts." 5 Stat. 394. The provisions of the judiciary act of 1789 (1 Stat. 88) of this subject were substantially the same, except it was not prospective, but confined the selection of jurors to the mode practised in the several states at the time of its passage. It will be perceived that the act of 1840 is prospective, and supersedes that of 1789, and constitutes the rule by which the United States courts are governed in the selection of jurors; and this act, too, for the first time, expressly recognizes the exemptions allowed by the state laws. This act applies to grand and petit jurors, and to petit jurors in criminal cases. Conk. Pr. 270.

CRITTENDEN (BARTLETT v.). See Case No. 1,076.

Case No. 3,393b.

CRITTENDEN v. DAVIS.

[Hempst. 96.][1]

Superior Court, D. Arkansas. Jan. Term, 1831.

CURE OF DEFECTIVE VENUE.

Either a verdict or judgment cures a defective venue.

[1] [Reported by Samuel H. Hempstead, Esq.]

Error to Pulaski circuit court, determined before ESKRIDGE, CROSS, and BATES, Judges.

ESKRIDGE, J. This is a writ of error to the circuit court of Pulaski county, to reverse a judgment rendered in that court in an action of assumpsit, wherein John T. Davis, indorsee, was plaintiff, and Crittenden defendant.

Two points have been relied on by the counsel for the plaintiff in error to reverse the judgment of the court below: First, that there is not a sufficient venue laid in the declaration; and, second, that there is not a sufficient breach alleged. Both of these grounds are wholly untenable, because they are contradicted by the declaration itself. The declaration seems to have been drawn according to the most approved forms. The notes declared on are alleged to have been made in the county of Pulaski, and within the jurisdiction of the court; and the expression "then and there," applied to the execution of the indorsements, must be taken in connection with, and relate to, the venue as laid for the notes themselves. There is certainly a sufficient venue. There is a separate and distinct breach alleged to each count in the declaration, when in fact one general breach at the end of the declaration would have been sufficient. But, admitting the declaration to have been defective in not laying a sufficient venue, it was the duty of the defendant below to have availed himself of such defect, by demurring specially to it; and it is now too late, after a formal judgment by submission to the court below, to take advantage of it upon a writ of error. The modern practice, as well in England as in most of the states in the United States, is that either a verdict or a judgment cures a defective venue. 5 Mass. 94, 96; also, State v. Post, 9 Johns. 81. In the last case quoted, it was decided that, where no venue is laid in the body of the declaration, the venue in the margin is sufficient. It is not material in this case to inquire what may have been the effect of a defective venue at common law; whether it was matter of substance or barely matter of form, because it is very obvious that our statute of jeofail is as comprehensive as both the statute of Car. II. and of 4 Anne taken together. Statutes of this description have correctly received from all courts a liberal construction. Their object is to repress any attempts of parties litigant to defeat the ends of justice, by resorting to technical and frivolous objections, which do not touch the merits of matters in controversy. Judgment affirmed.

CRITTENDEN (HANK v.). See Case No. 6,-024.

Case No. 3,394.

CRITTENDEN v. STROTHER.

[2 Cranch, C. C. 464.] [1]

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

WITNESS—PRIVILEGE OF ATTORNEY.

If the plaintiff examines his attorney as a witness, he waives his privilege, and upon cross-examination the attorney is bound to answer generally.

[Action of] debt [by Robert Crittenden against Pendleton Strother] on bond. Plea: Gaming debt.

Mr. Hall, the plaintiff's attorney, offered himself as a witness, and testified in behalf of the plaintiff. Upon his cross-examination he objected to answer a question, claiming the privilege of his client.

THE COURT said, that when his client examined him as a witness in his favor, he must be considered as waiving his privilege.

Verdict for defendant.

CRITTENDEN (UNION BANK OF GEORGETOWN v.). See Case No. 14,354.

Case No. 3,395.

The CROATAN.

[Chase (1869) 546.] [2]

Circuit Court, D. North Carolina.

INTERFERENCE OF STATE COURT IN ADMIRALTY PROCEEDINGS.

1. A steamer being in custody of the marshal in a proceeding in admiralty, a state court has no jurisdiction to take it on attachment; therefore a judgment in such attachment creates no lien upon the steamer.

2. Such a proceeding in attachment was, in substance and in fact, a proceeding in admiralty, and beyond the jurisdiction of the state court. Instead of suing out an attachment in the state court, the creditor should have intervened for his interest in the United States district court.

This was an appeal from decrees in admiralty by the district court for the Cape Fear district of North Carolina [case unreported]. It appears that Braham and others filed a libel in the district court against the steamer Croatan, her tackle, apparel, and furniture, and that shortly afterwards Cassidy and Beery filed another libel in the same court against her and her appurtenances also. She was accordingly taken possession of by the marshal. While she was so in his possession, Levy sued out an attachment from the state court, and levied it on the steamer in the custody of the law, and in due time procured his judgment on attachment for three hundred and thirty-four dollars and seventy-six cents. After this levy of Levy's attachment, Dewey, on July 18, 1866, filed his libel on the vessel in the district court for the sum of one thousand five hundred and eighty-four dollars and twenty-nine cents, and on July 23, 1866, Styles & Carter also filed their libel against her in the same court for the sum of one thousand three hundred and fifteen dollars and twenty-eight cents. Matters were in this position when the district court on August 2, 1866, decreed in favor of Braham, the first libellant, and Cassidy and Beery, the second libellants, and ordered the vessel to be sold to satisfy their claims. She was accordingly sold on August 20, 1866, for ten thousand three hundred dollars, a sum much more than necessary to satisfy the two libels on account of which she was sold. On October 30, 1866, a decree was pronounced in favor of Dewey for one thousand five hundred and eighty-four dollars and twenty-nine cents, and Styles & Carter for one thousand three hundred and fifteen dollars and twenty-eight cents, and their respective costs. The claims of the first libellants having been paid, Levy filed his petition in this court, claiming the next lien on the surplus of the proceeds of the sale of the Croatan, by virtue of his attachment from the state court, which was levied next after the first two libels. Dewey and Styles & Carter also filed their petitions claiming the surplus under their libels in the order of filing them, the surplus not being sufficient to pay both of them.

THE COURT decided that Levy had obtained the prior lien by virtue of his attachment, and accordingly decreed in his favor to the amount of his claim, which it ordered to be paid out of the surplus in the registry of the court.

CHASE, Circuit Justice. This is a petition for the appropriation of a sufficient amount of the proceeds of the steamer Croatan, sold under the order of the district court, to the satisfaction of a judgment in attachment recovered by the petitioner, in one of the state courts of North Carolina. The petition alleged that sometime prior to the issuing of the attachment from the state court, a libel was filed in the district court by Thomas A. Braham and others, against the steamer. And that another libel was filed by James Cassidy and Benjamin A. Beery, against the same steamer; and that such proceedings were had in admiralty, that on August 2, 1866, the steamer, with her tackle, apparel, and furniture, were ordered to be sold. It further alleged that the steamer was sold on August 20, for ten thousand three hundred dollars, which was much more than sufficient to pay the amounts claimed in the two libels. The petitioner, therefore, prayed that a sufficient sum be appropriated out of the surplus and remnants to the satisfaction of his attachment. A decree was accordingly made by the district court, directing the satisfaction of the claim of Levy

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

[2] [Reported by Bradley T. Johnson, Esq., and here reprinted by permission.]

by the payment to him of three hundred and thirty-four dollars and seventy-six cents, with his costs, out of the surplus and remnants.

It further appears that on July 18, 1866, William H. Denny filed his libel in the district court for the district of Cape Fear against the steamer Croatan, alleging that in the month of March, 1866, the steamer being in the port of Charleston, S. C., the libellant furnished materials and labor towards equipping and finishing the steamer to the amount of one thousand five hundred and eighty-four dollars and twenty-nine cents. At the hearing of this libel on October 30, 1866, a decree was made against the steamer, in favor of the libellant, for the sum of one thousand five hundred and eighty-four dollars and twenty-nine cents, and for his costs.

It further appears that on July 23, 1866, L. C. Styles and J. F. Carter, partners under the name of Styles & Carter, filed their libel in the district court for the Cape Fear district of North Carolina, setting up a claim against the steamer Croatan for advances to pay the expense of necessary repairs and supplies, and praying a decree for the amount advanced, and for the sale of the steamer in order to the satisfaction of the same. Upon the hearing of this petition on October 30, 1866, a decree was made against the steamer, in favor of the libellants for the sum of one thousand three hundred and fifteen dollars and twenty-eight cents, and for their costs.

Subsequently, and while the petition of Jonas P. Levy for the application of the surplus to the satisfaction of his judgment in attachment, was pending in the district court, William H. Denny and Styles & Carter filed their petition by way of intervention in the district court, setting up the decrees in admiralty recovered by them respectively, and asking the appropriation of the remnants and surplus in the registry of the court to the satisfaction of their several decrees. This petition alleged that the proceeding of Levy by writ of attachment from the state court, created no lien upon the steamer, and insisted that he was not entitled to payment out of the remnants and surplus, which were insufficient to satisfy the claims of the petitioners. Notwithstanding this petition of intervention, a decree was made, as has been already stated, in favor of Levy for the satisfaction of his judgment in attachment, and from this decree, the petitioners William H. Denny and Styles & Carter have appealed to this court.

The proceedings in this case have been quite loose and irregular. The petition of intervention bears no date, nor is there anything which indicates that it was ever filed in the district court. No records of the proceedings of the district court in the original libel suits of Thomas A. Braham, James Cassiday, and Benjamin A. Beery, have been brought into this court. There is nothing before me which shows the amount of the decrees in favor of the libellants in these suits. There is nothing, indeed, which gives any information respecting them, except the loose reference in the petition of Levy. There is no record of the petition of Levy for payment out of the remnants and surplus; or of the petition of William H. Denny and Styles & Carter. The original papers only have been brought into this court. It is difficult, under such circumstances, to dispose of the case satisfactorily. There seems, however, to be no question that payment of the sum recovered in attachment was decreed as claimed, and that the decrees upon the libels of William H. Denny and Styles & Carter were rendered as stated. Nor is there any question that a surplus from the sale, under the original decrees, remained in the registry of the court, or that this surplus is insufficient to satisfy the decree, in favor of William H. Denny and Styles & Carter.

The real question is whether Jonas P. Levy was entitled to be paid the amount of his judgment in attachment, in preference to William H. Denny and Styles & Carter. I think he was not so entitled, for two reasons; in the first place, the steamer, at the time this attachment was issued, was in custody of the marshal of the United States, and could not be taken upon an attachment issued out of a state court; secondly, the proceeding in attachment was, in substance and fact, a proceeding in admiralty, and beyond the jurisdiction of a state court. Instead of suing out an attachment in the state court, Levy should have intervened for his interest in the district court. The decree of the district court, giving effect to the alleged lien of Levy under his attachment, was erroneous, and must be reversed. A decree of reversal will be made accordingly, and the cause will be sent back to the district court for further proceedings in conformity with this opinion.

Case No. 3,396.

CROCKER v. BEAL et al.

[1 Lowell, 416.][1]

Circuit Court, D. Massachusetts. Dec. Term, 1869.

SUIT BY SURVIVING PARTY TO COVENANT—ELECTION TO TAKE TESTAMENTARY PROVISION.

1. If there be a covenant to three persons jointly, and a breach, and two die, the survivor may sue alone.

2. By indenture between husband and wife and trustees for the latter, the husband covenanted with the trustees not to demand any property that might thereafter come to the wife by descent or devise, but that she might enjoy and dispose of the same as if unmarried. He afterwards received a considerable sum which came to his wife by descent from a brother. By his will made after he had received this money he made a trust fund for the benefit of his children, during their lives, and gave the

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

trustees of that fund power, in their discretion, to pay his wife out of the income of the fund enough to make her yearly income up to $3,000 if it should at any time fall short of that amount, and added that he had included in the trust fund any amount of money that in equity or honor might be due his wife or children by heirship from the brother, and that he intended it to be in full and in lieu of dower. Whether this provision was intended as a satisfaction of the debt due for breach of the covenant, quaere?

3. If so intended, the fact that the wife, soon after the husband's death, had accepted one small instalment of income, she having refused several others afterwards, and having brought this suit, is not a conclusive election to accept the provision of the will.

This was an action of covenant broken, brought by the plaintiff [Uriel Crocker] as the last survivor of three trustees, appointed under an indenture made between William J. Walker, of the first part, and the said three trustees, and Mrs. Eliza Walker, wife of said William J. Walker, of the second part, dated February 24, 1846, against the defendants [I. S. Beal and others] as executors of the will of said William. The parties by stipulation, under the statute, submitted the case to the court, without a jury; and further agreed that the record of a suit in equity between said Eliza Walker and these defendants, lately decided in this court, should be evidence in this cause. In addition to this record some oral testimony was produced. It appeared that by the indenture Dr. Walker and his wife were to live apart, and the former conveyed to the three trustees certain houses and other estate for the benefit of his wife, and covenanted with the trustees, their successors and respective heirs, executors, and administrators, that he would not claim or demand any property that might thereafter come to Mrs. Walker by devise or descent, but that she might enjoy and dispose thereof as if she were unmarried; and that she might receive and dispose of, as she might think proper, all personal property so acquired by her thereafter, &c. There was evidence tending to show that Dr. Walker did in his lifetime, and after the date of the indenture, receive the several sums mentioned in the declaration and in the amendment thereto, from the administrator of the estate of his wife's brother, amounting in all to $5934.69. The defendants objected, first, that the action could not be maintained by the plaintiff; and, secondly, that the cause of action had been released by Mrs. Walker.

LOWELL, District Judge. Upon the first point the ground taken is, that the surviving trustee cannot sue alone. But the law is that upon a joint covenant the survivor alone can sue: 1 Chit. Pl. 11; Anderson v. Martindale, 1 East, 497; 2 Walf. Parties, 1527. It is said, and truly, that the indenture provides for filling vacancies, and for keeping the number of trustees always at three; but whether new trustees could sue for an old breach of covenant, we need not inquire, because none have been appointed, and the defendants have no concern with that matter, at least in this court. If any person interested chooses to apply to the probate court, no doubt the vacancies may be supplied, but in the mean time the plaintiff has this cause of action vested in him by survivorship.

The other defence is that Mrs. Eliza Walker, on whose behalf and for whose sole benefit this covenant was made, has taken an interest under her husband's will, inconsistent with the assertion of the right sought to be vindicated in this action. This is pleaded as an accord and satisfaction and as a release. Granting that these defendants can set up this defence, which the case cited of Bonaffé v. Woodberry, 12 Pick. 456, seems to show that they may, and that it is properly pleaded, which it seems to be, yet I am of opinion that the facts do not support it as a bar to this action.

It is undoubtedly true that where provision is made in a will for the benefit of any one, he cannot both accept that benefit and repudiate the will in any part. Thus a widow who has an estate left to her in lieu of dower, cannot after voluntarily accepting the provision demand to be endowed; and there are many like cases. And the rule prevails in this country at law as well as in equity. In equity the party is put to an election; and even at law, this can sometimes be done, as where a paid legatee disputing the will was required to pay the amount of his legacy into court. Hamblett v. Hamblett, 6 N. H. 333. But courts of law find much greater difficulty in dealing with such a case, and, as I understand, will not hold the devisee or legatee to be barred, unless it is clear that he has made an irrevocable election. See the remarks of Lord Redesdale, 2 Schoales & L. 450. If there is doubt on that point, the executor must be left to his remedy in equity, where full and complete justice can be done to both parties.

When the question is whether a legacy is intended as satisfaction for a debt, the same general rule prevails, but all intendments of law are against the inference of such an intent. See Chancey's Case, 2 White & T. Lead. Cas. Eq. 380, and notes to Am. Ed.; Strong v. Williams, 12 Mass. 391. Very slight circumstances will avail to negative any such presumption, as for instance the mere fact that the testator has directed all his debts and legacies to be paid, or that the legacy is less beneficial in any respect, though more so in others, than the debt. In the present case, the testator leaves a fund to trustees to divide the income, and eventually, after the lapse of many lives, the principal, among his six children and their representatives, and directs that, if necessary, the trustees may in their discretion, out of the income of this fund, pay his wife enough to make her income up to $3,000 a year, if the income of the property settled by the indenture should fall short of that sum; and adds: "I having

included in the sum given in the second item above (that is, the trust fund) any amount of money that in equity or honor may be due to my said wife or children by heirship from her late father or brother, Joseph Heard, deceased. And it is my design and intention that the provision herein made, coupled with the amount secured to her by said indenture, shall be in full and in lieu of her dower in my estate." He then gives the bulk of his estate to certain charities.

Here is a very clear intent expressed to bar dower; but it is by no means so clear that he intended this provision to be a satisfaction of the amount due this plaintiff for the benefit of his wife. It is mainly a provision for his own children, of which he says that one inducement is that he may in equity and honor owe them and their mother something for what he received from the estate of this brother and some one else. He acknowledges no legal obligation, and does not assert that he is making any satisfaction. The provision for his wife is only contingent, and at the discretion of his trustees. Considering the great care and minuteness with which such matters are provided for in the will, I find it difficult to understand this ambiguous declaration as meaning that his wife, if she takes any income in any year shall not be paid this debt. Suppose she does not take it, the trust fund remains the same, only her children get a somewhat larger income. The defendants must read this will as meaning that, in consideration of a debt due his wife, he leaves certain property in trust for their children, out of which the wife may, in certain contingencies and on some occasions, at the discretion of his trustees, have an income. What is there for her to elect? She cannot elect that the trust-fund shall not be created, nor that her children shall not have the income. If the question were between her and the children, I can understand that she might be required to choose. But suppose the children all assent to her having this income, what concern have the executors with the question?

If she is put to such an election, the evidence does not show that she has made the same so conclusively that a court of law will hold her barred. It seems that she has accepted one installment of income and has refused all others. If there be any inconsistency, then the suffering this action to be brought may be an election, and the trustees may refuse to pay her any more income. This will work exact justice, and will require the point to be settled in equity, where this question of election can be more properly dealt with.

I find as matters of fact: (1) That the indenture referred to in the plaintiff's declaration was made as therein set forth, and that the plaintiff is the sole survivor of the three trustees named in said indenture; (2) that after the making of the indenture the defendant's testator received the sum of $5964.39, which came to his wife, Eliza Walker, from the estate of her brother, Joseph Heard, who died after the date of said indenture, whereby he broke the covenants thereof; (3) that said Eliza Walker received the sum of $145.51, on 14th July, 1866, as an addition to her income for the year 1865–6, under the third item of said testator's will; and that she has refused to receive any further sums under said item of said will.

And as matters of law: (1) That said indenture is valid; (2) that the plaintiff as the sole survivor of the three trustees named in said indenture, may well have and maintain this action, and is entitled to recover said sum of $5964.39, with interest at six per cent. per annum, from the dates of the payments respectively, and his costs; (3) that said cause of action has not been released by the act of said Eliza above mentioned.[2] Judgment for the plaintiff.

[2] [The validity of the indenture had been sustained in another suit before this case was tried. See Walker v. Walker, 9 Wall. (76 U. S.) 743.]

Case No. 3,397.

CROCKER v. FIRST NAT. BANK.

[4 Dill. 358; 3 Am. Law T. Rep. (N. S.) 350; 3 N. Y. Wkly. Dig. 105; 1 Thomp. Nat. Bank Cas. 317; 3 Cent. Law J. 527; 11 Am. Law Rev. 169; 1 Cin. Law Bul. 350; 24 Pittsb. Leg. J. 73.][1]

Circuit Court, D. Kansas. 1876.

NATIONAL BANKS — REVISED STATUTES, SECTIONS 5197, 5198, CONSTRUED — RATE OF INTEREST — RIGHT OF ACTION TO RECOVER BACK ILLEGAL INTEREST PASSES TO ASSIGNEE IN BANKRUPTCY —EXTENT OF RECOVERY.

1. A national bank located in Kansas charged and received interest at the rate of eighteen per cent per annum. *Held*, that it was liable, under the national banking act (Rev. St. §§ 5197, 5198), to pay back twice the amount of interest thus received.

[Cited in Markson v. First Nat. Bank, Case No. 9,097; Hill v. National Bank, 15 Fed. 433.]

2. If the person who paid such illegal interest is adjudged a bankrupt, the right of action passes to his assignee in bankruptcy, such assignee being his "legal representative" within the meaning of section 5198 of the Revised Statutes.

[Cited in Wright v. First Nat. Bank, Case No. 18,078.]

3. The amount of the recovery is twice the full amount of interest paid, and is not limited to twice the excess of interest paid over the legal rate.

This is an action by an assignee in bankruptcy, brought in 1875, to recover from the defendant [the First National Bank of Chetopa], a bank organized under the act of congress commonly known as the national banking act, double the amount of interest which he charges was taken from the bankrupts by the defendants upon numerous transactions

[1] [Reported by Hon. John F. Dillon, Circuit Judge, and here reprinted by permission. 11 Am. Law Rev. 169, contains only a partial report.]

after 1872 and prior to the bankruptcy. The petition states in each count that the interest charged was "a greater rate of interest than was allowed by the laws of the state of Kansas." It is material to inquire what was the law of the state of Kansas in regard to interest, during the period covered by the counts not barred by the statute. To properly understand the Kansas interest law, it is necessary to begin with the General Statutes of 1868 (page 525, c. 51), which contain the following:

"Sec. 2. The parties to any bond, bill, promissory note, or other instrument of writing, for the payment or forbearance of money, may stipulate therein for interest receivable upon the amount of such bond, bill, note, or other instrument, at any rate not exceeding twelve per cent. per annum.

"Sec. 3. All payments of money or property made by way of usurious interest, or of inducement to contract for more than twelve per cent. per annum, whether made in advance or not, shall be deemed and taken to be payments made on account of the principal, and the courts shall render judgment for no greater sum than the balance found due after deducting the payments of money or property made as aforesaid, without interest; nor shall any debtor be deemed in equal wrong on account of having paid, or having agreed to pay, such usurious interest or such inducement, but shall have like remedy and relief in either case.

"Sec. 4. Any person contracting, by promissory note, bill of exchange, bond, or otherwise, to receive a greater rate of interest than that allowed by this act, shall forfeit all interest, and shall recover no more than the principal of such note, bill, bond, or other contract."

These sections clearly limited the rate of interest to twelve per cent. per annum, and punished the creditor who contracted for more with an entire forfeiture of all interest, at the same time rewarding the debtor with a credit upon the principal debt of so much as he might have paid for interest on a usurious contract. This remained the law until June 20, 1872, when sections 2, 3, and 4, quoted, were repealed by the act of February 28th, and the following took effect (Laws 1872, p. 284):

"Sec. 2. The parties to any bond, bill, promissory note, or other instrument of writing, for the payment or forbearance of money, may stipulate therein for interest receivable on the amount of such bond, bill, note, or other instrument of writing: provided, that no person shall recover in any court more than twelve per cent. interest thereon per annum.

"Sec. 3. All payments of money or property made by way of usurious interest or inducement to contract for more than twelve per cent. per annum, whether made in advance or not, shall be deemed and taken to be payments made on account of the principal and twelve per cent. interest per annum, and the courts shall render judgment for no greater sum than the balance found due after deducting the payments of money or property made as aforesaid."

A general denial was filed to the petition, a jury waived, and the cause tried by the court.

McComas & McKeighan, for plaintiff.
John K. Cravens, contra.

DILLON, Circuit Judge. The usurious transaction in respect of which this action is brought occurred after the state statute of June 20, 1872 (Laws 1872, p. 284), went into operation. This statute, as construed by the supreme court of the state, "allowed parties to contract for any rate of interest they might choose, but did not allow the creditor to recover more than the principal and interest at the rate of twelve per cent. per annum." Jenness v. Cutler, 12 Kan. 511, per Valentine, J. On the loans to the bankrupts, the defendant bank contracted for and received interest at the rate of eighteen per cent. per annum. If the debtors had not been adjudged bankrupt, could they have recovered under section 30 of the national banking act? Rev. St. §§ 5197, 5198. If so, does this right of action pass to their assignee in bankruptcy? And if so, what is the extent of the recovery? These are the questions in the case.

1. If the effect of the state statute of June 20, 1872, was to abrogate all rates of interest—if after that enactment no rate of interest exists or "no rate is fixed by the laws of the state" of Kansas—then national banks would be restricted to seven per cent. as the maximum rate they could lawfully charge. Rev. St. § 5197; Tiffany v. National Bank of Missouri, 18 Wall. [85 U. S.] 408. If, however, this was not the effect of that enactment, then twelve per cent. is the maximum legal rate allowed by the laws of Kansas. In either event, the defendant bank charged and received an illegal rate. If bankruptcy had not supervened, it is clear that Marsh & Overhuls, the bankrupts, might, under the national banking act (Rev. St. § 5198), have recovered from the defendant bank twice the amount of interest paid, as therein provided. Indeed, the right of action is yet in them if it is not barred by the two years limitation (Rev. St. § 5198), unless it has passed to their assignee in bankruptcy.

2. The next question is, is the assignee in bankruptcy their "legal representative" within the meaning of the statute? Rev. St. § 5198. It is our opinion that an assignee in bankruptcy is, in respect of such a claim as this, which has injuriously affected and reduced the estate in bankruptcy, and which is to be enforced "by an action in the nature of an action of debt," peculiarly and most appropriately "the legal representative" of the bankrupt. Every reason which, in case of the

death of the debtor, without bankruptcy, would give the right of action to the administrator or executor, as his legal representative, applies with full force to the assignee in bankruptcy, if his estate is during his lifetime administered in a court of bankruptcy. See Tiffany v. National Bank of Missouri, supra; 1 Deac. Bankr. (3d Ed.) 523, 524; Beckham v. Drake, 2 H. L. Cas. 640. In this view, it is unnecessary to determine whether the right of action would vest in the assignee under the bankrupt act (Rev. St. §§ 5044-5047), though it seems not improbable that the provisions of these sections are comprehensive enough to embrace it. Darby's Trustees v. Boatman's Sav. Inst. [Case No. 3,571]; Id., 18 Wall. [85 U. S.] 375.

Under the English bankrupt act, no right of action passes to the assignee for a mere personal tort to the bankrupt, as for assault or libel, but it is otherwise in respect of injuries or torts which result in diminishing the estate of the bankrupt; and the distinction is taken between rights of action where personal suffering or inconvenience is the primary cause of the action (which do not pass), and where pecuniary loss or damage is the primary cause of action, which do pass. 1 Deac. Bankr. (3d Ed.) 522 et seq. This distinction seems to be made in our bankrupt act, which vests in the assignee all such "rights of action."

3. The next question is, whether the recovery shall be for double the whole amount of interest paid, or only double the amount in excess of the legal rate, whether that be seven or twelve per cent. Where an illegal rate of interest is charged, and an action is brought on the contract; the statute declares a "forfeiture of the entire interest," and if the usurious interest has been paid, the statute gives an action to recover back, not simply the excess over the legal rate, but "twice the amount of interest thus paid," that is, paid in pursuance of an usurious contract or transaction.

National banks owe a duty to the public to observe the limitations of the act of congress in respect of the rate of interest—limitations wisely imposed, but in many of the western states, at least, very frequently disregarded. They have privileges enough without usurping others. They have powers enough, without exercising those not conferred, or transcending the limits of their charters. They ought not to become usurers; and if they do, public policy is promoted by an enforcement of the penalties which the statute has denounced. It should be borne in mind that the statute confines the action to the person who has paid the illegal interest, or to his legal representative, thus showing that it was in part its purpose to repair this loss or reimburse his estate—there being superadded, for the purpose of preventing such violations of the law, the infliction of a penalty of twice the amount of interest paid. This penalty was, doubtless, supposed by congress to be no more than would be reasonably sufficient to cover the excess of interest over the legal rate, and costs and expenses of litigation, and at the same time make it more profitable to the banks to obey the law than to violate it.

Judgment will be entered for the plaintiff for $2,219.92, that being twice the full amount of interest paid on the usurious transactions set out in the petition, not barred. Judgment accordingly.

NOTE [from original report]. In Pennsylvania there is no general statute limiting the rate of interest which banks, organized under the laws of the state, may take. A number of such banks, by special charter, are authorized to charge and receive ten per cent. interest—the general legal rate of interest in that state being six per cent. A national bank in that state reserved and received interest at nine per cent. *Held* (construing Rev. St. § 5197), that it might rightfully contract for interest at the rate of ten per cent. per annum, and that the action against the bank for twice the amount of interest paid could not be maintained. First Nat. Bank of Mt. Pleasant v. Duncan [Case No. 4,804], western district of Pennsylvania, before Strong and McKennan, JJ., June, 1878. Jurisdiction of state courts of actions against a national bank, under section 30 of the national banking act, was asserted and maintained in Ordway v. Central Nat. Bank, 47 Md. 217; S. P. Bletz v. Columbia Nat. Bank [87 Pa. St. 87]. See Missouri River Tel. Co. v. First Nat. Bank [74 Ill.] 217; Newell v. Nat. Bank, 12 Bush, 57. The principal case was cited and followed by Gresham, J., in Wright v. National Bank of Greensburg [Case No. 18,078].

Case No. 3,398.

CROCKER et al. v. JACKSON.

[1 Spr. 141;[1] 10 Law Rep. 70.]

District Court, D. Massachusetts. March Term, 1847.

MARINE INSURANCE—DEVIATION.

1. If a vessel, upon seeing another vessel in apparent distress, departs from her course, in order to ascertain if those on board need relief, it is not a deviation.

2. Neither is it a deviation to delay, in order to afford such relief.

3. But departure from her course, or delay, merely to save property, is a deviation.

[Cited in Peterson v. The Chandos, 4 Fed. 653.]

4. If the master be influenced by the double motive, of relieving distress and saving property, it is not a deviation.

[Cited in Peterson v. The Chandos, 4 Fed. 653.]

5. If, in such case, the circumstances are not decisive, as to the motives of the master, the court will give him the benefit of a favorable construction.

This was a libel, on behalf of the owners of the bark La Grange, against the respondent, a consignee of part of the cargo, to recover a contribution for damage sustained by the voluntary stranding of that vessel,

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

near Provincetown, during a gale. The respondent was insured by the Merchants' Insurance Company, and the defence was made in their behalf. The defence principally relied upon, was, that the La Grange had previously committed a deviation, in going out of her course, to speak, and then taking in tow, a vessel in distress. It appeared, in evidence, that on the 21st of November, it then blowing fresh, with a heavy sea, a brig was seen from the La Grange, about three miles to leeward, with no sail set, apparently in distress; that the La Grange ran down to her, and found her to be the Samuel, of Portland, having lost or split all her sails, with no materials to mend them, short of provisions, the mate and one hand ill below, and another partially disabled. The sea was running so high, that it was impracticable to send a boat on board. The master of the Samuel requested the master of the La Grange to lie by, until he should be furnished with supplies, and ascertain what he could do. Both vessels were then drifting fast out of their course, and, in order to save time and distance, the master of the bark proposed to take the brig in tow. This was done. Subsequently, supplies were furnished. In about four hours afterwards, the brig began to make sail, and was kept in tow for about thirty-six hours, and until within about fifteen miles of Boston light, when it came on to blow, and the hawser parted, or was cast off, and both vessels ran for Provincetown. The reason given for keeping the brig so long in tow, was, that she was in a crippled condition, by reason of having no heavy canvas, and of the sickness of her crew, and want of provisions; and that the bark had not sufficient to supply her, and for her own use, if they should be driven off; and, therefore, it was deemed expedient to keep together, and to supply the brig as wanted.

[It was argued for the defence, that the delay caused by going out of her course and taking the brig in tow, was a deviation; that there was no necessity for taking the brig in tow, certainly not for towing her for so long a time; that a deviation could be justified only for the purpose of saving life, and if that had been the object here, the crew might have been taken off; that from the measures taken, the master of the barque must have intended to claim salvage. For the libellants, it was argued, that it was the duty of every master, on seeing a vessel in distress, to delay or go out of his course to speak her, and to give such assistance as he could; that such delay did not constitute a deviation, though delay for the sole purpose of saving property would; that there was no authority to sustain the ground taken by the defence; that it was according to the usage of the seas, for vessels to stop and aid others in distress, a usual incident of a voyage, and so not a deviation; and that good policy, and so far as insurers were concerned, their own interest required that the master should have the right to perform this duty, without subjecting his owners to the risk of losing their insurance, and becoming responsible to the freighters for the cargo; also, that the loss in the present case, could not be attributed to the alleged deviation; and that the ship-owner was not responsible to the freighter for a loss which occurred subsequently to a deviation, and not in consequence of it.][2]

F. C. Loring, for libellants.

R. Fletcher, for Merchants' Ins. Co.

SPRAGUE, District Judge, in delivering his opinion, said, in substance: Delay to save life is not a deviation; but delay merely to save property, is. [The rule as to intermediate cases is not settled. The general principle in respect to contracts of affreightment and insurance is, that the voyage shall be performed in the usual way. A voluntary departure from it is a deviation; but what is a voluntary departure? Parties must be held to contemplate the usual incidents of a voyage.][2]

In this case, when the brig was seen in distress, it was the duty of the La Grange to run down to her, to ascertain whether the persons on board needed relief; and upon learning that they did, she was bound to take the necessary measures to afford it; and this constitutes no deviation. As the sea and wind were such, that the crew of the brig could not be transferred to the La Grange, and both vessels were fast drifting out of their course, the taking of the brig in tow was the proper mode of relief.

The only serious question is, whether the towing was continued too long. It is urged in behalf of the respondents, that the object of the captain of the La Grange was pecuniary gain, by earning salvage. But the crew of the brig needed assistance, and it must be presumed that the master was also actuated by a desire to afford them relief. Now there being a double motive, to relieve distress and to save property, does not render the delay a deviation, nor impair the merit of the act. The law, so far from discouraging the union of these motives, enhances the amount of salvage compensation, where the saving of property is accompanied by relief to passengers or crew. But if this towing was continued after it had ceased to be necessary to relieve the distress of the crew, and merely to save property, then it was a deviation; but I am not satisfied that it was so continued. The circumstances are not decisive, and, in doubtful cases, where the master may be influenced by motives of humanity, as well as the desire to save property, I think the court should give him the benefit of a favorable construction. To do otherwise, might be unjust, and would certainly be impolitic. It would teach masters

[2] [From 10 Law Rep. 70.]

that, in doubtful cases, they would extend relief at their peril. That although they had fairly exercised their best judgment, yet, upon subsequent revision by the court, they might be deemed to have committed an unjustifiable deviation, to the ruin of their owners and themselves. We should not look at the conduct of a master, in such cases, with a jealous scrutiny, nor give such a construction to doubtful acts, as would admonish him that, in order to be safe from judicial condemnation, he must harden his heart, and stint the measure of relief to danger and distress. The humanity and morals of the seas require a more liberal doctrine.

Being of opinion that there was no deviation, I have no occasion to consider the question made at the bar, as to what would have been its effect.

Decree for the libellants, for $195.77, damages and costs.

No question of jurisdiction was raised by the eminent counsel, in this case. In Cutler v. Rae, 7 How. [48 U. S.] 729, it was held by the supreme court, that the court had no jurisdiction. That case originated in the Massachusetts district—see 1 Spr. 137 [Rea v. Cutler, Case No. 11,599]—and was defended by Messrs. Fletcher & Curtis, who were afterwards respectively judges of the supreme court of Massachusetts and of the supreme court of the United States; yet neither of them raised the question of jurisdiction. In Beane v. The Mayurka [Case No. 1,175] Mr. Justice Curtis, in submission to what he deemed the decision of the court, in Cutler v. Rae [supra], decided that the admiralty had not jurisdiction of a suit in rem, for average contribution; but subsequently the supreme court, in Dupont v. Vance, 19 How. [60 U. S.] 171, sustained the jurisdiction in such case. It is believed that the authority of Cutler v. Rae [supra] will not be extended, but will be limited, at least, to the particular circumstances of that case. See note, 1 Spr. 138 [Rea v. Cutler, supra]. That delay, for the purpose of saving life, is not a deviation. See The Boston [Case No. 1,673]; The Henry Ewbank [Id. 6,376]; Bond v. The Cora [Id. 1,621]; Lawrence v. Sydebotham, 6 East, 45; Blaireau, 2 Cranch [6 U. S.] 240; The Emblem [Case No. 4,434]; The George Nicholaus [Id. 13,578]; Warder v. Goods [Id. 17,165]; The Waterloo, 2 Dod. 443; The Jane, 2 Hagg. Adm. 345; The Beaver, 3 C. Rob. Adm. 292; Phil. Ins. § 1027. The language of the reported cases is generally restricted to the saving of life. But all acts incidental thereto such as bearing down to a vessel which has made a signal, are included. See Williams v. A Box of Bullion [Case No. 17,717]. So, also, is the relief of persons in distress. 2 Pars. Mar. Law, 301. And in the case of A Box of Bullion it was held, that delay, by a homeward bound ship, for the purpose of taking the crew of an American vessel, abandoned at sea, from a foreign vessel, by which they had been rescued, and which was bound to a foreign port, was not a deviation, the usage in such cases being proved. In England, the merchants' shipping act (17 & 18 Vict. c. 104, § 459) enacts, that in case a vessel is stranded, or otherwise in distress, on the shore of any sea or tidal water situated within the limits of the United Kingdom, there shall be salvage allowed for saving life, and that it shall be paid by the owners of the ship, before all other salvage claims; and if the ship is destroyed, or its value, after deducting expenses, is not sufficient to pay the salvage on lives, the board of trade may award such sums as it deems fit, out of the mercantile marine fund, in whole or part satisfaction of such unpaid salvage. The Bartley, 1 Swab. 198; The Coromandel, Id. 205; The Clarisse, Id. 129; The Leda, Id. 40.

Case No. 3,399.

CROCKER et al. v. LEWIS.

[3 Sumn. 1.][1]

Circuit Court, D. Maine. Oct. Term, 1837.

FRAUDULENT REPRESENTATIONS BY VENDOR—EVIDENCE—LETTERS.

1. A representation made to a stranger in respect to a sale and by him communicated to a third person, so as to become the basis of a purchase by the latter from the party making the representation, is not treated as res inter alios acta, but as if made directly by the vendor to the vendee.

[Cited in Mason v. Crosby, Case No. 9,235; Iowa Economic Heater Co. v. American Economic Heater Co., 32 Fed. 737.]

2. The negotiations and conversations of a party charged with false and fraudulent representations allowed to be taken into consideration in order to determine the question of fraud.

3. The letter of a deponent having been offered in evidence, *held* that it was not admissible, except to contradict or qualify some of the statements made in his deposition.

4. Semble, where evidence is unimportant in its bearings, and unless clearly irrelevant, it is better to admit it at a trial, so as to avoid a motion for a new trial, in case of its rejection.

This was an action [by Uriel Crocker and others against William Lewis] on the case for an alleged fraud in the sale of a part of a township of land in the county of Kennebec, sold by the defendant to the plaintiffs. Plea, the general issue.

The declaration in substance stated that the said Lewis, at Portland, in the state of Maine, had contracted to purchase of one John Dunlap a part of a certain township of land, situated in the said state of Maine, to the amount of one half part thereof, and had contracted with the said John Dunlap to pay him therefor the sum of three dollars and thirty-seven cents per acre and no more, afterwards, to wit, on the eighteenth day of July, in the year of our Lord one thousand eight hundred and thirty-five, at Boston aforesaid, to wit, at said Bangor entered into and held with the said plaintiffs a conversation relative to the purchase of one third of said township, and with the fraudulent design and intention to induce the said plaintiffs to purchase and pay for at a large price, to wit, for the sum of five dollars and twenty-five cents per acre, one-third part of said township, then and there did wickedly, falsely, and fraudulently represent and declare to said plaintiffs, that he had contracted to purchase said township or a part thereof, and had given therefor the sum of five dollars and upwards per acre, and that said township was of great value, and that he the said Lewis did not wish to retain the whole of said purchase, and that he would sell and cause to be conveyed to the plaintiffs one

[1] [Reported by Charles Sumner, Esq.]

undivided third part of said township at the price aforesaid, to wit, for the sum of five dollars and twenty-five cents per acre, and did with the corrupt design aforesaid, and with the intent aforesaid, falsely and fraudulently further affirm to the plaintiffs and represent that he had explored said township, and that it would be for the plaintiffs a great bargain to purchase said one-third part of said township at the price aforesaid, to wit, five dollars and twenty-five cents, which was the same amount he, said Lewis, falsely and fraudulently affirmed and declared to the plaintiffs he had contracted to give therefor, and no more. And the plaintiffs aver, that, trusting to, and believing in, and relying on said false, fraudulent, and deceitful representations and declarations of the said Lewis as true, they did then and there contract with said Lewis to purchase one-third part of said township, at the price of five dollars and twenty-five cents per acre, amounting in all to the sum of twenty-nine thousand one hundred and forty-one dollars and fifty cents, and then and there in pursuance aforesaid and in fulfilment of said contract, into which the said plaintiffs were induced, by said false and fraudulent representations and declarations so as aforesaid made by said Lewis, to enter, they the said plaintiffs then and there paid to said Lewis the sum aforesaid. By means of which false and fraudulent misrepresentations and declarations so as aforesaid made by said Lewis to the plaintiffs, he the said Lewis has cheated and defrauded the said plaintiffs of a large sum of money, to wit, of the sum of eleven thousand one hundred and one dollars and fifty cents, being the difference between what he gave therefor and the sum of five dollars and twenty-five cents which by reason of said false and fraudulent misrepresentations and declarations so made as aforesaid, the plaintiffs were induced and persuaded to give therefor.

At the trial before Ware, District Judge, at the last May term, at Portland, a verdict was found for the plaintiffs. A motion was afterwards made by the defendant for a new trial; and which was now argued by Rogers for the new trial and by Deblois and Sprague against it. The questions argued respected the admission or rejection of certain evidence hereinafter stated; and it is not necessary therefore to report the other evidence in the cause.

At the trial, the plaintiffs offered in evidence the deposition of Gordon Winslow, of which the following is the most important part: "About the fifth day of May, 1835, I was recommended to call on Mr. William Lewis, the defendant, in relation to timber lands in Maine, as a suitable person to give me information on the subject. I asked him about a certain tract of land which I had in view and he said he knew nothing of that from his own knowledge, and then on the map he pointed to the Bow township and stated he had it in view or had the refusal of it, I am not positive which, and if he could get enough to join him he should like to get the whole of it, as he thought it a great bargain, or words to that effect; he said he was not able to take the whole of it alone, he thought it the best bargain in the market. He said, if I was willing to take a portion of it, I might have it at the same price at which he obtained it. This was the substance of the conversation at that time. I gave no encouragement that I should take any part. I next met Mr. Lewis at Bangor about the 15th day of June, 1835. There I had some conversation with him in regard to the Bow township, and concluded to go on with him and see it. He gave me to understand that he had the refusal of it, in some way. We were on the township one night and one day, together with a person employed to explore it. I agreed to take a quarter of the township at six dollars an acre, that being the price which he gave me to understand he paid for it. This agreement was made at the township. We returned to Bangor, and bonds were made out, one bond for a deed of one quarter, and one bond for a quarter which I was at liberty to decline if I was inclined. This was about the 22d day of June. On this day I gave a note at fifty days for the first payment of one quarter of the township. Mr. Winslow here exhibited the note to the magistrate. I objected to paying interest on the note, but Mr. Lewis said he was paying interest and that I ought to pay interest, as I was to have the lands on the same terms he was; and the note was accordingly made with interest. I left Bangor soon after, expecting to dispose of the other bond which I had to a friend in New York, but he did not take it. On my return from New York I believe I met Messrs. Crocker and Brewster at Mr. Lewis's office in Boston, and offered them the bond at the same price at which I had it, they paying one half of my expenses in travelling and exploring; they did take it. Some time after Mr. Crocker mentioned to me that he understood that Mr. Lewis had bought the land at a less price than six dollars an acre. I had represented to them that I had obtained the bond on the same terms that Mr. Lewis had the land, as Mr. Lewis had previously stated to me. I told Mr. Crocker that that must be a mistake, and that I would see Mr. Lewis immediately. I went to his office and saw him, and stated to him what Mr. Crocker had said, and wished him to meet with Mr. Crocker and myself and talk the business over, that there might be a fair and full understanding. We met accordingly, I believe at Mr. Lewis's. The result of that conversation was that Mr. Lewis represented to us that the land cost him between five dollars and five dollars and a quarter an acre. That since his first representation he had got a deduction on the land. I told Mr. Lewis that for my part, if the land cost him over five dollars and within a fraction of five dollars and a quarter, I

should be willing to take a portion at five and a quarter. Mr. Lewis said if I would take one third and Mr. Crocker one third he would put it to us on those conditions in order that it might be in as few hands as possible. To this I agreed and wrote a memorandum of the agreement which was 'that we hereby agree to purchase each one third of the Bow township of Mr. William Lewis at five dollars and a quarter per acre.' I signed this the same evening. Mr. Crocker wished to see his partner before signing it, and as I have been told, he signed it the next morning. Mr. Crocker said, he was entirely unacquainted with timber land, and that he relied upon the judgment of Mr. Lewis and those who had explored the township. I distinctly understood from Mr. Crocker he expected to purchase the land on the same terms Mr. Lewis had, and that he did purchase it on those terms. At the same time I drew up the above memorandum I also drew up another paper in which Mr. Lewis agreed to sell to Crocker and Brewster and myself at five dollars and a quarter an acre, one third each of the Bow township. That was signed by Mr. Lewis the same night. Mr. Lewis, in the course of the conversation, stated that he had been put to more trouble than we, and that he ought to make a little something, and we accordingly threw in the fraction, giving him the full sum of five dollars and a quarter per acre. I understood Mr. Lewis that he should make little or nothing. This was about the middle of July. Mr. Crocker and myself agreed to meet Mr. Lewis at Skowhegan Falls in Maine. We went with Mr. Lewis to the township and made a thorough exploration of it. We were there about the 20th of July. We met in Portland afterwards, and the writings were drawn. My deed was from Henry Ilsley of one third. I was informed by Mr. Lewis that Mr. Crocker's deed was from Mr. Dunlap. I learned that there was some difference between the dates and times of payment in Mr. Crocker's notes and mine, and when I spoke to Mr. Lewis about it he said it was because Mr. Dunlap had consented to it. My notes were dated the 22d day of June, agreeably to the first bond and to the agreement which was written at Mr. Lewis's counting-room."

The defendant objected to so much of this deposition as stated the conversations and negotiations between Winslow and Lewis on the 5th of May and the 15th of June, 1835. antecedent to the final agreement between Winslow and the plaintiffs, and Lewis, in which the plaintiffs were to purchase one third and Winslow one third of the land. The court overruled the objection and the whole deposition was read to the jury. Afterwards, in the progress of the trial, the defendant, Lewis, offered in evidence a letter from Winslow to him, dated Milford, July 5, 1836, in order to affect the credibility of the deposition of Winslow. The letter was as follows:—

"Dear Sir:—I wish to inquire of you concerning a point upon which Mr. Crocker and myself do not now entertain the same impressions. I will put my inquiries in a direct form, that they may be the better understood and answered without much trouble to yourself. 1. Did not Mr. Crocker, yourself, and myself, agree together to give, and did we not give to General Kinsman a verbal refusal of a certain portion of our parts of the Bow township at six dollars per acre, provided he should meet us at Portland, prepared to make payment at the time agreed upon? 2. If he had the land, was he not to return the money paid to him for exploring? 3. When we bonded the township at eight dollars per acre on our passage to Portland, did not Mr. Crocker very frequently and in strong terms express his regrets that we had given the general any encouragement to let him have a portion at six dollars? 4. Did he not say many times in your hearing that he hoped the general would not be able to get the money so as to be in Portland in season to claim his promise, as he had rather retain the land than dispose of it at six dollars? 5. Did not Mr. C. hasten to have the writing drawn within the given time and executed so that he might be off, saying the general might come afterward and claim his promised portion at six dollars? 6. Finally, was not six dollars per acre the price and the only price which Mr. Crocker, yourself and myself agreed upon, at which we were to let the general have a portion? I know not how it happens, but Mr. Crocker now talks on this subject very differently from what he ever did in my hearing when the agreement was made. If I rightly understood him—seems to think you had all to say and do and he did and said nothing himself, whereas if I rightly remember, he talked as fast and said as much as any one. He denies that he ever expected to receive six dollars per acre of the general if he met us at Portland, as per agreement. Doubtless he has reasons for rendering such testimony just at this time. I do not know, however, what they are. If you will express to me your views on this subject in answer to these questions, you will confer a favor on, yours, &c. [Signed] Gordon Winslow.

"P. S. Please send your reply by the first mail, if convenient. Yours, &c. G. W."

The plaintiffs objected to the admission of this letter; and it was rejected by the court. The ruling of the court upon these points constituted the grounds for a new trial upon which the argument was had.

STORY, Circuit Justice. Two points have been argued upon the motion for a new trial. The first respects the admission of the parts of the deposition of Gordon Winslow, to go as evidence to the jury, which were objected to by the defendant. The second respects the rejection of the letter of the same witness, which, it is supposed, had a

tendency to qualify the statements in the deposition. Upon the first point there does not seem to me to be any difficulty whatsoever. The real question between the parties at the trial was whether there had been any false and fraudulent representation by the defendant, that he had given five dollars an acre and upwards for the lands sold to the plaintiffs. Now, it is apparent from the whole evidence in the present case, that the representations made by Lewis in his conversations with Winslow were communicated by the latter to Crocker (the plaintiff) and constituted the ground upon which the plaintiff entered into the subsequent contract with Lewis. No principle seems better founded than this, that if a party makes a representation to one person in respect to a sale, and that representation constitutes the basis of a subsequent sale made, by the party so making the representation, to the party to whom it is communicated by the third person, it is treated in the same way as if directly made by the vendor himself. It is by no means true that representations made to third persons are to be treated as res inter alios acta, if those representations have been communicated and acted upon by another person, who places entire confidence in them. The case of Barden v. Keverberg, 2 Mees. & W. 63, 64, where the court thought that representations made by a married woman to third persons, that she was a feme sole might, if communicated to the plaintiff by such third persons, entitle him to the same benefit as if made to himself.

But in the present case, it is not necessary to rely on this ground; because, it is clear that the original contract made between Lewis and Winslow, and that made between the latter and the plaintiffs, for the purchase of the land, were for a different proportion from that, which was finally agreed upon by all the parties; and the conversations respecting the purchase between Lewis and Winslow were proper to explain the nature and character and circumstances under which the new contract, substituted for the original contracts between all the parties, and with the consent of all, was entered into. By the original contract Winslow with Lewis was to have a half, or a quarter, of the land, at his election. By the original contract of Winslow with the plaintiffs they were to take a quarter of the purchase. By the substituted contract, Winslow was to take one third, and the plaintiffs one third. And it seems to me that it was proper for the jury to take all the negotiations of the parties into consideration in order to determine whether the defendant had been guilty of the false and fraudulent representation complained of. Indeed, in a case of this sort, it may fairly be presumed that, if Lewis falsely and fraudulently misrepresented to Winslow the sum which he had given or was to give for the land, the presumption would be strong, that he would not hesitate to make a like misrepresentation to the plaintiffs. In this view the evidence was properly admissible, as corroborative evidence. But it appears to me, that there is very strong reason to believe, that Lewis, at the time when the final contract was made with the plaintiffs, had full knowledge that his prior conversations with Winslow had been communicated to the plaintiffs, and constituted the basis of their arrangements with Winslow. If so, there is the best reason why those conversations should be given in evidence to the jury. And under all the circumstances, it seems to me that it was fit for the jury to have the whole evidence before them, so that they might pass their judgment upon this very important fact.

As to the second point, the rejection of the letter of Winslow, it is very clear that it was not admissible, except for the purpose of contradicting or qualifying some of the statements made by Winslow in his deposition, and thus affecting the credibility of his testimony. For any other purposes, or to establish any other independent facts, it would not be admissible, as it would be mere hearsay, and not under oath. Now it is not pretended that there is any contradiction between that letter and Winslow's deposition. Is there, then, in it any qualification of his testimony which would justly affect his credibility? It is said, that the contents of the letter have a direct bearing on the answers of Winslow to the sixth and seventh cross interrogatories of the defendant, and show the influences under which Winslow gave his testimony. The sixth cross interrogatory (which was objected to by the plaintiffs) is, "Was not Mr. Crocker offered six dollars an acre for a part of his purchase by Mr. Kinsman, one of the explorers?" The answer is, "Mr. Kinsman was desirous of purchasing a quarter of the township, and if he took it the price was to be six dollars an acre. And it was agreed between Mr. Lewis, Mr. Crocker, and myself, that we should each let him have one twelfth of the whole, which would make a quarter. He was to have it, if he met us at Portland on a day appointed. He did not come to Portland, nor did he take the land." The seventh cross interrogatory is, "Did not Mr. Crocker say on our way to Portland, that he hoped Mr. Kinsman would not get to Portland in season to get the land of us, as he would rather keep the land than sell it at six dollars?" The answer is, "I understood him to say so. We all felt very well satsified with the land at that time. We had bonded it at eight dollars, as abovementioned."

Now, it seems to me, that there is not the slightest qualification of the terms of these answers in any part of the letter written on the fifth of July, 1836. On the contrary the language of the letter entirely corroborates these answers. By "the general," in this letter it is admitted that Mr. Kinsman is meant; so that it is palpable, that the statement,

in the answers that Mr. Crocker was well satisfied with his bargain, and did not wish to sell to Kinsman at six dollars, is fully confirmed. In truth the letter contains no direct averment on the subject; but it only interrogates Lewis, as to certain supposed facts, which, from the manner in which the interrogatories are framed, taken in connection with the situation of the writer, it may fairly be presumed he believed to exist. If I had sat at the trial, it is not improbable that I should have leaned in favor of its admission, not because I should have thought that it shook the credibility of Winslow's testimony, for I think it corroborates it; but because where evidence seems unimportant in its bearings my inclination rather is to admit it, unless clearly irrelevant, in order to avoid a motion for a new trial, in case of its rejection. But, called upon at this time to consider its admissibility upon strict legal principles, my judgment is that it was rightly rejected.

Case No. 3,400.

CROCKER et al. v. REDFIELD.

[4 Blatchf. 378;[1] 18 How. Pr. 85.]

Circuit Court, S. D. New York. Oct. Term, 1859.

CUSTOMS DUTIES—"COINS"—RECOVERY BACK—PROTEST—VOLUNTARY PAYMENT.

1. Chinese coin, known in China as "copper cash," composed of copper and lead, and copper and nickel, and used in China as money by count, is not entitled to be imported into this country free of duty, under Schedule I of the tariff act of July 30, 1846 (9 Stat. 49), as "coins, gold, silver and copper," unless it is imported to be used as a part of the currency of this country, or is, at the time of its importation, a part of such currency.

2. Otherwise, it is chargeable with a duty of five per cent., under Schedule H of said act, as "copper, when old, and fit only to be re-manufactured."

3. Where money is paid for duties on imports, before a protest against such payment is made, the duties cannot be recovered back.

4. And, where money is deposited with a collector of customs, wherewith to pay the duties when they shall be ascertained, and the duties are afterwards ascertained, and then a protest is made against the payment, the protest is too late, the money not having been paid compulsorily, in order to get possession of the goods.

This was an action [by Eben B. Crocker and others] against [Heman J. Redfield], the collector of the port of New York, to recover alleged excesses of duties paid under protest, on a shipment of Chinese coin, and on a shipment of jute [in 1854, 1855].[2]

Almon W. Griswold, for plaintiffs.

Charles H. Hunt, Asst. Dist. Atty., for defendant.

NELSON, Circuit Justice. The coin shipped was one thousand boxes, and is described in the invoices as "copper cash." It appears, from the evidence in the case, that this description of coin, at the time of the importation from China, passed in that country by count as money, and was known by the designation of "copper cash," being the only coin in China; and that the pieces were composed of 60 per cent. to 70 per cent. of copper, and 30 per cent. to 40 per cent. of lead or nickel. The plaintiffs claim that the article was entitled to be imported into this country free of duty, under Schedule I of the tariff act of July 30, 1846 (9 Stat. 49), within the words "coins, gold, silver and copper." The collector claims that it fell under the description in Schedule H, "copper when old and fit only to be re-manufactured," and was chargeable with a duty of five per cent.

The purpose for which the coin was imported is nowhere stated in the case. Some light might, I think, have been thrown upon the question, if evidence had been given on this point; for, I am inclined to think that the clause in the free list has reference to coins that are imported into the country for circulation as money. Inasmuch as no such purpose appears in respect to the coin in question, and no inference can be drawn to this effect from the description or designation of the article, the better opinion is, that it has been properly arranged under Schedule H, within the terms above referred to. At least, in my view of the clause in the free list, I am of opinion, that the article in question cannot be brought within it, without first proving that it was imported to be used as part of the currency of the country, or that it was, at the time of the importation, a part of such currency.

As it respects the excess of duty claimed to be recovered upon the shipment of jute, it is a sufficient answer to say that the protest is defective. It appears, on the face of it, that the money was paid, and in the hands of the collector, before the protest was made against the payment of the duty and the penalty. There is no date to it, but the inference is unavoidable from the facts stated in it. Indeed, a balance is still in the hands of the collector, of $92.85. It is said, that the money was only deposited with the collector as a security for the payment of the duties when ascertained, and that the application did not take place till the ascertainment of the duties. Admitting this to be so, I do not agree to the consequence claimed. The money deposited was to be applied by the collector to the duties, and it cannot be said, after this, that it was paid compulsorily, in order to get possession of the goods. The protest, after the duties were ascertained, came too late.

I do not think that the suit should be sustained for the $92.85, as that sum was tendered to the plaintiffs before suit brought. They knew, at all times after the ascertainment of the duties, that that sum was ready for them. Judgment for defendant.

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

[2] [From 18 How. Pr. 85.]

CROCKER (RINGGOLD v.). See Case No. 11,843.

CROCKER (RUTLAND & B. R. CO. v.). See Case No. 12,176.

Case No. 3,401.

CROCKET v. BROWER.

[10 Hunt, Mer. Mag. 378.]

District Court, D. New York. Jan. Term, 1843.

STOWAGE—EVIDENCE.

[1. Conflicting certificates of surveys by port-wardens and marine surveyors appointed by the chamber of commerce and board of underwriters, are not within themselves evidence as to the manner in which a cargo was stowed. That must be proved by witnesses whose testimony is entitled to such weight as their knowledge, character, and experience deserve, and no more.]

[2. It is bad stowage to place hogsheads of sugar on barrels of whiskey, without dunnage and beds at the bottom.]

This was a suit by [Jonathan Crocket, Jr.] the master against [John H. Brower] the consignee for freight of goods from New Orleans to New York. The usual bills of lading were signed for the goods, which were found to be damaged on their arrival here. There were two surveys, one on the part of the master, by the port-wardens, which certified that the goods were well stowed, and injured by the perils of the sea; the other on the part of the consignee, by the marine surveyors appointed by the chamber of commerce and board of underwriters, which certified that the goods were badly and improperly stowed. The certificates of surveyors were objected to as evidence, and the court decided they were not evidence in themselves; that the state of the cargo must be proved, like other facts, by witnesses; and that the persons making the survey would be entitled to such weight as their knowledge, character, and experience deserved, and no more.

Moffat and Kittle, two of the port-wardens, testified they made a survey of the whiskey in question, and found it well stowed, so far as they examined; that they saw no sugar stowed on the whiskey. Hogsheads of sugar on barrels of whiskey would be bad stowage. Captains Drinkwater and Hopkins, shipmasters, testified that they would stow sugar on whiskey; considered it good stowage. Barrels of whiskey are stronger than hogsheads of sugar. Messrs. Candler and Tinkham, two of the marine surveyors, testified that they made a survey of the whiskey, and the same was very badly stowed. Hogsheads of sugar were stowed on barrels of whiskey, without being dunnaged and bedded; the barrels were pressed down or crushed, so that the liquor ran out. Hogsheads on barrels is bad stowage. Messrs. Spear, Kennedy, Bergeny, coopers, testified that they coopered twenty nine casks, which were in very bad order. The bilges were flattened from bad stowage, so as to leak; they were well made casks; appeared to have been stowed under sugar. Mr. Dick, a carman, saw the whiskey in the vessel and on the dock; sugar, lard, and lead were stowed atop of it; the bilges were very much flattened. The barrels had no dunnage under them at all. Mr. Dunlap, a clerk of consignee, testified the casks were so much flattened that you could run your hand under the quarter hoops. The whiskey which the coopers worked at was the lot in question. The whiskey was stowed with heavy weight on it. Mr. Waring, inspector of the Atlantic Company, Mr. Ricketson, inspector of the Sun Company, and Mr. Thompson, inspector of the Alliance, testified that they had had thirty, thirty five, and forty years' experience; such stowage is decidedly bad. Hogsheads on barrels, and barrels on the bottom, without beds and dunnage, is very bad stowage.

THE COURT. The point submitted by the parties is, whether the goods were properly stowed. It appears to the court that the goods were negligently and insufficiently stowed in the vessel, and that the libelant sustained damage in the goods by bad stowage, and is not, accordingly, entitled to recover freight. The libel must be dismissed with costs.

CROCKET (The ISAAC NEWTON v.). See Case No. 7,092.

Case No. 3,402.

In re CROCKETT et al.

[2 Ben. 514;[1] 2 N. B. R. 208 (Quarto, 75); 2 Am. Law T. Rep. Bankr. 21.]

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

BANKRUPTCY—WHAT ARE COPARTNERSHIP ASSETS—DISSOLUTION.

1. A formal dissolution of a partnership will not prevent the operation of the bankruptcy act upon the partners, so long as there are partnership debts and partnership assets existing.

[Cited in Re Williams, Case No. 17,703; Re Redmond, Id. 11,632.]

2. C. & S. applied for an adjudication of bankruptcy against themselves and J. as partners. The partnership did not exist at the time the petition was filed. There were partnership debts, but no partnership assets except a claim against B. & Co., for damages arising out of their fraudulent recommendation of a person to the firm, in consequence of which the firm intrusted property to him, which he failed to account for. *Held*, that such a claim was not within the description, in the fourteenth section of the act, of the assets which pass to the assignee in bankruptcy, and that the petition as to J. must be dismissed with costs.

[Cited in Re Cook, Case No. 3,150; Hopkins v. Carpenter, Id. 6,686; Trustees Mut. Building Fund v. Bosseiux, 3 Fed. 825;

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

Tufts v. Matthews, 10 Fed. 611. Applied in Re Brick, 4 Fed. 807.]

[In bankruptcy. In the matter of the petition of Joseph D. Crockett and Christian F. Schramm for an adjudication of bankruptcy of themselves and James C. Jewett, as their copartner.]

C. N. Black, for petitioners.
Dan Marvin, for Jewett.

BLATCHFORD, District Judge. The petitioners set forth in their petition that they and one James C. Jewett are copartners; that the members of the copartnership are unable to pay their debts in full; and that Jewett refuses to join in the petition. The prayer of the petition is that the petitioners and Jewett may be adjudged bankrupts. There are schedules annexed setting forth debts and assets of the copartnership. The answer of Jewett to the petition avers that he has not been a partner with Crockett since January 1st, 1867; that Schramm is not and never was a copartner with Jewett, or with Jewett and Crockett; and that there was not, when the petition was filed, any property in existence which belonged to Jewett, in connection with the petitioners, or either of them, as copartners, or otherwise. The answer also denies specifically the existence of the assets named in the petition as assets of the copartnership. On the issue thus raised, testimony has been taken.

The thirty-sixth section of the bankruptcy act [of 1867 (14 Stat. 534)] provides that two or more persons, "who are partners in trade," may be adjudged bankrupt on the petition of the partners or of any one of them. The language of the fourteenth section of the bankruptcy act of 1841 [5 Stat. 448], in this particular, was substantially the same as is that of the thirty-sixth section of the present act. Such language can only apply to a subsisting copartnership. In re Hartz [Case No. 6,174]. But a mere formal dissolution of the copartnership, so long as there are partnership debts and partnership assets existing, the partners being joint debtors and the assets being joint property, will not prevent the operation of the act upon the partners, either in a voluntary or an involuntary case. This has been so held under a provision of the Massachusetts insolvent law, similar in language to that found in the thirty-sixth section of the present bankruptcy act. McDaniel v. King, 5 Cush. 469, 476. Where there are assets as well as debts of the copartnership remaining, the copartnership may properly be considered as subsisting quoad its creditors, and for the purpose of applying its joint stock and property to the payment of its creditors, there is every reason for such a construction of the act, and no reason for a different one.

In the present case, I am satisfied, from the evidence, that there was no partnership subsisting between the petitioners and Jewett when the petition was filed. As there were debts of the former copartnership, the only remaining question is, whether, at the time the petition was filed, there were any assets of the copartnership in existence. The only copartnership assets mentioned in the schedule to the petition are set forth thus: "Merchandise in the cities of Hongkong and Shanghai, China, and in Matamoros, Mexico; policies of insurance made by the following companies: Columbian Insurance Co., Great Western Insurance Co., Sun Mutual Insurance Co.; claims against insurance companies heretofore named, of no fixed value; claim against Black, Brothers & Co. for damages on letter of recommendation, no fixed value—above claims now in suit; claim against W. C. Pickersgill & Co., now in suit." The substance of the testimony of the petitioners, as to these claims, is that they have never been disposed of to their knowledge. But it is shown that neither one of the petitioners had anything but a general knowledge as to these claims, and that Jewett had specific knowledge in regard to them. Jewett shows satisfactorily that no merchandise, in China or Mexico, belonging to himself, or either of the petitioners, or to the copartnership, existed when the petition was filed; and that a claim in favor of the copartnership against one, and only one, of the three insurance companies named, and a claim against Pickersgill & Co., once existed, but that those claims were transferred long before the filing of the petition. The claim against Black, Brothers & Co. is shown to be a claim in suit, arising from the fact that Black, Brothers & Co. recommended a certain person to the copartnership as worthy of trust, and that the copartnership, on such recommendation, entrusted merchandise to such person for sale, and he disposed of it, and did not account for the proceeds. The suit is brought for fraudulently and deceitfully recommending the person as worthy of trust and confidence. Such a claim is not within the description, in the fourteenth section of the act, of the assets which pass to the assignee in bankruptcy. It is not a debt, or a security for a debt, or a right in equity, or a chose in action, or a right of action for property. Nor is it a right of action for a cause of action arising from contract. It is an action of tort for the fraud and deceit, and not an action on a contract.

The petition must be dismissed, as to Jewett, with costs.

CROCKETT (GURNEY v.). See Case No. 5,874.

Case No. 3,402a.

CROCKETT v. RILEY.

[Betts, Scr. Bk. 141.]

District Court, S. D. New York. July 25, 1849.

COLLISION—STEAM AND SAIL—RULES OF NAVIGATION.

[1. Where a schooner, exercising a strict right to hold her course, refused to change though

hailed to do so, and thus avoid an approaching steamer, the master of which had misjudged the schooner's speed or his means of avoiding her, and a collision resulted, the steamer was *held* not liable.]

[2. The schooner had no right to incur the hazard of a collision by pertinaciously adhering to a strict rule of navigation.]

[3. The master of the steamer was wrong in placing himself in the situation he did, and in trusting to slender chances to avoid the schooner, and would be liable, but for the unreasonable refusal of the schooner to give way.]

[4. The owners of the steamer are not entitled to costs.]

[In admiralty. Libel by Levi B. Crockett against Thomas Riley for damages sustained by a collision.]

PER CURIAM. The whole evidence shows that the respondent moved from the piers with his steamboat and a barge in tow, when the libellant's schooner was opposite him, or nearly so, going up the East river against an ebb tide. He misjudged the speed of the schooner or his own means of avoiding her, and by getting under way at that moment was brought into such proximity to the schooner that a collision became inevitable, unless the schooner gave way for him. The weight of reliable evidence is, that the schooner might have kept away, without prejudice to herself, enough to leave a free passage to the steamer. She was hailed to do so, but her pilot refused and she held on her course and the steamer's barge was brought up against her. The schooner had but light sail on, and the tide was rapid, yet her headway was sufficient to allow the manoeuvre, and thus have escaped damage herself and prevented injury to the steamer. Such at least is the effect of the testimony. Those on board the schooner thought otherwise, and refused to go off their course. The schooner was in the exercise of her strict right in holding her course, but the maritime law does not hang on a rigid observance of nautical rules. They are a general guide, not an inflexible law. No vessel is permitted unnecessarily to incur the hazard of a collision by pertinaciously adhering to a strict rule of navigation.

An action for damages, cannot in my opinion be maintained under the facts in proof; but the respondent is not entitled to costs. His conduct was imprudent and wrong in leaving the slip under the circumstances, and trusting to a slender chance of avoiding the schooner. All the damages, for that reason, could be imposed on him, but for the unreasonable refusal of the libellant to give way and thus secure himself from injury. As it is, costs are denied him. Decree accordingly.

Case No. 3,403.

CROFFORD v. MORGAN.

[Cited in McAfee v. Crofford, 13 How. (54 U. S.) 454. Nowhere reported; opinion was rendered in 1841, and is believed to have been destroyed during the Civil War.]

Case No. 3,404.

In re CROFT et al.

[8 Biss. 188; 17 N. B. R. 324; 10 Chi. Leg. News, 204; 6 Am. Law Rec. 597; 6 N. Y. Wkly. Dig. 218.][1]

District Court, N. D. Illinois. March, 1878.

VOLUNTARY ASSIGNMENT AN ACT OF BANKRUPTCY — INDIVIDUAL EXEMPTIONS FROM PARTNERSHIP ASSETS — ASSIGNMENT IN FRAUD OF CREDITORS —DISCHARGE IN BANKRUPTCY.

1. The making of a voluntary general assignment by a debtor is an act of bankruptcy of itself and must be presumed to have been made in contemplation of bankruptcy.

2. Partnership assets are a trust fund for the payment of the creditors of the firm, and no exemptions can be set apart from them to the individual partners, until all the partnership debts are paid.

[Cited in Re Corbett, Case No. 3,220.]

3. Where prior to the filing of a voluntary petition in bankruptcy, the partners made a general assignment of all their assets, and the assignee set apart a portion of these as exemptions to one of the partners, it was *held*, that the assignment was made for the purpose of preventing some portion of the assets of the firm being distributed to satisfy firm debts, and, *held*, further, that the court under such circumstances would not grant a discharge.

In bankruptcy.

Becker & Dale, for objecting creditors.

BLODGETT, District Judge. This case was submitted to the court and tried upon evidence tending to sustain the following specifications: First—That the bankrupts are voluntary bankrupts. Second—That the bankrupts had within two months from the filing of their voluntary petition in bankruptcy, made a general assignment of all their assets to one Howe, in contemplation of bankruptcy, with intent to prevent their property from coming into the hands of their assignee, or being distributed under the bankrupt law.

The undisputed facts in this case are: That about November, 1871, the bankrupts entered into partnership in the merchant tailoring business in this city; that they then had very little or no capital. Both were young men, and Frederick W. Croft only was married. In the spring of 1871, he had purchased a house and lot in the south part of the city for the sum of $3,228, $200 of which was paid down, and the balance to be paid by monthly payments of $32.28 each, which would make the payments run about seven years from the time the purchase was made. These monthly payments have been regularly made up to the first of last January, and mainly made by Mr. Croft, although his wife has kept boarders and earned money in that way, and earned some money by her needle, to the amount of five or six hundred dollars, which, if not directly applied to the making of these payments, yet aided in keeping them up.

[1] [Reported by Josiah H. Bissell, Esq., and here reprinted by permission. 6 N. Y. Wkly. Dig. 218, contains only a partial report.]

During the same time, that is between the time the parties commenced business in the fall of 1871, and the time of their bankruptcy, Mr. Frederick W. Croft had furnished his house with furniture to the value of four or five hundred dollars. All the payments for the house, or to apply on the house, were taken out of the partnership business, as well as the money to buy the furniture, with the exception, perhaps, of what was earned by Mrs. Croft [or what is said to have been earned by her].[2]

On the 12th of February, 1876, the bankrupts made a voluntary assignment to one W. E. Howe, of all their partnership and individual assets, "except what were exempt under the laws of the state of Illinois," in trust, to be converted into money, and the proceeds to be applied, first, to the payment of the expense of the assignment, and second, to be ratably distributed to the creditors of the bankrupts, or either of them. At the time of the assignment the firm owed about $4,200 to their commercial creditors. The nominal value of their assets turned over to the voluntary assignee, was a little over $3,000.

Immediately after the making of the assignment, Frederick W. Croft received from the assignee at least one hundred dollars' worth of cloth, and a sewing machine, together with the fixtures in the copartnership store, with the tools used in the business—the shears, cutting table, etc., as exemptions. These, he has testified, he gave to his wife, and with the property so withdrawn from the stock as exemptions, and the sum of $200 borrowed from a brother of the bankrupts, F. W. Croft resumed business in his wife's name and has carried it on up to this time. It does not appear that E. L. Croft received any exemptions from the firm assets, he being at that time an unmarried man.

On the 11th of April, 1876, this voluntary petition was filed. In the schedule of assets no mention is made of the cloth, fixtures, and tools withdrawn from the copartnership assets as exemptions to F. W. Croft, nor of the household furniture of F. W. Croft.

The question occurs then, was this assignment to Howe made in contemplation of bankruptcy? It is admitted that the bankrupts were insolvent and knew themselves to be so at the time this assignment was made. Indeed, this admission is made upon the face of the assignment itself. And as early as the 20th of January preceding this assignment, the bankrupts had addressed a circular letter to each of their creditors informing them of the fact that they had taken an account of stock and liabilities, and found themselves unable to pay over forty cents on the dollar.

Frederick W. Croft, who has been sworn, testifies that he did not contemplate bankruptcy at this time; but he must be held to have known that the act of making this assignment was in itself an act of bankruptcy. The courts have so held, especially since the case of Globe Ins. Co. v. Cleveland Ins. Co. [Case No. 5,486], decided by his honor, Judge Emmons, in the northern district of Ohio, in 1875. That case has been so generally followed, and the courts have acted upon it so uniformly, that I think it may no longer be considered as an open question, that the making of a voluntary general assignment by a debtor is of itself an act of bankruptcy.

The firm was insolvent at that time, and, by the making of the assignment, they put it in the power of any of their creditors to put them into bankruptcy for this act. A man must be held to have contemplated the natural result and legal consequences of his act; he must be held to have known that his creditors could put him into bankruptcy for making this assignment, although he may not be presumed to know that they would so act.

So that I think from the admitted facts in the case, the assignment must be said to have been made in the contemplation of bankruptcy.

But to prevent a discharge, the assignment must have been made, not only in contemplation of bankruptcy, but it must be made with intent to prefer some creditor, or for the purpose of preventing the property from coming into the hands of his assignee in bankruptcy, or from being distributed in satisfaction of his debts. Does the proof show such intention?

It appears that immediately after the execution of the assignment, within a day or two, the voluntary assignee turned over to F. W. Croft, as a matter of course and without question, the fixtures in the store, the tools of the trade, including a sewing machine, and at least a hundred dollars' worth of cloth, from the partnership stock, with which F. W. Croft immediately resumed business in another locality. This conduct of the parties, simultaneously with the making of the assignment, is sufficient proof to me that such a course was intended at the time the assignment was made. In other words, it was expected that, as part of the transaction, this portion of the partnership assets was to be withdrawn from the hands of the assignee, and go into the control of F. W. Croft, and they were so withdrawn.

The amount so withdrawn was not large, but it was probably all that he could have taken under the bankrupt law, if the property had been his individual property. It must be borne in mind that this Frederick W. Croft had his homestead in the name of his wife; that it had been paid for out of the partnership earnings; he had his house furnished, which is proved to have been paid for out of the partnership earnings, and he then took from the partnership assets the amount he claimed as exemptions, and which was set apart and turned over to him by the

[2] [From 17 N. B. R. 324.]

voluntary assignee. But this court has uniformly held that exemptions cannot be taken from copartnership assets; that the partnership assets are a trust fund for the payment of the creditors of the firm, and that no exemptions can be set apart from them to the individual partners, until all the partnership debts are paid. This has been the rule of this court ever since I have been upon the bench, and I think ever since the bankrupt law was passed.

Upon the admitted facts, then, the conclusion is inevitable that this assignment was made with the intention and expectation that under its operation these exemptions, as they are called, would be withdrawn from the partnership funds, and applied to the benefit of one of the partners, and this intention was carried out.

I must, therefore, hold that this assignment was made in contemplation of bankruptcy, and for the purpose of preventing the property of the firm, or some part of it, from coming into the hands of the assignee in bankruptcy, to be distributed in satisfaction of the debts of the firm. If F. W. Croft had, on filing his petition in bankruptcy, returned these assets to the voluntary assignee, it might have prevented the conclusion to which I have arrived—it might have rebutted the presumption that the intention of the voluntary assignment was to withdraw part of the partnership assets, and prevent them from being applied in satisfaction of the partnership debts.

I conclude, therefore, that this voluntary assignment, and the conduct of the parties under it, makes it incumbent on the court to withhold the discharge.

CROGHAN (ALLEN v.). See Case No. 220.

Case No. 3,405.

In re CROMIE.

[2 Biss. 160;[1] 1 Chi. Leg. News, 361.]

Circuit Court, N. D. Illinois. July Term, 1869.

REMOVAL—MANDAMUS TO STATE COURT.

1. The U. S. circuit court has no power to issue a writ of mandamus to compel the removal of a cause from a state court.

2. The act of July 27th, 1866 (14 Stat. 306), made no change in this respect.

3. The statute seems to contemplate some judicial action on the part of the state court.

This was a motion by Charles and Amelia Cromie, defendants in a suit pending in the circuit court of Lee county, for a writ of mandamus against the state court to compel a removal of the cause into this court.

John J. McKinnon, for plaintiffs.

Ustis & Barge, for defendants.

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

DRUMMOND, District Judge. The decision of the motion for a mandamus, on the application of Charles and Amelia Cromie, was postponed for the purpose of enabling me to look into the law of July 27, 1866, to see how far the judiciary act of 1789 [1 Stat. 73] has been modified. I have since examined the law of 1866, and am satisfied that, so far as this motion is concerned, no change has been made by that act in the law of 1789.

I had occasion, as was intimated the other day, in the case of Hough and others against the Western Transportation Company [Case No. 6,724], decided in January, 1864, to examine the question as to the authority of this court, under the act of 1789, to issue a mandamus to a state court, compelling the latter to remove a cause to this court, and came to the conclusion that the authority did not exist, and for that reason declined the writ then; and I shall now, for the reasons contained in the opinion then given, decline to issue a writ in this case.

The material change made in the judiciary act by the act of July 27, 1866, consists in the power of removal from the state to the federal court given by the last act to some of the parties, provided the case can proceed in the federal court without the presence of all the parties to the suit, and whereas, by the old law the application was to be made at the time of entering appearance, the law of 1866 authorizes the removal at any time before the trial or final hearing of the cause. The language of the act of 1866 is substantially the same as that of 1789, namely: "And it shall be thereupon the duty of the state court to accept the surety, and proceed no further in the cause as against the defendant so applying for its removal." I do not find in this law, as is the case in some of the recent statutes concerning removals from state courts of cases affecting the revenue, a provision authorizing the federal court to proceed, irrespective of the action of the state court, with the cause. But the act of 1866, like the act of 1789, seems to imply, in order that the removal shall be complete, some judicial action of the state court. And when the cause is removed in the manner prescribed, it provides that "the cause shall there proceed in the same manner as if it had been brought there by original process against the defendant who shall have filed a petition for its removal as above provided," the language being substantially the same as that contained in the 12th section of the act of 1789: "And, the said copies being entered as aforesaid in such court of the United States, the cause shall there proceed in the same manner as if it had been brought there by original process."

I am not aware that the question has ever been decided as to what would be the effect of a compliance with the provisions of law for the removal of the cause from a state court, and of its refusal to make the neces-

sary orders, if the parties asking the removal should file copies of the papers in the federal court, with a view of giving the latter jurisdiction of the cause. For a discussion of this question, consult Akerly v. Vilas [Case No. 119]. The cases that have been decided under the law of 1789, where there has been a refusal on the part of the state court to remove the cause, have generally been decided by the supreme court of the United States so that the case has proceeded alone in the state court, and not at the same time in the state and in the federal courts. There would seem to be something incongruous in two suits, between the same parties, and referring to the same subject matter, proceeding at the same time in a state and in a federal court, although the statute of July 27, 1866, seems to contemplate that, as to the parties to the suit who have not made the application for removal, there may be instances where the cause may proceed in the state court, and, as to those seeking the removal, in the federal court. Whatever may be the true rule upon the subject, these parties do not at present seem to be in a proper position to avail themselves of the right they ask, because, as I understand, they have not filed in this court copies of all the proceedings in the state court.

Therefore, at present, the motion for the court to take jurisdiction of the cause, the court overruling the motion for mandamus, will, for the reasons just given, have also to be overruled.

Consult, however, Spraggins v. County Court of Humphries, Cooke, 160; Ladd v. Tudor, [Case No. 7,975]; In re Turner [Id. 14,245].

CROMMELIN (ROGERS v.). See Case No. 12,009.

Case No. 3,406. [1]

CROMPTON v. BELKNAP MILLS et al.

[3 Fish. Pat. Cas. 536.][2]

Circuit Court, D. New Hampshire. May Term, 1869.

PATENTS—"LOOMS"—OATH—PRESUMPTION—SURRENDER—REISSUE—CONSTRUCTION OF CLAIM—ASSIGNMENT—COMMISSIONER'S DECISION—CONCLUSIVENESS—FRAUD—INFRINGEMENT—COMBINATION—EQUIVALENTS.

1. To warrant a patent, the invention must be useful: that is, capable of some beneficial use, in contradistinction to what is pernicious, or frivolous, or worthless.

2. The fact that a blank form of oath not executed is found among the papers, can not overcome the direct recital of the letters patent that the oath was taken, or the presumption that the requirements of the law were complied with in issuing the patent. The taking of the oath is not a condition precedent, failing which the patent must fail. Whether the oath be taken or not, or the fee paid, the omission would not render the patent void when granted.

[Cited in Hartshorn v. Eagle Shade-Roller Co., 18 Fed. 91; Hancock Inspirator Co. v. Jenks, 21 Fed. 914; Tonduer v. Chambers, 37 Fed. 338. Quoted in Holmes Burglar-Alarm Tel. Co. v. Domestic, etc., Tel. Co., 42 Fed. 222.]

3. Differences of description or specification between the original and reissue are consistent with the identity of the thing patented. To correct a description or claim, or both, is one object of allowing a surrender.

4. In the reissued patent the patentee need not claim all that was claimed in the original patent. He may retain whatever he deems proper. A claim in a reissue for the use of a pattern chain, or any other device for determining the design to be woven, is not a claim for all subsequent improvements, nor does it enlarge the patent. It is limited to the pattern chain described, or one substantially the same, or some well known substitute.

[Cited in Chicago Fruit-House Co. v. Busch, Case No. 2,669.]

5. A reissue granted to an assignee may be extended to the patentee. In judgment of law, a reissue is only a continuation of the original patent.

[Cited in Washburn & Moen Manuf'g Co. v. Griesche, 16 Fed. 671.]

6. A notice of an application to extend the original patent is a sufficient notice of an application for the extension of a reissue.

7. The functions of the commissioner in extension cases are judicial, and his judgment settles conclusively all questions of notice.

[Cited in Railway Register Manuf'g Co. v. North Hudson C. R. Co., 23 Fed. 595.]

8. If there was fraud practiced in obtaining the patent, that is a matter between the patent office and the patentee. The patent, although obtained by fraud, must be respected and enforced until reversed or anulled by some proceedings directly for that purpose. It is not exposed to the attacks of strangers or third persons for such reason.

9. The claim of Crompton is for a combination of five elements, to-wit: the jacks, the lifter, the depresser, the pattern chain and the holding mechanism; and any machine combining substantially in the same manner substantially the same elements, or well-known substitutes for the same, must be regarded as an infringement. Such a claim would not be infringed by a combination which dispensed with one of the elements, and substituted therefor another element substantially different in construction and operation, but serving the same purpose. Nor by any and every combination of the same elements which may produce the same result, but only by the peculiar combination of the elements described, or one substantially the same.

10. The elements combined being old and the patent being for the peculiar combination, the doctrine of mechanical equivalents does not apply.

[Cited in Yuengling v. Johnson, Case No. 18,195.]

11. The identity or diversity of two machines depends, not on the employment of the same elements or powers of mechanics, but upon producing the given effect by substantially the same mode of operation, or substantially the same combination of powers.

12. One device can not be said to be a well-known substitute for another which can not be used for it.

13. A patent for a combination of three distinct things is not infringed by combining two of

[1] [For corrected report of this case, see Case No. 18,285.]

[2] [Reported by Samuel S. Fisher, Esq., and here reprinted by permission.]

them with a third, which is substantially different from the third element described in the specification.

14. The loom manufactured under letters patent granted to S. T. Thomas, July 3, 1855, and February 11, 1862, and to Thomas and Everett, July 25, 1866, does not infringe the patent granted to Moses Marshall, December 11, 1849, as reissued and extended.

This was a bill in equity [by George Crompton against the Belknap Mills and others] filed to restrain the defendants from infringing letters patent [No. 6,939] for "an improvement in looms for weaving figured fabrics," granted to Moses Marshall, December 11, 1849, assigned to complainant May 5, 1859, reissued to complainant April 24, 1860 [No. 947], and extended to the inventor for seven years from December 11, 1863, and assigned to complainant for the extended term, December 19, 1863.

The claim of the original patent was as follows: "What I claim as my invention, and desire to have secured to me by letters patent, is the improvement herein above described in the machinery for operating the harness, so that any proper number of heddles may be used or changed as desired without taking the loom to pieces; said improvement consisting, first, in providing the movable spring rests for supporting the jacks of the harness when they are not in use, and which are sprung back by the bevel face on the shoulders of the jacks when they are kept in play by the cams on the pattern chain, the whole arrangement being substantially as herein above set forth; and second, in the 'evener,' constructed and operating as herein described, for assisting in moving the upper heddle levers and keeping them even, so that the cams or rollers on the pattern chain will operate accurately on the jacks as specified: meaning to claim the exclusive use of said spring rests and 'evener,' in a loom, the invention of which is entirely original with me. I also claim the combination of rotating, lifting and depressing bars, arranged in endless chains, so as to revolve, as described, with the forked jacks, having internal shoulders, as specified."

The claim of the reissue was as follows: "I claim combining with the jacks that operate the series of leaves of heddles, and with the lifter and depresser, and pattern chain, or any equivalent apparatus for determining the pattern, a mechanism for holding the jacks either in their elevated or depressed position, when not required to be operated, substantially as and for the purpose specified. I also claim imparting an irregular motion, substantially such as herein described, to the jacks, by means of eccentric cog wheels, substantially as and for the purpose specified."

The defendants claimed to manufacture looms under letters patent granted to Samuel T. Thomas, July 3, 1855, and February 11, 1862, and to Samuel T. Thomas and Edward Everett, July 25, 1866.

Causten Browne and B. R. Curtis, for complainant.

Joshua D. Ball and T. A. Jenckes, for defendants.

CLARK, District Judge. December 11, 1849, a patent was granted to Moses Marshall for "an improvement in looms for weaving figured fabrics." He described his improvement to consist in this, to-wit: "providing the movable spring rests for supporting the jacks of the harness when they are not in use, and which are sprung back by the bevel face on the shoulders of the jacks when they are kept in play by the cams on the pattern chain," "substantially as set forth;" and, second, "the evener," as described. "Meaning to claim the exclusive use of the rests and evener in a loom, the invention of which is entirely original with me." He also claimed a combination of rotating, lifting, and depressing bars, which are not material in this case. The complainant alleges, that before May 5, 1859, the patentee, Marshall, assigned to him, the complainant, all right, title, and interest in, to, and under said letters patent. And that, on said 5th day of May, 1859, he covenanted and agreed with the complainant to convey to him all right, title, and interest whatever in, to, and under any extension of said patent which might be obtained.

That afterward, and before the 24th day of April, 1860, said letters patent were surrendered for a defect in the specification, and new letters were issued on said 24th day of April, 1860, to the complainant for the remainder of the term of fourteen years, from the date of the original patent, to wit: the 11th day of December, 1849.

On the 8th day of December, 1863, this reissued patent was extended for the further term of seven years from the 11th day of December, 1863, and on the 19th day of December, 1863, said Marshall sold and assigned all his right and interest under said extension to the complainant. Under the reissued patent, the patentee, or assignee, stated his claim as follows: "What I claim as my invention, and desire to secure by letters patent is, combining with the jacks that operate the series of leaves of heddles, and with the lifter and depressor, and pattern chain, or any equivalent apparatus for determining the pattern, a mechanism for holding the jacks either in their elevated or depressed position, when not required to be operated, substantially as and for the purpose specified." He also claims imparting an irregular motion to the jacks, which is not here material. This reissued patent the complainant alleges the respondents have infringed.

His bill of complaint is dated the 1st day of October, 1864, and prays that the Belknap Mills may be decreed to account for and pay over to the complainant all such gains and profits as have accrued to them in that behalf, and may be restrained from making,

using, or vending any looms embracing in their construction the invention of said Marshall, and for general relief.

The respondents in their answer deny the validity of the original patent to Moses Marshall, December 11, 1849. They also deny the validity of the reissue, April 24, 1860, and of the extension, December 8, 1863.

And they also deny any infringement of the complainant's patent, if he has any, and say that they have never manufactured or used any looms involving the invention of Marshall, but that their looms have been manufactured under letters patent issued, two of them, to Samuel T. Thomas, and one of them to Samuel T. Thomas and Edward Everett, and that they were essentially different in principle, construction, and mode of operation.

These letters patent they produce in evidence. The first are dated July 3, 1855, and are for an "improvement in looms." Among other things, the patentee claimed the combining with each rocker, lever, and lifter, an arm, cam, and sector, or equivalents, the whole being applied together, and made to operate substantially as described. Also the combining with the series of lifters and pattern prism, a series of bent levers, or their equivalents, and imparting to the pattern prism vertical, or up and down, movements as described.

This patent, and that to Moses Marshall and the reissue, had in view the accomplishment of the same object, to wit: the production of an "open-shed loom." And the question of infringement arises between this patent mainly, and the Moses Marshall patent, as reissued and extended.

The next patent to Thomas is dated February 11, 1862, and that to Thomas and Everett, July 25, 1866. The respondent objects to the Marshall patent of December 11, 1849. That the invention was neither new nor useful, and that the patentee did not, before the granting and issuing of the letters to him, take the oath prescribed by section 6, of the act of July 4, 1836, that he verily believed he was the original inventor or discoverer of the art, machine, etc., for which he solicited a patent. 5 Stat. 119.

A patent is deemed prima facie evidence that the patentee has made the invention. Philadelphia R. Co. v. Stimpson, 14 Pet. [39 U. S.] 448. There is, in this case, no sufficient evidence to overcome that presumption, or prima facie case.

There is evidence that "open-shed" fancy looms were used prior to Marshall's invention, but not involving the combination of Marshall. His invention must, therefore, be taken to be new.

Precisely how useful it may be, the court have not undertaken to decide; but that it is sufficiently so to support a patent, we have no doubt. Other looms may have been preferred by different persons, or may have found a readier sale; but that good cloth can be woven by Marshall's loom and invention there is sufficient evidence.

To warrant a patent, the invention must be useful, that is, capable of some beneficial use, in contradistinction to what is pernicious, or frivolous, or worthless. Dickinson v. Hall, 14 Pick. 217; Whitney v. Emmett [Case No. 17,585]; Many v. Jagger [Id. 9,055].

These objections to the patent can not, therefore, avail. Nor can the other, that the oath required by section 6 of the act of 1836 was not taken, for two reasons: 1st. We are not satisfied the oath was not taken. The letters patent recite that it was.

The respondent finds among the papers on file in the case in the patent office a blank form of the oath, with the jurat not signed by any magistrate, and hence he argues the oath was not taken.

But the oath may have been taken for all that; and this negative testimony can not overcome the direct recital of the letters patent that the oath was taken; or the presumption that the requirements of the law were complied with in issuing the patent.

But suppose it were so. Suppose the oath was not taken; would the patent be void on that account? It was held otherwise by Justice Story, in the case of Whittemore v. Cutter [Case No. 17,600].

The taking of the oath, though to be done prior to the granting of the patent, is not a condition precedent, failing which, the patent must fail. It is the evidence required to be furnished to the patent office, that the applicant verily believes he is the original and first inventor of the art, etc.

If he takes this oath, and it turns out that he was not the first inventor or discoverer, his patent must fail and is void. So, if he do not take it, and still he is the first inventor or discoverer, the patent will be supported. It is prima facie evidence of the novelty and originality of the invention until the contrary appear. Parker v. Stiles [Id. 10,749].

So the act says, on payment of the duty, that is, fees, the commissioner shall make an examination, and, if the invention shall be found useful and important, shall issue a patent. Suppose the fees should not be required or paid, would the patent therefore be void? Yet the one requirement appears to be as much a condition precedent as the other. Both directory, not to be dispensed with; but neither involving the validity of the patent when granted.

The next objections are to the reissued patent, and they are two: First. That the original patent was void, and the reissue was therefore so; and, second. That the reissue was not for the same invention as the original.

The first of these objections has already been disposed of. It was maintained in the argument, that the original patent was void

for want of the proper oath, and that the defect could not be cured by the reissue. But, whether the oath were taken or not, we are of the opinion as already expressed, that such an omission would not invalidate the patent, nor would it affect the reissue.

The second objection to the reissue is a more serious one, and for its proper determination requires a careful examination and comparison of the original patent to Marshall, and the reissue to Crompton.

The presumption of law is, that the reissued patent is for the same invention as the original. O'Reilly v. Morse, 15 How. [56 U. S.] 62; French v. Rogers [Case No. 5,103]; Hussey v. McCormick [Id. 6,948]; Hussey v. Bradley [Id. 6,946]. Differences of description or specification are consistent with the identity of the thing patented. To correct a description, or claim, or both, is one object of allowing a surrender. Id.

The original patent to Marshall claimed the improvement therein described, consisting, first, "in providing the movable spring rests for supporting the jacks of the harness, when they are not in use, and which are sprung back by the bevel face on the shoulders of the jacks when they are kept in play by the cams on the pattern chain, the whole arrangement being substantially as herein above set forth;" and, second, "the evener constructed and operating as herein described, for assisting in moving the upper heddle levers, and keeping them even, so that the cams or rollers on the pattern chain will operate accurately on the jacks as specified, meaning to claim the exclusive use of said spring rests and evener in a loom, the invention of which is entirely original with me." "I also claim the combination of rotating, lifting, and depressing bars, arranged in endless chains, so as to revolve as described, with the forked jacks, having internal shoulders as specified."

In the specification the elementary features of the improvement are said to consist in a series of stationary rests, which support the jacks of the harness, when the sheds operated by them are not in use; the chain shafts, and lifting and depressing bars for operating the jacks and harness; and the evener, which is composed of two rollers, set in a frame having a reciprocating rectilinear motion, which rollers press against the beveled ends of the harness levers, and assist in shifting the sheds of yarn, and, what is more essential, operate always to keep the levers even, for the proper operation of the cams on the pattern chain.

The specification then describes the parts referred to, among others the jacks, the rests, the elevator and depressor arranged upon two endless chains, the method of connecting the jacks and heddle levers, the operation of the cams, the shafts, which carry the elevating and depressing bars, eccentric gear, the pattern chain, and the evener.

In the reissued patent the claim is stated to be, the "combining with the jacks that operate the series of leaves of heddles and with the lifter and depressor and pattern chain, or any equivalent apparatus for determining the pattern, a mechanism for holding the jacks, either in their elevated or depressed position, when not required to be operated, substantially as and for the purpose specified." "Also imparting an irregular motion, substantially such as herein described, to the jacks, by means of eccentric cog wheels, substantially and for the purpose specified."

The specifications described the object of the first part of the invention to be, to avoid moving any of the leaves of the heddles, which are not required to be moved for the production of the design, during any part of the operation, that is, to produce an open-shed loom, and of the second part of the invention, to consist in imparting an irregular motion to the lifters and depressers by means of eccentric cog gearing, etc.

They then go on to describe the levers, jacks, the elevators and depressers, the cams and motions and forms of the jacks, the spring latches or catches, the pattern chain, and the evener, sometimes in the same words, sometimes more minutely, but always substantially, as in the original Marshall patent.

The most important difference, so far, is in the statement of the claims. In the original patent the claim is, first, for the movable spring rests; second, for the evener; and third, for the combination of rotating, lifting and depressing bars, arranged in endless chains, so as to revolve, as described, with the forked jacks having internal shoulders.

In the reissued patent the claim is, combining with the jacks that operate the series of leaves of heddles, and with the lifter and depresser, and pattern chain, or any equivalent apparatus for determining the pattern, a mechanism for holding the jacks either in their elevated or depressed position, when not required to be operated, substantially as and for the purpose specified. In Battin v. Taggart, 17 How. [58 U. S.] 74, it was held, that whether the defect be in the specification, or the claim, of a patent, the patentee may surrender it, and by an amended specification, or claim, cure the defect. In that case, which was for an improvement for breaking and screening coal, the claim was for the manner in which the party had arranged and combined the breaking rollers with each other and the screen; and the amended specification described, in the reissued patent, substantially the same machine, but claimed the breaking apparatus only; it was held a dedication to the public did not accrue in the interval between one patent and the other.

It has been repeatedly decided that the reissued patent must be substantially for the

same invention as the original patent. Under such circumstances a new and different invention can not be claimed. Battin v. Taggart, 17 How. [58 U. S.] 74; French v. Rogers [supra].

In the reissued patent the patentee need not claim all that was claimed in the original patent. He may retain whatever he deems proper. Carver v. Braintree Manuf'g Co. [Case No. 2,485].

We think that substantially the same invention is described in the two patents. It was urged in the argument that the reissued patent was not for the same but for a greater invention, because the patentee had inserted in the specification these words: "It will be obvious that this part of my invention is not dependent upon the use of the pattern chain, as it can be used in connection with any other device for determining the design to be woven, by shifting the jacks or their equivalent into position to be elevated or depressed." This is said to be done for the purpose of making it embrace all improvements afterward invented. But it certainly can not have that effect, nor can it enlarge the patent. If it could do any such thing it would render the patent void for uncertainty. But in the specification the patentee has described a pattern chain; in his claim he has claimed a pattern chain, or any equivalent apparatus for determining the pattern, in combination with other things, and to that pattern chain, or one substantially the same, or some well-known substitute, the patent must be limited.

The same remarks will also apply to another interpolation, to wit: "Nor is it dependent upon the use of chains for carrying the lifting or depressing bars in a continuous circuit; as it is equally applicable to looms in which jacks are elevated or depressed by the well-known reciprocating lifters and depressors, as in the well-known Crompton loom," and to others of like character. They do not enlarge the invention or the patent. We think, therefore, that the invention described and patented in the reissued patent is substantially the same invention described in the Marshall patent of December 11, 1849. The claim is in a different form, but for substantially the same invention.

It may be open to the objection, so pointedly stated in the cases of Burr v. Duryee, 1 Wall. [68 U. S.] 535; Case v. Brown, 2 Wall. [69 U. S.] 320, that there is an attempt to make the new specification more elastic, and to cover more than the old, but it does not enlarge the invention.

But if it should be held that the original patent to Marshall, and the reissue to Crompton, assignee, were valid, it is contended that the extension to Marshall was not, for three reasons, to wit: (1) That as Marshall never had any interest in the reissued patent, it could not be extended to him. (2) That no sufficient notice was given to the public of the application for the extension of the patent; and, (3) That the extension was obtained by fraud.

To the first objection, to wit, "that as Marshall never had any interest in the reissued patent, it could not be extended to him," it is a full answer, that, in judgment of law, the reissue is only a continuation of the original patent. So held in Read v. Bowman, 2 Wall. [69 U. S.] 604; and as Marshall was the original patentee, the extension was legally and properly to him. Wilson v. Rosseau, 4 How. [45 U. S.] 646. The extension enuring, under the statute, to the assignees and grantees to the extent of their respective interests. [Act 1836] 5 Stat. 125, § 18.

The second objection is that there was no notice ever ordered, or given, of any application to extend the reissued patent. There was of the application to extend the original patent, and the objection stands upon the supposition, or idea, that they are two distinct patents, while in judgment of law they are one. If the reissue was only a continuation of the original patent, then a notice to extend the original would seem to have been sufficient.

Again, under the act of 1836, the secretary of state, the commissioner of patents, and the solicitor of the treasury were a board of commissioners to "hear and decide upon the evidence produced before them, both for and against the extension."

It has been held that the functions of this board were judicial, and that their judgment settled conclusively all questions of notice. Brooks v. Jenkins [Case No. 1,953].

The statute of May 27, 1848 (9 Stat. 231, § 1), provided that the power to extend patents then vested in the board of commissioners should be vested solely in the commissioner of patents; and in Clum v. Brewer [Case No. 2,909], it was held that the act of the commissioner in extending a patent was conclusive of the facts, which he is required to find, in order to grant such extension, in the absence of fraud or excess of jurisdiction. But here, third, it is said that the extension was procured by fraud.

We do not, however, think this objection is open to this respondent. He stands before the court accused of infringing the complainant's patent. He may, undoubtedly, show that the invention claimed by the complainant was not new or useful, or that it had been dedicated to the public, or that there was no sufficient specification or description, and so that there was in fact no infringement for which he should answer, but we think he cannot attack the granting and validity of the patent in this collateral manner.

If there was fraud practiced in obtaining the patent, that is a matter between the patent office and the patentee; and can, perhaps, be inquired into by some proper proceeding of the officers of the government to vacate the patent. But, in this particular, like a judgment, it must be respected and enforced, until reversed or annulled by some

proceedings directly for that purpose. It is not exposed to the attacks of strangers or third persons for such reason.

The next, and only question remaining, is that of infringement. The respondents admit they have on hand, with intent to sell, the Thomas loom, manufactured under the patents to Thomas and to Thomas and Everett. But they deny that either of the respondents ever at any time, before or since the date of said alleged reissued letters patent, or before or after the alleged extension of said alleged patent, have manufactured, used, sold, or continue to manufacture, use, or sell any loom or looms embracing the said alleged improvement, or any mechanism substantially the same.

The question then is, whether the Thomas loom, as it is called, infringes the Marshall patent as reissued and extended? The original patent to Marshall, December 11, 1849, claimed the movable spring rests to hold the jacks of the harness, and the "evener," and the combination of the rotating, lifting and depressing bars, so as to revolve, etc.

As reissued to Crompton, the claim was for combining with the jacks and with the lifter and depresser and pattern chain, or any equivalent mechanism for determining the pattern, a mechanism for holding the jacks either in their elevated or depressed position when not required to be operated, substantially and for the purpose specified.

The language is "a mechanism for holding the jacks." This is broad enough, upon its face, to cover any mechanism, and if it stood alone and unaided it would be so general and uncertain as to be entirely void, but in the specification the holding mechanism is described particularly and precisely, and the claim is limited by such specification.

Here, then, are combined five elements, towit: the jacks, the lifter and depresser, the pattern chain, and the holding mechanism; and any machine combining, substantially in the same manner, substantially the same elements, or well-known substitutes for the same, must be regarded as an infringement of this reissued patent. Gorham v. Mixter [Case No. 5,626].

But it would not be infringed by a combination which dispensed with one of the elements and substituted therefor another element, substantially different in construction and operation, but serving the same purpose. Eames v. Godfrey, 1 Wall. [68 U. S.] 79; Vance v. Campbell, 1 Black [66 U. S.] 427.

Nor by any and every combination of the same elements, which may produce the same result, but only by the peculiar combination of the elements described, or one substantially the same. Case v. Brown, 2 Wall. [69 U. S.] 320.

The elements here combined are old, the patent is for the peculiar combination, and the doctrine of mechanical equivalents does not apply. McCormick v. Talcott, 20 How. [61 U. S.] 405.

The identity or diversity of two machines depends not on the employment of the same elements or powers of mechanics, but upon producing the given effect by substantially the same mode of operation, or substantially the same combination of powers. Odiorne v. Winkley [Case No. 10,432]; Evans v. Eaton [Id. 4,560].

Following these principles and adjudications, we proceed to the examination and comparison of the Marshall and the Thomas looms. In both we find, substantially, the same jacks, differing in form, but performing, substantially, the same office. In both we find, substantially, the same elevator and depresser. Arranged in the Marshall loom is a rotating, endless chain, so that the same bar in going up is an elevator, but in rotation or revolution going down, becomes a depresser. These three elements are substantially the same, but when we come to the holding mechanism we find a marked and substantial difference in the two machines.

In the argument of the respondents' counsel, it was contended that the holding mechanism of the Marshall loom was not only the "series of horizontal spring latches or catches," and the shoulders on the two prongs of the jacks, but that it included the connecting mechanism of the jacks with the heddle lever, the pattern mechanism, and the "evener." Now, although it be true that the connecting mechanism and pattern mechanism of the jacks hold the jack securely upon the spring latches as upon a seat, until they be forced or allowed to come off by the pattern mechanism, and although in the operation of the machine there is a point of time after the jacks are forced off the springs, when the heddle levers are firmly held by the evener so that the jacks can not move nor the sheds close until allowed to do so by the removal of the evener, yet we have considered the holding mechanism to be as decided in the patent, to wit: the series of horizontal spring latches or catches, and the notches on the prongs of the jacks, and still we find the holding mechanism of the two machines to be substantially different.

In the Marshall machine the elevator carries upward a particular jack, the beveled face on the projecting notch on the prong of the jack meets the beveled face of the spring, presses it back and passes it. Then the spring flies out under the shoulder of the jack and the jack rests upon it in a manner similiar to a window-sash raised and resting on the old and familiar window-spring. Here it sits or is held until the pattern mechanism forces it off the spring and allows it to descend.

When a jack is carried down by the depresser, it is held by a similar spring; being kept on its seat by the pattern mechanism, until allowed to be drawn off by the oblique connecting mechanism.

Now in the Thomas loom there is a very different mechanism or device. There is a

jack which is carried up and down by an elevator and depresser. On one side of this jack there is a gearing connecting it with and operating a sector. As the jack goes up and down, it rolls or rocks this sector forward and backward as if you should turn a wheel part of the way round, say one-fourth, and then bring it back again, and so continue.

In or near the circumference of this sector, there is a cam groove, and playing in this cam groove, forward and backward, as the sector moves, a projecting stud or friction roller connected with an arm of the heddle lever. This heddle lever rocks upon its fulcrum, and as the arm, guided and controlled by the projecting stud in the cam groove, is carried upward or downward by the cam groove, the ends of the rocking heddle lever are carried backward and forward, elevating or depressing, or holding stationary the harnesses.

In the one end of the cam groove is a concentric into which the projecting stud or roller falls, which it is contended by the complainant's counsel is a substitute for the spring latch or catch of the Marshall loom; but we are of the opinion it is not so; but that the whole cam groove, of which the concentric makes a part, is more correctly a substitute for the cam; and that this device of the Thomas loom much more resembles in principle and operation the old Middlesex cam loom than it does the Marshall loom. It can not be conceded that the Marshall and the Thomas holding devices are the same, because the operation in both cases is performed by a surface of metal passing under or over another surface, and that, therefore, one infringes the other.

In the old Middlesex cam loom one surface passed over another, to wit: over the cam, and was elevated, depressed, or held stationary by it; yet it was very different from the Marshall device. We can not give the Marshall holding device any such latitude of construction.

There is also in the Thomas loom a brake connected with and operating upon the periphery of the sector, retarding, regulating, and governing its motion.

And whether we regard this brake as a part of the holding mechanism or not, we think and conclude that these two elements are substantially different, and that one is not a well-known substitute for the other.

We come now to the last element or device, to wit: the pattern mechanism. Had the patent to Marshall not been surrendered, and a new one issued, the question of infringement, if it arose at all, must have arisen between the holding mechanism of the two looms; but that patent having been surrendered, and a new one issued, claiming a combination of elements, that new one is liable to be avoided by showing that the Thomas loom uses a substantially different element from any one of those combined.

To return to the pattern devices. These two mechanisms or devices are very different in their construction and in their operation. H. B. Renwick, one of the complainant's experts, says: "I think the pattern chain in model B (the Thomas loom) is, considered by itself, a substantially different species of pattern chain from that specially described and represented in the drawing of the Marshall reissue, and differing from it in the fact that it requires motion in two directions in order to cause it to operate upon the jacks, while the chain represented in the drawings of Marshall requires motion only in one direction." Precisely in the sense mentioned by this expert we are now considering these two devices or mechanisms; that is, by themselves; and in that view they are substantially different in principle, construction and operation. But if we consider them in regard to the functions they perform, we shall find as great and substantial difference. Both select the jacks to be operated; but the pattern chain, in addition to this, in the Marshall loom, forces the jacks off the upper series of spring catches, and holds them on to the lower series, in both instances in opposition to the force supplied by the oblique connection of the jacks with the heddle levers. Both these devices are said to be old. That is true in a limited sense. The Marshall chain is old. The Thomas mechanism is old in the fundamental principle. It is that of the Jacquard pattern; but Thomas has made two improvements upon it, which are not old. They are also said to be well known substitutes for one another; but it is very evident, both from the testimony of the experts and an examination of the machines, that, though the Marshall pattern mechanism might be applied to the Thomas loom, there is no apparent practical mode of applying the Thomas pattern mechanism to the Marshall loom, with its present method of holding the jacks. Can one device be said to be a well-known substitute for another which can not be used for it? Thus much for the elements of the Marshall combination. We now pass to the combination itself. Is the combination in the two machines substantially the same? It may be said they can not be, if the elements are not the same, as gold and copper is not the same combination as silver and copper. But the inquiry is to another point. Is the method or manner of the combination the same? We think not. Indeed, there seems to be as wide and substantial a difference in the mode of combination as in the things combined. Take, for instance, the combination of the jacks with the holding mechanism in the Marshall loom. By the lengthening of the lower heddle lever, giving an oblique direction to the connection of the jacks with the upper lever and lower, the protuberances upon the prongs of the jacks are held upon the upper series of spring catches. There is no such connection, device, office performed, or combination, that we can discover, in the Thomas loom.

Again: take the combination of the pattern mechanism in the Marshall loom with the jacks. It is so arranged as to hold the protuberances of the jack upon the lower series of spring catches, there performing substantially the same office that the oblique connection of the jacks with the heddle levers does in regard to the upper catches. There is nothing like this in the Thomas loom. Again: take the combination of the holding mechanism with the pattern mechanism and jacks, and there we find a substantially different combination, or mode of combination, in the two looms.

In the Marshall loom the jacks are combined with the holding catches by their oblique connection with the heddle levers, keeping the jacks seated upon the upper catches until forced off by the pattern cams, and pulling the jacks off the lower catches when not held on by the cams. Is there any such arrangement in the Thomas loom? We do not find it, nor anything nearly approaching it.

In the Thomas loom the jack is connected with the rocking sector by a gearing, rocking the sector backward and forward as the jack goes up and down. In the circumference of this sector is a cam groove or slot; in this groove plays a stud or friction wheel attached to an arm of the heddle lever.

This stud is guided and held by the cam slot, thus elevating, depressing, or holding the heddle lever as it comes into one or the other part of the slot. The pattern mechanism has nothing whatever to do with this holding, elevating, or depressing, farther than to select the particular jack. We leave out of this combination the brake, purposely, though that device in the Thomas looms, and the "evener" in the Marshall, play very important, parts, both in holding the shed open and in preventing its closing too quickly.

We might pursue this examination and comparison further, but we have gone far enough to warrant the conclusion to which we have come, that the respondents have not infringed the complainant's reissued patent. See Brightly, Dig. p. 612, §§ 84, 96, 89.

To constitute an infringement of a patent for a combination, the defendant must have used the same combination, constructed and operated substantially in the same way. Gorham v. Mixter [Case No. 5,626].

Case No. 3,407.

CROMPTON et al. v. CONKLING.

[9 Ben. 225.][1]

District Court, S. D. New York. Oct. 23, 1877.

BANKRUPTCY—PARTNERSHIP—ASSETS—DISCHARGE.

1. It is necessary that all the members of a copartnership should be adjudged bankrupt, in order to enable an assignee to deal with the joint property of the firm, and in order to enable a discharge of one of the members of the firm to operate to discharge him from the debts of the firm.

[Followed in Re Plumb, Case No. 11,231.]

2. C. and H., being copartners, made a promissory note in their firm name. Afterwards, a petition in involuntary bankruptcy was filed against C. alone, and he received a discharge. Afterwards, in a suit on the note against C. and H., C., being alone served with process, set up, as a defence, such discharge. The court charged the jury, that if, when the petition was filed against C., there was no property of his firm which continued to be its copartnership property, the discharge of C. was a discharge of the note, but if there was such copartnership property at that time the discharge of C. did not discharge the note. *Held*, that the charge was correct.

3. A person who receives, on loan, from a bankrupt, after the petition is filed and before adjudication, moneys of the bankrupt, is liable to respond therefor to the assignee, after his appointment.

[At law. Action by John Crompton and John C. Dickinson, as assignees in bankruptcy of Almon Miller & Co., against Gurdon Conkling, Jr., and Harriet Goetschius, to recover upon two promissory notes made by the defendants, composing the firm of G. Conkling, Jr., & Co., to the bankrupts. There was a judgment against the defendant Conkling (Case No. 3,408), and he now moves for a new trial.]

F. N. Bangs and F. C. Bowman, for plaintiffs.

W. A. Beach and H. E. Farnsworth, for defendant.

BLATCHFORD, District Judge. On the 23d of November, 1872, the bankrupts, composing the firm of A. Miller & Co., were adjudged such, on a petition filed January 28th, 1870. The usual assignment was made to the plaintiffs December 30th, 1872, assigning to them all the property in which the bankrupts were interested, or which they were entitled to have, on the 28th of January, 1870. This suit is brought on promissory notes, made by the firm of G. Conkling, Jr., & Co., a firm composed of the defendants, each dated July 16th, 1870, and payable, one five months, and the other six months, after date, to the order of A. Miller & Co., one for $3,602.08, and the other for $3,622.50. The complaint alleges, in respect to each note, that, on the 16th of July, 1870, the defendants, being copartners under the firm-name of G. Conkling, Jr., & Co., and being indebted to the said firm of A. Miller & Co. in the amounts of the respective notes, made the notes. Conkling alone was served in the suit. He answered, and the case as to him was tried, and resulted in a verdict for the plaintiffs for the full amount of the notes, with interest. He now moves for a new trial, on the ground of alleged errors committed by the court on the trial, in its rulings, and on the ground that the verdict was against the weight of the evidence.

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

The principal question is as to the effect of a discharge in bankruptcy obtained by Conkling. On the 3d of June, 1871, a petition in involuntary bankruptcy was filed in this court against Conkling, and, on the 4th of April, 1872, a discharge was granted to him by this court from all debts and claims "provable against his estate," which existed on the 3d of June, 1871. Harriet Goetschius, the copartner of Conkling in the firm of G. Conkling, Jr., & Co., was the wife of the bankrupt, Goetschius. The proceeding in bankruptcy against Conkling was against him individually and did not include Mrs. Goetschius, and was not a proceeding against the firm or against the property of the firm. The court charged the jury, that if, on the 3d of June, 1871, there was no property of the firm of G. Conkling, Jr., & Co. which continued to be its copartnership property, then the discharge of Conkling was a discharge of the notes in suit, but, if there was such copartnership property at that time, the discharge of Conkling did not discharge the notes in suit. The statute in force when this discharge was granted—Act March 2, 1867 (14 Stat. 533, § 34; now section 5119, Rev. St.)—provided, that a discharge duly granted should release the bankrupt "from all debts, claims, liabilities, and demands, which were or might have been proved against his estate in bankruptcy." It is contended, for the defendant, that such charge of the court was erroneous, and that the court also erred in not directing the jury to find a verdict for the defendant, on the said discharge in bankruptcy. The view urged is, that it is not necessary that both of the members of the firm of G. Conkling, Jr., & Co. should have been adjudged bankrupt, in order to have enabled an assignee in bankruptcy to deal with the joint stock of the firm, or in order to make the discharge of Conkling operate to discharge him from the debts of the firm. The case of Wilkins v. Davis [Case No. 17,-664] sustains that view, but the weight of authority under the present bankruptcy statute is, I think, against that view.

In Re Little [Case No. 8,390], it was held by this court, in the case of a copartnership consisting of two persons, where there were copartnership debts and copartnership assets, that neither partner could be discharged from the firm debts, unless both of the partners were made parties to the bankruptcy proceeding. This view has been concurred in by the district court for South Carolina, in Re Grady [Id. 5,654]; by the district court for North Carolina, in Hudgins v. Lane [Id. 6,-827]; and by the circuit court for the eastern district of Wisconsin, in Re Noonan [Id. 10,292]. It appears not to be concurred in by the district court for the western district of Wisconsin, in Re Jewett [Id. 7,306]. The case of In re Abbe [Id. 4], in the district court for New Jersey, holds only, that where there are no assets of a copartnership to be administered, a member of it may, upon his individual petition, be discharged from all his debts, copartnership as well as individual.

In Nutting v. Ashcroft, 101 Mass. 300, under the insolvency law of Massâchusetts, on which the bankruptcy statute of the United States was framed, it was held, that the record of insolvency proceedings ought to show that they were instituted against a firm as well as against an individual who was a member of it, and that the assignment in insolvency ought in terms to convey the property of the firm as well as the property of the individual, or otherwise the partnership affairs would not be included in the proceedings, and the assignee of the individual would acquire, by the assignment to him, no title to the property of the firm.

But I regard the question as substantially disposed of by the decision of the supreme court in Amsinck v. Bean, 22 Wall. [89 U. S.] 395. In that case it was held, that where an individual member of a copartnership is adjudged a bankrupt, without any adjudication against the copartnership, or against the other partner or partners of which the copartnership is composed, the assignee of the individual cannot administer the estate of the copartnership, or call third parties to an account for partnership property. This being so, it is difficult to see how the estate of the firm can be in the bankruptcy court in any such wise as to make a discharge of the individual operative in respect to the debts of the firm, provided there are assets of the firm when the bankruptcy proceedings are instituted. Although the statute declares that the discharge shall release the bankrupt from all debts "which were or might have been proved against his estate in bankruptcy," yet if there was an estate of the firm of which he was a member, when the proceedings were commenced, and such estate is not in bankruptcy to be administered therein, no debts can be proved against the estate of the firm, and his estate in the firm is not in bankruptcy. Persons who have claims against the firm may prove such claims against him as an individual, because he is individually liable for the debts of the firm; but such claims are provable and proved against his individual estate alone, which alone is in bankruptcy, and are not provable or proved against his estate in the firm, which is not in bankruptcy, and is, therefore, not "his estate in bankruptcy." Consequently, such claims, if claims against the firm, are not released by his discharge in bankruptcy. This view is necessary in order to carry into effect all parts of the statute, on the same harmonious plan.

The case does not show that the defendant took any exception to the foregoing charge of the court, or made any request to the court to charge the jury in a particular manner on the foregoing question; but, inasmuch as the case shows, that at the close of the trial he requested the court to direct a verdict for the defendant, on the discharge in bank-

ruptcy of the defendant, and that the court denied the motion, and that the defendant excepted, I regard the case as raising the foregoing question for review, on this motion for a new trial.

At the trial the plaintiffs introduced in evidence the assignment in bankruptcy to them and the two notes, and proved how much was due on the notes, and rested their case. Thereupon the defendant requested the court to direct a verdict for the defendant, on the ground that the notes were made after the 28th of January, 1870. The court allowed the plaintiffs to give further testimony, against the objection of the defendant, (as the case states it), that evidence to show that there was an indebtedness before January 28th, 1870, would be alleging a new cause of action. The defendant excepted. The further testimony given was not testimony to show that there was an indebtedness of the defendant to A. Miller & Co. or to the plaintiffs, before January 28th, 1870, but was testimony to show that, although the notes were dated after the 28th of January, 1870, and were notes payable to the order of A. Miller & Co., there was really an indebtedness of G. Conkling, Jr., & Co., to A. Miller & Co., as alleged in the complaint, represented by the notes, which indebtedness the plaintiffs were entitled to enforce by this suit on the notes. It appeared, that while the bankruptcy proceedings were pending, and before the adjudication, the assets of A. Miller & Co. were in the hands of the bankrupt, Goetschius, for nearly three years, and that during that interval he loaned, out of such assets, to G. Conkling, Jr., & Co., the money represented by the two notes. This was the further evidence that was allowed. It was not evidence as to any indebtedness before January 28th, 1870. It was evidence strictly to prove the allegation of the complaint, that G. Conkling, Jr., & Co., being indebted to A. Miller & Co., made the notes, and was not evidence to prove any new cause of action. G. Conkling, Jr., & Co., having received on loan from the bankrupt, Goetschius, after the petition in bankruptcy was filed, and before the adjudication, moneys of A. Miller & Co., the title of the plaintiffs to recover such moneys, on their subsequent appointment as assignees and the assignment to them, is clear. The case of Hampton v. Rouse, 22 Wall. [89 U. S.] 263, shows that, prior to an assignment in bankruptcy, the title to the debtor's property remains in him, although the assignment, when made, relates back to the commencement of the proceedings. The evidence given on the trial satisfactorily showed that the money loaned by Goetschius to G. Conkling, Jr., & Co., was the proceeds of property which was assets of A. Miller & Co. when the bankruptcy proceedings were commenced. In addition to this, the giving of the notes to the order of A. Miller & Co., when all that there was of A. Miller & Co., after the petition in bankruptcy was filed, was a dealing by Goetschius with what were their assets when such petition was filed, was an acknowledgment by G. Conkling, Jr., & Co., which binds the members of that firm, that the moneys loaned them, and the consideration of the indebtedness created by the notes, were moneys which were assets of A. Miller & Co. when the petition in bankruptcy was filed. The case does not show that the defendant requested, on the trial, that the question as to whether the moneys loaned by Goetschius to G. Conkling, Jr., & Co., were property or the proceeds of property which belonged to A. Miller & Co. when the petition in bankruptcy was filed, should be submitted to the jury.

There was nothing in the proof of debt by Vandewater Smith, on the notes, in the bankruptcy case against Conkling, which could affect the rights of the plaintiffs. On the evidence, Smith never owned the notes, and his attempted dealing with them could not prejudice the plaintiffs.

But I think a new trial must be granted, on the ground that the verdict was against the weight of the evidence. The jury were not, I think, warranted in finding, on the evidence, that there was any firm property of G. Conkling, Jr., & Co., remaining in existence when the petition in bankruptcy was filed against the defendant, Conkling.

Case No. 3,408.

CROMPTON et al. v. CONKLING et al.

[15 N. B. R. 417.][1]

District Court, S. D. New York. April Term, 1877.

DISCHARGE OF ONE PARTNER IN BANKRUPTCY—FIRM CREDITORS.

A discharge in bankruptcy, granted to one member of a partnership, after he alone had been adjudged bankrupt in a proceeding affecting him alone, to which his copartner was not a party, is not a bar to an action against him and his copartner by a partnership creditor, where the creditor shows affirmatively that, at the time of the filing of the petition, there were partnership assets as well as partnership debts.

[Cited in Re Johnston, 17 Fed. 72.]

Action [by John Crompton and John C. Dickinson, as assignees, etc.] on two promissory notes, amounting to ten thousand four hundred and thirteen dollars and thirty-nine cents, made by the firm of G. Conkling, Jr., & Co., consisting of the defendants Gurdon Conkling, Jr., and Hannah [Harriet] Goetchius. The notes were payable to the order of Almon Miller & Co., who furnished the consideration, in money, to the makers. The payees, A. Miller & Co., became bankrupt, and the plaintiffs were the assignees in bankruptcy. The suit was defended by Gurdon Conkling, Jr., who pleaded in bar a discharge from his debts granted to him by this court in April, 1872, in proceedings commenced

[1] [Reprinted by permission.]

against him individually by an individual creditor in June, 1871. The notes in question were made in July, 1870. The case was tried before a jury. Proof was given by both parties on the question of fact, whether, at the time of the commencement of the proceedings in bankruptcy against Conkling, there were partnership assets in existence. Defendant's counsel moved the court to direct the jury to find a verdict for the defendant, referring to Wilkins v. Davis [Case No. 17,664], and to Jewitt's Case [Id. 7,306]. Motion denied.

F. N. Bangs & F. C. Bowman, for plaintiffs.
Henry E. Farnsworth, for defendant Conkling.

BLATCHFORD, District Judge. Gentlemen of the jury, I shall detain you but a few moments. In the view which I take of this case, and of the law applicable to it, there is but a single question for your consideration. The two notes sued on in this case are dated on the 16th July, 1870. The plaintiffs, in the first instance, have proved sufficient to entitle them to recover the full amount of these notes, with interest, viz., ten thousand four hundred and thirteen dollars and thirty-nine cents. The only point of defense set up for your consideration is the discharge in bankruptcy obtained by Mr. Conkling in this court in April, 1872, in a proceeding commenced here 3d June, 1871. These proceedings were, as you see, commenced nearly a year after the date of these notes. Of course these notes were in existence at the time the petition in bankruptcy was filed. The notes are notes made by the firm of G. Conkling, Jr., & Co. The proceedings in bankruptcy against Mr. Conkling are proceedings against himself individually, without in any manner bringing in his partner, Mrs. Goetchius. She was a partner in the copartnership of G. Conkling, Jr., & Co., the maker of these notes. The terms of the copartnership agreement have been stated by Mr. Conkling. Now, as matter of law, the court charge you, that under the terms of the agreement, any property purchased with money belonging to the firm became the property of the copartnership; any money borrowed by the firm became, when borrowed and received, the money of the copartnership, and of course, if that money was used to purchase any articles which passed into possession of the firm, the articles became the joint property of the copartners as copartners, Mrs. Goetchius having an interest in it as copartner to the same legal extent that Mr. Conkling had. It is in evidence in this case that the notes in suit were given to Mrs. Goetchius, representing A. Miller & Co., and the notes were drawn to the order of A. Miller & Co., the consideration for them being the money of A. Miller & Co., paid by Mrs. Goetchius to G. Conkling, Jr., & Co. That money, when paid into the hands of Mr. Conkling on behalf of the firm of G. Conkling, Jr., & Co., became copartnership property of the firm of G. Conkling, Jr., & Co., and in that money, or in any property into which that money passed, Mrs. Goetchius had an interest; and the creditors of the firm had an interest that that money, or the proceeds of it, the property which represented it, should be applied to pay the debts of the firm; and that is what is meant by the statement that that became copartnership property. The creditors of Mrs. Goetchius, on partnership account, had a right, a legal right, to insist that that property should be applied to pay the debts of the firm. Therefore it became copartnership property; and the propositions stated to you by the counsel for the plaintiff on that subject are perfectly correct, not only in substance but in language. Any property which was obtained on the credit of the firm, like the money obtained on the two notes in suit, was partnership or firm property, irrespective of the question what might be the respective shares or interests of the partners as between each other in that property; that is irrespective of the quantum of interest of each partner as against the other. This also is a correct proposition, that any property which either partner was entitled to have applied to the payment of partnership debts, or to his or her own indemnity against partnership debts, was the partnership or firm property. When the notes in suit were given in the name of G. Conkling, Jr., & Co., binding the partners who composed that firm, binding Mr. Conkling and Mrs. Goetchius, Mrs. Goetchius had a right to have that money, or anything into which it went, applied to the payment of the notes. That was her right and the right of the creditors of the firm acting and represented through her.

So also any property obtained or purchased with money borrowed in the name of the firm, or on its credit, was and is partnership or firm property. I have stated these propositions to you in several forms, and you undoubtedly have applied them every day in the business of life. That there was at one time partnership property is perfectly clear. This money, which A. Miller & Co. paid for these notes to Mr. Conkling, became at that instant, and by that act of paying it for these notes, partnership property. Now the question is, what of the partnership money or property which that firm ever had remained partnership property on the 3d of June, 1871, when Mr. Conkling was adjudged bankrupt? If at that date no partnership property remained, if it was all gone, if it had been spent, if it had been squandered, if it had been lost, if there was not only no money, but no other property at that time, of any value at all, which remained the copartnership property, the joint property, under the definition of such property which I have given you, then Mr. Conkling's defense in this case, that the claim on these notes is barred by his discharge in bankruptcy, is made out; because, under the law, Mr. Conk-

ling put into his schedules, which have been read in this case, the partnership liabilities, among which are these very two notes (although stated to be held by one Vandewater Smith), which are put in as liabilities of the firm of G. Conkling, Jr., & Co.; and so there are six, eight, or ten others. Now if there was any copartnership property at that time, then it was the duty of Mr. Conkling, not only to bring that copartnership property into this court in the bankruptcy proceedings, if he desired to be discharged from his liability on the partnership debts; but, if there was such property, unless he did bring it in, his discharge does not relieve him from copartnership debts. If you find, as a matter of fact, that there was copartnership property when this petition in bankruptcy was filed, the plaintiff is entitled to recover the full amount claimed. If you find that there was no copartnership property or assets at the time of the filing of the petition in bankruptcy in Mr. Conkling's proceedings, then the defendant is entitled to your verdict. And upon this subject the plaintiffs have the affirmative, and the burden of proof, and must make out the case that there was such copartnership property to your satisfaction by a fair preponderance of evidence.

The jury rendered a verdict for the plaintiffs for the full amount claimed, viz., ten thousand four hundred and thirteen dollars and thirty-nine cents.

[NOTE. The defendant Conkling moved for a new trial, which was granted. Case No. 3,-407.]

CROMPTON (HOWARD v.). See Case No. 6,758.

Case No. 3,409.

CROMWELL v. BANK OF PITTSBURG.

[2 Wall. Jr. 569;[1] 1 Pittsb. Leg. J. 17.]

Circuit Court, W. D. Pennsylvania. Nov. Term, 1853.

EQUITY OF REDEMPTION — ESTOPPEL IN PAIS — PENNSYLVANIA RECORDS—ENTRY AND PRESUMPTION OF FORMAL JUDGMENT — CORRECTION OF CLERICAL MISPRISIONS.

1. Even where no judgment of foreclosure has been entered on a mortgage, if the mortgagor allows the mortgagee to hold possession for twenty years without accounting, or without admitting that he possesses the mortgage title only, the mortgagee's title becomes as absolute in equity, as it was previously at law; and this though the land has grown greatly valuable during the term.

2. Even where no judgment of foreclosure has been entered on a mortgage, yet if the mortgagor has admitted in writing the whole mortgage debt to be due; has assisted by his signature and acts to forward and expedite the master or sheriff's sale of the mortgaged premises; waiving matters of form; surrendering possession to the purchaser; and moving away, or standing by and suffering purchasers, for large and valuable consideration, to improve the property,—he is equitably estopped in pais from asserting his ownership for want of a proper authority, at the time, in the master or sheriff to sell.

3. The history of records and of the mode of entering judgments in Pennsylvania, is given in this case in detail; and the loose and careless mode of preserving judicial papers, and transacting matters of form, by judges, prothonotaries, attorneys and parties in Pennsylvania, set forth. It is declared that a record is seldom or never, and never need be, made up at the time in form; all that is required being sufficient outline entries upon which, as upon a fabric or frame, a formal record can be afterwards wove or filled in, so as to be certified if wanted.

4. No actual, formal entry of judgment, on any docket or other paper, need be made by either court or prothonotary to justify the issue of final process, as on a judgment. If the party himself, prior to the precipe for final process, have signed a paper meant to authorize such entry—whether such paper be expressed in the present or in the past tense—it is enough. The clerk may enter judgment on his dockets, or make up a formal record at any time afterwards, e. g. if a party by writing, signed, says, "In my proper person, I this day appeared and confessed judgment to the plaintiff, for, &c., besides costs," &c., on this final process may issue, even though no more formal entry of judgment has been made on the docket, or on the record by the court or prothonotary, or by any body.

5. The original or rough docket upon which, according to ordinary practice of the court, judgments were formally entered, having been lost, such formal entry of a judgment, may, at the distance of thirty years, be presumed, from the fact that the defendant in the case had signed a writing, filed among the papers of the case, prior to the alleged date of judgment, saying that he had appeared and confessed judgment; this writing being followed immediately by a precipe for final process, and by final process itself, both of which recite a judgment; by an agreement of the defendant expediting the sale, indorsed on such final process; by an actual sale made with his concurrence, and remaining unquestioned by him during the residue of his life, a term of about thirty years. And this although the final process recite a judgment, as of a date different from the day when judgment was alleged to have been entered; to wit, recite a judgment as entered on the 13th of May, 1820, instead of the 13th of September, 1820; and although no entry of judgment was made upon a larger and cleaner docket, upon which it was as usual to transcribe the entry of judgments from an original or rough docket, as to enter them previously upon the latter docket itself.

6. If the record shows anything to amend by, the court may amend its own records at the distance of fifteen years, as in this case, or at any distance of time, without any notice to the parties, and without their presence. The action of the court in this respect, cannot be questioned by another court, even upon error.

7. This last point was the only one actually necessary to be decided; but the case having been fully argued on the other points, they were all passed upon by the court.

Thomas Cromwell being seised of a large tract of land near Pittsburg, mortgaged it in fee, in May, 1819, to the Bank of Pittsburg. A scire facias (equivalent to the equity bill of foreclosure,) having issued in August, 1820, upon the mortgage, service was accepted by Cromwell, and the writ regularly returned. By the practice of the court, the entries of all its judgments were first made

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

in a rough or small docket, and then as regularly copied, with care, from it into a clean and larger one; none being copied into the larger, unless first made in the rough one. The large docket contained no contemporaneous entry of judgment; and the smaller or rough one being now lost, the only direct evidence of a judgment at all, independent of writs and other papers reciting it, was an original paper, without date itself, signed by Cromwell, found in the bundle of papers in the case, among the records of the court, and indorsed at the time by the clerk, with his signature and date of the 13th of September, 1820. The paper was properly entitled, and ran thus: "In my proper person, I this day appeared before the prothonotary, in his office, and confessed judgment to the plaintiff, for $21,740.40, besides costs, with a release of all errors, without stay of execution, and that the plaintiff shall have execution by levari facias to November term, 1820. Thomas Cromwell." On the same day, the 13th of September, 1820, on which this paper was filed, the attorney of the bank directed a precipe in the case, properly entitling it by term and number; and adding "scire facias sur mortgage and judgment. Issue levari," &c. A levari facias, reciting the judgment, accordingly issued; but it recited a judgment as having been entered on the 13th day of May, 1820, and not on the 13th of September; the day when it was entered, if entered at all. There was a stay-law at this time, in Pennsylvania, but by an indorsement on the writ of levari, Cromwell, "the within defendant and mortgagor, acknowledges to have received due and regular notice of the time and place of holding an inquisition and appraisement, and releasing all errors touching the premises." The property was sold in November, 1820, by the sheriff to the mortgagees, the defendants in this case, the Bank of Pittsburg: and a deed regularly acknowledged in open court. The bank, having received from Cromwell, in the spring of 1821, full possession, proceeded to sell it out in parcels, as opportunity offered, and had sold it all out prior to 1830. The property—vacant ground when bought by the bank—had now become the site of a large and incorporated village, and was covered with extensive and permanent improvements.

On the 1st of December, 1835-6, some of the purchasers from the bank discovering the state of the record, that the usual entry of judgment did not appear on the large docket, and that the date of the judgment as recited in the levari, did not conform to the date of the judgment which Cromwell appeared to have confessed, Mr. Charles Bradford, who was their counsel, took a rule in the court in which the case was, to show cause why the record should not be amended by the entry on the docket, as of September 13th, 1820, "of the judgment which appears among the papers of the case;" which rule was, after consideration, made absolute. And on the 19th of March, 1836, took another rule absolute to amend the levari facias, "by inserting the 13th day of September, A. D. 1820, instead of the 13th day of May of the same year, so as to conform to the judgment;" which rule was also made.[2]

Cromwell, the mortgagor, having moved away from Pittsburg soon after the sale, died in 1851; never having raised any objection to the proceedings.

It did not appear that notice had ever been given to him of this application to amend the docket or levari.

Upon these facts this bill was filed by his heirs to have an account of the rents and profits of the mortgaged premises; and if the mortgage debt, interest and costs, had not been fully discharged, then, upon payment of any balance, or, if they had been discharged, then without such payment, to have the mortgage cancelled and delivered up, and satisfaction entered on record.

There were several suits of dower on the law side of the court, dependent upon the same point essentially as one decided as a third point in this case; and by consent the whole matter was made dependent upon the decision of that point here.

For the Complainants. The equity and only equity of this case is, that the mortgagee

[2] The following was the opinion of the court, delivered December 14th, 1835, upon the former of these motions:—

DALLAS, C. J. It is apparent on the face of the record in this case, an exemplification of which has been furnished to the court, that the amendment now desired is rendered necessary, in consequence of the neglect or omission of the prothonotary to enter upon the appearance docket a judgment confessed by the defendant in person, on the 13th September, 1820, which confession was contained in a slip of paper signed by the defendant, and filed with the papers in the case, but never noticed in the docket entries. The doctrine of amendments has, in modern practice in Pennsylvania, been applied on very liberal principles; the exercise of the power now invoked, generally speaking, tends very much to the promotion of justice. To deny the amendment now prayed for, might be productive of consequences alike as unjust as they would be extensively injurious. There is here something to amend by, and the effect of the amendment is to make that appear upon the docket which the prothonotary ought to have made appear, on the day that the confession of judgment by the defendant was filed. The case of Murray v. Cooper, 6 Serg. & R. 126, argues strongly in favour of the present rule. In that case Chief Justice Tilghman, in delivering the opinion of the court, says: "But, independently of the statute (17 Car. II. c. 8), the court has power, in order to do justice, to enter judgment at their discretion, as of a past time, when it ought to have been entered. It was so determined in the case of Griffith v. Ogle, 1 Bin. 172. Perhaps," continues the chief justice, "it was through the fault of the prothonotary that it was not entered." So far as the parties to the record are concerned, it is no more than justice to consider it as entered at the time when they thought it was and intended it should be entered. As to third parties, they are not to be injured. The entry of the judgment, as of a past time, will not be permitted to affect their rights.

shall have his money and interest upon it, and that the mortgagor shall have his land. This equity—the right to redeem—is a peculiar favourite equity. It is so much an equity that it is called the equity of redemption; and it is one which the courts of chancery will go very far to encourage, assist, and uphold. Chancery will consider the debt as subsisting until it is regularly foreclosed, and it will even open a regular decree of foreclosure, years after foreclosure, upon grounds strongly conscientious. It will make all presumptions in favour of the equity, none against it. Least of all will it attempt to support void, erroneous, or even irregular proceedings to destroy it. It looks with suspicion upon even the solemn release by a mortgagor of his equity of redemption; and will not support it unless it were clearly made by one who was quite untrammelled, cognizant of his rights and acts, and who in parting with his equity had received its full equivalent. To imply an abandonment of that equity, and to construe beyond its literal operation, and as having the intention and effect of such abandonment, any act of the mortgagor which naturally does or can operate more restrictedly and without such abandonment, would be abhorrent to every principle of equity. It will take the acts and admissions of the mortgagor for what they do or admit; and will not take them, or suffer a hard creditor to take or claim them, one tittle beyond either their action or their language.

In the case now before us, when the bank issued her sci. fa. she admitted a subsisting right of redemption. She does not claim under a long possession without being called to account. Her suit is quite inconsistent with such claim. The suit never having been withdrawn or dismissed, it is still open unless she has proceeded to judgment. She claims under a sheriff's sale upon a valid judgment, or she has no claim. And she cannot claim validly, unless the judgment was valid.

Now, no judgment was ever entered. What if judgment might, or could, or ought to have been entered on the dateless paper put away among the "papers of the case?" The answer is, that it was not entered. "Judgment is the sentence of the law pronounced by the court upon the matter contained in the record." It is not the act of the defendant at all. He may confess a judgment, but he confesses it to the court, and the court accepts and records his confession in its judgment. It may be in a solemn form, or in a form not solemn, and one form is as good as the other. It may have the "whereupon the matters and record abovesaid having been seen and by the judges here fully understood," &c.; or it may be "judgment," "judg't," or even "J." Language, sign, orthography, is not important. But there must be some language, some sign, some orthography; and being matter of record, it can be proved by inspection of the record only. Suppose an amicable agreement to enter judgment on a fixed day, drawn up and signed by the parties in the most approved form, meant to be entered on the record, would it be "a judgment," until the court had exercised its action upon it? Would it be, even if the defendant said in express terms, "I hereby do confess judgment, and judgment is hereby entered?" Would this be a lien? Would any prothonotary certify to it as a judgment, till it was entered by the court or by some officer of the court, on some roll, or docket, or index, or paper? In this case the dateless paper is in the past tense; it refers to something previously done of record, which the record shows was not done, or does not show was done. It does nothing. It is no present judgment. It can be no past, nor any future one. It claims that the admission of a prior confession of a judgment by a party, is an entry of judgment by the court. The docket being shown to be lost, but it not being shown at all what that docket contained, the paper amounts at very best to but parol proof, without grounds laid for parol proof, that a judgment was confessed. This is a matter not to be proved by parol at all, unless there be ground laid in prior proof that a record of judgment once existed, and has now been lost. Suppose any person, after this paper had been signed and filed, had, bonâ fide and for value, and after an inspection of the dockets, rolls, and minutes, and search there for entry of judgments, without finding any, bought this land as free from the lien of any judgment, would such purchaser be affected? Certainly not. The bank might have its action against the prothonotary on his official bond for his not having done his duty, but the land would be free of everything but the mortgage itself. None of Cromwell's papers or confessions aid this case in the vital point. His statement, drawn up by opposite counsel and signed by him, that he had confessed judgment, is of no force, except to prove that a judgment had been entered by the court, and as evidence of that it is outweighed by the fact that no such entry is found on the large docket, where, according to course, it would be. If really no judgment was entered, then his admission that he confessed one comes to nothing. It don't enter it. And in regard to his waiver of inquisition and appraisement, it amounts to nothing beyond what it professes to be, a waiver of "notice of time and place of inquisition and appraisement." The law would give it no further effect. Equity will not go beyond law, to the injury of a mortgagor offering back all the money and years of accumulated interest. Was it Cromwell's duty in addition to all he had done, to see that the judgment which he had confessed, was entered to authorize the levari facias? Had the power ever been vested in him or any other person

in Pennsylvania, to validate process and pass titles to land, against the spirit and policy of the law? Does he now complain of the want of regularity of notice, or repudiate a single act of his?

Mr. Charles Bradford's entry nunc pro tunc, don't help the case, but makes it worse. It shows that there was no judgment on the record, in other words no judgment at all, while it shows how absolute was felt to be the necessity of one. His application was not to mould the judgment into technical form. Such a form it has never had. That being mere form, may always be considered as already done. What he sought was to give it substance. And how does he do it? He ingeniously takes a rule to show cause why the record should not be amended by the entry on the docket, of the judgment among the papers. The docket quoad hoc, is the record. And the motion is, therefore, to enter judgment on the record, from the judgment among the papers. Judgment among the papers! Who ever heard of a judgment among papers, as distinguished from judgment on the record? Independent of which there was no judgment; no act of the court or prothonotary—on the papers. That we have shown. Then Mr. Bradford appeared for neither party originally or now in interest. And if he had appeared for both, and we should concede the validity of the judgment as respects sales made after its entry, nunc pro tunc, how is it to infuse into it that retroactive vitality requisite to support a sale anterior to it?

GRIER, Circuit Justice. Assuming, for the present, the truth of the complainant's assertion, that the record in evidence does not show a legal judgment as foundation for a writ of levari facias, have the complainants shown themselves entitled to a decree on the other facts of the case?

On this assumption, their case stands thus: The mortgagee takes possession of the mortgaged premises, claiming to be the owner of the equity of redemption, and of an indefeasible estate in fee. The mortgagor, not disputing the validity of his claim, delivers the possession. The mortgagee and his vendees remain in possession, claiming the absolute fee for thirty years, rendering no account to the mortgagor, and denying his right to any, or that there is any subsisting trust, or privity with the mortgagor. Will equity, under such circumstances, decree an account, or interfere with the legal title of the mortgagee? Certainly not. It is a settled rule of equity, that, "if the mortgagor permits the mortgagee to hold possession for twenty years without accounting, or without admitting that he possessed the mortgage title only, the mortgagor loses his right of redemption, and the title of the mortgagee becomes as absolute in equity as it previously was at law." 2 Story, Eq. Jur. § 1028a, etc. Chancery will not interfere in favour of the mortgagor after twenty years, where the entry of the mortgagee was equivocal, or only under his defeasible legal title, and where no account has been rendered or demanded, or other acknowledgment of privity, trust, or subjection to the claim of the mortgagor; much less, when the mortgagee claimed and the mortgagor admitted the equity of redemption to be foreclosed, and when the purchasers, for a full consideration, from the mortgagee, have been in possession, making valuable improvements, claiming adversely to all the world for more than twenty years. For if, after such a great length of time, it should be discovered that there was some informality or irregularity in the proceedings intended to foreclose the mortgage, and for which the sale for that purpose might have been avoided; instead of being a reason why equity should interfere in favour of the mortgagor, it is the most conclusive reason to the contrary. It proves the very facts to exist, which equity presumed to exist from length of time alone; to wit, that the mortgagee did not hold in trust, or in privity with, or subjection to, the rights of the mortgagor.

But if length of time and the staleness of the complainant's claim, were not, of themselves, a conclusive objection to it, does not the case show acts and conduct of Thomas Cromwell, which should operate as an equitable estoppel to the claim now advanced?

Let us suppose a bill filed by the mortgagee to foreclose the mortgage, and that the mortgagor (knowing that the land is not worth the money secured on it, and his equity of redemption is worthless,) makes no objection to the foreclosure and sale, but instead of filing an answer to the bill, agrees with the mortgagee to expedite the sale and waive all matters of form; that he signs a written acknowledgment to be filed of record, admitting that the whole amount of mortgage money is due, and agreeing that a master may proceed to sell the premises immediately in discharge of the mortgage; that he waives a valuation; that he delivers up possession to the purchaser; that he stands by, without objection, and sees purchasers for large and valuable consideration, expend large sums in improvements, on the faith of the title thus acquired. Would a court of equity, under such circumstances, entertain a bill for an account, and treat the purchasers as trustees for the mortgagor, on the plea that he has since discovered a flaw or irregularity in the proceedings, and that there was no formal decree of the court foreclosing the mortgage? Surely it would not; and I need not attempt to fortify the assertion, by a reference to the very numerous cases to be found both in law and equity reports, on the subject of estoppel in pais. Yet the hypothetical case I have stated, is the one substantially before us. Cromwell gave his written assent to the sale, and assisted to expedite it, and thus encouraged purchasers to believe they obtained an indefeasible estate. He cannot now be per-

mitted, in a court of equity, to assert the defect of title.

II. Thus far we have considered this case on the assumption, that the allegation of the bill, which is the whole foundation of the complainant's claim, is true; to wit, that the record of the proceedings on the scire facias shows no judgment to support the writ of levari facias, and that the sheriff had no legal authority to sell. But the truth is, that this allegation of the bill is unfounded in fact. And the case shows: 1st. That even without the amendment of the docket, made in 1836, there is sufficient record evidence of a judgment. 2nd. That, if it were absolutely necessary to the validity of a judgment that it be recorded in a book or docket, there is sufficient evidence that such a docket record was made, and is now lost or destroyed. 3rd. That the amendment (though not strictly necessary,) was properly made, and being made, is absolutely conclusive between these parties.

It would lead to absurd and mischievous conclusions, if we should attempt to test the validity of the records of the courts of Pennsylvania, by a comparison with those of the king's bench and common pleas in England, or those, perhaps, of several of our own states.

In early times, one of the justices of the court had possession of the seal, signed all writs and judgments, took bail, and performed all the functions of the prothonotary. This continued to be the case till the adoption of the new constitution in 1790. After that time, and till the present constitution was adopted, the prothonotary was appointed by the governor; now he is elected by the people.

The judiciary act of the 13th of April, 1791 [1 Stat. 73], provides that these "prothonotaries shall have the like power to sign all judgments, writs of process, &c., as they had for those purposes, when they were justices of the court."

Since that time the prothonotary has exercised many quasi judicial functions. Parties appear before him and confess judgment ore tenus, in vacation or at any time; or it is entered upon a precipe, or written order from the party; or on a general power of attorney, or any other acknowledgment or agreement of the party to confess a judgment, whether written in the present or preterite tense. Cook v. Gilbert, 8 Serg. & R. 568; McCalmont v. Peters, 13 Serg. & R. 196; Reed v. Hamet, 4 Watts, 441.

But these prothonotaries, notwithstanding they exercised such large powers, were too often appointed or elected without any regard to their capacity to perform the duties of their office. Wholly ignorant of law and legal forms, they became a law unto themselves. There was no system, rule, form, or precedent adhered to. Judgments were seldom or ever signed by clerk or judge. No judgment roll or record proper is ever engrossed. Minutes of the acts and judgments of the court are made sometimes by the clerk in the minute book of the term, sometimes by the judge on the trial list, or in the rough docket, or indorsed on a case stated, or declaration, or other paper on file. Generally a large folio docket is kept, into which these minutes, whether found in the rough docket, book of minutes of court, trial list, or elsewhere, are collected and copied in a fair and legible hand. This duty is usually performed after every term, with more or less attention to accuracy and correctness, but often with many and important omissions. But all these entries, whether found in this docket or not, are but the minutes from which a formal record may be made, but in fact never is made. They are made as brief as possible, and are mere short hand intimations of what the record ought to be when drawn out in form. For the purpose of notice to purchasers, as regards liens, a minute of the judgment must be made in a certain docket called a judgment docket. But the want of this registry does not affect the judgment inter partes. None of these dockets has any title to be called the record of the court. Minutes of the acts of the court found in the trial or argument lists, in the handwriting of the judge, or indorsed on a case stated, or any other document or agreement of the parties or their counsel, filed in the suit, furnish as proper materials from which to draw out a proper technical record, as the short minutes copied into the folio docket. These minutes, whether made by the judge, the clerk, or an attorney, are always brief and informal; usually, the word "judgment," connected with the date and amount, or "judgment for sum due," leaving the clerk to compute it, is all the actual record that is made. When judge of the state court, I have entered many thousands in that way, and never signed one drawn up in legal form. The "ideo consideratum est" of a formal record of judgment, is nowhere to be found. When a defendant is willing and desirous to confess judgment, he may do it upon the back of the writ or narr., or by any other paper put on file; or he may come in propria persona before the prothonotary. There is no given form for such writing, or for the mode of recording the fact. Usually, when an agreement or acknowledgment, such as is found in this case, has been put on file, the entry made by the clerk on the rough docket would be, "Sept. 13, 1820, judgment confessed, see paper filed with writ;" a more careful clerk would transcribe the substance of the agreement; and a very careful one would have written out a copy on the rough docket, and have required the party to sign it. And I have known one prothonotary (a very worthy man, but somewhat eccentric in his orthography) who would have made the following minute only: "Cept. 13 gugt." Yet with this paper on file to show the amount and terms of the judgment, and with the help of which

a formal record might have been drawn up, no lawyer acquainted with the practice and records of Pennsylvania, would venture the assertion that there was no judgment.

In Prine v. Com., 6 Harris [18 Pa. St.] 103, the late Chief Justice Gibson complains that the same laxity and disregard of legal forms are to be found in criminal cases. "Our looseness," says he, "in recording forms of procedure, especially in criminal cases—if we have any forms left—has grown till the knowledge of the principles of which they were the exponents has been lost to the bench and the bar. More method sometimes appears in the record of a justice's judgment for a few dollars, than appears in the record of a conviction of murder."

A certified copy of the docket entries, is not legal evidence of a record. All the papers on file with their indorsements are as much entitled to that name. Leveringe v. Dayton [Case No. 8,288]. A clerk who understands his business and duties, could use these documents and memoranda, whether on the docket or on file, as a frame on which to construct a formal record, with all the verbiage to be found in Saunders's Reports, or the Appendix to 3d Blackstone's Commentaries. If the court in this case had refused to receive (as they might well have done) the docket, memoranda, and other papers read without objection as record, and required a formal record certified under the seal of the state court, the prothonotary would have been justified, nay, bound, to certify a judgment in the case as entered on the 13th of September, 1820, by confession or nil dicit, with the "ideo consideratum est," and any and all other terms of art to satisfy the formalist. The confession of judgment on file in this court, is itself the original, and as much a part of the record or minutes, from which a formal record may be made, as any other paper or docket memorandum in the case. The amendment of the docket made in 1836, was in fact superfluous and unnecessary as between the parties to the judgment. It was an amendment of the docket, not of the record. The omission of such registry being a palpable oversight or neglect of the clerk who copied the minutes of the record into that docket, it could be remedied at any time by the clerk, even without an especial order of the court to authorize it.

2dly. Assuming that a registry of the minute of judgment in a docket, is absolutely necessary to its legal existence, there is no law which requires it to be made in a large and not in small docket; in a folio bound in Russia leather, and not in a common bound rough docket; or that the original would not be as good record evidence, if it was in existence, as a copy. The omission of the clerk to copy the entry of judgment into the larger docket, would not invalidate it. The course pursued by the prothonotary, of making the minutes and entries first in the rough docket, which is now lost, leaves it altogether probable, if not certain, that the only omission of duty has been a neglect to afterwards copy it into the folio docket. But this presumption is legally conclusive, when connected with the other facts of the case. The written acknowledgment on file; the recital of the precipe, "scire facias sur mortgage and judgment. Issue levari," etc.; the writ of levari facias, reciting a judgment; the indorsement by the defendant Cromwell on the writ; the sale made with the concurrence of the defendant, remaining unquestioned by him during his whole life, and for the space of thirty years. These facts can leave no doubt that the lost docket contained a record of the judgment on which the writ of levari facias and sale by the sheriff were founded. If, after such a length of time, titles could be called in question for want of some writ, docket, or other memorandum, no man's property in Pennsylvania would be safe; and more especially would this be the case in Pittsburg, where process of execution on which valuable titles depend, is often found among the papers of deceased attorneys and sheriffs, who have sometimes removed to near or to distant places and states, and where the archives of the court are treated as useless lumber. The case of Shaw v. Boyd, 12 Pa. St. 215, would have been without difficulty, if any paper on file had shown that a judgment had been entered, as in the present case. There, on the issue of "nul tiel record," the court presumed that a judgment had been entered in 1820, from lapse of time and other circumstances. "The probability is," says the court, "that judgment was entered on the back of the paper containing the case stated, or special verdict. That paper is now lost or mislaid, and cannot be found. Strong presumptions are tolerated and allowed in favour of records irregularly kept, after a great length of time."

3dly. Assuming it in the last place to be absolutely necessary that the entry of judgment should be copied into the folio docket, in order to give it validity; the omission to do so is a clerical error or misprision, which may be amended at any time; and the amendment when made is conclusive, and cannot be denied or questioned in a collateral suit.

A court may possibly not have the power to alter or vacate its own judgments truly recorded, after the term to which they have been entered. But that any misprision, omission, or mistake of the clerk may be amended at any time, where the record shows anything to amend by, has never been doubted since the statute of 1 Edw. III. c. 6. It is a power vested in every court, and one which it is their duty to exercise in a proper case, in order that suitors may not suffer by the carelessness or mistakes of clerks and officers. It is a power committed to the discretion of the court, to be exercised over their own records, and the correct use of that discretion cannot be questioned by another court, even on a writ of error. The jurisdic-

tion of the court does not depend on the consent or presence of the parties to the suit, but on the power of the court over its own records. A record is received as absolute verity, and it is the duty of the court to see that it speaks the truth and the whole truth. If the amendment made is according to the truth, the parties have no right to complain. If it be alleged that the amendment was ordered on a false suggestion, the party making such allegation should apply to the court to vacate or set aside such order for that reason. The court of common pleas of Alleghany county having decided that a judgment was confessed by Cromwell on the 13th of September, 1820, and that it should have been entered by the clerk on the docket, and having ordered that omission to be amended nunc pro tunc, it is conclusive evidence to this court that such a judgment was rendered or confessed on the 13th of September, 1820. The complainants in this case cannot question its propriety or deny its effects.

The case of the complainants, taken as a whole, is therefore without foundation, either in fact or in law.

The doctrines which I have just stated are supported to their fullest extent by precedent. I need refer but to few to be found in the reports of Pennsylvania.

In Maus v. Maus, 5 Watts, 319, the court say, "It is never too late to amend the record merely for the purpose of correcting a misprision of the clerk." In Owen v. Simpson, 3 Watts, 87, it is decided, "That not only has every court the power, but it is its duty to amend a clerical error which stands in the way of justice, and when it is evident the defect was produced by the blunder of the prothonotary. To suffer the imprision of a clerk to destroy the title of a purchaser, with such materials for amendment, would be inconsistent with the liberality which is so conspicuous a feature of the day."

In Murray v. Cooper, 6 Serg. & R. 126, a judgment given in 1808, was neglected to be recorded; and in 1816, the court amended the record by ordering a judgment to be entered as of August term, 1808. On error brought to reverse this amendment, the supreme court decided that it was not the subject of review on a writ of error, and say, "The court has power, in order to do justice, to enter judgment at their discretion as of a past term when it ought to have been entered. They exercised that discretion; they had a right to do so, and we cannot say they have abused it." In Wilkins v. Anderson, 11 Pa. St. 399, a memorandum found on an old trial list, in the handwriting of the judge, was considered sufficient record evidence that a person was substituted as defendant, where the docket entry of the verdict and judgment and the other papers in the cause, showed another person as the defendant. And the court say, "This entry on the trial list being among the archives or monuments from which a record may be made at any distance of time, the record might be amended." In De Haas v. Bunn, 2 Barr [2 Pa. St.] 339, the court say, "It is only by patching up errors in matters of mere form arising from inexperience consequent on the popular principle of rotation in office, that we can hope to preserve the substance of justice." In Rhoads v. Com., 3 Harris [15 Pa. St.] 272, the court state it as "a plain legal truth, which ought not to have been brought in question, that the court having the power to amend, the regularity of the amendment cannot be inquired into collaterally." So also in Sickler v. Overton, 3 Barr [3 Pa. St.] 325, and see 7 Serg. & R. 180.

These are but a few of the cases on this subject; and an examination of them will show amendments of clerical omissions and misprisions, "reconstructions of the whole fabric of writs," presumptions of records, far beyond any charity which need be invoked to hide the omission in this case, so easily corrected, and afterwards actually and conclusively amended. Much of the most valuable property in Pennsylvania has gone through the hands of the sheriff, and nearly all through the orphans' court more than once. In most of these cases the titles now depend on the preservation of loose papers and other documents by officers selected too often with little regard to any principle save that of rotation; whereby skill and experience are often superseded by ignorance and incompetency.

Bill dismissed with costs.

NOTE [from original report]. The evidence given in the case presents somewhat vividly the manner in which records are occasionally kept in Pennsylvania. A witness who had been employed to hunt up all the evidences of judgment entered in the original suit against Cromwell, testified as follows:

"At the request of the solicitor for the respondents in this case, I proceeded to the top of the court house, and in a space surrounding the base of the cupola, amidst a quantity of old acts of assembly thrown negligently down into the space, I found a number of old papers, apparently belonging to the prothonotary's office, and a number of old, rough, appearance dockets. I returned twice afterwards, took a candle, went down into this space, and made a most thorough search. I handled every paper and docket that was there. Some of these dockets went as far back as 1789, or farther: and some came down as late as 1836. They were in a damaged condition, dirty, and apparently thrown away as useless. The docket of 1820 I could not find. The nearest I came to it was the one of 1821. I also made an examination in the prothonotary's office, and was unable to find it there. There were entries of judgments, and confessions of judgments, on these dockets."

This carelessness of records is not peculiar to western Pennsylvania. For many years past, it has been known to autograph hunters in Philadelphia, that a vast number of ancient, curious and valuable papers were piled carelessly about the loft over the supreme court room of the state, at the south-east corner of Sixth and Chestnut streets. They were in truth the records of the criminal courts and court of common pleas of Philadelphia, and of the supreme court of the state, from the very earliest date until comparatively recent times. Through the zealous diminutions of them by members

of the Historical Society of Pennsylvania and other curious persons, they have now in a large degree passed into public or private collections. The history of their removal to the loft, was not the least interesting part of their history. It appeared that they had been taken from their proper repositories some years since to make room for coming and anticipated records of a later date, and put into one of the cellars of the public buildings. The cellar being wanted as a place to confine vagrant dogs, the records were carted round to the hall above mentioned, and taken in barrows and baskets up two pair of stairs, where they were pitched down negligently about the loft of the building. Being dry, they were found quite useful for some time in kindling various fires in the court rooms about the building; but the building itself having taken fire one day, the value of them for this purpose, was impaired by the city hose having been allowed to empty the issues of several fire-plugs for some hours upon them.

More recent times have probably not improved the matter. An acquaintance suggests to me a case well remembered at the bar of Philadelphia, which had been several times taken to the supreme court in banc, on various points, all charged or chargeable to the loss of an original record. The case got so bad at last, and, from the loss of the papers, was such a stated source of intemperate vexation and dispute, that it was becoming the plague of every body who had any thing to do with the court. One day, in 1850, when matters had got to a pass which defied all possibility of any settlement, and the thing was expected to make fine matter for a summer's morning, the record was found—inside of the stove. Mr. Ingraham, as amicus curiae, informing the court, that the inside of the stove was a place where it was well known that many records were put in winter; but that, until the recent discovery, it was generally supposed that a different disposition was made of them in summer.

Lest our English brethren should suppose that this carelessness of judicial records is confined to America, let me mention for their benefit, that the same negligence prevails among themselves. In a summer ramble in 1850, through the interior of England, I accompanied a relative, eminent for his taste and pursuits in architecture, through the upper parts of the Sheldon Theatre, at Oxford. On our way through its lofts to examine the joints and beams of its curious cupola, my eye was caught by baskets of records placed about the floor; which, I ascertained from our guide, were records of some kind from the English courts. The city library at Philadelphia, contains two huge volumes of original papers, communications from the privy council and warrants from the king himself to the lord lieutenant of Ireland—many of these last apparently connected, not remotely, with the titles of landed estates in Ireland; and I am, myself, the owner of an original record of the English chancery, sold, with a great number of similar things, at auction in Philadelphia, for a few cents; and valued only as containing a noble illustration alike of Lord Hardwicke's well known autograph and of his intelligence and decision in chancery decrees.

Case No. 3,410.

CROMWELL et al. v. The ISLAND CITY.

[1 Cliff. 221.] [1]

Circuit Court, D. Massachusetts. May Term, 1859.

SALVAGE—DERELICT—COMPENSATION—EMBEZZLEMENT.

1. A disabled bark in tow of a steamer was anchored and left for a necessary and temporary purpose. The officers and crew of the bark went on board the steamer; but nothing was taken out of the bark, it being the intention to return and take her to a place of safety at the earliest practicable moment, which intention was carried into effect. *Held*, the bark was not derelict when found by another vessel, during the steamer's absence.

2. But when a party finds property thus temporarily left, whether from necessity or other cause, and he takes possession of it with the bona fide intention of returning it to the owner, and if by his exertions he contributes materially to the preservation of the property, he will be entitled to remuneration as a salvor, according to the merits of the service.

[Cited in The Blackwell v. Sancelito Water & Steam-Tug Co., 10 Wall. (77 U. S.) 14.]

3. In this case the vessel saved was, with her cargo, worth $70,000; the steamer that rendered the service, with her cargo, $90,000. Salvage decreed to the owners of the steamer, $1,500; and in the absence of any charge of embezzlement or theft, $3,000 would have been adjudged to the officers and crew.

[Cited in The Camanche v. Coast Wrecking Co., 8 Wall. (75 U. S.) 475.]

4. But where all, or nearly all, the personal effects of the officers and crew of the bark saved were embezzled, locks being broken, chests and trunks forced open, and these acts of plunder committed by the crew of the rescuing steamer, under circumstances which showed that her officers either connived at them, or were grossly negligent in failing to prevent them, and in not causing the property to be restored. *Held*, that the salvage that would otherwise be decreed to the officers and crew of the steamer was forfeited to the owners of the property saved.

[Cited in New York Harbor Protection Co. v. The Clara, 23 Wall. (90 U. S.) 17; U. S. v. Stone, 8 Fed. 251.]

[On certificate from the district court of the United States for the district of Massachusetts.]

This, like the two preceding cases [i. e. Adams v. Island City, Case No. 55, and Norris v. Same, Id. 10,306, which were claims for services rendered to the same vessel], was a libel [by Henry B. Cromwell and others, owners, etc., of the steamship Westernport] claiming to recover for a salvage service, and was also certified to this court. The circumstances under which the service was rendered appear in Adams v. The Island City [Case No. 55]. It appeared in this case, that, after the bark was taken into a place of safety, the crew of the steamer Westernport were allowed to break open the chests of seamen and officers of the bark, and take out their contents, which consisted of clothing, money, and other articles.

R. H. Dana, Jr., and Daniel W. Gooch, for libellants.

The elements necessary to constitute salvage: (1) A marine peril; (2) voluntary service upon contingent compensation; (3) success. The Henry Ewbank [Case No. 6,376]; The India, 1 W. Rob. Adm. 406; The Dodge Healy [Case No. 849]. The services of the Kensington's crew had the two former requisites, but failed in the last. As to the R. B. Forbes, there is no claim for salvage. She

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

was engaged by the owners of the Island City, in their service, and subject to their order. The employment of the Forbes could have been terminated at any moment by the owners of the bark. The libel of the Forbes is solely to obstruct the claim of the Westernport. The service of the Westernport was salvage in its nature. The Island City was derelict in the sense of the law of salvage. In the salvage laws, derelict means deserted, with or without the hope of returning. The test is the power of resuming possession. The Amethyst [Id. 330]; The John Gilpin [Id. 7,345]; The John Wurtz [Id. 7,434]; Rowe v. The Brig [Id. 12,093]. In cases like this the rule is to give one half for all the salvage. The Boston [Id. 1,673]; Sprague v. Barrels Flour [Id. 13,253]; The Galaxy [Id. 5,186]; L'Esperance, 1 Dod. 46; The Frances Mary, 2 Hagg. Adm. 90; The Elliotta, 2 Dod. 75; The Reliance, 2 Hagg. Adm. 91, note; The Eugene, 3 Hagg. Adm. 156; The Effort, Id. 166; Twee Gebroeders, Id. 431, note; The Watt, 2 W. Rob. Adm. 70; The Nicolina, Id. 175; The Britannia, 3 Hagg. Adm. 154.

Reasons for high rate of salvage in this case: The vessel saved was derelict. The service was solely by libellants. She was in immediate peril. Service was successful. Salving vessel was a steamer. The Gen. Palmer, 5 Notes Cas. 159, note. Chances of reasonable relief from other sources were small. The articles taken from the Island City by the men of the Westernport were so taken to protect themselves from the severity of the weather. If the Forbes was not acting as agent of the owners of the Island City, then she was a mere trespasser on the Kensington's possession.

B. R. Curtis and William Dehon, for claimants.

CLIFFORD, Circuit Justice. On this state of facts, it has already been determined, in the case of Adams v. The Island City [Case No. 55], that the steamer is entitled to a salvage compensation. Her counsel, however, insist that the bark was derelict, and that the amount of the compensation to be allowed should be ascertained upon the principles applicable to cases of derelict. Reference to the facts, as already stated, will show that the theory of fact assumed by the counsel cannot be sustained. When the officers and crew of the steamer anchored and left the bark, it was with the openly declared intention of returning, and the same remark applies to the master of the bark and her crew. They left for a necessary and temporary purpose, with the intention of returning, and actually carried that intention into effect at the earliest practicable moment. Suffice it to say, without repeating the testimony, that their efforts in that behalf were unceasing from the moment they reached Provincetown, where it was expected they would find suitable coal, until they finally returned. One great cause of danger was the ice, and no doubt is entertained, from the evidence, that the place where the bark was left by the R. B. Forbes was one less exposed in that respect than the one she previously occupied. She was left in as safe a condition as the means at hand would allow. No more could have been done had her crew remained, and as they were destitute of provisions, or nearly so, it was not an unreasonable step on the part of the master to allow the crew to accompany the steamer to Provincetown. Property is not in the sense of the law derelict, and the possession left vacant for the finder, until the hope of recovering it is gone, and the intention of returning is finally given up. But when a party finds property thus temporarily left to the mercy of the elements, whether from necessity or any other cause, and he takes possession of it, though it is not finally abandoned and derelict, with the bona fide intention of saving it for the owner, he will not be treated as a trespasser. On the contrary, if by his exertions he contributes materially to the preservation of the property, he will entitle himself to a remuneration as a salvor, according to the merits of the service rendered. The Bee [Id. 1,219]. It is not enough that the officers and the crew left the vessel, unless it also appears that she was so left without any intention on their part of returning to the vessel. Tyson v. Prior [Id. 14,319]. To constitute a case of derelict, it is not sufficient that the vessel was abandoned, but it should also appear that the abandonment was without the hope of recovery, and without the intention of returning to the vessel. The Aquila, 1 C. Rob. Adm. 41. All the cases show that the mere quitting of the ship, for the purpose of procuring assistance from shore, and with the intention of returning to her, is not an abandonment. The Beaver, 3 C. Rob. Adm. 293; The Barefoot, 1 Eng. Law & Eq. 661; The Emulous [Case No. 4,480]; The Boston [Id. 1,673]. Unexpected difficulties and delay had been encountered by the steamer, and her master finding that his coal was nearly consumed, and that the crew of the bark were destitute of provisions, concluded to go to Provincetown after supplies, and the officers and crew of the bark decided to go in the steamer, it being fully understood that all would return to the bark at the earliest practicable moment. Intention to return in this case is fully proved, and as a matter of fact was actually carried into effect without any previous knowledge that the bark had been removed from the place where she had been left by the steamer and her own crew. These considerations lead necessarily to the conclusion that the proposition that she was derelict cannot be sustained. Compensation, therefore, in this case, must be ascertained by the same rule and upon the same principles as have been applied in the other cases already decided which grew out of the same

disaster. Thirteen thousand dollars is the whole amount allowed as salvage, and of that sum five thousand two hundred dollars have been adjudged to be the proportion to be paid in the case of Adams v. The Island City [supra], and three thousand three hundred dollars in the case of the schooner Kensington. Deducting these sums from the whole amount allowed, it leaves four thousand five hundred dollars which remains to be adjusted in the case under consideration. One third of that sum is hereby adjudged to the owners of the steamer, leaving the sum of three thousand dollars, which, in the absence of any charge of embezzlement, theft, wanton destruction of the property saved, and gross carelessness, would be adjudged to her officers and crew.

But whatever salvage may have been earned by the master, officers, and crew of this steamer, it is insisted by the respondents, was forfeited by embezzlement and by gross negligence. That embezzlement of the most censurable kind, such as robbing the chests of shipwrecked mariners, actually took place is clearly proved, not merely in a single instance, but extensively, and upon a plan of general plunder of their effects. The master of the bark first went on board, after his return from Provincetown, on the 1st of February. She was then in possession of the crew of the Westernport. On going into the cabin he found a trunk broken open which was on freight. It contained a few clothes and papers, and was filled with pecan-nuts, and similar nuts were scattered all about the cabin. He then went ashore; and on returning and looking round, he found that all his clothes were gone. Complaint was then made to the mate of the steamer, and most of the articles were returned. When he left the bark to go to Provincetown his chest contained sixty-five dollars in money, and that also was gone. Of that sum twenty-five dollars were returned by the mate. Forty-two dollars, belonging to his sister, he says, was rolled up in a newspaper, and there was alongside of it in the till of his chest his purse, containing twenty-three dollars in gold and silver. That purse and its contents were gone, and were not returned. His loss, in addition to the money already mentioned, he estimates at ten dollars, consisting, among other things, of a dozen and a half of socks, his razor, a pair of flannel drawers, and two or three silk handkerchiefs. Several of the seamen were also examined, and they also testify that their chests were broken open and pillaged of their contents. One of them, George Patten, testifies that he had forty-three dollars in money in his chest, and that when he went on board he found the chest broken open and the money gone. Other things had been taken from the chest, such as a quadrant, his coat, socks, drawers, and other small articles. Twenty-four dollars and fifty cents of the money were returned to him by the mate in about two hours after he went on board. He says that the chest of the master, the trunk of the mate, the chests of two of the seamen in the forecastle, and the chest of the carpenter, were also broken open. After ascertaining what had been done, he complained of his loss, first to the mate of the bark, and then to the engineer of the steamer, and that the latter promised him to return what articles they had in their possession. Some of the articles of clothing were returned to him by two of the crew, and the mate gave him back the quadrant. His loss in money and clothing amounts to twenty-five dollars and fifty cents. Others also were robbed of their effects in the same way, and among the number was the mate of the bark. He estimates his loss at seventy-five or eighty dollars, consisting for the most part of articles of clothing, and including his watch, razors, clothes-brush, and some books. Some of the articles he saw on board, and he also says that the mate of the steamer told him that he took the quadrant and barometers of the ship, and such things, himself. Another seaman, Hiram Wallis, testifies that his chest was split and broken open, and everything taken out. His loss was twenty dollars, chiefly in articles of clothing, and exclusive of what was returned. Some of the seamen had no chests, and left their clothing in the bark, as they had been in the habit of keeping it, in carpet-bags. Those also were rifled and robbed of their contents. Charles McCarty testifies that he lost all of his clothing, valued at twenty dollars, and none of it was returned. He complained of his loss, and was told by two of the crew of the steamer that the mate went down first into the forecastle, and broke open the chests, and took out what he thought was worth taking, and that the crew afterwards followed him. Clothing was also lost by Isaac McGowan, another seaman, to the amount of twenty dollars, and he says he heard the mate of the steamer acknowledge that he had overhauled the chest of the master of the bark. Another seaman, by the name of John Williams, also lost clothing and other articles of the value of thirteen or fourteen dollars, and he says that the chests, when he went on board at Hyannis, were all broken open, and everything was taken out of them. He also says that two of the crew of the steamer told him that the mate and engineer of the steamer went down first into the forecastle, and when the crew got there the chests had been broken open. Two of the seamen of the bark were taken sick at Provincetown, and did not return. They were both examined as witnesses, and each testifies that he had lost some seventeen or eighteen dollars in clothing, and such other articles as are usually kept by seamen in their chests.

These references to the testimony are believed to be sufficient to show that a general plan of embezzlement, so far as respects the

effects of the officers and crew of the bark, was actually practised by the crew of the steamer, and that the mate and other officers in charge of the property saved either participated in the robbery, or were so grossly negligent in the performance of their duty to protect it against such practices as to render them equally culpable. When the bark was anchored near the wharf, the master of the steamer was on board, and he admits that he remained there until he set the watch, and then he went on shore to visit his family. His duty plainly required him to prevent such open violation of law by those under his command, and it is not doubted that the mate and other officers and crew might have been restrained if he had exercised proper diligence in enforcing the authority with which he was invested. Whether the chests were broken open before or after he went on shore does not very clearly appear. One thing, however, is certain, little or no effort was made on the part of the master of the steamer to cause restitution to be made after he returned, and there is much reason to infer from the evidence that the depredation had been commenced before he left the vessel. As a master mariner, he well knew that the seamen, shipwrecked as they were in midwinter and in weather of almost unparalleled severity, were in need of all their clothing, and his failure to exert himself to cause it to be restored adds something to the other grounds of inference that he was guilty of gross negligence in suffering this outrage to be committed. Open embezzlement, such as was practised in this case, stands upon a somewhat different principle in that behalf from secret theft. Orders from the master, however strict, might not prove sufficient to prevent the latter, while they would in general be an ample safeguard against the former. According to the testimony, the master of the steamer admitted in effect that he expected pilfering, and yet he took no measures to guard against it; and when complaint was made, and he found that his expectations had been realized, he was indifferent to the calls for redress. All of the crew who did not actively participate in the plunder, if any such there were, must have been aware that it had taken place, and it was the imperative duty of every man to have exerted himself to have it restored; and in this respect they were guilty of culpable negligence and wilful default. Considering that so brief a period had elapsed after the bark was anchored at the wharf before the officers and crew of the bark arrived, it is scarcely possible that the money had been expended or the property consumed. And if not so, then it might have been returned. No discrimination, therefore, can be made in favor of any one of the officers or crew, and the claim of each salvor must abide the conclusion to be drawn from the general conduct of the whole company. Salvage property is always from necessity more or less exposed to be plundered by the salvors, and when found unoccupied, whether derelict or otherwise, it is peculiarly so, because the owner then being absent, has no power to protect it, either by himself or his agents. Public policy encourages the hardy and industrious mariner to engage in these laborious and sometimes dangerous enterprises, and with a view to withdraw from him every temptation to embezzlement and dishonesty, the law allows him, in case he is successful, a liberal compensation. Those liberal rules as to remuneration were adopted and are administered, not only as an inducement to the daring to embark in such enterprises, but to withdraw as far as possible every motive from the salvors to depredate upon the property of the unfortunate owner. While the law is thus liberal as to compensation, it requires on the part of the salvors the most scrupulous fidelity. It visits, says a learned judge, any embezzlement, although small, with an entire forfeiture of all claim for salvage. It not only withholds the extraordinary reward allowed to the honest salvor as a premium for his courage and hardihood, but, by way of penalty for his fraud, deprives him even of a quantum meruit for his labor. The Rising Sun [Case No. 11,858]; The Duke of Manchester, 2 W. Rob. Adm. 478; The Barefoot, 1 Eng. Law & Eq. 661. While the general interests of society require that the most powerful inducements should be held out to men to save life and property about to perish at sea, they also require, says Chief Justice Marshall, that those inducements should likewise be held forth to a fair and upright conduct with regard to the objects preserved. Mason v. The Blaireau, 2 Cranch [6 U. S.] 240. Judge Story held, in the case of The Boston [supra], that compensation for salvage service presupposes good faith, meritorious service, complete restoration, and incorruptible vigilance, so far as the property is within the reach or under the control of the salvors. Salvors are required by the nature of their undertaking, and by a due consideration of the large award allowed them for their services, to be vigilant in preventing, detecting, and exposing every act of plunder upon the property saved; and if they are guilty of embezzlement, whether at sea, in port, or even after the property is delivered into the custody of the law, it works a forfeiture of their claim to salvage. When secret, and purely an individual act, it is justly held not to prejudice co-salvors who are innocent. But all may become guilty by consenting thereto, or by connivance, concealment, or encouragement afforded to the actors, or by not preventing the act when it is in their power. Apply these principles to the facts of the case as already ascertained, and it is obvious what the decision must be. All, or nearly all, of the personal effects both of the officers and crew of the bark were embezzled within a few hours after she was anchored at the wharf. Locks were broken, chests and trunks forced open, clothing, mon-

ey, and other articles of value to the mariner carried away and never returned; and these acts of plunder were committed under circumstances which, within the principles here laid down, implicate all of the officers and crew of the steamer, and therefore render all responsible for their commission. For these reasons it is adjudged that the entire portion of the salvage compensation allowed in this case, which would otherwise be due to the officers and crew of the steamer, be considered as forfeited to the owners of the property saved.

CROMWELL (WILSON v.). See Case No. 17,799.

Case No. 3,411.

In re CRONEY et al.

[8 Ben. 64.][1]

District Court, S. D. New York. April Term, 1875.

RENT—COVENANT—USE AND OCCUPATION.

Bankrupts occupied a store, under a lease which contained a covenant that, in case of default in payment of the rent, the landlord might re-enter and re-let the premises as the agent of the tenants, and that they would pay him any deficiency in the amount of the rent so received. Some time after the bankruptcy, the landlord re-entered and re-let the premises, and he sought to prove against the estate, not only the rent due at the time of the bankruptcy, but the amount of the deficiency in the rent for the whole term of the lease: *Held*, that the provable debt must be limited to the rent due at the time of the bankruptcy, but there might be a claim for use and occupation of the premises by the court and the assignee after that time.

[In the matter of George W. Croney and Lorenzo Tuttle, bankrupts.]

The register in this case certified that the assignee had applied to him by petition for the re-examination of the claim of J. Weed Bell, who had filed a proof of debt amounting to $8,051.16; that he had taken testimony on such examination; and that the debt should be reduced to $1,011.65. The evidence showed that the bankrupts, at the time of the filing of the petition, occupied a store under a lease, by the terms of which $1,011.65 was the amount of the rent then due. The lease contained also this covenant: "That if any rent shall be due and unpaid, or if any default be made in any of the covenants herein contained, then the party of the first part at his option may re-enter said premises, and may thereupon re-let the same as the agent of the said parties of the second part for their benefit; and in case the rent received by said party of the first part as such agent of the parties of the second part be not equal in amount to the rent hereby reserved and agreed to be paid, in such case the parties of the second part hereby promise and agree to pay to the party of the first part such sum as will be sufficient to make up such deficiency." Some time after the filing of the petition, and after the sale of the stock in the store by the assignee, the landlord re-entered the premises and re-let them at a reduced rent, and the amount of the deficiency for the unexpired term, together with the rent due up to the time of the filing of the petition, constituted the debt, of which Bell had filed proof.

BLATCHFORD, District Judge. The provable debt ought to be reduced to $1,011.65. There may be a valid claim for the value of the use and occupation of the premises by the court and the assignee after the petition was filed.

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

CRONKHITE (WARNER v.). See Case No. 17,180.

Case No. 3,412.

CROOK v. AUDENREID et al.

[7 Ben. 564.][1]

District Court, S. D. New York. Jan., 1875.

ATTACHMENT—ASSIGNMENT—FREIGHT.

F., the owner of a canal-boat, brought a cargo of coal to A., the freight of which, $158 38, was due to F. on Sept. 16th, 1869. F., having assigned the debt to C., he filed a libel against A. to recover it. Before the assignment, an attachment against the property of F. was issued out of the first district court of the city of New York, which was served on A. before the libel was filed. The plaintiff in the action in the first district court obtained judgment against F., and issued execution, and A. paid to the marshal of the first district court, the person duly authorized to collect the execution, the $158 38. The case was heard on an admitted statement of facts: *Held*, that, as A. had admitted that the debt was due to F., it was for him to show that the attachment and execution bound the debt in his hands, and, as he had not done so, C. was entitled to a decree for the amount of the debt.

The libel in this case alleged, that one Feaney was the owner of a canal-boat, and brought a cargo of coal in her for [Lewis] Audenreid & Co., the respondents, on which the freight was $158 38, which they had not paid, and that Feaney had assigned the claim to the libellant [John Crook], who sought to recover it in this suit. The answer set up, that, previous to the assignment by Feaney and the filing of the libel, the freight in the hands of Audenreid & Co. was attached at the suit of one Compton; that judgment was recovered in the suit, and execution issued; and that Audenreid & Co. had paid over the money. The case was submitted on the following agreed statement of facts: The defendants admit that there was due from them to the libellant's assignee, James Feaney, the sum of one hundred and fifty-

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

eight dollars and thirty-eight cents, for freight on a cargo of coal—such sum was due on the 16th day of September, 1869. Plaintiff admits, that, on that day, an attachment issued out of the first district court of the city of New York, at the suit of one Oscar F. Compton, against the property of the said Feaney, which attachment a duly authorized marshal of said court duly served on the defendants before the commencement of this suit, upon the indebtedness so due from them to Feaney. That, thereafter, the said Feaney assigned the said claim to the plaintiff, who thereupon commenced this action. That, thereafter, the said Compton obtained judgment in the said first district court, against said James Feaney, for $158 38, and issued execution thereon, and, on demand made under said execution, the defendants paid over to the said marshal of the first district court, the person duly authorized to collect said execution, the said sum of one hundred and fifty-eight dollars and thirty-eight cents, being the amount so due from them to the said Feaney, and so sought to be attached by said Compton.

Horace Andrews, for libellant. F. C. Bowman, for respondents.

BLATCHFORD, District Judge. As the debt to the libellant's assignor is admitted to have been due, $158 38, September 16th, 1869, it is for the respondents to show that the attachment and execution set up bound the debt in the hands of the respondents. This they have not done, and the libellant must have a decree for $158 38, with interest from the above date, and costs.

CROOK v. BRONSEN. See Case No. 1,549.
CROOK v. REDFIELD. See Case No. 1,549.
CROOK (UNITED STATES v.). See Case No. 14,891.
CROOKE v. LAFAYETTE COUNTY COURT. See Case No. 15,549.

Case No. 3,413.

CROOKE v. MAXWELL.

[5 Int. Rev. Rec. 69.]

Circuit Court, S. D. New York. Feb. 1867.

DUTY ON SEA FREIGHT.

Statute of limitations in suits brought to recover from the United States duties claimed to have been exacted and paid in error.

This action was brought to trial on the 20th of February, inst. No witnesses were called in by the plaintiff [Septimus Crooke], who rested his case upon the following statement of facts, agreed upon between the parties:

This action was commenced April 24, 1863, to recover for an excess of duty paid to the defendant [Hugh Maxwell], as collector, under protest on additions made for sea freight and transhipment charges from Wales to Liverpool and London, and to make market value at the latter ports, on railroad iron imported into New York between January, 1851, and May, 1853. And it is agreed that the plaintiff is entitled to recover in his said action, unless the court shall be of opinion that his claim is barred by the statute of limitations. It is agreed that the defendant, since said cause of action accrued, and before the commencement of any suit, has been absent from the country in Europe, a year and nine months. It is further agreed that under date of February 1, 1856, the secretary of the treasury issued a circular, known as general regulations No. 63, containing, among other things, the following instructions, viz.: "Freight or transportation from the foreign port of shipment to the port of importation is not a dutiable charge. In cases, therefore, of goods arriving in the United States after having been first transported from the place of their production or manufacture to another port or place whether in the same or another country, by land or by water, and thence transhipped for the United States,—provided satisfactory evidence be adduced, to the collector of the customs at the port where the said goods shall arrive, that they were originally shipped with the bona fide intention of having them transported to a port in the United States, as their final port of destination,—no dutiable costs or charges will have accrued, either on the transportation from the first to the intermediate port, or while remaining in or leaving the latter, the voyage or transportation being regarded as continuous from the country whence originally exported in good faith, on a declared destination for a port and parties in the United States. In illustration of the rule thus established, it may be remarked that, the evidence of final destination being satisfactory, no duties would be chargeable in ports of the United States on the freight or transportation, or charges in the intermediate ports, on goods originally from China, or Glasgow, or Cardiff, or Londonderry, to Liverpool; from Malaga to Valparaiso; from Dresden to Bremen; or from Basle to Havre, —on the said goods being transhipped for the United States from the several intermediate ports enumerated."

It is further agreed that on the 17th of March, 1856, the plaintiff, by his counsel, filed with the proper officer, under the collector, at the customhouse, a statement of his several importations of railroad iron, on which he claimed a return of duty on sea freight and transhipment charges, for adjustment under the above instructions; a copy of that portion of it in which the duties were paid to the defendant being annexed, and marked "A." That under date of October 4, 1856, the secretary of the treasury addressed to the collector of customs a letter, of which the following is a copy: "Treasury Department, Oct. 4th, 1856. Sir: On application being made to you by Messrs. A. Iselin & Co. and others, of New York, you are authorized

and directed to cause to be prepared the usual certified statements for return of 'duty on freight' in such cases where the same has been found to have been paid in excess, as decided by this department in general regulations No. 63, page 22, and under written protest, and transmit the same to this department for its consideration. Very respectfully, your obedient servant, James Guthrie, Secretary of the Treasury. H. J. Redfield, Esq., Collector of Customs, New York." That the plaintiff's claim was unadjusted when Mr. Redfield retired from the collectorship, July 1, 1857, and remained so until after Mr. Schell retired, in May, 1861. That under date of May 21, 1858, the secretary of the treasury addressed to Mr. Schell a letter, of which the following is a copy: "Treasury Department, May 21, 1858. Sir: I would call your attention to the instructions of the department, dated Oct. 4th, 1856, wherein authority is given to prepare and transmit the usual certified statements for return of duty on sea freight, paid under written protest. As the parties who represent several of the claims have made complaint of the delay attending the preparing of the same in your office, you are requested to have the above instructions complied with at your earliest convenience. I am, respectfully, Howell Cobb, Secretary of the Treasury. Augustus Schell, Collector, New York."

That notwithstanding these instructions to Mr. Redfield and Mr. Schell, they both neglected to adjust the plaintiff's claim, and on the 6th of July, 1860, he commenced a suit in this court for the recovery of the excess paid to defendant on the several importations embraced in the said statement, marked "A," and on the 23d of April, 1861, a verdict was had for the plaintiff, and, by order of the court, the case was referred to the collector for adjustment according to the usual practice at that time, and on the 25th of September, 1862, the collector made a report to the clerk of this court, of which the following is a copy: "U. S. Circuit Court—Septimus Crooke v. Hugh Maxwell. Customhouse, New York. Collector's Office, Sept. 25, 1862. Sir: The verdict in the above-entitled cause, as adjusted in this office, with interest to the 24th inst., amounts to the sum of four thousand nine hundred and thirty-four dollars, thirteen cents ($4,934.13). Respectfully, yours, C. P. Clinch, Deputy Collector. Kenneth G. White, Esq., Clerk of the United States Circuit Court, Southern District of New York."

The plaintiff relying on the truth of this report, judgment was entered on it September 30, 1862, for $4,934.13 damages, and $54.95 costs, making the total amount $4,989.08, which judgment was paid and satisfied of record, October 21, 1862. It is further agreed that neither the plaintiff or his attorney was consulted or advised with by the collector, or the person employed by him, in making said adjustment, nor had they any knowledge or suspicion that said adjustment was not correct, or that any items had been omitted, till some time in January, 1863, when it was accidentally discovered that a few items had been omitted, the extent of which was not ascertained till some time in April, 1863. This present suit is brought to recover the items so omitted in the adjustment of the verdict taken April 23, 1863.

The pleadings and papers in this suit, and also in the suit commenced July 6, 1860, may be used by either party. The affidavits read on the motion to set aside the verdicts in the cases of Massett v. Maxwell [Case No. 9,261], and two other cases argued in this court in February, 1863, may also be read in this case. If the court shall be of opinion, upon all the facts, that the plaintiff's claim is not barred by statute, a verdict is to be rendered for him, for the excess paid under protest on such items as were omitted in the adjustment of the former verdict.

E. Delafield Smith, Defendant's Atty.

Almon W. Griswold, Plaintiff's Atty.

May 27th, 1864.

Pursuant to the agreed statement of facts, the following treasury decision was put into the case, viz.:

"Treasury Department, May 18, 1858. Sir: In the certified statements of claims of J. Sawyer, S. A. Way, and S. L. Wiggins & Co., for return of excess paid on storage, it would appear, from a portion of the dates of importation, that they are debarred by the statute of limitations of your state. The department, therefore, before taking any action upon them, will require further information as to the fact, and also the various dates when the payments of the storage were made. I am, respectfully, Howell Cobb, Secretary of the Treasury. A. W. Austin, Esq., Collector, Boston."

"Customhouse, Boston. Collector's Office, May 20, 1858. Sir: I am in receipt of your letter of the 18th inst., requesting information in respect to the claims of James Sawyer, Samuel A. Way, and J. L. Wiggins, for storage exacted in excess, portions of which, from the dates of importation given, appear to be barred by the statute of limitation of this state. By the Revised Statutes of Massachusetts (chapter 120, § 1) 'all actions of assumpsit, or upon the case, founded on any contract or liability, expressed or implied, are required to be commenced within six years next after the cause of action shall accrue, and not afterward.' The action of Foster v. Peaslee [Case No. 4,979], on the judgment in which this class of claims is allowed, was commenced in the May term of the circuit court, 1856. The law was argued at the October term, and decided by the court against the collector. At the May term, 1857, judgment was entered and the decision acquiesced in by the department under date of June 16, 1857. It has been the practice, in claims of this description, where a single case was tried to determine the law, to ex-

tend to all the claimants under the decision the advantages in respect to limitation acquired by the party bringing the suit, provided their claims were equally valid in other particulars. Thus, in the cases in question, I deemed it proper to include in the statements all claims which accrued within a period of six years, prior to May, 1856, when the action of Foster was commenced. This rule was adopted to prevent a multiplicity of suits for the same cause, which would otherwise be likely to be brought, and so to save expense to the United States. Under this rule, none of the items embraced in the statements referred to in your letter are barred. Assuming, however, that claims which accrued six years or more, prior to June 16, 1857, the date of the department's acquiescence in the decision of the court, are cut off by this statute, then the item of $3 in the statement in favor of J. Sawyer is not allowable, the same having been paid on the 3d of April, 1851. (In the other cases an examination of the dates of payment, as appearing on the records of this office, shows that the several claims were made within the time limited by law. A memorandum of those dates, in all instances involving doubt, is enclosed.) Very respectfully, your obedient servant, (Signed) Arthur W. Austin, Collector. Hon. Howell Cobb, Secretary of the Treasury, Washington."

"Treasury Department, May 27, 1858. Sir: Your report relative to the claims of James Sawyer and others for return of excess paid on storage is received, and, the department having concurred therein, you are informed that all cases of a similar nature must only include statements * * * subsequent to May, 1850. I am, respectfully, (Signed) Howell Cobb, Secretary of the Treasury. A. W. Austin, Esq., Collector, Boston."

The affidavits in the case of Massett v. Maxwell, referred to in the statement of facts, showed, among other things, that it was the practice at the New York customhouse, up to 1861 or 1862, sanctioned by the secretary of the treasury, that where a question had been decided by the courts, and recognized and acquiesced in by the treasury department, the presentation to the collector of a merchant's claim under such decision entitled him to recover on all items overpaid within six years prior to such presentation. The testimony for the plaintiff being here closed, defendant's counsel offered in evidence the judgment in the former suit to show that the matter was res adjudicata. The judge said that by the agreement of facts the pleadings and papers in that suit might be referred to, if there was anything in them bearing on the question of the statute of limitations, but the defence of res adjudicata had not been pleaded in the case, and he should exclude the evidence as offered. No further testimony was offered, and the question of the statute of limitations was argued by counsel.

The plaintiff's counsel argued (1) that, the secretary of the treasury having made the decision in the Boston cases, the defendant should be estopped from setting up the statute. He urged that under the New York Code (section 110), a new promise made "by the party to be charged" took the case out of the statute, and that the directions of the secretary of the treasury to the collectors, which are binding in law, amounted to such a new promise; that he was "the party to be charged," because by the act of March 3, 1863 (section 12), the collector was discharged from liability on any judgment recovered in such actions as these, and the judgments were ordered to be paid out of the treasury of the United States.

The defendant's counsel answered, that the defendant, Maxwell, was the party to be charged, and there was no pretence that there was any new promise made by him.

Almon W. Griswold, for plaintiff.

S. G. Courtney, U. S. Dist. Atty., for the government.

SMALLEY, District Judge. No fact arises in this case, and the question which presents itself is one entirely of law. From the large amount involved, and from the precedent that may be established when it is determined, it is one of great importance. It is very clear that the equity of the case is with the plaintiff, for the agreed case which has been presented to the court shows, beyond a doubt, that he is entitled to recover, unless barred by the statute of limitations. It admits, therefore, that he has paid to the government an amount of money, which has been illegally exacted from him, and that in equity he is entitled to recover; but the government claims that he is barred from such recovery by the statute of limitations. From the case it appears that he brought suit, and obtained a verdict, and that, according to the practice that then existed in this court (after verdict had been rendered for the plaintiff), the matter was referred to the officials at the customhouse, for the purpose of enabling them to make up their adjustment of the amount of damages. This was done, and they made up the amount without giving any notice in regard to it to the plaintiff or the plaintiff's counsel. They sent a certificate to the clerk that the amount found to be due to the plaintiff was nearly $5,000; judgment was entered in pursuance of that certificate, and the plaintiff was paid that amount. Subsequently it was ascertained that various items had been omitted in that adjustment, for which the plaintiff was undoubtedly entitled to recover, unless barred by the statute of limitations.

Now, in such a case as the one now presented to me, if I could see any way consistent with my duty, and with the well-settled principles of law which have been laid down for my guidance, that would enable

me to get over this bar by the statute of limitations, I would cheerfully do it, and at once direct a verdict to be rendered in favor of the plaintiff. I confess, however, that I cannot see how this can be accomplished. (I will consider the case further, and should I arrive at a different conclusion, the verdict shall be reversed.) It is claimed that various instructions were received from the treasury department to collectors at New York, Boston, and elsewhere, which amount to a new promise in law. From 1863 down to the present time, a judgment against the collector cannot be enforced against him so far as it bound his property, and it can only be satisfied out of the treasury department, under the directions of the secretary of the treasury. The last promise was in 1858, which is relied upon. At that time Mr. Maxwell had been out of office a number of years. Mr. Guthrie issued the first letter in 1856, and Mr. Cobb issued another in 1858, referring to that of 1856. In 1858 an execution would have been issued against the property of Mr. Maxwell.

Now it is claimed that although the promise, when it was made, was not the promise of the defendant, Maxwell, it did not come within the statute of the New York Code, as far as this question was concerned, and because congress changed the liability of the collectors, that changes the contract. The court is in this case asked to give this new promise a construction which the law does not warrant, and by it to remove a bar which it did not remove at the time it was made. Now that bar was removed by that promise in 1858, if it were ever removed. Consequently I can see no other way at the present time, after a careful consideration of this matter, and with a desire to avoid this bar if I can, than to direct a verdict for the defendant, subject to the opinion of the court.

The defendant, therefore, will take a verdict subject to the opinion of the court. Should the court, after further consideration, see any mode by which this bar can be removed, the verdict will be changed in favor of the plaintiff, with an order of reference.

Verdict for defendant, subject to the opinion of the court.

[NOTE. Judgment was subsequently rendered on the verdict in favor of defendant, and a motion made to open the judgment was granted, the judgment vacated, and a new order of reference made to assess the damages. See Case No. 3,415.]

Case No. 3,414.

In re CROOKER.

[1 MacA. Pat. Cas. 134.]

Circuit Court, District of Columbia. July Term, 1850.

APPEAL FROM COMMISSIONER OF PATENTS—NEW OATH.

[1. The seventh section of the act of 1836, requiring a new oath by an applicant for a patent who persists in his application after information from the commissioner of the errors and defects of his specification, does not apply to an applicant who appeals from the commissioner's decision, so as to make such an oath a prerequisite of the appeal.]

[2. It is not necessary to sustain a decision rejecting the application for a patent that there should be evidence of a device or arrangement similar to that of the applicant, as other grounds for the commissioner's action may have existed.]

[3. If the decision of the commissioner is correct, the fact that his opinion is erroneous is immaterial.]

John Bulloch, for appellant.

CRANCH, Chief Judge. Appeal from the decision of the commissioner of patents rejecting the application of Matthew A. Crooker for letters-patent for an improvement in oscillating propellers, by arranging "the fulcrum beam C with reference to each of the beams B B and uprights D D over the guards of the boat, supported and combined in the manner set forth." The decision of the commissioner was communicated by the commissioner to the applicant in a letter dated February 19th, 1850, as follows: "Sir: Your claims to letters-patent for alleged improvements in propellers have been examined, and, I regret to state, are disallowed. You will find in Hebert on the Steam Engine, page 482, an illustration of the same devices presented by you, with the exception of the uprights, which, although not there shown, it is very evident must have been used to give support to the fulcrum of the beams."

The first reason of appeal is that in all the original evidence before the commissioner there was no device nor arrangement at all similar to that contained and defined in the claim of the specification in the application of the said Crooker. The second reason of appeal is that his claim was "for the arrangement of the fulcrum beam C', with reference to each of the beams B and upright D, extended over the guard of the boat, in the manner and for the purposes set forth. And in Hebert on the Steam Engine, page 482, to which said commissioner refers, and on which he grounds his decision of rejection, there is no fulcrum beam at all and no upright at all." The third reason of appeal is "that the commissioner in rejecting the application did reject it because it seemed to him evident that the arrangement of the fulcrum beam, and the support for it, as described by said Crooker in said application, was intended to be used by Hebert in page 482 referred to. The said Crooker denies that it is evident that said Hebert intended to use such arrangement for supporting his fulcrum beam and combining it with the other machinery as described and defined in the said claim of the said Crooker." The fourth reason of appeal is "that the suppositions or imaginations by the commissioner as to what was 'evidently the intention' of 'Hebert on the Steam Engine,' is not a good and legal

reason for rejecting the application of said Crooker."

The commissioner, in the grounds of his decision laid before the judge, seems to think that after an application has been rejected, and the applicant has taken an appeal, the applicant must make oath anew under the seventh section of the act of 1836; but by that section the oath anew is to be taken only when the applicant persists in his application after having been informed by the commissioner of the errors or defects of his specification. This happens before his claim is rejected. When finally rejected, no new oath is necessary to enable him to appeal.

The first reason of appeal is that there was no evidence of any device or arrangement like those of the applicant. In order to sustain the decision of the commissioner it was not necessary that there should be any such evidence. He might have had other grounds for rejecting the application. This is therefore no ground for reversing the decision of the commissioner.

The second reason of appeal is, in effect, that there was no fulcrum in the propeller described in Hebert, p. 482, and therefore the invention was not like Crooker's. It might not be like Crooker's, and yet the decision rejecting the application may be correct. But the commissioner, in the grounds of his decision, has, I think, shown the machines to be substantially alike.

The third reason of appeal is merely an objection to the opinion of the commissioner. Whatever may have been his opinion on that point, the decision may be correct, and the opinion is no ground for reversing it.

The fourth reason of appeal involves no point which would justify a reversal of the decision of the commissioner.

I am therefore of opinion, and so decide, that the decision of the commissioner rejecting the application of the said Matthew A. Crooker is correct and ought to be, and is, affirmed.

Case No. 3,415.

CROOKES v. MAXWELL.

[6 Blatchf. 468;[1] 10 Int. Rev. Rec. 50.]

District Court, S. D. New York. June 21, 1869.

CORRECTION OF JUDGMENT.

In this case, the court, on the motion of the plaintiff, made in 1867, opened a judgment recovered in 1862, and then paid and satisfied of record, in order to permit errors in the assessment of damages in the case to be corrected, the suit being one against a collector of customs, to recover back moneys paid, under protest, for duties, and the plaintiff not having been guilty of laches, and the errors being manifest.

[Cited in Eagle Manuf'g Co. v. Draper, Case No. 4,234; U. S. v. Millinger, 7 Fed. 850, Id. 188.]

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

This was a motion by the plaintiff to set aside a judgment recovered in this suit on the 30th of September, 1862, the suit having been commenced in July, 1860, against the collector of the port of New York, to recover back moneys alleged to have been illegally exacted by him as duties upon various goods imported from England and Wales, into the port of New York. The judgment was for the sum of $4,989.08 damages and costs, and on the 21st of October, 1862, the amount thereof was paid.

In April, 1863, another action was commenced in this court, by the plaintiff against the defendant [Crooke v. Maxwell, Case No. 3,413], which came on for trial in February, 1867, before the court and a jury, upon the following agreed statement of facts, dated May 27th, 1864.

[Here follow, substantially in full, the agreed statement of facts referred to, and the decision of SMALLEY, District Judge, thereon. Both will be found in the prior report of that case. Case No. 3,413.]

On the 20th of February, 1867, this motion to open the judgment of September 30, 1862, was made, and, at a subsequent day in the term, judgment was rendered on the verdict in favor of the defendant, in the second action.

SMALLEY, District Judge. The question arising in this case is whether the plaintiff is entitled to have the judgment in the suit commenced in 1860 opened, and to have the errors made in the assessment of damages therein corrected. The power of the court to open a judgment for the correction of such errors in the assessment of damages as are claimed to have been made in this case is not denied; and, if it were, it is too well established, both in the state and the federal courts, to require authorities to sustain it.

It is claimed that the plaintiff has been guilty of laches in presenting and prosecuting this claim, and is, therefore, without redress, although the government, through its officers of the customs, has, in violation of law, and against the decisions of the courts, extorted from him quite a large sum of money, which it has heretofore refused to refund. It should be borne in mind, that all the invoices, entries, and other evidence to prove these claims, were in the custom house, subject to the examination of, and under the exclusive control of, its officers, and only accessible to the plaintiff by special favor; and that the plaintiff had no reason to distrust the correctness of the custom-house adjustment of the 25th of September, 1862, at the time, although he had no knowledge when it was made. In looking into the matter, in January, 1863, he discovered some errors, and was then induced to make a further examination, in which he discovered many more, and in April, 1863, he commenced a second suit, when he should have moved to open the judgment in this one.

Immediately upon an adverse termination of the second suit, he made the present motion. By the bill of particulars filed in the second suit, on the 13th of May, 1863, the defendant was apprised of the full extent and character of the plaintiff's claim, so that but a small interval of time had elapsed after the filing of the custom-house adjustment of September, 1862. Certainly, the plaintiff's delay, under the circumstances, ought not to defeat or prejudice his legal or equitable right to the money wrongfully withheld from him.

I regret that the government of the United States should resort to such a defence, and do not believe that, upon mature consideration, it will persist in it. If the suit were one between citizens only, a defendant would badly tarnish his reputation by insisting upon such a defence, and few lawyers would be willing to stand up in court and defend his cause.

It is ordered that the judgment rendered on the 30th of September, 1862, for the amount reported by the custom-house officers, be vacated; that the order of reference made in the suit be revoked; and that the assessment of damages therein be referred to Kenneth G. White, Esquire, United States commissioner, under the same rule as to notice, and other questions thereto appertaining, as was prescribed by this court in the case of Benkard v. Schell [Case No. 1,307]; and that, upon such assessment, the defendant be credited and allowed the amount paid on the 21st of October, 1862, as appears of record.

CROPLEY (UNITED STATES v.). See Case No. 14,892.

Case No. 3,416.

CROPPER et al. v. COBURN et al.

[2 Curt. 465.][1]

Circuit Court, D. Massachusetts. Oct. Term, 1855.

INJUNCTION TO SHERIFF — LEVY ON FIRM PROPERTY—CONCURRENT JURISDICTION.

1. The fifth section of the act of March 2, 1793 (1 Stat. 334), which forbids this court to grant an injunction to stay proceedings in a state court, does not restrain it from enjoining a sheriff from levying on the property of A. on a process against B.

[Cited in U. S. v. Collins, Case No. 14,834; Daly v. Sheriff, Id. 3,553; Perry v. Sharpe, 8 Fed. 23.]

2. A court of equity will enjoin the levy of an execution against one partner, on property of the firm, in which it is admitted he has no interest which can pass by a sale; and this, though the bill does not pray for a dissolution.

[Explained in Peck v. Schultze, Case No. 10,895.]

3. If the law of the state has provided for relief at law in the state courts, which equity alone could previously give, this does not affect the equitable jurisdiction of the courts of the United States.

[Applied in Frazer v. Colorado Dressing & Smelting Co., 5 Fed. 164.]

4. If an officer attach and take possession of personal property of a firm in Massachusetts, on a writ against one partner who has no equitable interest in such property, he is a trespasser.

5. Semble, the Revised Statutes of Massachusetts (chapter 90, §§ 73–76) do not apply to attachments of partnership property, but only to the property of part owners, who are tenants in common.

This was a suit in equity by two partners, to enjoin the creditor of one of them, and also the sheriff, from laying or continuing an attachment on property of the firm. The bill was demurred to. So much of the bill as was material to the points raised is as follows: "John Cropper, of Nottingham, in the kingdom of Great Britain, and a citizen and subject of said kingdom, and an alien, and Francis Hemsley, of New York, in the state and district of New York, and a citizen of said state of New York, bring this their bill against Daniel J. Coburn, of Boston, and Joseph Butterfield, of Lowell, both in the state and district of Massachusetts, and both citizens of said state of Massachusetts. And thereupon your orators complain and say, that on or about the year 1849, your complainants formed a copartnership under the style of Hemsley & Cropper, and that said firm has ever since dealt in laces, embroideries, and other goods in the said city of New York, and as such copartners, on the twentieth day of January, 1855, were the owners of certain merchandise, of the value of ten thousand dollars, a schedule of which is hereto annexed, marked A, and which your complainants pray may be taken as a part of this their bill of complaint, which was stored by the said Hemsley & Cropper in the United States warehouse, in said Boston. And your complainants further say, that the respondent, Joseph Butterfield, sued out of the clerk's office of the court of common pleas for the county of Suffolk, a writ directed to the sheriffs of the several counties of said state of Massachusetts or their deputies, and bearing date January 20th, 1855, and returnable to the term of said court to be holden at Boston, aforesaid, on the first Tuesday of April, 1855, against the said Francis Hemsley, for a private debt and liability of the said Hemsley to the said Butterfield, and on the same day placed the same in the hands of the defendant Coburn, for service, then and ever since a deputy of the sheriff of the county of Suffolk. And your complainants further say, that the said Coburn, by virtue of said writ, on the said twentieth day of January, 1855, attached and seized the merchandise aforesaid, property of said firm of Hemsley & Cropper, and removed the same from the possession and control of your complainants, and still holds the same under said attachment. And

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

your complainants further say, that large claims and debts, and liabilities, are outstanding against said firm of Hemsley & Cropper, and more than sufficient to absorb all the partnership property of said firm, and the interest of said Hemsley in said copartnership, and that after the payment of said partnership debts and liabilities, no surplus or interest in said copartnership will remain to the credit of the said Hemsley, and that the merchandise so as aforesaid attached, is required to pay and discharge the debts and liabilities of said copartnership, and that your complainant, John Cropper, is solvent. And the complainants further say, that the merchandise attached by said Coburn, is daily diminishing in value, and if not soon sold, will become unsalable and valueless. And your complainants further say, that they have frequently applied to the said respondents, and informed them that the said Hemsley had no interest in said merchandise or in said copartnership after the payment of its debts and liabilities, and requested the said defendants to restore said merchandise to the possession of your complainants, but the respondents refused so to do. And your complainants well hoped that no disputes would have arisen touching the said merchandise and the property in the same, but that the said defendants would have complied with the reasonable request of your complainants, as in conscience and equity they ought to have done. And your complainants further say, that said defendants sometimes allege and pretend that said Hemsley has an attachable interest in said copartnership, and that a large surplus will remain to the said Hemsley after the payment of the partnership debts and liabilities of said firm. Whereas, your orators charge the contrary thereof to be the truth. To the end, therefore, that the said defendants may, upon their several and respective oaths, full, true, direct, and perfect answer make to all and singular, the matters hereinbefore stated and charged as fully and particularly as if the same were hereinafter repeated, and they thereto severally interrogated, and that an account may be taken of the assets and liabilities of the copartnership, and that the interest of said Hemsley in said copartnership may be ascertained, and that said defendants and their agents may be restrained from selling or otherwise disposing of said merchandise, so as aforesaid attached, and that said attachment may be dissolved, and that the defendants may be decreed to deliver up and return said merchandise to your complainants, discharged of said attachment, and to pay to your complainants damages for the attachment and removal of said merchandise, and the injury your complainants have thereby sustained, and that your complainants may have such other and further relief in the premises, as the nature of their case shall require, and to your honors shall seem meet. May it please your honors to grant unto your complainants the most gracious writ of subpoena of the United States of America, to be directed to the said Daniel J. Coburn and Joseph Butterfield, thereby commanding them at a certain day and under a certain pain therein to be specified, severally to be and appear before your honors in this honorable court, and then and there to answer all and singular the premises, and to stand to perform and abide such order and decree therein, as to your honors shall seem meet and your orators shall ever pray."

Hutchins & Wheeler, for complainants.
Mr. Dean, contra.

CURTIS, Circuit Justice. The first question is, whether this court is restrained from granting the injunction prayed for, by that clause of the fifth section of the act of March 2, 1793 (1 Stat. 334), which provides, "nor shall a writ of injunction be granted to stay proceedings in any court of a state." The gist of the complainants' bill is, that under process against Hemsley, the creditor and the sheriff have taken property in which he has no equitable interest whatever; and that the aid of a court of equity is needful to ascertain that he has no interest therein, and to protect the real owner.

It must be admitted that an attachment on mesne process, out of a state court, which the sheriff is authorized by that process to make, is a proceeding in a court of a state, within the meaning of this act of congress; for the word "proceedings" may properly include all steps taken by the court, or by its officers under its precepts, from the institution of the suit to the close of the final process which may issue thereon.

But it is equally clear, that an attachment on mesne process, which the sheriff was not authorized by that process to make, is in no sense a proceeding of the court from which such process issued. Thus, if a sheriff under a writ of attachment against the property of A, should take his body, or the property of B, this would not be a proceeding of the court, but a mere trespass, for which any appropriate remedy may be instantly sought in any court having jurisdiction. And, accordingly, it was held, in Slocumb v. Mayberry, 2 Wheat. [15 U. S.] 1, that though the state courts could not interfere with seizures made by officers of the United States, for breaches of laws of the United States, yet, where, under authority to seize a vessel, an officer seized the cargo with the vessel, the owner might at once bring replevin in a state court. As Chancellor Kent has expressed it in 4 Comm. 410: "If a marshal of the United States under an execution in favor of the United States against A, should seize the person or property of B, then the state courts have jurisdiction to protect the person, or property so illegally invaded; and it is to be observed that the jurisdiction of the state courts in Rhode Island was admitted by the

supreme court of the United States, in Slocumb v. Mayberry [supra], upon this very ground." Yet this is but the converse of the question we are considering; for the state courts can no more interfere with the proceeding of the courts of the United States, than the latter can with the former. McKim v. Voorhies, 7 Cranch [11 U. S.] 279. Property attached on mesne process which does not authorize its seizure, is not in the custody of the law, and such attachment is not a proceeding of the court out of which the process issues.

The real question is therefore, whether on a writ against Hemsley alone, the sheriff was authorized to attach the property of an insolvent firm of which Hemsley was a member, in which property, it is admitted by the demurrer, he had no equitable interest. The manner in which individual creditors may attach or levy on the property of a firm in which their debtor is a partner, has given rise to much discussion, and to some diversities of decision in the different states. The decisions are collected in 1 Hare & W. Lead. Cas. 454-478. It would be useless here to examine them, or display those diversities. The writ of attachment in the case under consideration is governed by the laws of Massachusetts; and in this state, since the case of Pierce v. Jackson, 6 Mass. 242, the law has been, as it respects personalty, that only the interest which may remain to the debtor after payment of the partnership debts and of any balance he may owe to the firm, can be attached by his creditor. Allen v. Wells, 22 Pick. 453. Accordingly, it was held in Blanchard v. Coolidge, 22 Pick. 155, that where a partner had no interest in the stock except a share of expected profits, and there had been no profits, he had no attachable interest, and trover would lie against the attaching officer. The case of Peck v. Fisher, 7 Cush. 386, points out the distinction, as held in Massachusetts, between real and personal estate. This makes the validity of the attachment depend upon the ultimate interest of the debtor; and as it is admitted in this case, he had no such interest, and that nothing would pass by a sale of it, it follows that the attachment was unlawful.

I am aware that in some other states, the tenancy in common which exists at law among copartners, is alone considered at law; and that a court of law will execute its process on partnership property, as if the partners were tenants in common merely, leaving the purchaser and the other partners or the creditors of the firm, to adjust their relative rights in a court of equity. But, as I understand, this has not been the law of Massachusetts in reference to personal estate; and a creditor who attaches, or levies on property of a partnership, in which his debtor, though a member of the firm, has no substantial interest, is a trespasser.

This being so, it is argued, that the complainants should have resorted to an action at law, by which they had a complete remedy. But it must be remembered, that though it is now admitted by the demurrer, that Hemsley has no interest, when the bill was filed it did not appear that it might not be necessary to have an account taken, to ascertain this fact. Indeed, it may still prove to be necessary; because, if the demurrer be overruled, the defendants may answer, and deny what they now, for the purposes of the demurrer, admit.

When it is necessary to take such an account, which a court of law has only very inadequate means of doing, and which, in trespass or trover, can only be taken, by and before a jury in Massachusetts (Whitwell v. Willard, 1 Metc. [Mass.] 216), there is not an adequate remedy at law; and if equity has jurisdiction on this ground, it is not defeated by an admission made by the defendant in the course of the suit, which renders an account unnecessary. If it were, the defendant could admit the plaintiff out of court.

It is further insisted in support of this ground of demurrer, that the Revised Statutes of Massachusetts (chapter 90, §§ 73-76), provide a complete remedy at law, by enabling the copartner to give a bond to the officer, to pay to the attaching creditor, the appraised value of his debtor's share of the property attached.

I think it extremely doubtful whether this statute can be made to apply to attachments of copartnership property. The value of a share of a tenant in common is generally capable of being ascertained without much difficulty. But, as has already been said, it is only the interest which may remain to the debtor as a partner, after payment of the partnership debt and any balance due from him to the firm, which the creditor can attach; and how is it possible for appraisers to fix the value of this interest? Their action must be founded on the merest conjecture. It would seem, that these provisions must be understood as limited to the case they speak of, namely, part owners, as distinguished from partners. But, however this may be, it is very clear that no law of a state can force an alien, or a citizen of another state, in a controversy with citizens of Massachusetts, to forego a remedy which would otherwise exist in equity, under the constitution and laws of the United States. When the judiciary act (1 Stat. 73) speaks of a plain, adequate, and complete remedy at law, it refers to the common law, not the statutes of the states. Robinson v. Campbell, 3 Wheat. [16 U. S.] 212; Bodley v. Taylor, 5 Cranch [9 U. S.] 191; U. S. v. Howland, 4 Wheat. [17 U. S.] 108; Boyle v. Zacharie, 6 Pet. [31 U. S.] 648. The equity jurisdiction of the courts of the United States is the same in all the states. Besides, the statute has no application to a case where the defendant in the action has no attachable interest. I am of opinion, the bill shows a case in which this court has jurisdiction.

But the defendants still deny that upon the allegations of this bill the plaintiffs are entitled to relief, because a court of equity will not interpose to restrain a creditor from proceeding at law, to levy his execution on partnership property; it will allow him to work out his legal remedy by a sale, and then interpose and have an account taken and the equities adjusted. Chancellor Kent so held in Moody v. Payne, 2 Johns. Ch. 548, and he adheres in his Commentaries (3 Comm. 77, note) to the correctness of this decision, as the result of the authorities; though he admits that the more fit and suitable rule of practice would seem to be, to have the adjustment of the partnership account precede the sale. Mr. Justice Story (Story, Partn. 380) concludes that this is in fact the practice, according to the decisions. And of this opinion was the chancellor of New Jersey, in Cammack v. Johnston, 1 Green, Ch. [2 N. J. Eq.] 163; and the same opinion is held in Ohio (Place v. Sweetzer, 16 Ohio, 142), and seems to be entertained in Maine (Thompson v. Lewis, 34 Me. 167). Without expressing any opinion on what Chancellor Kent calls "this litigious subject," it is only necessary to observe, that in this case, it being admitted by the demurrer that the debtor partner has no interest, the decision in Moody v. Payne does not apply. The question there made was, whether a court of equity would restrain the sale, till the quantum of interest should be ascertained. If there be no interest on which to levy, there is no right to proceed at law against the property. And where, as in Massachusetts, an attachment on mesne process may be made, and the property taken into the possession of the sheriff, and kept for months, and even years, before a judgment is rendered, it would be a hardship indeed, if the firm were obliged to await a sale of that which has no existence, in a case where, as here, the debtor partner has no interest. The firm and its creditors are no more compelled to await a sale before applying to equity for relief, than before bringing an action of tort at law, in a case where the officer is a trespasser.

It is objected that this bill contains no prayer for a dissolution. Speaking generally, a court of equity will not take an account between partners, during the continuance of the partnership. The reason is, that the balance will probably fluctuate while the business continues. But this rule though admitted to exist, (and Sir John Leach denied it altogether in Harrison v. Armitage, 4 Madd. 143; and Richards v. Davies, 2 Russ. & M. 347,) is but a general rule, to which some exceptions have been made, when necessary to conform the practice of the court to the wants of its suitors, and to prevent a failure of justice. The cases on this subject are reviewed by Lord Chancellor Cottenham in Wallworth v. Holt, 4 Mylne & C. 619, and more recently by Lord Langdale in Richardson v. Hastings, 7 Beav. 307. The result of all the cases in their judgment is, that the rule which denies the assistance of the court, where a dissolution is not prayed for, is not of universal application.

In my opinion, it does not apply to the case at bar. Where the court is asked to order an account between partners, in order to determine, whether, at the time of the attachment, the partner proceeded against at law by his creditor had any beneficial interest in the property attached, the same reason for refusal to proceed, does not exist, as in case of a suit between partners, where the object is, to ascertain their relative rights, with a view to decreeing the payment of a balance by one to the other. The creditor attaches the interest of one partner as it exists at the time of the attachment. Subsequent changes in the relations of the partners, inter sese, or in the rights of creditors, which are only substituted rights of the partners, are not necessary to be ascertained.

The objection that the court would be doing but incomplete and temporary justice, is inapplicable. For the object in hand, the inquiry would be final, and its result not affected by the subsequent continuance of the business of the firm. The contrary rule would put it in the power of any creditor of an individual partner, to force a dissolution of the firm by making an attachment of part of its property; or to deprive the firm of all remedy in equity, for the ascertainment, upon a bill by the firm, of the just rights of the attaching creditor, or of the purchaser on execution. Suppose a creditor who has purchased on execution, the beneficial interest of a partner in certain property of the firm, files his bill for an account. to ascertain what that interest was. Can he force a dissolution? I apprehend not. And if not, I do not perceive why the court may not interpose on the application of the firm, to take a similar account for the same purpose. Especially should this be so, in a case like the present, where the demurrer admits, that the debtor partner had no interest, and consequently, as the case is now presented, no account is to be taken.

The demurrer is overruled, and the defendants must answer.

Case No. 3,417.

CROPPER v. NELSON.

[3 Wash. C. C. 125.][1]

Circuit Court, D. Pennsylvania. Oct. Term, 1811.

INTERESTED WITNESS.

1. In an action on a bill of exchange, brought by the endorsee of the second endorser, against

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

the payee, who had endorsed the bill to the plaintiff; the plaintiff's endorser cannot be a witness to prove that the bill belongs to him.

2. Exchange is to be settled at the rate prevailing at the time of the verdict.

[Cited in Weed v. Miller, Case No. 17,346.]

Action on a bill against the payee, who endorsed it to one B., in blank, who endorsed it in full to the plaintiff. The defendant offered B., to prove that he is the real owner of this bill, in order to show a want of jurisdiction in the court; B. being a citizen of this state.

BY THE COURT. The witness cannot be admitted to swear himself into an interest. It would be a great temptation to perjury to admit him.

THE COURT directed the jury to settle the exchange, (this being a sterling bill,) as of this day, which is from 18 to 20 per cent. below par.

Case No. 3,418.

CROPSEY v. CRANDALL.

[2 Blatchf. 341;[1] 10 N. Y. Leg. Obs. 1.]

Circuit Court, S. D. New York. Oct. 15, 1851.

LIEN OF JUDGMENT.

1. A judgment or decree docketed in a court of the United States for the southern district of New York is a lien on the lands of the defendant in whatever county of the district they are situated.

2. It is not necessary to the creation of such a lien that a transcript of the judgment or decree should be filed in the office of the clerk of any county in the district.

3. The statutes of New York which limit the duration of the lien of the judgments and decrees of the state courts apply to the judgments and decrees of the courts of the United States within the state. But the New-York statute of May 14, 1840 (Laws 1840, c. 386, § 26), prescribing what acts are necessary to be done to create the lien of a state judgment or decree, does not apply to the judgments or decrees of a court of the United States.

The libellant [Elias Cropsey] obtained a decree in this court, on appeal from the district court, in a suit in personam, in admiralty, against the respondent [Joshua Crandall] and one [Charles] Cleaveland, his stipulator. The decree was duly docketed in this court, and an execution was issued upon it against Cleaveland, on which real estate of his, situated in Williamsburgh, Kings county, was about to be sold. The decree was not docketed in Kings county, nor was any transcript of it filed in that county. Cleaveland now moved to set aside the execution against him, or the ground that, under the 26th section of the act of the legislature of New-York of May 14, 1840 (Laws 1840, c. 386), no lien could attach to his real estate in Kings county until a transcript of the decree was filed in the office of the clerk of that county.

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

Before NELSON, Circuit Justice, and BETTS, District Judge.

THE COURT held that a judgment or decree docketed in a court of the United States for the southern district of New-York was a lien upon the lands of the defendant in whatever county in the district they might be situated; that it was not necessary to the creation of such lien that a transcript of the judgment or decree should be filed in the office of the clerk of any county in the district; that the statutes of New-York which limited the duration of the lien of the judgments and decrees of the state courts applied to the judgments and decrees of the courts of the United States within the state; but that the New-York statute of May 14th, 1840, prescribing what acts were necessary to be done to create the lien of a state judgment or decree, did not apply to the judgments or decrees of a court of the United States.

Motion denied.

[NOTE. The following opinion is published from 19 Betts, D. C. MS. 112:

[October 14.

[BETTS, District Judge. An action in personam was instituted by the libellant against the respondent on the 17th of October, 1849. After a default against the respondent and various intermediary proceedings, he put in an answer, and on the 4th of November, 1850, filed a stipulation entered into by Charles Cleaveland to pay the money awarded by the final decree rendered in this court or in any appellate court. The cause was heard in court and a decree rendered for the libellant for the sum of $421.75, on the 28th day of December thereafter, and execution therefor issued against him Jany. 31, 1851. On the 4th of February an order was entered for the stipulator to show cause why he should not perform his stipulation, and the 15th day of the same month a decree was rendered against him upon the stipulation, that he pay and satisfy the said sum of $226.17 the amount of the decree unpaid and which decree was then docketed by the clerk in the docket book of judgments of the court. On the 29th of April execution was issued on the last mentioned decree against the said stipulator and delivered to the marshal, who levied it on certain real estate situated in Williamsburgh, Kings county, and advertised the property for sale on the 7th day of October instant.

[On an affidavit by the stipulator, that no notice of the advertisement had been publicly affixed at Williamsburgh, and that the decree had not been docketed in the clerk's office of Kings county and that a large amount of real estate consisting of numerous distinct parcels and lots, were advertised by the marshal for sale, this court ordered a stay of proceedings on the execution to enable the

stipulator to move to quash the execution or for other relief.

[On the hearing of the motion the libellant proved that notices of such sale had been duly affixed in three of the most public places in Williamsburgh to the knowledge of the stipulator and that he had applied at the marshal's office for a short stay of sale, promising if it was adjourned one week he would in the mean time pay the debt, interest and costs. It was stated on argument and not denied that the reason so many parcels of land were levied on was that the property was largely encumbered and it was impossible to obtain bids on any particular lots, sufficient to satisfy the decree. The equities of the motion being thus met and repelled, the right of the stipulator to relief rests solely upon the question of law raised, whether the judgment or decree of this court, binds real estate in Kings county, without the judgment is also docketed in the clerk's office of that county.

[The argument for the defendant is that the act of congress July 4, 1840 [5 Stat. 393], adopts the law, of the state of New York then in force, and renders the same proceedings necessary in the United States courts, as in the state tribunals to obtain a lien by judgment on real estate. The language of the act is this "judgment and decrees hereafter rendered in the circuit and district courts of the United States within any state, shall cease to be liens on real estate or chattels real in the same manner and at like periods as judgments and decrees of the courts of such state, now cease by law to be liens thereon." The section then repeals the 8th, 9th and 10th sections of the act of the preceding session, March 3, 1839. The provisions of those repealed sections will indicate what particular purpose and object congress had in mind and intended to effect in the passage of the act of 1840.

[The 10th section limited the duration of judgment liens, but was so framed as to work gross inequalities between judgment creditors, for under it a judgment rendered the 2d of March held its lien but five years, whilst one given two days after, would retain it ten years, and besides retroacted without notice, upon the rights of judgment creditors already acquired cutting them off from the remedy the law had given them on a judgment duly recorded. 5 Stat. 338. It was palpable that private suitors and the United States themselves might be great sufferers under the act, for on the records of the federal courts in this state, there remained at that day unsatisfied judgments in favor of the United States to an amount of millions of dollars. It was furthermore manifest that the legislation was aimed solely at this state and had been promoted either by the influence of local officers here, or practitioners in the state courts, to be benefitted by it. Congress had every motive and interest opposed to partial legislation of that character, and at the first session after that enactment repudiated all three provisions and adopted regulations which should be common to all the states. The bill was reported to the senate by the judiciary committee April 18, and was passed without amendment and sent to the house April 29. Senate Jour. 1840, pp. 323, 344. It was reported to the house by their judiciary committee without amendment June 19, and was read and passed June 20 (House Jour. 1840, pp. 1134, 1135) and approved July 4, 1840.

[It is plain upon this law as also on that of 1839 that congress acted upon the assumption that judgments and decrees of the United States courts are liens on real estate, and meant only to provide the compensation clerks of courts should receive for searches therefor, and to fix the time when such liens should terminate and cease. In both these particulars it referred to the existing laws of the state; and by the act in force when this law passed the senate, the judgment ceased to bind lands after ten years as against bona fide purchasers. 2 Rev. St. p. 350, § 3. After the above act had passed the senate, and whilst it lay unacted upon in the house, the legislature of New York, May 14, 1840, passed an act "concerning costs and fees in courts of law and for other purposes," the 25th section of which, it is contended, is adopted by the act of congress, and governs the present case. That section is as follows: "No judgment or decree which shall be entered after this act takes effect, shall be a lien upon real estate, unless the same shall be docketted in books to be provided and kept for that purpose by the county clerk of the county where the lands are situated." And by the last section, it was declared the act should take effect the first day of June next. Sess. Laws N. Y. 1840, cc. 334, 336, 386.

[This act did not alter the existing law of New York respecting the running out or terminating of judgments liens; they remain as before extinguishable by payment, or presumption of payment (2 Rev. St. p. 301, §§ 46, 47), or the lapse of ten years after they were docketted (4 Kent, Comm. 435; 2 Rev. St. 359, § 4). It in effect merely took away the privilege granted by previous laws for executions to be issued to sheriffs of different counties on judgments or decrees of the highest courts, in all cases, and limited the power to sell real estate, to executions on judgments thereafter docketted in the county where the land lay. Liens by judgment or decree are made local and territorial and must be recorded or registered in the county in which the real estate is situated. The jurisdictions of the supreme court and county courts are placed on the same footing in this respect. But this is no regulation of the manner or period in which existing liens shall cease. It declares when only they shall come into being and effect. The Revised Statutes had fixed the period when judgment liens should cease. No execution could be issued upon

them after two years, unless revived by scire facias, and after the lapse of 10 years they cease to be liens against bona fide purchasers (2 Rev. St. p. 359, § 4), and after 20 years they will be presumed satisfied and paid (Id. p. 228, §§ 46, 47; Id. § 1).

[It is not to be supposed congress would make the validity of judgments and decrees in the United States courts dependent upon the acts of county clerks or other local officers of the states over whom it could have no control. Shrew v. Jones [Case No. 12,818]. Upon the hypotheses of the argument for the defendant, the judgment of the federal court, although operating throughout the district (Sellers v. Corwin, 5 Ohio, 398), yet affords creditors no remedy for their debts, against the real estate of debtors situated within the district without the concurrence and co-operation of a state clerk in each county within the respective United States districts. It would require a very plain expression of the intention of congress so to trammel the action of its own courts, and the remedies therein, before the appropriate remedy could be denied them, upon the terms or operations of the state law alone. If the law now requires a judgment of the United States courts to be registered to bind real estate there, it also requires the same act to be done in the county clerk's office in the city of New York, and in effect abrogates the duties of its own officers and transfers them to a county officer of the state, who may perform the service or not at his option. The improbability that any such intendments could have entered into the enactment of the act of 1840, supplies a strong reason against that interpretation of it. The language of the act is fully satisfied by holding that it applies not to the manner of creating liens, but exclusively to the mode and time of terminating them, and through which parties affected by them can become freed from their lien. So far as the meaning of congress as to the description of state laws which were to be adopted by this statute, can be inferred from the existing condition of the United States law in respect to the state of New York, the act of 1840 most palpably had reference to the statutes for a long time in force here, and not to one, only passed in this state twenty days previously, and in which the provision in question seemed to be thrown in casually in a very short section, the act being a long one and by its title seemingly devoted to other objects.

[Laws have been passed by the state legislature in 1830 (2 Rev. St., 1st Ed., p. 557, §§ 41-43), and in 1832 (Sess. Laws, c. 210, § 2), to have transcripts of judgments docketted in the United States courts in this state, obtained by the clerks of the supreme court of the state and made part of their dockets, to be kept and examined the same as state judgments.

[The state having no authority to enforce the execution of the law, it is not probable, that the act of congress of 1839, was passed in part with a view to aid that object. Section 8 directs the clerk of the United States courts in the city of New York, to transmit certified copies of his judgment dockets to the clerk of the state supreme court in the city of New York. 5 Laws U. S. 338. This act must at all events be taken as expressing the extent to which congress was willing to go at that time in making the dockets of judgments in the United States courts in this state, conform to and become part of the state dockets, and as has been before shown, after the experiment of one year, congress withdrew even this concession and repealed the provision absolutely substituting nothing of like character in its place. This would denote an intention to leave the matter of docketting judgments and searches in respect to them, wholly to their own officers, without any reference to the method of keeping or publishing such dockets by the state officers. The jurisdiction of the United States courts is territorial over districts and has no regard to the local subdivisions within the states of counties, cities, towns or parishes. 2 McLean, 78, 84 [Shrew v. Jones, Case No. 12,818]; [Massingill v. Downs] 7 How. (48 U. S.) 760; 1 Wall. Jr. 202 [Lombard v. Bayard, Case No. 8,469].

[Its processes run throughout the district, and its offices to serve mesne and final processes, act ministerially in aid of the courts, have authority co-extensive with the district, and the district composes in effect but one county. But with respect to the supreme court of this state, it only acts through ministerial officers appointed for the particular county, where its process is to be executed, and there would be great fitness and unity, (in addition to the matters of conveniency to parties affected by judgments) in requiring evidence of the existence of a judgment to be registered in the county whose sheriff is to enforce it against real property: and those local officers being all alike subject to the state law, it is as easy to require the services of county clerks to keep the dockets of a supreme court clerk as to allot the duty to him alone. This is wholly different with the United States. A direct enactment by congress that the county clerks within the state of New York shall docket judgments rendered in the federal courts within the state would be nugatory, and an indirect requirement, by rendering it necessary to a judgment creditor to have it done, would in parity of reason be equally inefficacious and void.

[But as already intimated the state act of May, 1840, has relation only to the manner in which liens on land shall thereafter be created or acquired. It is not enough now under the state law to enter a judgment in the supreme court to render it a lien throughout the state, but the statute directs something more to be done before such lien is brought into existence. Its words are, "no

judgment or decree which shall be entered after this act takes effect, shall be a lien upon real estate, unless," &c. The registry within the county where the land lies, is thus made a condition to any lien coming into being. It is not the language or purpose of the act of congress to provide for creating or constituting liens, by judgments or decrees in the manner done under the state law; that method was already established by its own laws and procedure ([Conard v. Atlantic Ins. Co.] 1 Pet. [26 U. S.] 453; 1 Kent, Comm. p. 248, note 6), and the plain bearing, as well as legal construction of the statute limits its operation to the manner and period in which existing liens shall cease to be such. Three methods, manner or periods of terminating them under the state are above shown to be in force, and those provisions only of the state law, this act of congress has adopted.

[The process act requires that writs of execution and other final process issued in judgments and decrees, rendered in any of the courts of the United States and the proceedings thereupon shall be the same as used in the states respecting where the act passed. May 14, 1828; 4 Laws U. S. 281, § 3. This statute has no relation to the point in controversy in this case, because the filing or entry of transcripts in a particular county, is no way connected with the proceeding to be had in executing final process on the judgment. The latter is ministerial wholly, the other relates to the creation of the judgment or its encumbrance on the property sought to be sold. The case of Massingill v. Downs, 7 How. [48 U. S.] 760, before cited, is strong and direct to the point that the judgment of the United States court creates a lien in this state co-extensive with the district, not to be divested or varied by subsequent legislation of the state; and as the right to this lien was anterior to the state act of 1840, and in no way derived from or strengthened by that act, its provisions cannot operate to divest the right, any more than an express legislative enactment now passed would prevent judgments and decrees of the United States courts becoming liens on real estate within the state.

[The precise point in controversy on this motion would appear to have arisen and been decided in the circuit court for the eastern district of Pennsylvania in 1848, after the act of congress of 1840 went into operation. The court do not notice that act in its decision as in any way affecting the question. It must have had a most important bearing on the point, if the position taken for the defence is sound, because a statute of Pennsylvania limiting liens of judgments to the counties in which they are rendered was in force at the enactment of the act of congress and had been since 1799. The decision of the court was that the judgment in the United States court was a lien throughout the eastern district of Pennsylvania and was not limited to the county in which it was rendered or recorded. Lombard v. Bayard [Case No. 8,469]; 7 Pa. Law J. 250.

[The limitation of a lien by the state law rests on different principles, and will govern its directions in the United States courts equally as in state courts. 1 Baldw. 273, 274 [Thompson v. Phillips, Case No. 13,974].

[I am clearly of opinion that the lien in the present case extended to the lands of the defendant in Kings county on docketting the same in this court, and that the motion to set aside the execution must be denied with costs.]

CROSBY (BOCKEE v.). See Case No. 1,593.

Case No. 3,419.

CROSBY v. CADWALADER.

[5 Am. Law Rev. 187.]

Circuit Court, E. D. Pennsylvania. June 8, 1870.

WAR—LIABILITY OF ARMY OFFICER FOR SEIZURE AND ARREST.

[Act March 3, 1863 (12 Stat. 756), provides that any order of the president, or under his authority, made during the existence of the Rebellion, shall be a defense to any action for acts done under or by virtue of such order. *Held*, that a general in the army was not liable for a seizure and arrests made by him during the Rebellion in pursuance of instructions from the secretary of war; the instructions of the secretary being, in that behalf, the act of the president.]

Action [by Philander Crosby against George Cadwalader] for damages growing out of the seizure of the bark A 1, at the close of the year 1863, and the arrest and confinement in Fort Mifflin of Captain Crosby and the other officers of the vessel. The damages claimed were laid at ten thousand dollars.

STRONG, Circuit Justice, after reciting the circumstances of the case as detailed by the witnesses, referred to the act of congress of March 3, 1863 [12 Stat. 756], in which it is declared that any order of the president or under his authority made at any time during the existence of the present Rebellion, shall be a defence in all courts to any action or prosecution, civil or criminal, pending or to be commenced, for any search, seizure, arrest, or imprisonment made, done, or committed, or acts omitted to be done, under and by virtue of such order or under color of any law of congress, and such defence may be made by special plea or under the general issue. He then referred to the telegraph despatches which had been sent from the secretary of war to General Cadwalader in reference to the detention of the bark A 1,—the first one, several days before the seizure, and the second ordering the release of the vessel,—and said that the act of the secretary of war was that of the president. If, then, the jury were satisfied that the defendant did act under authority, the law was a bar to

the recovery of damages by the plaintiff, and he had to look to Washington, either to the court of claims or to congress, for redress. The jury, after a few minutes' deliberation, rendered a verdict for the defendant.

Case No. 3,420.

CROSBY v. CALDWELL.

[Nowhere reported; opinion not now accessible.]

Case No. 3,421.

CROSBY v. FOLGER et al.

[1 Sumn. 514.][1]

Circuit Court, D. Massachusetts. Oct. Term, 1833.

COSTS—JOINT PARTIES.

In a case of tort, several costs of travel, attendance and attorney's fees will be allowed to several defendants, whether the pleadings are joint or several.

[Cited in The Baltimore, 8 Wall. (75 U. S.) 391.]

At law. The action was trover against four persons. No pleas were filed until October term, 1833; no motion or call was made by the plaintiff for pleas; and no objection was made to the pleas, when filed by the plaintiff. The cause proceeded to the jury, and the plaintiff [John Crosby, Jr.] went through their side of the cause. The defendants [Philip P. Folger and others] stated their case, and put in some of their evidence, when the court intimated an opinion against the plaintiffs, and they became nonsuit. The defendants now moved for several costs of travel, and attendance, and attorney's fees. They claimed them under the authority of a case decided in Massachusetts (Mason v. Waite, 1 Pick. 452), which they thought settled this case. The plaintiff's counsel objected to the allowance of several costs at all; and at least, they said, they could not be allowed before the pleas were actually filed.

Hubbard and Webster, for plaintiff.

C. P. Curtis, for defendants.

THE COURT, upon the authority of Mason v. Waite, 1 Pick. 452, directed several costs to be allowed to the defendants. They thought it made no difference in a case of tort, whether the pleadings were joint or several, as to costs. See Brown v. Stearns, 13 Mass. 536.

Case No. 3,422.

CROSBY v. GRINNELL et al.

[9 N. Y. Leg. Obs. 281.]

District Court, S. D. New York. March Term, 1851.

DUTY OF CARRIER—CUSTOMS AND USAGE — PERIL OF THE SEA — BLOWING — SALE OF DAMAGED CARGO.

1. Sea-going vessels, transporting merchandize for hire, are common carriers, and subject to the responsibility of such, when that responsibility is not qualified by an express contract or reservation. Courts never assume to engraft exceptions, beyond those indisputably settled by law, to the absolute responsibility of common carriers, any more upon water than upon land.

2. The responsibility of a common carrier may be qualified by a custom or usage of established notoriety.

3. If the parties annex no qualification by agreement to the undertaking of the master, the marine law applies none. The master is bound absolutely to deliver the cargo as received, unless prevented by the act of God or public enemies.

4. Blowing of a vessel is a peril of the sea, and not, like sweating, an incident to navigation which cannot be prevented or avoided by human means.

5. A sale of the damaged cargo by the respondents, at private sale, is not one binding the libellant. It should have been sold at auction, with notice to the ship owner, or at least an appraisement, with notice, should have been made.

This action was brought by [Joshua Crosby] the master of the brig Frederick against [Moses H. Grinnell and others] the consignees of certain hides and coffee shipped under two bills of lading. The bill of lading was special, and without the usual exception of "perils of the sea." The cargo was well stowed, and came out in good order, with the exception of about one hundred hides, which were wet. The consignees received the cargo, and disposed of it at private sale, deducting an estimated sum for damages to the hides. When the libel was filed they tendered the freight earned on the cargo, in part, but claimed to set off, by way of recoupment, the damage upon the hides, to the claim for freight.

E. C. Benedict, for libellant.

D. Lord, for defendants.

BETTS, District Judge. This action is brought by the master of the brig Frederick, to recover the balance of $697.29 freight on a shipment of hides and other merchandize of the defendants, from the port of Rio Janeiro to New York. Part of the hides, when delivered here, were found in a damaged condition from wet or moisture. The libellant insisted that the hides were well and securely stowed in the ship, and, if injured any way on the passage, it was owing to inherent defects in the articles, or to perils of the sea, or the blowing of the vessel, and that for none of those injuries the ship owner is responsible.

The defendants admitted the appellant's right to freight for coffee as charged, $567.42, and to $29.97 for the hides, over and above the damages and deterioration sustained by them, which is claimed to be $100, and pleaded a tender of payment of those two sums previous to the commencement of this suit, and insist the libellant is answerable to them for the injury the hides had received, equal-

[1] [Reported by Hon. Charles Sumner.]

ling the balance of the freight money demanded. The main controversy related to the question whether the libellant is liable for the injury the hides had received. If he is, he denies that the amount of that injury and his responsibility has been ascertained in a manner to bind him.

Another point between the parties is, whether the libellant has the right to apply the payment of $597.39 made to him by the respondents to the satisfaction of the freight of the hides specifically, and the balance over to the coffee, and thus leave no disputable matter between the parties; or whether the payment must first go to extinguish the freight for coffee, leaving the question open in this action as to his liability for the injury to the hides, and whether that injury is equal to the balance of freight claimed. The answer insists that the libellant took upon himself the responsibility of a common carrier, and is not discharged from it, if he proves the hides damaged by perils of the sea, or any other cause not being an act of God; and that the respondents are entitled to countervail the demand of the libellant for freight, by recoupment of the damages sustained by the hides. The cargo consisted of coffee, rosewood, and about 1,100 hides, and was all discharged in good order, with the exception of 107 hides somewhat wet and damaged. The stowage was proved to be good, and conformably to the usage of trade, except, in regard to the hides, there was evidence to show it was not proper to lay them on rosewood, and some witnesses asserted it was prudent and usual, if not necessary, in stowing a cargo of hides, to place a lining of hides between the main cargo and the skin or sides of the vessel.

There is nothing in the evidence to justify the inference that those hides were injured by being stowed on rosewood. There was no indication of wet or moisture in the wood when the cargo was discharged. So, also, the vessel came into port staunch and tight, and performed other voyages to the West Indies, and brought return cargoes of sugars undamaged, without being repaired; and from those circumstances it is justly inferred, she did not damage the cargo on the voyage in question by direct leakage. It might be uncertain, upon the proofs in court, whether all the damage to the hides occurred at sea; a witness to that point (Bullard) estimates that the ratio of 40 to a 1,000 of hides imported from Rio Janeiro, &c., receive shore damages before shipment to the extent of the injury these had sustained, or approximating to it; unless the terms of the bill of lading preclude the libellant raising the question in this case as it now stands.

The witnesses ascribe the wetting of the hides on the passage, not to letting in water by leakage on the hides, but to the blowing of the ship, which arises from throwing the water lying about the kelson, upon the sides, by the rolling and pitching of the ship, and thus forcing it through the skin or ceiling upon the cargo. A lining of mats was placed along the sides of the ship, between them and the hides, to prevent that injury; but it was proved that mats so placed are not sufficient security, unless of good quality, and laid thick, and that hides are usually required for lining, to prevent the water or dampness penetrating to the body of the cargo. Several witnesses, experienced in that trade and the commerce of this port, testified that damages to cargo, arising from the blowing of the ship, have never, within their knowledge, been charged upon the ship owner; they could not say there was any established usage throwing the loss upon the shipper or underwriter.

1. It is an incontrovertible point of commercial law, that sea-going vessels, transporting merchandize for hire, are common carriers, and subject to the responsibility of such, when that responsibility is not qualified by an express contract or reservation. Ang. Carr. §§ 87–91; 2 Kent, Comm. (6th Ed.) 599, 608; Hale v. New Jersey S. Nav. Co., 15 Conn. 539. The only reported case in the New York courts, which has called this doctrine in question, is Aymar v. Astor, 6 Cow. 267. Judge Story and Chancellor Kent regard that case as anomalous, and that its principle is directly reversed by subsequent decisions in the same court and court of errors. 2 Kent, Comm. (6th Ed.) 509, note; Story, Bailm. § 497; McArthur v. Sears, 21 Wend. 193.

The notion that the common-law doctrine is founded upon the custom of the realm, and has no operation out of the realm, is not supported by the English authorities, and is nowhere sanctioned by the decisions of the courts in the United States. Ang. Carr. § 153, note. On the contrary, it is directly repudiated in this state. Elliott v. Rossell, 10 Johns. 1. The libellant was, accordingly, answerable, as an insurer, for the safe delivery of the goods shipped to the respondents, except in so far as that liability is qualified by his contract, express or implied. The bill of lading executed by the libellant does not correspond in form with those in use in England and this country. It is dated Rio Janeiro, Sept. 23, 1848, and is as follows: "I, the undersigned, captain of the American brig Frederick, at present anchored in this port, to proceed to the port of New York, being my port of discharge, declare that it is true, I have received and stowed within the decks of said vessel perfectly dry and well conditioned, account of Jo Tenio Puto, eleven hundred and eighty dry hides, with hair on, on account and risk of whom it may concern, being marked and of the weight of and quantity expressed in the margin, which I bind myself to deliver at the aforesaid port, in the name of the aforesaid, to Grinnell, Minturn and Co., receiving for freight one half cent per pound with five per cent. premium, and for fulfillment thereof, I bind per-

son, goods, and said vessel, and therefore have signed four bills of lading, all of equal tenor and date, of which one being fulfilled, the others shall have no validity. (Weight unknown.) (Signed) Joshua Crosby."

This engagement being entered into, to be performed in New York, it is, as to its nature, obligation and interpretation, to be governed by the law of the place of performance. Story, Confl. Laws (3d Ed.) § 280; 2 Kent, Comm. (6th Ed.) 459, note 6. If the contract is not to be construed as rendering the master an insurer for the safe delivery of this cargo by express agreement, it manifestly in no way curtails his obligation as a common carrier under the law of this state. 19 Wend. 329; 7 Hill, 292.

For the libellant, it is contended that the shipment of goods on a contract of affreightment carries with it the implication that the ship is not responsible for perils of the sea, and that a bill of lading containing such qualification is not necessary to exempt the ship owner from liability for any damage to goods coming within the description of losses of that character. No case has been produced in which that principle has been adjudicated. The references above given show that no such doctrine entered into the decisions made upon this subject, or has been recognized as law by the courts.

The bill of lading, or other stipulation outside the act of affreightment, is looked to to relieve the ship owner or master from the stringency of the obligation imposed upon him by law on his undertaking to transport goods for hire. Abb. Shipp. 322, 382, note 1; Citizens' Bank v. Nantucket Steamboat Co. [Case No. 2,730]. The courts never assume to engraft exceptions, beyond those indisputably settled by the law, to the absolute responsibility of common carriers, any more upon water than upon land.

It is further urged for the libellant that the damage received by the hides in this instance, if not shore damage affecting them when shipped, was incurred from the blowing of the ship on the passage, and that such injury does not arise from perils of the sea, or any culpable act or omission on the part of the ship master or owner. That it is one necessarily incident to water carriage, and is no way caused by leakage of the ship, or fault of stowage, and falls within the principle of the case of Baxter v. Leland [Case No. 1,124], decided in this court in November, 1848, in which the court held that the owner was not liable to the shipper for damage to cargo from the sweating of the ship on the voyage.

A bill of lading was executed in that case, and contained the exception of liability, because of "the dangers of the sea," or "dangers of navigation." The court held those forms of expression were equivalent to, and imported no more than, the usual phrase, "perils of the sea," but that, on the proofs as to the cause of sweating in ships, the injury could not be properly ascribed to a peril of the sea.

The court said, tempestuous and violent weather tends to increase the difficulty, but does not produce it; all the testimony showing that it occurs in quiet and smooth voyages, where there is no straining or unusual rolling or pitching of the ship. Its causes are probably atmospheric, but whether ascribable to that source, or others more occult, it cannot be properly classed with perils of the sea. It is of ordinary occurrence, scarcely failing to exist in any case of navigation from New Orleans to northern ports in the cold seasons of the year. It is a quiet, secret exhalation, generated in the hold of the vessel, in no other known way produced by the winds and waves and navigation, than that those are agents and accompaniments of her transit out of a warm into a cold climate. Although, upon these considerations, the court did not hold the ship acquitted of her responsibility as a common carrier, under the exceptions in the bill of lading, yet it was added that the testimony in the cause proved a uniform and well understood usage in the trade between New Orleans and New York, that injuries received by goods from the sweating of the vessel should be borne by the goods alone. That case, then, in its ruling features, would meet this no farther than to decide that the ship is not exonerated from responsibility for the loss from sweating because exempted from liability for perils of the sea, (if this vessel could be regarded entitled to such exemption,) but that the damage falls upon the shipper because of the character of the injury intrinsic or inherent to navigation from a high to a low temperature, without regard to the condition of the ship or the stowage of the cargo; and also because, from the usage of trade between New Orleans and New York, well known to persons concerned in it, the goods, and not the ship, bear the loss under such circumstances.

I think the libellant fails proving, in this case, that the blowing of a ship is, in its character and cause, analogous to sweating. It is, doubtless, as usual, or more so, because its effects are no way dependent upon change of climate, and, to a greater or less degree, occurs in all voyages. The marine surveyors examined by the libellant testify it is occasioned by water in the bottom of the ship, thrown up between the sides and ceiling by the rolling of the ship, and thus forced through upon the cargo. This water generally lies below the reach of the pumps, but the damage more usually occurs because of the insufficient pumping of the vessel. There is no evidence giving a different account of the cause of blowing. Some of the witnesses for the claimant impute the damage in this instance to sweating or blowing. They, however, state that the stowage of hides on wood, particularly rosewood, occasions a sweating often very injurious to them. It is to be re-

marked, upon this testimony, that, in supposing the damage to have arisen from either sweating or blowing, the witnesses for the claimants all ascribe it to improper stowage, both in employing rosewood for dunnage, and in omitting to put a sufficient lining between the hides and the dunnage and the sides of the ship.

So, also, the marine surveyors say it is necessary, to protect a cargo of hides from blowing, that a lining of hides should be put between them and the sides of the vessel, of several inches thickness. The evidence offered by the libellant, therefore, affords no ground for bringing this case within the principle recognized by the court in Baxter v. Leland [Case No. 1,124], for the witnesses agree in representing it a damage which might be prevented by proper stowage, or which, if the stowage is proper, is borne by the shipper or underwriter, because it arises from perils of the sea. Captain Thompson, the marine surveyor, says underwriters pay for damages occasioned by the blowing of the vessel, as sea damage. To the same effect is the testimony of Mr. Foster, a commission merchant, engaged in the trade; and the other two witnesses, Captain Candee and Mr. Nickerson, go no farther than to say the owner of the goods bears the loss when there is a certificate of the marine surveyors that the stowage is good. Mr. Foster, a partner of Nickerson, qualifies this statement by adding that the owner bears the loss unless it amounts to an average, and then it is paid by the underwriter. These witnesses, evidently, therefore, are speaking of cases in which the ship owner is exempt, under the bills of lading, from losses arising by perils of the sea. The responsibility of a common carrier, may, no doubt, be qualified by a custom or usage in a particular trade, or between particular ports of established notoriety. The implied assent of parties to the usage will properly be regarded of like force between them, as an express agreement. Baxter v. Leland [supra], and cases cited.

The libellant claims that such custom notoriously prevails in respect to the transportation of hides, particularly from South American ports to the United States. He, however, furnishes no other evidence of it than that above recited, and evidently the witnesses do not speak of a usage in any other sense than as distinguishing the instances in which the consignee or underwriter bears the loss because it results from perils the ship is exonerated from, under the contract of affreightment. To give a custom the effect of controlling the ordinary rules of law, there must be the most clear and satisfactory evidence of its long continuance and notoriety. The Reeside [Case No. 11,657]; Ang. Carr. § 230. It does not appear to me the evidence in this case approaches that requirement, or can be considered as pretending to anything beyond showing the usual method of adjusting losses of this description, when the goods are delivered under an ordinary bill of lading. The bill of lading executed by the master on receiving the hides in question on board his ship was special and peculiar in its terms. It declares it to be true that the libellant has received and stowed within the decks of the vessel the hides in question, perfectly dry and well conditioned, which he binds himself to deliver at the port of New York. There is, as already observed, in this, no qualification of his full responsibility as a common carrier, but, on the contrary, an explicit recognition of that obligation by the libellant in the express language of his undertaking, and in my opinion he must, in every view of this case, be answerable to the claimants for the damages received by the hides on the voyage.

The bill of lading admits the hides were perfectly dry and well conditioned when laden on board. This acknowledgment, however, as between the immediate parties to the bill of lading, is not conclusive (Abb. Shipp. 324), though prima facie evidence of the facts (7 Mass. 297). It is still competent for him to prove, as against the shippers, a mistake of fact or misinformation in that respect. The hides were put on board in the name of the claimants, and the engagement, by the bill of lading, is to make the delivery to them, so that the controversy is in effect between the shipper and ship owner. In such circumstances the libellant would be allowed, against the prima facie evidence of the bill of lading, to prove the actual condition of the merchandize at the time of shipment. The acknowledgment in the bill of lading by no means necessarily imports the personal knowledge of the master of the condition of the goods. He may have acted on the report of an agent of the ship, or of the shipper himself, and the law permits him to defend himself by showing the facts as they actually existed.

The method adopted by the claimants for fixing the amount of loss is not one binding the libellant. The property should have been sold at auction, with notice to the ship owner or master, or at least an appraisement, with notice, should have been made, in order to affect him. Loewig v. The Columbus [Case No. 8,463].

The freight on the coffee was $567.42, and on the hides $129.87, in the aggregate $697.29. Of this sum the defendants admitted to be payable $597.39, which they tendered and paid into court. The libellant sues for the whole freight, and the tender and payment must be regarded as made upon the gross freight, and he is not entitled to divide it, and apply part to the payment of the entire freight of the hides, the residue pro tanto for the coffee, and then set up the unsatisfied balance as coffee freight. The whole freight money demanded of the claimants included that for coffee and for hides. The claimants denied they were liable for the whole amount demanded, and it does not lie with the libellant to appropriate the tender and payment

to the extinguishment of the contested demand, and then sue for the undisputed residue as the balance due him. By receiving the payment on the general account, and pursuing his action to recover beyond it, the case is open to the defendants to prove the amount paid justly extinguishes all they are legally liable to pay.

In my opinion, the defendants are entitled to compensation, by way of recoupment against the demand of the libellant, for any damage or deterioration of the hides incurred on the voyage. A reference must be had to ascertain that damage.

CROSBY (HARDING v.). See Case No. 6,050.

Case No. 3,423.

CROSBY et al. v. LANE.

[4 Am. Law J. (N. S.) 333; 14 Law Rep. 452.]

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

PROMISSORY NOTE—WHEN PAYMENT.

1. *Held*, that, by the commercial law, a negotiable promissory note, received in payment of a pre-existing debt, bona fide, and without notice, is not subject, in the hands of the holder, to the equities between the original parties, although it be an accommodation note, though the rule in the state of New York be otherwise.

2. But *held*, that the acceptance of such note as payment, on the express assurance of the assignor that it was business paper, and not accommodation, does not amount to a payment and extinguishment of the original indebtment.

3. *Held*, also, that a representation made by the assignee, at the time of transferring the note, that the parties were of high credit and responsibility, those parties not being residents of the state, and being unknown to the creditor, if found to be not true in point of fact, and circumstances indicating a knowledge of the debtor, that their credit and responsibility were doubtful, receiving the note on such representation does not extinguish the original debt.

4. *Held*, that the creditor, on returning the note protested for non-payment, or dishonored, or offering it to the assignor in court on trial, may maintain an action on the original debt.

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

Case No. 3,424.

CROSBY v. LAPOURAILLE et al.

[Taney, 374.][1]

Circuit Court, D. Maryland. Nov. Term, 1854.

PATENTABILITY OF COMBINATION.

A combination in machinery is patentable, if the combination be new, although the elements which compose it may be old, provided it was invented by the patentee, and is not the mere effort of ordinary mechanical skill, putting together known powers and combinations to produce the result.

[1] [Reported by James Mason Campbell, Esq., and here reprinted by permission.]

In equity. The object of the bill filed in this case was, to restrain the defendants [A. P. Lapouraille and William H. Maughline], by injunction, from an alleged infringement of a patent for a saw-mill [granted to N. & Pearson Crosby, March 27, 1835]. The case was submitted and argued upon bill and answer. The facts sufficiently appear from the opinion of the court.

The issues of fact were not tried by a jury, and at November term, 1856, the bill was dismissed with costs [not reported].

Schley & Latrobe, for complainant.
Wm. H. Young, for defendants.

TANEY, Circuit Justice. This case has been submitted for final hearing upon bill and answer and general replication. The object of the bill is, to enjoin the respondents, perpetually, from using a certain machine for sawing lumber, which is particularly described in the answer, upon the ground that the machine, as thus described and admitted to be used, is an infringement of a patent granted to the complainant for a machine of the like character. The patent, under which he claims, is exhibited with the bill. The oral argument in court, as well as the written arguments since presented, have been chiefly directed to the construction of the patent of the complainant, and the extent of the claim made in it. Upon this point, the court is of opinion:

1. That the patent is for a combination; and undoubtedly, it is patentable, if the combination is new, although the elements which compose it may be old, provided it was invented by the complainant, and is not the mere effort of ordinary mechanical skill, putting together known powers and combinations to produce the result.

2. The patent of the complainant covers the saw, as described in his specification, in combination with the framework, and any saw hung and strained in a manner substantially the same; but it does not cover a combination in which a saw may be combined with the framework, and hung and strained in a manner substantially different from that described in his specification. In other words, it does not cover every combination in which a saw acts perpendicularly, and produces the prescribed result upon lumber pressed against it, in the manner set forth in the patent and specification. The saw used must be hung and strained substantially in the manner described, in order to be covered by the patent.

The second part of the claim, is for the particular manner of hanging and straining the saw by the combination of three stirrups at the end. This claim covers a saw of this description, although the other machinery combined with it may be entirely different from that described in the specification of the complainant. The dispute in this case, however, is not upon the second branch of

the claim, but upon the first branch. The complainant contends that his patent is infringed, if a saw hung and arranged in any manner for sawing timber, is used in combination with the machinery and framework described in the specification, upon the ground that a saw hung and strained in any manner, with this combination, is a violation of the patent. I have already said, that I do not think this proposition can be maintained, and that the patent is not infringed, unless the saw is hung and prepared for its work in a manner substantially the same with the mode of hanging and arranging it mentioned in the specification.

But there are two questions of fact to be decided, before the case can be disposed of. The saw used by the respondents is particularly described in their answer, and certainly does not appear to be hung in precisely the same manner with the complainant's; but it may or may not be substantially the same, with only an important variation. The testimony of experts may be necessary on this question.

So again, the answer denies that a combination, such as the complainant describes, with a saw hung in the manner of the respondents, would be a new and patentable invention. He avers that his saw is hung and works in the manner used in some mills, long before the plaintiff obtained his patent; and that in the framework, by which the timber is moved forward to the saw and presented to its action, he has done nothing more than adopted the machinery long known and used in Woodworth's planing-machine, and indeed known and used, as he avers, before the patent for that invention. And that no change is made in this machinery to adapt it to sawing timber, beyond such slight alterations as would suggest themselves to a mechanic of ordinary skill, who was acquainted with the planing-machines in which it was used. And therefore, if the machine and combination he uses is substantially the same with the combination for which the complainant has obtained a patent, that combination was not new, and not patentable.

Here then are two questions of fact to be decided, before a final decree can be passed: (1) Whether the combination used by the respondents, hanging and arranging the saw in the manner described in the answer, is substantially the same with the improvement patented by the complainant, and the construction placed upon the patent, by the court as above stated? (2) If it be substantially the same, and covered by the complainant's patent, as construed by the court, is this combination a new invention for sawing lumber into boards, or is it substantially the same with all combinations known and used before this patent was issued?

There are some admissions of fact made in the argument on both sides, but the court must act upon the case as presented by the pleadings; for there is no agreed statement of facts, nor any testimony in the case; and the court cannot decree upon admissions made arguendo by counsel.

The case is, therefore, continued by order of the court until the next term, when the court will direct issues to be tried by a jury, upon the two questions of fact above stated.

CROSBY (MASON v.). See Cases Nos. 9,234–9,236.

Case No. 3,424a.

CROSBY v. The ORIENTAL.

[19 Betts, D. C. MS. 76.]

District Court, S. D. New York. Sept. 15, 1851.

MARITIME LIENS—UNDER STATE STATUTES — PRIORITY.

[A state statute (2 Rev. St. N. Y. p. 405, § 1, cl. 3), giving a mortgage on a vessel precedence over all other liens, does not avail to give it precedence over maritime liens subsequently arising, in preparing the vessel for sea, with the knowledge and consent of the mortgagee.]

[In admiralty. Libels by Seth Crosby and others against the brig Oriental, Alexander M. Andrews, claimant, to enforce certain maritime liens.]

BETTS, District Judge. Numerous parties having maritime liens in this vessel have procured her condemnation and sale by decree of court to satisfy those demands. Alexander M. Andrews intervened and contested the several actions, but the cases were defaulted at term, and orders of reference to a commissioner to ascertain and report the amounts due the respective libellants were entered. A stipulation for consolidating the cases, and having the decision in one determine the right of the claimants in all the others, was entered into between the proctors, and it was also agreed that the points in controversy between the libellants and claimant should be tried and decided on a petition to the court to determine the right of priority of the respective parties to the fund in court. The liability of the vessel to the various libellants accrued in June or July, whilst she was in possession of Robert Taylor, as owner and master, and the suits against her thereon were instituted in July. Taylor is an alien, and incapable, in that capacity, to take title to the vessel. She was purchased by and for him, and the title given in the name of Robert Roulston, who immediately thereupon, May 14, 1850, mortgaged her to Andrews, the claimant, for $2,000, to secure the purchase money, which was furnished by him in his notes payable in October thereafter. The mortgage was registered the next day, and the mortgagee demanded payment of the money secured to be paid by it, on the 8th of July, 1850. The first libel was filed July 6, and others the 9th, and followed by others on different days

of the same month. On the hearing, the mortgagee insists he is entitled to a priority of satisfaction out of the funds in court, his mortgage being registered before the debts were incurred to the several libellants.

First, in respect to the demands for materials and supplies furnished the vessel for her outfit on the voyage contemplated, they have a precedence given them over other debts owing by the vessel, by the statute of this state which gives the lien now sought to be enforced. The act declares "such debt shall be a lien upon the ship or vessel, and shall be preferred to all other liens thereon, except mariners' wages." 2 Rev. St. p. 405, § 1, cl. 3. The mortgage was taken subject to this provision of the law, and the claim under it, if unexceptionable, must be postponed to the demands of that class of creditors and to the petition of the seamen for wages. Several of the libellants entered on board the vessel here in the capacity of seamen, to work their passage to California, and, in addition to their services as seamen, advanced and paid for the privilege a sum of money to the master or owner. The voyage was broken up by the arrest and sale of the vessel, and those parties sue for the monies advanced, and also for damages for the loss of the voyage. The commissioner reports various amounts due them in that behalf. No exception is taken to the report, and the only question raised is whether the claimant has not, by virtue of his mortgage, a prior right to the fund in court. If the mortgage is regarded equivalent to an hypothecation of the vessel to Andrews, with actual possession, the mortgagee could not thus hold her exempt from liability for maritime liens subsequently accruing.

The only question would be whether he did not become also personally responsible for such debts. The vessel is chargeable under the maritime law for the fulfilment of the contract of her master, or ship's husband, in respect to freight, the transportation and safe delivery of cargo, and other matters incident to her service and employment in her legitimate business, and those liabilities take priority over antecedent obligations, even by way of bottomry, when first presented. Abb. Shipp. 161, note 1, 344; Domat, lib. 3, tit. 1, § 5; Marshall v. Bazin [Case No. 9,125]; The Pacific v. Cleveland [Id. 10,643]; Daveis, 29 [The Calisto, Case No. 2,316]; Daveis, 71 [Davis v. Child, Case No. 3,628]; Daveis, 199 [Hull of a New Ship, Case No. 6,859].

If there may be room for question as to the effect of conflicting claims between bottomry creditors and posterior creditors having only ordinary maritime liens on the vessel, a mortgagee has no pretence to priority of privilege over the latter. His claim is not of a maritime character. If he does not take the vessel into possession and keep her from employment at sea, he must be held to acquiesce in her being subjected to all the responsibilities of vessels engaged in navigation and trade. It could operate as a fraud to allow her to be repaired, fitted out, supplied and freighted for sea, if advances to these ends accrued to the benefit of the mortgagee. If a vessel can be treated as a mere chattel, and subjected to the law applicable to chattels, it can be only so in her home port, where she is expressly excluded by the pawnee or mortgagee from being employed in navigation. When a mortgagee allows a vessel to undertake a voyage at sea, he must be held to place her in all respects in relation to maritime obligations incurred by her, in the same situation as if she was fitted out directly by him in the character of mortgagee in possession, and he cannot be permitted in equity and good conscience to set up his antecedent contract encumbrance on her, to the prejudice of maritime creditors thus acquiring liens on the vessel herself.

In my opinion, the demand of the mortgagee in this case cannot supersede or displace the claims of the prosecuting creditors, and they are entitled to the satisfaction of their decrees out of the fund in court, together with costs.

Case No. 3,424b.

CROSBY v. The PRINCE ALBERT.

ELWELL et al. v. SAME.

[Betts' Scr. Bk. 589.]

District Court, S. D. New York. April 14, 1859.

FEES OF UNITED STATES COMMISSIONER.

[A United States commissioner, appointed to perform the duties of a referee, is entitled to three dollars per day, the compensation to masters in chancery for similar services, and not to the fees prescribed by the fee bill of 1853 for attending to a reference in admiralty in pursuance of an order of the court.]

[In admiralty. Libels by James W. Elwell and others against the steamer Prince Albert, and by Philander Crosby against the same. On taxation of the fee bill of Mr. White, United States commissioner, for his services as referee.]

Benedict, Burr & Benedict, for libellants.

Van Vorst & Beardslee, for claimants.

Before BETTS, District Judge. These cases were referred by the court, pursuant to the rules adopted in January term, to Mr. White, United States commissioner, to hear the testimony and report his findings thereon. The hearing took place, and the commissioner reported in favor of the libellants. He thereupon made out his bill of fees for the services rendered, according to the charges allowed to United States commissioners by the fee bill of 1853, and this bill was brought before the court for taxation.

HELD BY THE COURT: That the 44th rule of the supreme court, under which, with the other rules and acts giving the district courts authority over the practice of the

court, these referees or commissioners are appointed, had no allusion to the commissioners, provided for as standing officers by the fee bill of 1853, as the commissioners who were to be subrogated in place of the court in executing these references.

But that there is strong reason for holding that the particular compensation allowed to United States commissioners by the fee bill was designed to apply with its limitations to like services performed by any denomination of commissioners or referees, and the provision of the fee bill which determines the allowance for attending to a reference in pursuance of an order of court should be regarded as covering that service in cases of this class also. The commissioner ought not, therefore, to be allowed more than $3 per diem for that special service, nor for the reason that he takes the appellation of a commissioner, but because that sum is awarded by law "for attending to a reference in admiralty in pursuance of an order of court."

That the fee bill does not, however, govern the subject of compensation to which the referee is entitled for his services, further than establishing the per diem allowance for attending to the reference. He is clothed with the powers and functions of a master in chancery, and would seem entitled to a compensation equivalent to what that officer might demand for services of a like order.

The bills of costs are accordingly sent back to the commissioner, to restate them to the court for allowance.

Case No. 3,425.

CROSBY v. The SUNSHINE.

[Nowhere reported; opinion not now accessible.]

CROSBY (UNITED STATES v.). See Case No. 14,893.

CROSE, In re. See Cases Nos. 3,426 and 3,-427.

Case No. 3,426.

In re CROSS.

[2 Dill. 320.][1]

Circuit Court, D. Nebraska. 1873.

MORTGAGE OF HOMESTEAD—WAIVER.

1. Under the statutes of Nebraska the husband and wife may make a valid mortgage of the homestead property.

[Cited in Connecticut Mut. Life Ins. Co. v. Jones, 8 Fed. 305.]

2. An express waiver of the homestead right is not essential to the validity of such a mortgage.

This is a petition under the second section of the bankrupt act, to review an order of the district court refusing to subject to sale lots 1 and 2 in block 12, in Tecumseh, claimed by the bankrupt as a homestead.

The adversary parties in this proceeding are the bankrupt and his wife on the one hand, and Dutcher & Co. mortgage creditors of the bankrupt, holding a mortgage on the homestead property.

The facts are briefly these: Prior to June, 1870, the bankrupt became indebted to Dutcher & Co., and in June, 1870, he erected a house on the two town lots herein claimed as a homestead, and removed there with his family, where he has ever since resided. On the 22d day of October, 1870, the bankrupt and his wife executed a mortgage upon two hundred and forty acres of land, and upon the two lots occupied by them as a homestead, to secure Dutcher & Co. the sum of $2,000, evidenced by the promissory note of the husband of that date. This mortgage is duly signed and acknowledged by Cross and his wife, and is in proper form, but it contains no express waiver or relinquishment of the homestead right or exemption.

Cross having afterward been adjudicated a bankrupt, and the mortgage not having been paid, the mortgagees, on the 19th day of April, 1872, filed their petition in the bankruptcy court, setting forth their mortgage and praying that the assignee in bankruptcy might be ordered to sell the mortgaged property free of all incumbrances, and that the lien of the mortgage be transferred to the proceeds.

That court found that there was due upon the mortgage $2,000, with interest from October 22, 1870, and on September 16, 1872, made an order to sell the two hundred and forty acres of land embraced in the mortgage. It was further "ordered by the court that lots 1 and 2 in block 12, Tecumseh, be not sold for the reason that the same are occupied by the said bankrupt and his family as a homestead." To this last order the mortgagees objected, and to have its correctness determined bring the case here for review.

A. J. Poppleton and Wm. O. Bartholomew, for petitioners for revision.

E. W. & V. D. Metcalf and Isaac N. Shambaugh, for bankrupt and his wife.

DILLON, Circuit Judge. There is substantially but one question in this case, and that is whether the mortgage executed by the husband and wife upon the homestead is valid and created a lien thereon in favor of the mortgagees. In the chapter of the state statutes relating to "Executions against the property of the judgment debtor," occur certain provisions as to "Homestead and other Exemptions." Section 525 is as follows: "A homestead, etc., owned and occupied by any resident of the state, being the head of a family, shall not be subject to attachment, levy, or sale upon execution, or any other process, issuing out of any court within this

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

state, so long as the same shall be owned and occupied by the debtor as such homestead."

By the act of 1870 [page 6, § 1], "clerks', laborers', or mechanics' wages or for money due and owing by any attorney at law" are excepted from the benefit of the exemption.

There is no provision in the statute prohibiting the alienation, sale, or mortgage of the homestead, or of any of the other property exempted by the statute from judicial sale. Nor is there any provision respecting the mode of conveying the homestead, but there are general provisions relating to the manner of conveying real property, in conformity with which the mortgage here in question was executed.

Under these circumstances I perceive no difficulty in the question here presented.

The legal title to the lots occupied as the homestead being in the husband, he and his wife, by joining in an absolute conveyance thereof, might, undoubtedly, make to the purchaser a perfect title. There being no restriction upon the right of disposition, I think it equally clear that they could in this mode make a valid mortgage upon the homestead. If so, then such a mortgage can and should be enforced.

The provisions of the statute above mentioned, respecting the exemption of the homestead from sale upon execution or other judicial process, plainly refer to executions or process upon general judgments, not to decrees upon foreclosure of a valid mortgage upon the homestead. The language exempting the homestead from judicial sale can no more be construed to prohibit the owner from making a mortgage upon it than from making a sale of it. Similar language is employed in section 530 as to the personal property thereby exempted from judicial seizure and sale, and yet it could scarcely be contended that a valid mortgage might not be made by the owner of such property.

The exemption in both cases is for the benefit of the debtor and his family. It may be waived. And when the husband and his wife unite in the execution of a mortgage upon the homestead for a valuable consideration received by them or either of them, the right to the exemption is thereby waived in favor of the mortgagee.

I perceive nothing in the legislation of the state which prescribes a particular method of conveying the homestead or requiring an express waiver of the homestead right. In Iowa the statute in terms provides that no sale or conveyance of the homestead shall be of any validity, unless both husband and wife concur in and sign the conveyance, and yet it is held that no express waiver of the homestead right is necessary to a valid deed or mortgage. Reversed.

NOTE [from original report]. The cases on the subject of the homestead exemption down to 1862 will be found collected in 1 Am. Law Reg. (N. S.) pp. 641, 705. See, also, Cox v. Wilder [Case No. 3,308], and cases cited in note [In re Hook, Case No. 6,671; Smith v. Kehr, Id. 13,071; In re Cross, Id. 3,426; Rix v. Capitol Bank, Id. 11,869; In re Tertelling, Id. 13,842; In re Jones, Id. 7,445]; Bartholomew v. West [Id. 1,071].

An express relinquishment of the homestead right held not necessary, where it was not required by the statute. Babcock v. Hoey, 11 Iowa, 375; Pfeiffer v. Reihn, 13 Cal. 643.

But formal release or waiver is in some states required. Kitchell v. Burgwin, 21 Ill. 40, explained 23 Ill. 536; 26 Ill. 107, 150; 1 Am. Law Reg. (N. S.) 706, note.

Case No. 3,427.

In re CROSS.

[16 N. B. R. 294;[1] 25 Pittsb. Leg. J. 35; 5 Cent. Law J. 313.]

District Court, D. Indiana. Sept. 25, 1877.

APPLICATION BY BANKRUPT FOR DISCHARGE.

The bankrupt must apply for his discharge before the final report and discharge of the assignee.

GRESHAM, District Judge. In this case the bankrupt filed his petition for discharge September 17, 1877. The assignee in the cause had rendered his final account, and received his discharge from the register November 1, 1876. The question in the case is made under the amendment to the bankrupt act approved July 26, 1876 (19 Stat. 102). That amendment provides that section 5108 of the Revised Statutes be amended to read as follows: "At any time after the expiration of six months from the adjudication of bankruptcy, or, if no debts have been proved against the bankrupt, or if no assets have come to the hands of the assignee, at any time after the expiration of sixty days, and before the final disposition of the cause, the bankrupt may apply to the court for a discharge from his debts." The amended provision is expressly extended to "all cases heretofore or hereafter commenced." The original provision on this subject, as in the section cited, differs from the amendment in this: Instead of the words, "before the final disposition of the cause," the original act reads in their stead, "within one year from the adjudication of bankruptcy." So that originally the bankrupt was required to apply for his discharge within a year after the adjudication, whereas, by the amendment, he is required to apply "before the final disposition of the cause."

What is meant in this amendment by the final disposition of the cause cannot be a matter of doubt. But two principal objects are contemplated by a proceeding in bankruptcy: 1. The administration and distribution of a bankrupt's estate. 2. The discharge of a bankrupt from his debts. It is plain the amendment does not contemplate the latter as the final disposition of the cause, for that is the part of the case yet to be disposed of.

[1] [Reprinted from 16 N. B. R. 294, by permission.]

The final settlement made by the assignee, and the discharge of that officer from his functions, constitute, within the meaning of this amendment, the final disposition of the bankruptcy. Under the act as it originally stood, this provision was variously interpreted. Congress, however, interposes to fix a new period, and declares that the bankrupt may ask for his discharge before the case is so disposed of, or, in other words, before the assignee has completed his administration and received his discharge. If any liberality of construction was indulged before this amendment, there seems to be no place for it now. Congress evidently intended to fix a limit within which a discharge could be asked for, and they very reasonably repealed the arbitrary limitation of one year, and substituted one not open to the objection that the estate remained unsettled—that is, that the period for applying for discharge must not be later than the final report and discharge of the assignee. Such, I think, is the only conclusion that can be reached, for it is the only one that gives any effect to the legislation of congress. This is substantially the view taken by the district court of the United States for the northern district of New York, and sustained on review by the circuit court for the same district, in Re Brightman & Losee [Case No. 1,878]. The application for discharge comes too late, and is therefore rejected.

Case No. 3,428.

CROSS v. The BELLONA.

[Bee, 193.] [1]

District Court, D. South Carolina. Jan., 1803.

MEASURE OF SALVAGE COMPENSATION.

Whatever may be the service rendered, court will never give more than one half by way of salvage; and will restore the remainder to owners. Less than one half may be awarded, according to circumstances.

The ship Bellona, of New York, sailed from Cadiz on the 2d September last, with a cargo of wine. She encountered several violent storms, in which she was dismasted, and had her rudder irons knocked off. In this state, with three feet water in the hold, she met at sea a schooner bound to Boston, from which they could obtain no supply of provisions, nor other assistance. But the master offered to take them into his schooner, and to land them in one of the ports to the eastward. The crew of the Bellona accepted the offer. On the 7th November following, she was met with in latitude 42, 40, longitude 63, by the brig John, Sanders, master, who put his mate, Brown, and two seamen into the Bellona, with a supply of provisions and other necessary articles. She had, at that time, three and a half feet water in her hold, her hatches were open, and her rudder irons gone. Brown and the two seamen continued their endeavors to make a port, till the 30th November, when the libellant Cross boarded the Bellona in latitude 32, 39, longitude 68. Her stock of provisions consisted then of no more than thirty weight of beef, and as much of bread. Brown agreed with Cross that, upon his staying by the wreck, and assisting to get her into port, he should receive one half of the ship and cargo. Upon these conditions Cross remained with the Bellona, sent one seaman on board, and furnished her with all necessary supplies. He was with her when she arrived in this port, seventeen days after he fell in with her. It was proved that Sanders, who put the first three men on board, took out thirty-six casks of wine, and carried them with him to Salem.

BEE, District Judge. After arguing the merits of the respective salvors, a claim was interposed by the owners and underwriters resident in New York. Counsel were heard also on their behalf. Much ingenuity has been displayed as to the proportional service of the several salvors; but as they have agreed to divide equally whatever may be adjudged to them, I shall not rest upon that point. It is said that they are entitled to two thirds of the vessel and cargo. But the owners, by their counsel, as strenuously maintain that they will be amply compensated by a fourth; or, at most, a third part. It was admitted that essential service had been rendered. It is, indeed, highly improbable that the vessel would have reached land without the assistance of Sanders, who found her derelict; and the subsequent aid of Cross, who supplied her with necessaries, and towed her into this harbour.

The value of the property saved is considerable. 1 C. Rob. Adm. 1, 43, were quoted in favour of the salvors. Sir William Scott there says, that courts should not be desirous of reducing to one dead level, the various degrees of merit that must attend the circumstances of each particular case. He refers to a pretended universal rule of giving one half in every case. No more was contended for in that case; but, though no owners appeared, it was declared that the salvors were not entitled to a moiety, and it was determined accordingly. The case quoted by the counsel for the owners from 3 C. Rob. Adm. 355, is also inapplicable to this. There the services were rendered on land, and the crew of the William Beckford were on board, and assisted in saving her. In the case before me, the vessel was abandoned on the high seas, was found six or seven hundred miles from any land, in a disabled state, and at a tempestuous time of the year. I have always considered cases of derelict as different from other claims for salvage, and have invariably decreed one half by way of compensation. Circumstances may induce me, on future occasions, to give less: I would

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

not, therefore, be understood as laying this proportion down universally. But I cannot conceive that the owners ought by any considerations to be divested of more than a moiety.

I adjudge that proportion now; and decree that the salvors here receive one half of the amount of sales of the Bellona and cargo, after deducting the costs of this suit, and all other necessary charges The thirty-six pipes of wine taken out of the vessel by Sanders must be carried to account of the share of salvage to be divided between him, his mate, and two seamen. One equal part of the salvage money, (or fourth of the whole net proceeds,) must be paid to Captain Cross or his agent. All these parties must settle their respective shares between themselves. The court has been pressed to do this for them; but I do not feel myself bound, or authorized to do so. The remaining half of the net proceeds must be paid over to the agent for the owners and underwriters.

Case No. 3,429.

CROSS v. BLANFORD.

[2 Cranch, C. C. 677.][1]

Circuit Court, District of Columbia. May Term, 1826.

JURISDICTION OF JUSTICE OF THE PEACE—APPEAL.

If the justice of the peace had not jurisdiction of the cause, his judgment may be reversed, upon appeal, although the cause was tried before him by a jury.

This was an appeal from the judgment of a justice of the peace in a cause tried before him by a jury, under the act of March 1, 1823 (3 Stat. 743), extending the jurisdiction of justices of the peace, &c. The suit was brought upon an account for damages sustained by Blanford, the plaintiff below, by reason of false imprisonment, at the instance of the defendant Cross. There was a trial by jury, before the justice. The defendant objected to the jurisdiction of the justice because the real cause of action was a tort, the damages being only an incident. The justice stated the facts in the nature of a bill of exceptions.

THE COURT (MORSELL, Circuit Judge, absent) was of opinion that, although the verdict of the jury was conclusive as to the facts of the case, yet this court had a right to look into the facts upon a question of jurisdiction; and having done so, and being of opinion that the real ground of action, before the justice of the peace, was a tort, they reversed the judgment, with costs.

CROSS (DENNIS v.). See Case No. 3,792.

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

Case No. 3,430.

CROSS v. DE VALLE.

[1 Cliff. 282.][1]

Circuit Court, D. Rhode Island. June Term, 1859.[2]

CONSTRUCTION OF WILL—ALIEN DEVISEE—FUTURE RIGHTS.

1. A court of equity will not interfere to declare future rights which may arise under a will.

[See note at end of case.]

2. The rule which prevails at common law, that an alien can take lands by purchase, though not by descent, prevails also in equity.

3. Where an interest in real estate is devised to an alien, he will be entitled to hold the same until the state shall interpose its prerogative claim.

[See note at end of case.]

The complainant in this case [George W. Cross] was the devisee of certain property described in the will of Thomas Lloyd Halsley, of Providence, under certain contingencies specified in the will of the testator. All that portion of the property which was the subject of controversy was devised and directed to be placed in trust, in the hands and possession of John C. Brown and Moses B. Ives of Providence, and the survivor of them, in fee-simple, with directions to pay over the rents, income, and profits to the natural daughter of the testator, one Maria Louisa A. De Valle, who then resided with her husband in Buenos Ayres, for and during the term of her natural life, upon her sole and separate receipt therefor, and for her sole and exclusive use. The testator then directed the trustees to convey to the eldest son of his daughter living at the time of her decease, if he shall have arrived at the age of twenty-one years and have complied with certain conditions as to his change of name and residence, one half of the property included in the devise to his daughter, and the other half to the remaining children. The will also provided for the contingency of the minority of the eldest son at the decease of his mother, as well as for the event of the son's failure to comply with the conditions of the legacy. Further provision was also made in the will for the event of there being no sons of the said Maria Louisa, in which case the testator directed that the property should be conveyed to his granddaughters, to share and share alike. But in case Maria A. De Valle should die without lawful issue living, or male issue only, who should die before arriving at the age of twenty-one years, or should leave issue, all of whom should neglect or refuse to comply with the conditions before expressed, then the property was to be conveyed to the complainant upon similar conditions, should he then be living, and subject to certain special legacies. Maria Louisa

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

[2] [Affirmed in Cross v. Del Valle, 1 Wall. (68 U. S.) 1.]

A. De Valle was shown in the record to be a native of Buenos Ayres, and at the death of the testator was domiciliated there, with her husband Raimondo De Valle. When the bill was filed, she was the mother of one son, and two other children were subsequently born in the state of Rhode Island. The surviving trustee, Maria Louisa A. De Valle and her husband and children, and the heirs at law of the testator, were made parties to the suit as respondents. The object of the bill was to obtain from the court a decree to declare the trusts of the will, and that the trusts in favor of Maria Louisa A. De Valle and her children, so far as they related to real estate situate in Rhode Island, might be declared void and of no effect, and incapable of being enforced, on account of the alienage of the said Maria Louisa A. De Valle and her children; also that the trusts in the will, so far as the same related to said real estate, be hastened in enjoyment, by such failure of the trusts made in the will in favor of said Maria Louisa and her children; and that the trustees be decreed to convey the same to the complainant upon his compliance with the conditions of the will. Demurrers to the bill were filed by the trustees, the guardians ad litem of the children of Maria Louisa A. De Valle and her husband. The cause stood for hearing upon the demurrers.

A. Payne and C. Hart, for complainant.

T. A. Jenckes and B. R. Curtis, for De Valle and trustees.

R. Curtis and S. Currey, for heirs at law.

CLIFFORD, Circuit Justice. On this state of the case the first inquiry to be made is, as to the limit to the jurisdiction of this court in declaring the trusts of a will upon the suit of a person interested in the dispositions. This question was so fully considered in the case of Langdale v. Briggs on appeal, and reported in 39 Eng. Law & Eq. 194–214, that it would be merely to repeat what is there said, to enter upon an extended consideration of it at the present time. Several questions were there presented, and among the number the one whether the court, in a case like the present, would declare future rights and give directions accordingly, pursuant to the prayer of the bill of complaint. But the court declined to interfere in that behalf, and Lord Justice Turner held that a court of equity had no power to make such a declaration. His remarks upon the subject are so entirely applicable to the case before the court, that we prefer to give them in his own language. Responding to the counsel who had urged the point, he said: "The argument on the part of the appellant in support of his claim to have his rights declared and directions given with respect to them, even assuming his interest to be reversionary merely, was so strongly pressed at the bar that I think it right in the first place to state my opinion on that point, the more so as it is certainly a point of much importance with reference to the course and practice of the court, and, I may perhaps add, to the law of the country. As long as I have known this court, now for no inconsiderable period, I have always considered it to be settled that the court does not declare future rights, but leaves them to be determined when they come into possession. In all cases, within my experience where there have been tenancies for life, with the remainder over, the course has been to provide for the interests of the tenants for life, reserving liberty to apply upon their deaths. The practice has been so familiar to me, that I confess myself to have been surprised at the length to which the argument on the part of the appellant was carried on that point." Various considerations were urged in support of the proposition, and in the course of the argument the great convenience and advantage it would be to parties to have their future rights ascertained and declared, were much pressed upon the court by the counsel of the appellant. To that suggestion the learned judge replied in effect, that the question was not one of discretion, but deeply affected the law of the court; that the course and practice in such cases constituted the law of the court; and added: "I cannot agree to break through that law upon any mere ground of convenience. If the law is productive of inconvenience, it is for the legislature to alter it, and I am far from thinking that, to some extent at least, the legislature might not usefully interpose and provide some remedy for the ascertainment of future rights; but I think if this be done at all, it should be done by the legislature, as the legislature alone can fence the measure with the protections which will obviously be required; and such a measure, if adopted, ought not to be confined to mere equitable rights. * * * Generally speaking," he concludes, "I apprehend that it is not according to the course of the court to declare future rights." In the case of Jackson v. Turnley, 21 Eng. Law & Eq. 13, the vice chancellor held that the court will not entertain a suit merely for the purpose of declaring that a person who claims to have a right which may arise hereafter has no such right. Believing these principles to be correct, we shall confine the decision at the present time to the single question whether the equitable interest of Maria Louisa A. De Valle is null and void in consequence of her alienage, so that the persons who have interests in remainder have the right to be hastened in their enjoyment of the estate. Other questions discussed at the bar will not now be considered, for the reason that the opinion on this point will dispose of the case made in the bill of complaint. Had the dispositions of the will in her favor been of a legal estate for her life, it is very clear that it could not have been declared void on account of her alienage. All the authorities agree that at common law an alien can take

lands by purchase, though not by descent, or, in other words, he cannot take by the act of law, but he may by the act of the party. This principle, say the supreme court, has been settled in the year-books, and has been uniformly recognized as sound law from that time. Nor is there any distinction whether the purchase be by grant or by devise; in either case the estate vests in the alien, not for his own benefit, but for the benefit of the state; or, in the language of the ancient law, the alien has the capacity to take, but not to hold lands, and they may be seised into the hands of the sovereign. But until the lands are so seised, the alien has complete dominion over the same. Fairfax v. Hunter's Lessee, 7 Cranch [11 U. S.] 619. Assuming this principle to be correct, of which there can be no doubt, it would seem to follow almost as an inevitable consequence that the same rule must prevail in equity. It is a principle of equity that equitable estates shall be subject to the same modes and conditions as corresponding legal estates, and it could hardly be, in a case like the present, that the consequences of a purchase by an alien of an interest in land would so far differ as to be valid or invalid accordingly as the estate was legal or equitable. Support to the proposition that equity recognizes no such distinction, is to be found in the decision of the courts as well as in the standard works of elementary writers upon the subject. A trust of lands, says Mr. Lewin, may be declared in favor of an alien, but cannot be enforced by him for his own benefit, it being contrary to law that an alien should plead or be impleaded touching lands in any court in the kingdom, and the king, on inquest found, will be entitled to the trust by forfeiture; for the mischief is the same as if the alien had purchased the lands themselves. But the forfeiture vests not in the king the legal estate, but merely transfers to him the right of suing a subpoena against the trustee in equity. A distinction, says the same author, has been taken, that although, when a trust is perfected in favor of an alien, the crown may be entitled, yet when a trust in favor of an alien is not in esse, but only in fieri and executory, the court will do no act to give it to an alien who by law cannot hold. Lewin, Trusts, 43. This subject was discussed with much learning and ability in the case of Hubbard v. Goodwin, 3 Leigh, 492, by the court of appeals of Virginia; and the court sustained the conclusion that a trust estate acquired by an alien is acquired for the state, and that a court of equity will compel the trustee to execute the trust for the benefit of the state. To the same effect also is the case of Barrow v. Wadkin, 24 Beav. 1, which arose on a devise to the widow of the testator for life, and after her decease to the defendant Wadkin in trust for Elizabeth Barrow so long as she should be the wife or widow of John Barrow, for her sole and separate use without power of anticipation, and after her decease or marriage, upon trust for the children of John and Elizabeth Barrow. Elizabeth Barrow and her children were aliens. On this state of facts the question was, whether the trustees, the heir at law, or the crown took the estate. Sir John Romilly, the master of the rolls, gave the opinion, in which he went into a lengthened and careful investigation of the whole subject. Without repeating his remarks, it will be sufficient to say that his conclusions are similar to those of the court of appeals of Virginia to which reference has already been made. He dissents, however, from the distinction alluded to by Lewin, in the closing part of the extract we have made from his work. These authorities, in our opinion, are conclusive to show that, conceding the allegations of the bill, Maria Louisa A. De Valle is an alien, and that the will conveys an interest in real estate which she cannot hold, and that no treaty between the United States and the Argentine Confederation is applicable to the case to corroborate her title, that nevertheless no one or all of these considerations can be productive of any benefit to this complainant. She is entitled to hold the estate until the state of Rhode Island shall interpose her prerogative claim. Under these circumstances, we do not consider it necessary or proper to inquire or decide whether the interests disposed of in favor of the respondents are subject to that claim, either upon the terms of the will or of the treaty. Those questions will necessarily arise in case the state of Rhode Island should deem it suitable to present her claim, and to institute a suit to try the right. Demurrer allowed.

[NOTE. The bill was dismissed, and complainant appealed. Pending the appeal he died, and the appeal was prosecuted by his administrator.

[Certain heirs at law of testator filed a cross bill for the purpose of asserting their rights as against the complainant and the other devisees, and a motion was made to dismiss the same for want of jurisdiction.

[The supreme court affirmed the decree, and held, per Mr. Justice Grier, that the circuit court having rightly decided that Maria Del Valle took an equitable life estate by the will, defeasible only by the action of the state of Rhode Island, the complainant was in no situation to call on the court to declare the fate of the contingent remainders, for the reasons, with others, that if the remainders were void his own fell with them, and, if valid, the children of Mrs. Del Valle, in esse and in posse, would be entitled to come in before him, and that, furthermore, the case presented no necessity which called upon the court to depart from the general rule and decree as to the future rights of parties not before it. The court further held that, the principal bill having been dismissed, the cross bill fell with it. Cross v. Del Valle, 1 Wall. (68 U. S.) 1.

[For proceedings on a bill filed in the district of Massachusetts, and seeking the same relief, see Case No. 3,431.]

Case No. 3,431.

CROSS v. DE VALLE.

[21 Law Rep. 734.]

Circuit Court, D. Massachusetts. 1859.

PRACTICE—APPOINTMENT OF TRUSTEES FOR ABSENT PARTIES.

Bill was filed by a devisee for the destruction of certain previous estates and interests, which the will attempted to confer on other parties, on the ground of the alleged alienage and illegitimacy of such parties. *Held*, that the court cannot, under the 49th rule, safely or properly allow such parties to be represented by trustees; but in the exercise of the discretion conferred by the last clause of the rule, should not proceed without giving them opportunity to become effectually parties to the suit, and to be heard therein.

This was a bill by George W. Cross, a citizen of the state of Louisiana, the scope of which is to obtain a construction of the will of the late Thomas Lloyd Halsey of the city of Providence, and a decision respecting the legal effect of its provisions. It appears that the testator, having a large real and personal estate, made the will, which has been duly admitted to probate, by which he devised all the residue of his property, after certain pecuniary and specific legacies, unto John C. Brown and Moses B. Ives, in trust, among other things, to pay the rents and income of the residue of his property to his daughter, Maria Louisa De Valle, wife of Raimond Pasquel De Valle, who was born at Buenos Ayres on or about the tenth day of November, 1823, during her life; and as to certain specified estates, and one moiety of such residue, to the eldest male issue of his said daughter living at her decease, who shall then have arrived, or when he should arrive at the age of twenty-one years, upon condition, however, either precedent or subsequent, that he should adopt the name of Halsey, and take up his residence in the United States, within five years after he should become twenty-one years of age; with limitations over to the second and other sons on the failure of those prior in age to take; and also to daughters, all sons failing to take; and both sons and daughters failing to take, then to the plaintiff Cross.

The bill alleges that the defendant, Maria Louisa De Valle, if the daughter of the testator was illegitimate. That she and her children are all aliens, and consequently incapable of taking, under the will of the testator, any interest in his real estate. That the bequests and devises to the eldest and other sons, and to the daughters of the said Maria, are void for remoteness. That the bequest and devise to the complainant were limited to take effect in case those to the children of the said Maria should fail; and that, consequently, the bequest and devise to the complainant is to be accelerated, and the others declared void. And it prays for a decree requiring the trustees to convey the property to him, to be held in his own right. The trustees and the collateral heirs at law and next of kin of the testator are made parties, have been served and have appeared. Maria De Valle and her husband are also named as parties, and process is prayed against them; also against their children, without naming them, if they should come within the reach of process; "and in the meantime to be directed to Thomas A. Jenckes, for service of the same upon him, in substitution of the said Thomas A. for them or such of them as are represented by him in the matters embraced by this bill of complaint; and also to be directed to the said Pedro A. De Valle." In another part of the bill, Pedro A. De Valle is named as one of the children of the said Maria. A subpoena has been served on Pedro A. De Valle, but he has not appeared. From the date of his mother's birth, mentioned in the will, it seems to be quite clear that he must be a minor; but no motion had been made respecting him.

The following order was made for a substituted service: "Ordered, that service of this subpoena upon the within named Raimond and Maria Louisa, and upon their children, except Pedro A. De Valle, be made upon the within-named Thomas A. Jenckes, as their attorney, in substitution for them, subject to all exceptions in law and fact at the hearing or otherwise. John Pitman, District Judge U. S. for R. I. District."

Mr. Jenckes filed the following motion in writing: "Rule Day, December 3d, 1855. Thomas A. Jenckes, upon whom a subpoena in said suit has been served, appearing solely for the purpose of making this motion in his own behalf, and not as solicitor for any other person moves the court that the said service as to himself be vacated and said process quashed, because it appears in and by the bill and exhibits in said case that he has no interest, actual or contingent, in any of the matters to which said bill relates; and that such service if intended as service, upon Raimond P. De Valle and Maria Louisa Amdrea De Valle and their children, be quashed and declared void and insufficient to require them to appear and answer to said bill, inasmuch as it does not appear by said bill that he, the said Thomas A. Jenckes, is the attorney of said parties in his suit; and nothing is shown therein and nothing exists which will authorize or require him to take upon himself the defence of this suit. T. A. Jenckes."

The executors and trustees demurred to the bill, and among other objections insisted on want of parties.

Mr. Jenckes, for trustees.

Mr. Paine, for Cross.

George Wood and Mr. Curry, for collateral heirs.

CURTIS, Circuit Justice. No foundation for the order for a substituted service on Mr. Jenckes appears; and it cannot have any

effect to bring any party before the court. The question is, whether the court can or ought to proceed in the absence of Maria L. De Valle and her children. Independent of the forty-ninth rule, this would not admit of a moment's doubt. Their interests are not only necessarily affected by any decree the court can make, but they are the sole subjects of the controversy. Unless the 49th rule has changed the law of such a case as this, they are indispensable parties without whom the court can make no decree. Naming them as parties to the bill, and praying process against them when they are out of the jurisdiction, and no service of process has been made, rendering it their duty to appear, does not enable the court to proceed. Browne v. Blount, 2 Russ. & M. 83, and the cases there cited; Shields v. Barrow, 17 How. [58 U. S.] 130; Dandridge v. Custis, 2 Pet. [27 U. S.] 370.

What I have to consider, therefore, is whether the 49th rule applies to this case. That rule is as follows: "In all suits concerning real estate, which is vested in trustees by devise, and such trustees are competent to sell and give discharges for the proceeds of the sale, and for the rents and profits of the estate, such trustees shall represent the persons beneficially interested in the estate, or the proceeds, or the rents and profits in the same manner and to the same extent as the executors or administrators in suits concerning personal estate represent the persons beneficially interested in such personal estate; and in such cases it shall not be necessary to make the persons beneficially interested in such real estate, or rents, and profits, parties to the suit; but the court may, upon consideration of the matter at the hearing, if it should so think fit, order such persons to be made parties." The rule does not enable such trustees to represent those interested in the real estate in all cases; but only in the same manner and to the same extent as executors or administrators represent those interested in suits respecting personal estate. Now it is true that executors and administrators generally, represent pecuniary legatees in suits by third persons, making demands on the personal estate. It is their duty to resist all unfounded claims, and they are clothed by the law with ample powers to do so. But it does not follow that there may not be cases where a question arises directly between a legatee and a third person, of such a nature that the court ought not to be satisfied to allow the executor or administrator to represent the legatee. The case of the Marquis of Hertford v. Countess de Zichi, 9 Beav. 11, was such a case. And in my opinion the case at bar is stronger than this one in the 9 Beav. Here the controversy is directly between the complainant and Maria L. De Valle, named in the will as the daughter of the testator, and her children. The sole object of the bill is the destruction of interests which the will attempts to confer on them. Their title is denied on the two grounds of their alienage and the illegitimacy of Maria L. De Valle. I entertain doubt whether these trustees can safely and properly be allowed to represent Mrs. De Valle and her children, for the purpose of litigating in their absence, the question of her legitimacy, or the status of herself and her children in respect to citizenship. It may be said that it will be the duty of the trustees to give Mrs. De Valle and her children notice of the suit, and obtain from them the information necessary to defend it, and that it must be presumed they will perform this duty. Be it so. But this does not meet the difficulty. Have not Mrs. De Valle and her children a right to the benefit of their answers, as evidence in the cause, respecting any facts within their personal knowledge? It is true neither of them can have personal knowledge of the marriage of the testator, if there was a marriage, and it preceded Mrs. De Valle's birth; but for aught I can know, she may have been made legitimate by a marriage with her mother after her birth, and within her personal knowledge; and however this may have been, it is not safe to assume that she has not personal knowledge of facts bearing directly on the question of her own legitimacy; and therefore, if this be a case within the 49th rule, as I am of opinion it is, it seems to me to be one where I am bound to exercise the discretion conferred by the last clause of the rule and make such order that Mrs. De Valle and her children shall, at least, have opportunity to become effectually parties to the suit, and to be heard therein, before I make any decree affecting their interests.

I am therefore of opinion that an order should be entered, that the cause stand over, with liberty to serve on Mrs. De Valle and her husband, if living, and on each of her children, a copy of the bill, to the end that they may appear and become parties, if they shall think fit. And let some day of appearance be named, which will allow reasonable opportunity to appear, after the service made. In respect to the person already served, who is said to be one of her children, if he be a minor, a proper petition should be presented to appoint a guardian ad litem.

[NOTE. For the dismissal of a bill, seeking the same relief, filed by complainant in the district of Rhode Island, see Case No. 3,430.]

Case No. 3,432.

CROSS v. The DOLPHIN.

[Bee, 152.][1]

District Court, D. South Carolina. Feb. 28, 1800.

RECAPTURED VESSEL—ASCERTAINMENT OF SALVAGE.

In case of recapture by a public vessel of war, the salvage can only be ascertained by sale of the recaptured property, unless both parties consent to an appraisement.

In this case salvage was decreed, and a sale of the vessel ordered. Claimant's counsel requested the court to direct an appraisement instead of a sale. The judge said that he had carefully examined the different acts of congress relative to captures and recaptures, and that they made an evident distinction between captures by a private vessel, and those of a public vessel of war, as was the present case. In the former instance, the court might direct the prize to be delivered over to the captors, or to be sold. In the latter, there is no discretion; the vessel taken must be sold. These distinctions, he said, were applicable to the question of salvage, and must guide him on this occasion; he should, therefore, adhere to the original decree, unless both parties would agree that appraisement should be substituted for sale. In such case, he did not doubt the power of the court to concur; and would order a sale of such parts of the cargo as might be sufficient to pay expenses and salvage. Accordingly, the following order was made: "The agents for the recaptors, and also the agent for the owners of the brig Dolphin, having, in open court, consented to fix the valuation of said brig and her cargo by appraisement, in order to ascertain the amount of one eighth part for salvage, ordered and decreed that A, B, C, D, &c., or any three of them, be appraisers for the above purpose; and that they make a return of the value of said brig and her cargo, on oath, under their hands and seals, into the office of the registrar of this court, within ten days. That the marshal sell at public auction, after the usual notice, such part of the cargo of said brig as will amount to one eighth of the value thereof, to be paid for salvage, free of deduction; together with all costs and expenses of this suit, and all other charges incident to the sale. That the marshal pay said amount of one eighth part to the agents for the officers and crew of the frigate John Adams; and after payment of costs and expenses, that he restore the said brig and the remainder of her cargo to the agent of the owners."

CROSS (GREENLEAF v.). See Case No. 5,777.

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

Case No. 3,433.

CROSS v. MORGAN.

Circuit Court, D. New Jersey. March 22, 1881. [See 6 Fed. 241.]

CROSS (POSTMASTER GENERAL v.). See Case No. 11,306.

Case No. 3,434.

CROSS v. UNITED STATES.

[1 Gall. 26.][1]

Circuit Court, D. Massachusetts. May Term, 1812.

VIOLATION OF EMBARGO—DECLARATION — DOUBLE DAMAGES.

1. In debt for a penalty on a statute, the declaration must conclude against the form of the statute, or it will be bad on error.

[Cited in U. S. v. Babson, Case No. 14,489; Jewett v. Cunard, Id. 7,310; Walsh v. U. S., Id. 17,116; U. S. v. Batchelder, Id. 14,-541; Fish v. Manning, 31 Fed. 341.]

2. In debt for the double value under the third section of the embargo act (Jan. 9, 1808, c. 8) it is not necessary to allege the particular articles which composed the cargo; nor that the owner was knowingly concerned in the illegal voyage.

3. In such a case, if the jury find a verdict for a specific sum, it is to be considered as the double value of the vessel and cargo, unless the contrary appears.

[Cited in Sears v. U. S., Case No. 12,592; Smith v. U. S., Id. 13,122. Applied in U. S. v. Clarke, 20 Wall. (87 U. S.) 107.]

4. Where a statute gives the party double or treble damages, the jury may find the single damages, and the court will double or treble them. And a general verdict will be deemed for single damages, unless the contrary appear. But a verdict for the double or treble damages will be good, if expressly so found.

[Cited in The Idaho, 29 Fed. 187.]

[5. Cited in Cleveland Ins. Co. v. Globe Ins. Co., 98 U. S. 375, to the point that seizures made on waters which are navigable from the sea by vessels of 10 or more tons burthen are exclusively cognizable in the admiralty, subject to appeal to the circuit courts.]

[Error to the district court of the United States for the district of Massachusetts.

[Action by the United States against Thomas Cross to recover a penalty under the embargo act of 1808.]

C. Jackson, for plaintiff in error.

G. Blake, for the United States.

STORY, Circuit Justice, delivered the opinion of the court.

This action is debt for a recovery of the double value of vessel and cargo, under the third section of the embargo act of Jan. 9, 1808, c. 8 [2 Stat. 454]. The declaration alleges, that on the 9th of October, 1808, sundry goods and merchandize, of domestic growth and manufacture, viz. 300 barrels of flour, 50 barrels of beef, 3 tons of butter, 10

[1] [Reported by John Gallison, Esq.]

hogsheads and 65 boxes of fish, and 2,000 feet of boards, all of the value of $3,000, were laden, shipped, and put on board a certain vessel or schooner, called the Phoenix, of Falmouth, of the burthen, &c. which vessel was of the value of $2,000; and afterwards, on the night of the same day, the said vessel, with her cargo on board, did depart from the port of Portland aforesaid, which is a port of the United States aforesaid, without a clearance or permit; and tne declaration avers, that the plaintiff in error was then and there the freighter of said vessel, and the owner of said goods and merchandize; and that said vessel and cargo, although forfeited, hath not been seized, having never been found within the United States aforesaid, whereby and by force of the laws and statutes of the said states, the said plaintiff in error hath forfeited and become liable to pay to the United States, on demand, a sum equal to double the value of the said vessel and her cargo aforesaid, which double value amounts to the sum of $10,000, and an action hath accrued to the United States, &c. To this declaration the general issue was pleaded, and on issue joined, the jury found a verdict that the plaintiff in error was indebted to the United States in the sum of $3,060, in manner and form as alleged in the declaration. Judgment was rendered in the district court for the United States on this verdict, upon which the plaintiff has brought a writ of error.

Upon the argument, sundry errors have been assigned by the counsel for the plaintiff in error, which we shall now consider.

1. That it is not alleged in the declaration, of what articles the cargo consisted at the time of the departure of said vessel from said port. But we are of opinion, that the allegation, that "the vessel with her cargo on board departed," must mean, with the goods and merchandize previously stated to have been shipped on board; for by such shipment they became her cargo; and by such reference, the cargo is accurately specified. But we by no means yield to the argument, that it was necessary to specify the articles which compose the cargo, as this is a proceeding for the double value only, and not for the articles themselves.

2. A second objection is, that the declaration contains no averment, that the plaintiff in error was knowingly concerned in procuring or effecting the departure of the vessel. To this it is a sufficient answer, that the offence is stated in the words of the act; and if want of knowledge were a just excuse against the charge, it should have been shown by the plaintiff in error in his own defence at the trial. It is certain that in many cases, the property of an owner may be forfeited for an offence, without his knowledge or procurement. It was so held in Idle v. Vanbeck, Bunb. 231, Park. 227.

3. A third objection is, that the jury have not found the value of the vessel and cargo; but only that the plaintiff in error owed a certain sum, and the court have given judgment for the same sum, and non constat, that it is the double value; whereas, the judgment should have been for the double value, and should so have been alleged in the record. It has been said in answer, that this objection cannot be assigned for error, because it is for the advantage of the party. But the rule, that a party shall not take advantage of an error for his benefit, does not apply to errors of the court, as where it pronounces a wrong judgment. Bac. Abr. "Error," K 4, pp. 490, 491. It has been laid down as a rule, that where a statute gives double or treble damages to the party injured, by action, the jury in such case should find the single damages, and the court in their judgment should assess the double or treble damages. This is laid down in Brooke, Abr. "Damage," pl. 70, who cites 19 Hen. VI., 6, in support of it. The same doctrine was held in an action on the statute of March 5, 1787, § 7 (1 Mass. Laws, 389), by the supreme court of Massachusetts. Lobdell v. Inhabitants of New Bedford, 1 Mass. 153. In 5 Com. Dig. "Pleading," 2, § 16, it is said that it is sufficient in such case, that the declaration demands the single value. for it shall be trebled by the court or jury; and for this, 2 Rolle, 54, is cited. But upon looking into Rolle, the latter part of the position does not seem supported. In Sayer on Damages (page 244) it is said that the jury, who try the issue joined in an action, wherein treble damages are recoverable, may assess the treble damages; and in Bennet v. Hart, Sayer, 214, the court awarded a writ of inquiry to assess treble damages, where a verdict had passed for the defendant, who, by law in such case, was entitled to treble damages. Were this a case, in which damages were demanded, we think that it would be good, either for the court or jury to assess the double damages, if it appeared upon the record that such assessment was in fact made. See, also, Doug. 730, note 41, under case, Grant v. Astle.

But this is not such a case, but a demand of a penalty, which, though uncertain in amount, is to be reduced to certainty by the verdict of the jury. The mode of estimating the amount, by the statute, is by doubling the value; but the issue puts it expressly to the jury to fix that amount. In looking into precedents in informations for breaches of the revenue laws, we find that in general, the verdict finds the single value, and the court assess the double value. But in such precedents, the issue is not found to be "nil debet," but it is a special issue, and the single value of the property is assessed by the jury, to enable the court to impose the penalty, as well as to decree the forfeiture of the goods. Mod. Prac. Exch. In the case at bar, we must intend, that the sum assessed by the jury, was the double value, and the judgment was therefore rightly given. We give no

opinion how it would be, if the jury had expressly said, that the sum found was the single value only.

4. Another objection, and the last, that has been relied on, is, that the offence is not alleged to be contra formam statuti. This has presented the principal difficulty. The general rule, that all offences against statutes shall conclude against the form of the statute, is not denied; and is indeed too well settled to admit of question. Hawk, bk. 2, c. 25, § 117; Bac. Abr. "Indictments;" 3 Bac. 567; Com. Dig. "Action on Statute," 4, H; 1 Chit. Pl. 357; 1 Vent. 103. But it is said that it is sufficient, if it appear on the whole, that the action is founded on a statute; and the averment "whereby and by force of the laws and statutes of the said United States, an action hath accrued," plainly shows this intent. It is denied, that this averment is sufficient, because, as the counsel contend, the offence is here averred to be against the statutes, whereas it is founded on a single statute; and to conclude against a statute, when the offence is against several statutes, or the contrary, is fatal. The cases, Com. Dig. "Pleader," 2, § 10; Yelv. 116; 1 Vent. 135; Hawk, bk. 2, c. 25, § 117,—certainly contain dicta which countenance the latter part of the position, and of the former part there can be no doubt. But even if this argument be wrong, it remains to inquire, if the exception be not fatal. In Lee v. Clarke, 2 East, 333, this precise objection was taken, and the declaration contained the same averment as the present. Lord Ellenborough said, in an action on a statute for a penalty, "it has been invariably holden, that the fact must be alleged to be done against the form of the statute;" and of the same opinion were the whole court. In that case Mr. Justice Lawrence said, that perhaps the allegation, "whereby and by force of the statute an action had accrued," would have been sufficient, if it had been statutes; but it is stated doubtingly, and the opinion of the rest of the court is directly against him. See, also, Doct. Plac. 332.

We yield to the authority of this decision, because we think, that in principle, it is fully supported by former cases. Whatever we might think of the merits of the case before us, it is our duty to expound the laws, without reference to the character of the transaction which the record discloses.

The case of Priestman v. U. S., 4 Dall. [4 U. S.] 28, which was finally affirmed in the supreme court of the United States, contains allegations in this respect exactly corresponding with the present declaration: but, as no exception was ever taken to that information, it would be too much to set aside the solemn decisions of other courts, founded on good reasons, by the authority of a precedent which passed sub silentio. Besides, that was an information in rem, in respect to which, perhaps, a distinction may be made. In proceedings in the admiralty, the same strictness is not required, as in proceedings in common law courts. And where the seizure is on land—as was the case in Priestman v. U. S. [supra]—although the proceedings would seem to be analogous to informations in the exchequer; yet, I do not know, that in our courts, the rigid principles of the common law applicable to such informations have been solemnly recognized. See Anon. [Case No. 444]; The Concord, 9 Cranch [13 U. S.] 387; The Palmyra, 12 Wheat. [25 U. S.] 1; Atty. Gen. v. Ray, 11 Mees. & W. 464; Atty. Gen. v. Smith, 5 Mees. & W. 372–374. The judgment of the district court must, therefore, be reversed.

Judgment reversed.

CROSS (UNITED STATES v.). See Case No. 14,894.

CROSS (WHITE v.). See Case No. 17,546.

Case No. 3,435.

In re CROSSETTE.

[17 N. B. R. 208.][1]

District Court, W. D. Michigan. Feb. 28, 1878.

BANKRUPTCY—PROVABLE DEBT — SECURED CREDITOR.

1. So long as a creditor holds ample security on property of the debtor, and does not waive or release the same, he is not to be counted as a creditor having a provable debt within the meaning of section 39, as amended. Rev. St. § 5021.

2. A secured creditor may, at any time, release his security as to the whole or a part of the debt, and if he does so seasonably, before the hearing and decision as to the quorum of creditors and debts, he is entitled to be ranked as a creditor having a provable debt and admitted as such in determining whether the requisite number and amount have joined in the petition.

Creditors commenced proceedings for adjudication. Debtors resisted on the ground that the requisite number and amount had not joined, and filed a list of their creditors and debts. A reference was made to Register Thompson, who reported that there was not one-third of the provable debts represented. Other creditors then joined as petitioners, and a re-reference was made. It was now reported that in number and amount the necessary quorum had joined. Exceptions were filed by the debtors. D. H. Waters, who did join in the petition, was a secured creditor for twenty-two thousand dollars, but after commencement of the proceedings, and before the reference to the register, transferred to Warner seventeen thousand dollars of his claims and the separate security covering that sum. Warner then released the security as to nine thousand dollars of the seventeen thousand dollars. The register held, first, that secured creditors were not to be reckoned as having provable debts within amended section 39 of the bankrupt

[1] [Reprinted by permission.]

act; and second, that a release of security after petition filed did not change the rule on the questions of adjudication.

Simonds & Fletcher, for petitioners.
R. W. Butterfield, for debtors.

WITHEY, District Judge. The register, in determining the question of quorum, held that creditors whose debts are secured are not to be reckoned in number or amount, and also that the question of whether a creditor was secured must be determined as of the date of filing the petition. Hence, although Warner had, after petition filed, and before the day for determining as to the number and amount joining for adjudication, released the security, as to part of his debt, the nine thousand dollars were not to be reckoned, nor was Warner to be counted as a creditor having a provable debt.

As to the first ruling, the court concurs with the register's views, that so long as a creditor holds ample security on property of the debtor and does not waive or release the same, he is not to be counted as a creditor having a provable debt within the meaning of original section 39, as amended in 1874 [18 Stat. 180]. "Debts provable," within the meaning of the provisions for launching proceedings in bankruptcy, are those entitled to share in dividends of the estate. In re Bigelow [Case No. 1,396] is a leading case, referred to and approbated in this district by the late circuit judge in Re Stansell [Id. 13,293]. Secured debts may be proved against the bankrupt's estate, as such, but the creditor holding the security "shall be admitted as a creditor only for the balance of the debt after deducting the value of such property" as his security covers. Rev. St. U. S. § 5075. Construing 5067 and 5075, Rev. St., and section 39 of the act of 1867 [14 Stat. 517], as amended in 1874, together, there is no room for doubt that "debts provable," mentioned in section 39, refer to unsecured debts, and these include any balance of secured debts after deducting the value of the property constituting the security. Creditors who may join in a petition and be counted in ascertaining the quorum of number and amount are those only entitled to be "admitted as a creditor," to share in dividends. While those creditors who, by reason of mortgage, pledge, or lien on the debtor's property, have fully secured debts, and which remain such, are not entitled to petition, nor are their debts to be reckoned, because not entitled to be "admitted as a creditor" to share in the distributable assets.

A most careful review of all the accessible judgments bearing on the question, and of the various provisions of the bankrupt act, leaves no escape, in my opinion, from the conclusion expressed. I am forced to this conclusion, notwithstanding the counter-views presented by the late circuit judge, in Re Stansell, supra, bearing upon the question I have been considering. I have never understood that what was said by the learned judge in that case was intended to be controlling in the bankrupt courts of this circuit. It will be seen, the case was really disposed of on another ground, viz.: that the petitioning creditor had waived his lien before the hearing. At the same time I do not fail to understand that the circuit judge expressed opinions quite at variance with those I have adopted in this case. No one can entertain a higher respect for his judgments than myself; nevertheless, as the question presented here differs from the one decided in Re Stansell, and arises under a different state of the law, I feel at liberty to follow my own judgment until the exact question is ruled against my views by the circuit court. The opinion of Hoffman, J., in Re California Pac. R. Co. [Case No. 2,315], seems to me eminently correct.

I adopt the views of Judge Lowell, in Re Alexander [Id. 161], that where a debt is not amply secured, the creditor may bring the matter of his claim before the court and upon sufficient showing be admitted as a creditor for the balance over the value of the security held, and that it is not necessary to await the appointment of an assignee before such adjustment can be reached for the purpose of determining whether a creditor has a provable debt within section 39.

Upon the second question I am not able to agree with the register's conclusion, being of opinion that a secured creditor may at any time release his security as to the whole or a part of the debt, and if he does so seasonably, before the hearing and decision as to the quorum of creditors and debts, he at once occupies a position where he is entitled to be ranked as a creditor having a provable debt, and to be admitted as a creditor in determining both the number of creditors and the aggregate of provable debts under section 39. It was held in Re Stansell, supra, that a creditor holding a lien which secured his debt, who had petitioned for an adjudication against the debtor, if the fact of his debt being secured deprived him of the right to petition, a voluntary waiver of the lien prior to the hearing was sufficient to secure him all the rights of an unsecured creditor; though the court also said the fact of a creditor holding security was no objection to his becoming a petitioning creditor, as the law was prior to the amendment of 1874. Warner should have been counted as a creditor, and the nine thousand dollars as to which security was released should have been reckoned in the aggregate of provable debts. Had this been done the petitioning creditors would not represent one-third of the aggregate of the provable debts. The petition is therefore dismissed.

Case No. 3,436.

CROSSLEY v. The LOUIS.

[4 Ben. 510.][1]

District Court, S. D. New York. Feb., 1871.

POSSESSION—RELEASE.

1. Two parties, J. and C., were interested in the building of a steam-tug, but the vessel was enrolled in the name of C. alone, and was run for their joint benefit. C. died, and a suit was brought by J., against the administratrix of C., to have a receiver of the boat appointed, and the boat sold and the accounts adjusted. That suit was settled by the payment by J., to the administratrix, of a sum of money, on the receipt of which she executed to J. a general release of all claims and demands which C. had against J. in connection with the boat. Afterwards, the administratrix brought this possessory action to recover the boat: *Held*, that the burden of proof was on the libellant, to show that she did not understand the transaction in which she gave the general release.

2. The libellant had failed to establish that fact, and was, therefore, not entitled to the possession of the boat.

This was an action of possession brought by the libellant to recover possession of the steam-tug Louis. The libel alleged that the libellant had been duly appointed administratrix of the estate of John J. Crossley; that the boat was enrolled in the name of Crossley; and that she, as his administratrix, was entitled to the possession of the boat.

The answer of Francis L. Johnson and others set up that the boat was built under an agreement between Crossley and Johnson, by which Crossley was to be interested in the proportion of one-fourth and Johnson in the proportion of three-fourths; that she was enrolled in Crossley's name, and was run for the benefit of both parties; that, after the death of Crossley, Johnson commenced a suit against the libellant, as administratrix of Crossley, to have a receiver of the boat appointed and the boat sold, and the accounts adjusted; that that suit was settled by the payment to the libellant of the sum of $1,000; and that the libellant executed to Johnson a general release, under seal, releasing him from all claims which Crossley had against him by reason of their connection with the boat. The libellant gave evidence tending to show that she had not properly understood the contents of the release signed by her.

T. D. Adams, for libellant.

Benedict & Boardman, for claimants.

BLATCHFORD, District Judge. Although the Louis was enrolled and registered in the name of Crossley as her owner, yet the proofs show that she was held by him in trust for himself and the respondent Johnson, subject to the adjustment of accounts between them in reference to the expense of building and running her; that Crossley superintended her running; that she was run for the benefit of Crossley and Johnson, in the proportion of three-fourths of her net earnings to Johnson, and one-fourth to Crossley; that, after Crossley's death, Johnson brought a suit against the libellant, as administratrix of Crossley, to have a receiver of the boat appointed, and the boat sold, and the accounts between Johnson and the estate of Crossley in reference to the building and running of the boat adjusted; that that suit was settled, after an examination of the accounts by the counsel for the libellant, by the payment by Johnson to the libellant, of the sum of $1,000; and that thereupon the libellant executed and delivered to Johnson a general release under seal, releasing him, also, especially, from all claims and demands which Crossley had, at the time of his death, against Johnson, "growing out of any connection he had, in his lifetime, with the said Johnson, with the steam propeller Louis or any other vessel." The burden of proof is on the libellant, on these facts, to show that she did not understand the transaction or understand why she was receiving the $1,000. The matter appears to have been conducted with care and deliberation by the counsel on both sides, both in respect to an investigation of the subject-matter of the controversy and in respect to the preparation of the settlement papers. Mrs. Crossley admits that she executed the release, but says that she did not know its contents, and that her counsel did not tell her what the $1,000 was paid to her for. This testimony is contradicted by her counsel, who testifies that he told her the $1,000 was to settle the suit brought by Johnson, and that Johnson's counsel required a general release, and that she knew what the release was given for. In addition to this, it is shown that she took to the office of her counsel, before the suit was brought by Johnson, the books of her husband, which she had found, relative to his transactions with Johnson, that her counsel examined them, and that, at the time she received from her counsel so much of the $1,000 as she did receive, she took away from his office such books. The libellant has, therefore, failed to make out that she is entitled to the possession of the tug, as against the respondents, or to a decree against them for her earnings while in their possession, which is the prayer of her libel.

The libel is dismissed, with costs.

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

CROSSMAN (STAR SALT CASTER CO. v.). See Cases Nos. 13,320 and 13,321.

CROTHERS (WEBSTER v.). See Case No. 17,334.

Case No. 3,437.

CROUCH v. ROEMER.

[2 Ban. & A. 637;[1] 11 O. G. 1112.]

Circuit Court. D. New Jersey. June, 1877.[2]

PATENTS—"SHAWL-STRAPS"—VALIDITY.

The complainant's patent for an improvement in shawl-straps which was held valid in the case of Crouch v. Speer [Case No. 3,438], adjudged invalid for want of novelty, upon facts different from those therein proven.

[See note at end of case.]

[In equity. Bill by George Crouch against William Roemer for infringement of patent.]

E. B. Barnum, for complainant.

Arthur v. Briesen, for defendant.

NIXON, District Judge. This is an action for an alleged infringement of complainant's letters patent, No. 82,606, dated September 29th, 1868, and reissued March 7th, 1871, No. 4,289.

The subject-matter of the patent is in the reissue described to be a strap "to confine a shawl or similar article in a bundle," and termed a "shawl-strap." The schedule, attached to and forming a part of the said reissued patent, states that, before the complainant's invention, straps had been used to confine a shawl or similar article in a bundle, and a leather cross-piece, with loops at the ends, had extended from one strap to the other, and above, and attached to this leather cross-piece was a handle. This leather cross-piece or connecting-strap is liable to bend and allow the straps to be drawn toward each other by the handle in sustaining the weight. Hence, the bundle is not kept in a proper shape, and the handle is inconvenient to grasp. The invention is then stated to consist of a rigid cross-bar beneath the handle, combined with the suspending-straps that are to be passed around the shawl or bundle, such straps passing through loops at the ends of the handle.

No question can be made but that the shawl-straps manufactured and sold by the defendant are infringements of the complainant's reissue. They consist of a metallic cross-bar, with slots at the ends for the reception of the straps, and which also connect the ends of the handle.

Several defences are set up in the answer, but the only one which it is necessary to consider is the first, to wit, the want of novelty and prior public use.

I had occasion, heretofore, to inquire into the validity of the complainant's patent, in a controversy between the same complainant and Speer [Case No. 3,438], in which, as in this case, the principal defence turned upon the novelty of the invention. A prior public use was alleged, and attempted to be proved. I there said, and now repeat: "That the patent is prima facie evidence that the patentee was the original and first inventor. Any one who controverts this, assumes the burden of proof, and undertakes to show affirmatively that there was a prior knowledge and use of the alleged invention, under such circumstances as to give to the public the right of its continued use against the patentee." Crouch v. Speer [supra].

The defence in this case has brought out many facts in regard to the public use of the rigid cross-bar in shawl-straps, anterior to the date of the complainant's patent, which were not developed in the former suit. There is no evidence, which, in my judgment, affects the honesty of the complainant's claim, or which creates any doubt that he really believed himself to be the original and first inventor; but, nevertheless, I am constrained to the conclusion, after a most careful examination of the whole testimony, that the proofs show with reasonable certainty that he has been anticipated in the invention, and that patent is void in consequence of prior knowledge and public use, and the bill must, therefore, be dismissed with costs.

[NOTE. On appeal by complainant, the supreme court affirmed the decree herein, and stated: "The thing which the complainant claims to have patented was substantially made and used long before his invention. All he did was by the use of well-known equivalents for some of the elements of former structures to make it somewhat better than it was ever made before. This is not patentable." Opinion by Mr. Chief Justice Waite, Crouch v. Roemer, 103 U. S. 797.]

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

[2] [Affirmed in Crouch v. Roemer, 103 U. S. 797.]

Case No. 3,438.

CROUCH v. SPEER et al.

[1 Ban. & A. 145;[1] 6 O. G. 187.]

Circuit Court, D. New Jersey. April Term, 1874.

PATENTS—SHAWL-STRAPS—VALIDITY — UTILITY — NOVELTY—EVIDENCE—BURDEN OF PROOF.

1. The test whether an invention is useful in the sense of the law, is not whether it is not mischievous, or hurtful, or insignificant, but whether it is capable of use for a purpose from which some advantage can be derived. If it be useful in this sense, the degree or extent of its usefulness, is altogether unimportant. It is not necessary that it should be the best means of producing a desirable result, but a means, although inferior to others, of producing it.

2. A rigid cross-bar connecting the ends of the handle of a shawl-strap, and provided with loops for the straps, is a patentable invention.

3. Where witnesses are called to prove want of novelty in the invention, of whom notice was not given in the answer, the evidence of such witnesses, if objected to, will not be considered in determining the question of novelty. When, however, the evidence is taken without objection, the defect of want of notice is deemed waived, and the evidence cannot afterward be objected to on that ground. A patent

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

is prima facie evidence that the patentee was the original and first inventor, and any one, who controverts this, assumes the burden of proof, and undertakes to show affirmatively that there was a prior knowledge and use of the alleged invention, under such circumstances as to give to the public the right to its continued use as against the patentee.

[Cited in Hawes v. Antisdel, Case No. 6,234; Crouch v. Roemer, Id. 3,437; Rogers v. Beecher, 3 Fed. 640.]

4. The burden of proof is on the defendant, to show want of novelty in an invention; and where the defendant's testimony is inconsistent, and contradictory, and there is a reasonable doubt as to its correctness, the complainant's prima facie case, even if uncorroborated, must prevail.

5. The reissue patent, granted to George Crouch, March 7, 1871, for improvement in shawl-straps, *held* valid.

[In equity. Bill by George Crouch against Heinrich Speer and others to restrain infringement of reissued letters patent No. 4,-289.]

Jonathan Marshall, for complainant.

James M. Scovel, for defendants.

NIXON, District Judge. This suit is brought for an alleged infringement of a patent for "improvement in shawl-straps," originally granted to the complainant, and surrendered and reissued March 7, 1871. The defendants put in a joint answer, admitting, in substance, the manufacture and use of the thing patented, but denying, (1) that there was anything new or useful in the patent, and, (2) that the complainant was the original and first inventor; and alleging that the improvement claimed had been known and used, in this country, prior to the invention of the complainant. The patentee states in his schedule, that before his invention straps had been used to confine a shawl or other similar article in a bundle, and a leather cross-piece, with loops at the ends, had extended from one strap to the other; and above, and attached to this cross-piece, was a handle; that the cross-piece or connecting-strap was liable to bend, and allow the straps to be drawn toward each other by the handle in sustaining the weight; that hence the bundle was not kept in the proper shape, and the handle was inconvenient to grasp; and, that his invention consisted in a rigid cross-bar beneath the handle, combined with suspending-straps, that are to be passed around the shawl or bundle, such straps passing through the loops at the ends of the handle.

He then states his three claims, as follows: (1) The rigid cross-bar A, connecting the ends of the handle B, and provided with loops, c, for the straps D, substantially as and for the purposes set forth. (2) The loops C C, made of the leather of the handle, and secured to the rigid cross-bar A, as and for the purposes set forth. (3) The rigid cross-bar for a shawl-strap, made of sheet metal, corrugated and covered with leather, as and for the purposes set forth.

If the third claim includes anything not embraced in the first, it is the limitation of the rigid cross-bar to sheet metal, corrugated. I find no evidence in the case that the defendants have infringed by the use of the corrugated metal cross-bar, except their admissions, that they had manufactured and sold Exhibit No. 4. The metal in that exhibit is covered with leather. It has the external appearance of being corrugated, but whether it is or not, is left to conjecture, as no one seems to have testified on the subject. While, therefore, it remains in doubt whether there has been any infringement by defendants of the third claim of the patent, there is no question about their infringement of the first and second claims. Their whole defence is an admission that they have infringed these, which they endeavor to justify on the ground that there had been a knowledge and use of the improvement in this country prior to the date of the complainant's invention.

1. The defendants' first allegation is, that there is nothing new or useful in the complainant's patent. If they mean by this that it is not the subject matter of a patent, the objection must be examined and answered in the light of the provisions of the 24th section of the patent act of 1870 (16 Stat. 201). That section authorizes a patent to be granted for "any new and useful art, machine, manufacture, or composition of matter, or any new and useful improvement thereof." It will be seen that utility and novelty are the requisite conditions. The inventions or the improvement claimed must have both, or the letters patent secure nothing for the patentee. Whether it is useful, in the sense of the law, is not whether it is not mischievous, or hurtful, or frivolous, or insignificant, but whether it is capable of use for a purpose from which some advantage can be derived. If it be useful in this sense, the degree or extent of its usefulness is altogether unimportant. It is not necessary, in other words, that it should be the best means of producing a desirable result, but a means, although inferior to others, of producing it. Curt. Pat. § 449. Testing the complainant's patent by this principle, it is undoubtedly useful. The rigid cross-bar and the loops holding the straps, securing them in their place, and made of the leather of the handle, if new, add neatness and finish and value to the manufacture; and this is shown by the fact that these defendants, active business men, and alive to the public demands, gave these methods of manufacturing a preference over others in finishing and furnishing shawl-straps for the markets.

2. It only remains to consider whether the defendant's second allegation of the want of novelty in the complainant's patent has been proved. In accordance with the requirements of the 61st section of the patent act, the defendants, in their answer, gave notice of prior knowledge and use of the al-

leged improvement of complainant by Speer & Mattner, Speer & Brother, Nicholas Murphy, Henry Van Buren, and Henry Simon. Neither Mattner nor Simon was sworn on the examination; nor was Reinhold Speer, until all the testimony in chief and in rebuttal, was closed on both sides. The complainant's solicitor, very properly, objected to his introduction, at that stage of the proceedings, to testify upon any points pertinent to the issues made in the pleadings. A number of witnesses, however, were examined on this subject, of whom no notice was given, but to whose testimony no exceptions were taken when they were offered, except in the case of Louisa Stephan. That objection renders her evidence inadmissible, and it has not been considered. In the other instances the court must assume that the want of notice was waived by the complaint. Parties are not allowed to experiment with witnesses, suffering them to be examined, and subjecting them to cross-examination, and afterward, if the testimony does not happen to suit them, asking for its exclusion. The object of the statute is to guard plaintiffs against surprise; but if they will not avail themselves of the privilege, and require the previous notice, they must not expect the court to invoke for them the provisions of the act.

In considering the case, it should be remembered, that the patent is prima facie evidence that the patentee was the original and first inventor. Any one who controverts this, assumes the burden of proof, and undertakes to show affirmatively that there was a prior knowledge and use of the alleged invention, under such circumstances as to give to the public the right of its continued use against the patentee.

This the defendants have failed to do; the evidence introduced by them is frequently contradicted, and is inconsistent with itself and many well established facts. The most unsatisfactory portion of it, and the part which leads to the gravest suspicions of a want of candor and accuracy, is the testimony of the defendant, Heinrich Speer, and that of his principal witness, Edward Simon.

Let us first advert to the evidence of the defendant, Heinrich Speer. He states, and repeats the statement in subsequent parts of his testimony, that he arrived in this country on the 16th day of February, 1866; that he came directly to Newark; worked "on his own hook" for three weeks, and then engaged with Mr. Simon about the end of March; remained there until June, and left his employ; went to work again for himself, and peddled his wares until the end of the year; then, in 1867, began work for Mr. Peddie, and continued with him about two years, Mr. Peddie furnishing the stock for shawl-straps, to wit, sheepskin, cowhide leather, and steel springs, the latter being used to make the rigid cross-bar. He is evidently mistaken in regard to all the material facts of his statement. He came to this country on a travelling pass-card, which had been renewed to him on the 28th day of May, 1866, at his residence in the city of Glogau, in Prussia. After that date he went to Munich, to Berlin, to Hamburg, and to Liverpool, whence he sailed to the United States. If he landed here in the month of February, and it seems to be impossible that he should fail to remember whether he crossed the ocean at so recent a date, and for the first time, in midwinter or in summer, it was not earlier than February, 1867. If he began work for Simon at the end of March, it was as late as March, 1867; and if he remained there until the close of the year, he could not have worked for Peddie before 1868. And to this effect is the testimony of Peter Marten, the foreman of Peddie & Co., and of Mr. Jenkinson, one of the members of the firm. Marten says that Heinrich Speer commenced work there in 1868; that he worked for about a year on ladies' satchels, and after that began upon shawl-straps; and that Reinhold Speer did not begin until about a year after Heinrich. Mr. Jenkinson, after referring to the books of the firm, testified that Heinrich began to work for them in July, 1868, and Reinhold not until afterward. Marten never knew or heard of Peddie's having, or having manufactured, shawl-straps with rigid cross-bars before about 1869, and cannot believe that they could have been in use without his knowledge. Mr. Jenkinson is more cautious, but he is not willing to say that he ever heard of them before 1868. It is to be regretted that Mr. Peddie, who, the defendant Speer alleges, furnished him with the steel bars for stiffening the shawl-straps as early as 1867, was not examined. He was absent and travelling for his health; but the evidence of Mr. Fitzgerald stands uncontradicted, that when the complainant notified Mr. Peddie in 1870, that the sale of shawl-straps, with the rigid cross-bar, was an infringement of his patent, he at once stopped the manufacture and purchase and sale of such articles, and complained that he had been imposed upon by Speer's misstatements in regard to his anticipating the patent.

Is it not quite obvious from all this that Speer has antedated—it is not necessary to say wilfully—his arrival in this country; that the different witnesses who speak of the use of the rigid crossbar by him in 1867, are mistaken in regard to the year, and that such use by him must be postponed to at least one year later?

Edward Simon is hardly more fortunate in the consistency and accuracy of his statements. He says, in his examination in chief, that he has been the manufacturer of shawl-straps, in Newark, since 1856; that, in making them, a flat bar of iron was applied between the two pieces of leather; that it was used during the year 1860, "off and on;" and that the loop at the end of the handle, was like the loop on complainant's Exhibit D;

that his firm was served with a notice from the complainant, Crouch, in 1868 or 1869, not to infringe his patent, but that they kept on making shawl-straps; and further that Heinrich Speer worked for them early in the winter of 1866. It is singular and significant that the only material statements in this testimony, which, from their nature, are capable of being contradicted, are the date of the complainant's notice to them, and the date of Speer's employment by them. And neither are true. He corrects the first himself afterward, and Heinrich Speer was doubtless in Europe "early in the winter of 1866." He was asked, on cross-examination, when he first used iron in the cross-bar of shawl-straps, and he answered: "In 1865 or 1866, and before." When pressed to state what time he meant by "before," he replied, "1864," that during that year and the subsequent years to 1868, they had manufactured large quantities of shawl-straps, with the rigid cross-bar, that they made the bar themselves from hoop-iron and sheet-iron, and put the straps upon the market and sold them, "in New York and all over the country, north, south, east, and west, and the Canadas and California." He was then asked, if he had not fixed a previous date for selling shawl-straps with iron cross-bars, in an affidavit filed in this case, on the motion for a preliminary injunction. He replied: "Yes; as far back as 1858, 1859, and 1860." He was also cross-examined in regard to the notice which the firm had received from the complainant, warning them against infringement, and what was done in reference to it; and his responses are so remarkable, and so fully exhibit the general tenor of his testimony, that I quote it from defendants' record, page 26: "Q. 51. You received a notice from Mr. Crouch some time in the latter part of 1870, to discontinue an infringement on his patent? A. What time in 1870? Q. 52. The latter part—December? A. I think we did. There was one sent to us. Q. 53. What did you do with reference to that notice? Did you stop making shawl-straps having the flat iron cross-bar in them? A. Did not stop it altogether—not to my knowledge. In fact, we are using to-day, on all our bag-handles an iron wire, which goes through the handle, fastened on the end with a screw, and fastened on the handle fastening, on which we claim a patent. Q. 54. What do you mean by saying, 'did not stop it altogether, to my knowledge?' A. Working up our scraps from iron, as well as pasteboard and leather fillings. In fact, our shawl-strap manufactory did not amount then to any account," etc. "Q. 55. Did you not stop using the cross-bar at the time, or shortly after the time, of receiving the notice? A. Not on the notice. Not on account of the notice. Q. 56. But you stopped using them, did you not? A. On the request of different customers. Remarks were made that by a bend you break them. They don't go back, you see. Q. 57. Then you stopped using them altogether, in consequence of these remarks, did you? A. You have asked me that three or four times already. Make it as a final question, and I will give you a final answer. Q. 58. Same question repeated. A. As a final question, I will answer you. (Counsel for complainant objects to the dictation of witness as to what shall be the question.) I will give you what I know about it. In the first place, pasteboard scraps are cheaper than iron scraps. 2d. I have been too much annoyed, from our machine operators, (sewing machine), to stitch them with the iron cross-bars for the same price as with pasteboard and leather chip fillings. They broke too many needles, and they have to buy them. 3d. Our drummers, or salesmen, as you call them, while the people found out by bending, with the iron bar, it will break or keep crooked; gradually we stopped using them. Q. 59. Do you make straps now with iron or pasteboard, for stiffening in the cross-bar? A. We make very few straps, and the bar filled with pasteboard, and we do make a very cheap shawl-strap—a handle, with two loops attached to it, with an iron filling, three-eighths iron, and a round handle; no cross-bar on it. Q. 60. You say, in answer to question 58: 'Gradually we stopped using them.' Have you commenced making, since then, shawl-straps with iron cross-bars in them? A. Not as I know."

Let us compare all the testimony of this witness with other evidence introduced by the defendants from the manufactory of Simon & Co. They first examined Nicholas Murphy, the foreman of the establishment. He testifies, that he has superintended the making of shawl-straps for Simon & Brothers, since 1866, and that he invented and first used these in that year—the flat iron bar for stiffening. He assigns no satisfactory reason why he fixed the date in 1866; but he acknowledges that, when the notice of Crouch was served upon them, they stopped putting iron into the body of the strap, and used pasteboard instead. Henry M. Van Buren, who has been manufacturing shawl-straps for Simon & Brothers, since 1865, is next sworn, and his statement is that they used the flat cross-bar from 1867 to 1870; that he and Nicholas Murphy were its inventors, and first brought it into use in 1866. He admits, in his cross-examination, that Mr. Simon put in the iron in 1865, as an experiment—"put it in to try how it would work;" that they manufactured very few in 1866, with the iron cross-bar but a large number in 1867; but he assigns no satisfactory reason, why he fixes the manufacture in these years, rather than in 1868 and 1869.

In the midst of such diversity of statement, who speaks the truth? But the testimony of Mr. Fitzgerald brings to light a still greater contradiction. He says, that in the year 1870, shortly after the complainant had sent the notice to Edward Simon & Bros. that they must cease their infringement, he called

at their store, and they asked him why a notice had been sent to them, as they were not infringing the patent; that they had never made shawl-straps with rigid cross-bars; that they manufactured nothing, except a common cheap article, such as they then had on hand, and invited him to examine their stock for himself; that he made the examination, and found that the shawl-straps were without the rigid cross-bar. No one has been offered to contradict this evidence; but, on the other hand, Joseph R. Davis, then a salesman in the employ of the Simons, substantially confirms it. It is impossible to give much weight to testimony so inconsistent and contradictory. I have adverted to it at greater length than usual in such cases, to show that there is ground for reasonable doubt, in regard to its correctness. Where such doubt exists, the complainant's prima facie case, even if uncorroborated, must prevail. But it does not stand without corroboration. The complainant called William H. Cleaveland, William Roemer, Peter Marten, Jacob Lagowitz, Joseph R. Davis, and Philip P. Lynch, to testify as to the state of the art. They seem to be intelligent and disinterested witnesses; have been for years, more or less, connected with the manufacture and sale of shawl-straps, and they all trace the origin of the rigid cross-bar, to the invention of the complainant, or deny its existence or use prior to 1868.

Upon the whole case, I am of the opinion, that there should be a decree sustaining the validity of the complainant's patent, and giving him profits and damages for its infringement, since March 7, 1871, the date of the reissue, and also an injunction, restraining the defendants from further infringement.

Case No. 3,439.

CROUDSON et al. v. LEONARD.

[1 Cranch, C. C. 291.][1]

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

INSTANTER OPINION OF COURT—SENTENCE OF FOREIGN COURT OF ADMIRALTY—CONCLUSIVENESS.

1. The court is not bound to give an opinion instanter, on the trial of a cause, but may direct the point to be saved by a special verdict.

2. A sentence of condemnation in a foreign court, is not conclusive.

At law. Assumpsit, on a policy of insurance on the cargo of the brig Fame, from Alexandria, to, at, and from Barbadoes, and four other ports in the West Indies, and back to Alexandria; captured by the British ship Centaur, and condemned at Barbadoes, by a British vice-admiralty court, for attempting to break the blockade of Martinique.

C. Lee, for plaintiffs, after stating that the law was not yet conclusively settled in the courts of the United States, upon the question whether the sentence of a foreign court of admiralty was conclusive evidence of the fact of violation of the neutral character of the captured vessel, in an action upon a policy of insurance, moved the court to instruct the jury to find a special verdict, and cited the following authorities: Vin. Abr. p. 490, tit. "Trial," B; Reg. v. Bewdley, 1 P. Wms. 213; Ridg. 34; Harg. Co. Litt. 155b, note 5; 2 Morgan, Essays, 44; 3 Tuck. Bl. Comm. 376; Wilson v. Rucker, 1 Call, 500; Watson v. Alexander, 1 Wash. [Va.] 354; Picket v. Morris, 2 Wash. [Va.] 274; Syme v. Butler, 1 Call, 105, 112, 114.

Mr. Simms, for defendant, contra. The question has been long settled, and there is nothing in the case which requires an extraordinary proceeding. The plaintiffs, if they please, may ask the instruction of the court, and take their bill of exception, if the opinion of the court should be against them, or if the court should refuse to instruct the jury.

THE COURT stopped Mr. Lee, in reply, and said: The right of the party who requests the opinion of the court is not to have an opinion instanter. If the point is saved in any manner, it is all he has a right to require. If the court refuse to instruct the jury, but direct them to find a special verdict, by which the point of law will be saved, the court will be excused; and their refusal to give an opinion instanter will not be error. The court and bar must know that the question intended to be saved is not settled in this country. It has been decided differently by different courts. In Virginia it has been decided in one way, in New York in another. We think the fairest mode of saving the point is by a special verdict. It is least expensive and most expeditious, as the whole facts will be before the supreme court, and the judgment will be final. Dowman's Case, 9 Coke, 11b, 13a, and 14a.

THE COURT directed the jury to find a special verdict.

The plaintiffs then offered evidence to disprove the ground of condemnation alleged in the sentence of the vice court of admiralty at Barbadoes, to which the defendant objected; but the court overruled the objection, and the defendant took a bill of exceptions.

The jury, not being able to agree, were discharged, by consent of the parties, and the cause was continued over to the next term.

A special verdict was found at a subsequent term, upon which judgment was rendered for the plaintiff, which was reversed by the supreme court of the United States. [Croudson v. Leonard] 4 Cranch [8 U. S.] 434.

[NOTE. The only question arising on the special verdict was whether the sentence of the court at Barbadoes was conclusive as to an attempt to violate the blockade of Martinique.

[The reversal was upon the ground set forth in the opinion of Mr. Justice Johnson, that the sentence was conclusive evidence against the insured to falsify his warranty of neutrality.]

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

Case No. 3,440.

In re CROUGHWELL.

[9 Ben. 360;[1] 17 N. B. R. 337.]

District Court, S. D. New York. March Term, 1878.

INVALID ASSIGNMENT UNDER STATE LAW—FILING INVENTORY—RECORDING.

1. The provision of section 3 of the act of the legislature of New York, passed June 16, 1877 (Laws N. Y. 1877, c. 466, p. 543), in regard to voluntary assignments for the benefit of creditors, that, if "an inventory shall not be made and filed within thirty days by the debtor or the assignee, the assignment shall be void," means, that the assignment is valid, during the thirty days, to vest the title in the assignee, but is subject to become invalid if the inventory is not filed within the thirty days; but, when it so becomes invalid, the invalidity does not relate back to the date of the assignment, so as to authorize a court to declare that the title is thereafter to be held never to have passed from the assignor, or never to have vested in the assignee. The provision of said act as to the recording of the assignment, considered.

[Cited in Hunker v. Bing, 9 Fed. 281.]

2. C. made a voluntary assignment December 20th, 1877. A sheriff, on January 5th, 1878, levied an execution on property covered by the assignment, in favor of a creditor. On January 9th a petition in bankruptcy was filed in this court against C., and he was adjudged a bankrupt January 19th. The assignee in bankruptcy having obtained possession of said property, the sheriff applied to this court, in March, 1878, claiming that said voluntary assignment was void because of the non-filing of such inventory, and that the voluntary assignee never obtained any title to the property, and praying that the property be applied on the execution. The assignee in bankruptcy claimed to hold the property on the ground that the voluntary assignment was invalid as to him; and the application of the sheriff was refused, to allow the assignee in bankruptcy an opportunity to avoid the voluntary assignment and recover the property.

[Cited in Olney v. Tanner, 10 Fed. 107.]

[In the matter of James Croughwell.

[Petition by the sheriff of the county of New York for the delivery of certain of the bankrupt estate, or for sufficient of the proceeds thereof to satisfy an execution in his hands.]

Vanderpoel, Green & Cuming, for the motion.

Foster & Adams, opposed.

BLATCHFORD, District Judge. The bankrupt, on the 20th of December, 1877, made a voluntary assignment of his estate to an assignee for his creditors, one Bessicks. On the 5th of January, 1878, Goodman & Mayer, creditors of his, recovered a judgment against him and issued to the sheriff an execution against his property, under which a levy was made on the property embraced in said assignment. On the 9th of January, 1878, a petition in involuntary bankruptcy was filed against the bankrupt, and he was adjudged a bankrupt on the 19th of January, 1878. An assignee in bankruptcy has been appointed, who has possession of the property. Neither the bankrupt nor Bessicks filed, within thirty days after the date of the voluntary assignment, the inventory required by the third section of the state act of June 16, 1877 (Laws N. Y. 1877, c. 466, p. 543). The sheriff now presents to this court a petition, claiming that, because of the non-filing of such inventory, the assignment to Bessicks "was and is void and of no effect," and that Bessicks never obtained any title to the property. The petition prays that the execution may be declared a lien on all the property of the bankrupt; that it be delivered to the sheriff, and he be allowed to sell it and apply the proceeds on the execution; or that, if it be sold by the assignee in bankruptcy, he pay over to the sheriff sufficient of the proceeds to satisfy the execution.

The third section of the state act of 1877 provides, that if "an inventory shall not be made and filed within thirty days, by the debtor or the assignee, the assignment shall be void." This language was not contained in the prior state act. The prior provision was section 2 of the act of April 13, 1860, as amended by section 1 of the act of June 4, 1874 (Laws N. Y. 1874, c. 600, p. 824). That provision was, that the debtor should, at the date of the assignment, or within twenty days thereafter, make and deliver the inventory of creditors and property, but, if he should not, the assignment should not "for such reason become invalid or be ineffectual," but the assignee might, within six months after the date of the assignment, file an inventory of the property which he could find. The second section of the act of 1860 (Laws N. Y. 1860, c. 348, p. 594), before its amendment in 1874, provided merely that the debtor should, at the date of the assignment, or within twenty days thereafter, make and deliver the inventory of creditors and property. It did not contain the provision that the assignment should not for such reason become invalid or be ineffectual. Under the act of 1860, it was held by the court of appeals of New York, in 1868, in Juliand v. Rathbone, 39 N. Y. 369, that the intention of the statute was to require the inventory "to be made as a necessary part of a valid assignment, and as a prerequisite of vesting an absolute title to the property in the assignee;" that during the twenty days "an inchoate title" was vested in the assignee, "good against creditors, provided it was thereafter perfected by a compliance" with the act as to the inventory and the bond; and that, "in case of failure so to comply, the assignment must be adjudged void." Section 3 of the act of 1860 required the assignee to file a bond within thirty days after the date of the assignment, "and before he shall have power or authority to sell, dispose of, or convert to the purposes of the trust, any of the assigned property." The case of Juliand v. Rathbone, above cited, held that the assignee did not acquire title to the property absolutely, until

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

he gave the security; that a strict observance of the requirements as to the inventory and the bonds was essential to the validity of the assignment; and that a non-compliance rendered the assignment "void as to creditors, whenever their rights to the property attach." After this decision the amendment of 1874 was made, to the effect above set forth, declaring, that if the debtor failed to make and deliver the inventory within the twenty days, the assignment should not "for such reason become invalid or be ineffectual," and allowing the assignee to file an inventory of property within six months, but not declaring, as in the act of 1877, that, in case an inventory should not be filed by either the debtor or the assignee within a specified time, the assignment should be void. The act, as it stood after the amendment of 1874, came before the court of appeals of New York, in Produce Bank v. Morton, 67 N. Y. 199, and it was there held, that the intention of the act of 1874, in declaring that the omission to make and deliver the inventory should not "invalidate the assignment," was to abrogate the rule laid down in Juliand v. Rathbone; that the provision allowing the assignee within six months to file an inventory, was not intended as a condition, the breach of which should invalidate the assignment; and that it could hardly be supposed that it was the intention of the legislators to leave it uncertain, during the six months, whether the title to the property was in the assignee, or to deprive him, during the interval, of the power of making any valid disposition of it.

The third section of the act of 1877 retains the provision, that if the debtor does not make and deliver the inventory within the twenty days, the assignment "shall not for that reason become invalid," and then provides that the assignee may, within thirty days after the date of the assignment, make and deliver as complete an inventory as he can, and that, "in case an inventory shall not be made and filed within thirty days, by the debtor or the assignee, the assignment shall be void."

I am not referred to any decision in the courts of this state as to the proper construction of this new provision in the third section of the act of 1877. The fifth subdivision of that section, in which this new provision is found, contains language all of which must be construed together. The debtor is to deliver the inventory at the date of the assignment, or within twenty days thereafter. In case he does not, the assignment is not "for that reason" to "become invalid," but the assignee is to have ten days more, or thirty days in all from the date of the assignment, to deliver such inventory as he can. If neither debtor nor assignee files an inventory within the thirty days, "the assignment shall be void." What is the meaning of the words "be void"? Do they mean anything different from the words "become void"? or anything different from the words "become invalid," used in the first part of the subdivision? If the assignment does not "become invalid" at the end of the twenty days, it must be valid at that time, and it must have been valid from its date. If valid at the end of the twenty days, its validity must continue at least till the end of the thirty days. The assignee is required, by section 5 of the act of 1877, to file a bond within thirty days after the date of the assignment. The same section provides, that, until the bond is filed, the assignee shall not have "any power or authority to sell, dispose of or convert to the purposes of the trust, any of the assigned property." So far this is the same provision as in section 3 of the act of 1860. But section 5 of the act of 1877 goes on to provide, that, "in case the debtor shall fail to present such inventory within the twenty days required, then the assignee, before the ten days thereafter shall have elapsed," may apply "for leave to file a provisional bond, until such time as he may be able to present the schedule or inventory, as hereinbefore provided." The eighth section of the same act provides, that a failure to file any bond required by the act "will not deprive the county judge of his power over the assignee or the trust estate." It certainly is contemplated by section 5, that the assignee may, after the twenty days have expired, and before the thirty days have expired, file such a bond, that he can, before the thirty days have expired, and before he files an inventory, sell and dispose of the assigned property. If so, he must have the title to it, which title does not accrue by the filing of the bond or of the inventory, but by the delivery of the assignment, duly acknowledged, and, perhaps, its recording. It has been recently held by the court of appeals of New York, in Brennan v. Willson, 71 N. Y. 502, under the act of 1860, that the property vested in the assignee by the assignment and its acceptance; that the giving of the statutory security was not a condition precedent to the vesting of the estate; and that the failure to give the security within the time limited did not invalidate the transfer and restore the title to the assignor. The provisions of the act of 1877 in regard to the bond are such as to require the same ruling under that act, even more strongly than under the act of 1860. In analogy to such construction of the provisions in regard to the bond, it must be held to be the meaning of the provisions of the act of 1877 in regard to the inventory, that if none is filed within the thirty days the assignment then ceases to have the validity which up to that time it had. The statute does not say that the assignment shall be held and treated as having been void ab initio. The assignment is regarded as valid to vest the title in the assignee, but is subject to become invalid if an inventory is not filed within the thirty days. But, when it so becomes invalid, the

invalidity does not relate back to the date of the assignment, so as to authorize a court to declare that the title is thereafter to be held never to have passed from the assignor or never to have vested in the assignee.

The petition of the sheriff alleges that the assignment was not recorded until the 29th of December, 1877, "contrary to the law of the state of New York." I find no provision in the act of 1877 as to the recording, except the provision in section 1, requiring that the assignment shall be recorded, and designating where, and a like provision in section 24. But there is no requirement as to when the assignment shall be recorded, unless the provisions of section 1 are to be regarded as requiring that the assignment shall be recorded before it can be regarded as operative. Even if this be so, this assignment was recorded on the 29th of December, 1877.

The only specific objection urged by the sheriff's petition is, that no inventory was filed "within thirty days after the making and recording" of the assignment. The petition also alleges that Bessicks has failed to comply with any of the provisions of the act. If this is intended, as was stated on the hearing, to allege that Bessicks never filed a bond, the observations already made dispose of that point.

The petition in bankruptcy in this case set forth, as an act of bankruptcy, the making, on the 29th of December, 1877, by the bankrupt, when insolvent, to Bessicks, of the assignment in question, with intent to defeat and delay the operation of the statutes of the United States in regard to bankruptcy. The adjudication was made by consent. The property covered by the assignment has come into the possession of the assignee in bankruptcy. He claims to hold it on the ground that the voluntary assignment is invalid as to him. This court must so regard it for the purposes of the present application. Whether it is necessary for the assignee in bankruptcy to bring any suit, or take any other steps, to have the voluntary assignment declared void as to him, or to perfect his title to the property, as against any claim which may be made by the voluntary assignee, or by the creditors, or by this execution creditor, is a question not now presented. The case, as it stands, must be disposed of on the principles laid down by the circuit court for the northern district of New York, in Re Beisenthal [Case No. 1,236]. In that view, the title of the assignee in bankruptcy to the property relates back to the time the voluntary assignment was made, whether the 20th or the 29th of December, 1877, because, apparently, such assignment is, under the bankruptcy statute, voidable as to the assignee in bankruptcy. and he claims the right to have it so declared. Nothing is adduced to show that the voluntary assignment was fradulent in fact. It was valid as against the assignor, and there was no title in the assignor to the property levied on when the execution was issued, and so no leviable interest to which the execution could attach. When the petition in bankruptcy was filed, on the 9th of January, 1878, to which date the title of the assignee relates, the thirty days had not expired, and so the life of the execution, quoad the right which the assignee has acquired, had not commenced. That right is a right to avoid the voluntary assignment and recover the property. He may do so on the ground that such assignment was in fraud of creditors, that is, fraudulent otherwise than as made void by the bankruptcy statute, or on the ground that it was made void by that statute. The assignee will be allowed an opportunity to avoid such assignment and recover the property on any ground which may exist. The petition in bankruptcy alleges, as an act of bankruptcy, that the voluntary assignment was made with an intent to hinder and delay creditors. This may have been so, and, if it was so, the rights of these execution creditors would, doubtless, be different from what, under the decision in Re Beisenthal, they would be if the assignment were only voidable, as made so by the bankruptcy statute.

The motion for the relief prayed for in the petition of the sheriff is denied, with leave to him to renew it hereafter, if so advised.

CROUSELLAT (DE TASLET v.). See Case No. 3,827.

CROUSILLAT (DE TASTETT v.). See Case No. 3,828.

CROW (UNITED STATES v.). See Case No. 14,895.

CROWDER (LYNCH v.). See Case No. 8,637.

Case No. 3,441.

CROWE v. AIKEN.

[2 Biss. 208;[1] 4 Am. Law Rev. 450.]

Circuit Court, N. D. Illinois. Jan., 1870.

LITERARY PROPERTY—PUBLICATION OF PLAY—DEDICATION.

1. An author or his assignees have, before publication, an exclusive right to control the use of his literary productions.

2. Representation of a play upon the stage is not, at common law, a publication.

[Cited in Thomas v. Lennon, 14 Fed. 851.]

3. The English statute of 5 & 6 Vict. c. 45, § 20, which makes representation there a publication, cannot be so extended as to affect the exclusive proprietary rights of the author or his assignees at common law in the United States. It affects only proceedings had under the statute itself.

4. The mere representation of a play does not dedicate it to the public, except so far as those who witness its performance can recollect it, nor have spectators the right to secure its reproduction by phonographic or other means independent of memory.

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

5. Unauthorized performance of a play which has been represented on the stage will not be presumed to be the result of memorizing it by a spectator, but the proof of this must be so clear as to negative any other conclusion.

6. No restrictive notice is necessary to spectators to secure the author's rights, nor will such notice give him a right which he has not at common law.

7. The author's rights at common law have not been taken away or limited by any existing act of congress.

In equity. This was a motion to dissolve a preliminary injunction restraining the defendant, the manager of a theater in Chicago, from producing a play, the copyright of which was owned by complainant.

Jos. P. Clarkson, for complainant.
Ira B. Warren, for respondent.

DRUMMOND, Circuit Judge. The bill in this case was filed to prevent the performance in Chicago of a drama called Mary Warner by the defendant, who is manager of a theatre. It is based not upon any copyright statutes, but on the principles of the common law and of equity. Mr. Tom Taylor, a subject of the queen of Great Britain, is the author of the drama. The plaintiff is the husband of an actress of distinction known to the public as Miss Kate T. Bateman. The play, written by Mr. Taylor for Miss Bateman, and the principal character to be personated by her, in pursuance of a contract between the plaintiff and Mr. Taylor made in February, 1869, at London, was not intended for publication, but for representation on the stage. After it was completed the author duly transferred in writing to the plaintiff all his right in the play and in the manuscript thereof, together with the exclusive right to its representation on the stage in the United States for five years from June 1, 1869. The manuscript was accordingly delivered to the plaintiff and the play was represented at the Haymarket theatre, in London, in June, 1869. Afterward the plaintiff and his wife came to the United States, and Mary Warner has been performed at Booth's theatre in the city of New York.

The foregoing facts do not appear to be controverted. The bill alleges that the play has always been kept in manuscript; that it has never been printed by Mr. Taylor, by the plaintiff, nor by Miss Bateman, nor with the consent or acquiescence of any one of them, nor published with the consent or acquiescence of any one of them, otherwise than by a representation on the stage, and that the defendant did not produce it at his theatre by means of the memory of those who had witnessed its representations on the stage, but by a copy wrongfully and surreptitiously obtained from the manuscript, or from a printed copy wrongfully and fraudulently printed. An injunction was issued by the court, and the performance of Mary Warner by the defendant's company stopped. The defendant now appears and moves to dissolve the injunction.

The motion has been fully argued by the counsel of the defendant upon two grounds: First, the law of the case as settled in England and in this country; second, on the facts contained in the affidavits of Robert M. De Witt and Charles J. Clarke, both of New York.

The affidavit of De Witt states that he furnished the defendant with a copy of the play used by him; that he procured it from a person in London, on or about the 29th of July, 1869, who obtained the same only from repeated representations on the stage at the Haymarket theatre; that there was no restriction or prohibition against any of the spectators using such play as they saw fit. He also states he is advised that by section 20, c. 45, 5 and 6 Vict., "The first representation or performance of any dramatic piece in England is deemed equivalent to the first publication of a book."

The affidavit of Clarke states that the play of Mary Warner was in print in the city of New York as early as August, 1869; that he bought a printed copy of the play at a public news-stand in New York, where the same was publicly exposed for sale.

The copy furnished to the defendant has been exhibited in court. It is not in the usual form of a published play, but consists of printed slips fastened together in pamphlet form, with plats and stage directions as if for dramatic use only.

Various affidavits have been introduced by the plaintiff, from which it is apparent that the play Mary Warner has never been printed with the knowledge or consent of Mr. Taylor, the plaintiff, nor Miss Bateman. It is not for sale generally in New York, and not at all in England. It is a fair inference, I think, from all that appears in the case, that the only printed copy in existence was printed by Mr. De Witt, or under his direction, and is kept for sale at a high price to the theatrical managers. Mr. Clarke's affidavit was made on the 14th of December, and the copy referred to by him may have been, and probably was, purchased directly or indirectly of De Witt or through his instigation, and as he does not state when, it may have been since this bill was filed.

It would seem, in answer to the allegations of the bill, the defendant ought to show that his copy of the play came from a printed or other copy authorized by the author or his assignee or from the memory of those present when the play was performed. The manner in which the play was procured in London is rather vaguely stated. It was from repeated representations only. But was it from the memory of those who heard it performed, or from phonographic reporters? The statement is entirely consistent with the latter source of information.

The author of any literary or dramatic work is the sole proprietor of the manuscript

and its contents, and of copies of the same, independently of legislation, so long as he does not publish it, or part with the right of property. This is called a common law right, and exists irrespective of copyright statutes. This right of property he can transfer, and a court of equity will protect him or his assignee, in a proper case, just as it will the owner of any other species of property. Those judges who maintained this common law right in the cases of Millar v. Taylor [4 Burrows, 2304] and in Donaldson v. Beckett [2 Brown, Parl. Cas. 129], decided a hundred years ago, it has always been thought, had the strength of the argument on their side in the great discussion to which they gave rise. Subject to the qualification stated, it has been generally admitted in this country.

Mr. Taylor, then, was the proprietor of the drama Mary Warner when finished, and when transferred to the plaintiff the latter became the proprietor on the terms of the transfer. Has the right of property been lost?

It is conceded that it would be lost by any general publication of the play by the proprietor which could be regarded as a dedication to the public, but save this, it is difficult to fix on any rule which shall meet the case. The giving of a copy, or of several copies of a manuscript will not necessarily be a publication. The representation of a play on the stage was decided in England, before the statutes of 5 & 6 Vict., not to be a publication.

There are cases in some of the courts of this country, which hold that the representation of a play is a qualified publication, viz.: to the extent in which the memory of the auditors can retain its language, scenery, or incidents, and if it is reproduced only in that way the author of the work has no remedy. Of these cases it may perhaps be said that, in some instances, the court has not looked very rigidly into the proofs, considering the intrinsic difficulty of the subject. Indeed, as some of the affidavits in this case show, and as all experience proves, to write out a play from memory alone is well nigh impossible.

None of the cases cited by counsel have gone so far as to decide that a reporter can take down the words of an unpublished play as they are uttered by the actors, and thus make it public against the wishes of the author, while on the other hand, it has been frequently held that such action of a reporter can be prevented because not warranted by express or implied conditions. In some instances stress has been laid on the fact of representations of a play being had without restriction, and it is claimed Mary Warner was so produced in England. This, however, is denied, and it is asserted, public notice was given both in London and in New York of the private property in the play. It is not easy to see, however, how a notice can have any effect upon the rights of the author or of the auditor. If the latter had the right to carry the play away in his memory, or to take it down phonographically, and in either case to use or publish it, the notice prohibiting it could not affect or change that right.

The principal reason, probably, why courts are so much inclined to construe with great strictness the common law right of an author in a manuscript work, partially imparted to the public, is because the right is perpetual. All claims under copyright statutes are for a limited time only. This reason may have had great weight in the discussion which took place in England in the two cases already referred to, and the result of which was the adoption of the principle that the statute of 8 Anne, c. 19, took away the common law property of an author in a published work. But this common law right is always under the control of the legislative power, and it has been exercised in England; and even under the qualified publication of a play by representation there can be no doubt that under the rule now established in the courts it might become public property, in the manner heretofore stated, after repeated representations.

There was some question whether the author of a play had, at common law, the sole right of representation; but so long as the play existed in manuscript, and was unpublished, and not in some way dedicated to the public, the sole right of representation or performance would seem to follow from the exclusive right of property. But the 20th section of chapter 45 of the statute of 5 & 6 Vict. put an end to this question, by declaring that the first public representation or performance of any dramatic piece should be deemed equivalent, in the construction of the act, to the first publication of any book; and I understand it has been decided in England that the public performance, even in a foreign country, of a play of which an English subject is the author, defeats his claim to a copyright under the British statutes.

It is insisted that as by this statute representation was publication, the play Mary Warner, by performance in England, was published there, and all right of property in the play was consequently lost, as well there as in the United States. This necessarily leads to the conclusion, and that is substantially the position of defendant's counsel, that there is no right of property in this country in the play, except that conferred by the statutes, and particularly that of Aug. 18, 1856 (11 Stat. 138). I do not understand that the authorities have gone that far, and it does not follow because his claim under the statutes is gone, that everything is lost. He may still stand on his natural, inherent right as the author and creator of the play, and maintain that right until in some mode, in reason or by statute, it is dedicated to the public. It cannot be true

in this country that the lecturer has no rights of property in his unpublished and unprinted lecture; that the clergyman has no rights of property in his unpublished sermon—the work, it may be, in each case, of weeks of thought and labor—merely because he has repeated it to an audience. And I cannot comprehend why, because congress has legislated about dramatic compositions, the author of a play should occupy different ground. The object of all copyright laws is to protect and regulate property in the product of the brain, not to annihilate it.

There can be no doubt of the authority of congress to legislate on the subject of literary property, and to prescribe the terms upon which copyrights shall be granted, and when it has so legislated it may be truly said to create those rights under the law; and this is the sense of the language of the supreme court in the case of Wheaton v. Peters, 8 Pet. [33 U. S.] 661, that congress, instead of sanctioning an existing right, created it, because the court admits the right at common law. Neither, perhaps, can there be any doubt that congress can declare what sort of publications of a literary or dramatic work shall constitute a dedication to the public.

It follows from what has been said that a definition of the word representation by a British statute is not operative as such in this country, and in all the cases which have arisen here recently upon the rights of authors to unpublished plays written by Englishmen, the objection that their rights in this country were destroyed in consequence of the clause already referred to in section 20, c. 45, of 5 & 6 Vict., seems not to have been taken either by counsel or the court.

I am of opinion that upon principle and authority the author, or his assignee, of an unpublished play, has a right of property in the manuscript and its incorporeal contents; that is, in the words, ideas, sentiments, characters, dialogue, descriptions, and their connection, independent of statutes, and that a court of equity can protect it. I am also of opinion that as the law now exists in this country, the mere representation of a play does not of itself dedicate it to the public, except, possibly, so far as those who witness its performance can recollect it, and that the spectators have not the right to secure its reproduction by phonographic or other verbatim report, independent of memory.

These being my conclusions, the only other question is whether the defendant has brought himself within the condition named; and, after what has been said, it necessarily follows that in my judgment he has not. I cannot doubt that De Witt obtained the copy of the play of Mary Warner, which he furnished to the defendant in this case, either in whole or in part, through a short-hand reporter, or in some other unauthorized or wrongful way, and not by memory only. The case will therefore go to proofs in the regular way, and the injunction stand until the hearing.

NOTE [from original report]. The cases of Millar v. Taylor and Donaldson v. Beckett, referred to by the court, are reported in 4 Burrows, 2304, and 2 Brown, Parl. Cas. 129. Consult, also, Woolsey v. Judd, 4 Duer, 379; Bartlett v. Crittenden [Case No. 1,076], in which cases the common law rights of authors are elaborately argued. Representation on the stage is not publication. Murray v. Elliston, 5 Barn. & Ald. 657; Keene v. Wheatley [Case No. 7,644]; Macklin v. Richardson, 2 Amb. 694; Roberts v. Myers [Case No. 11,906]; Jones v. Thorne, 1 N. Y. Leg. Obs. 408; Coleman v. Walthen, 5 Term R. 245; Boucicault v. Fox [Case No. 1,691]; Keene v. Clarke, 5 Rob. [N. Y.] 38. As to copy obtained surreptitiously or by memorizing, see Boucicault v. Fox [Case No. 1,691]; Keene v. Kimball, 16 Gray, 545; Morris v. Kelly, 1 Jac. & W. 481. For a full discussion of the right of copy before publication, representation, assignment, etc., see Palmer v. De Witt, 47 N. Y. 532. See, also, Boucicault v. Wood [Case No. 1,693].

Case No. 3,442.

CROWEL et al. v. The RADAMA.

[2 Cliff. 551.][1]

Circuit Court, D. Maine. April Term, 1866.[2]

COLLISION—SAILING VESSELS—RULES OF NAVIGATION—SALVAGE.

1. A schooner was heading southwest by south, a bark north-northwest, with the wind west. The bark was close-hauled on the wind, the schooner running six points off, having the wind somewhat free. The bark was seen from the schooner when at a distance of about two miles, off the weather bow, at which time the helm was hove up and the vessel kept off. The schooner was discovered from the bark when the vessels were about seven or eight hundred yards apart, three points on the bark's weather bow, at which time her helm was put hard up. When the vessels came together the schooner was heading east, the bark northeast or east-northeast. The bow of the bark struck the schooner by the main rigging, on the starboard side. *Held*, that the bark was responsible for the damages occasioned by the collision.

2. The rule applicable to this case is, that when two vessels are approaching each other from opposite directions, that one which has the wind free, or is sailing before or with the wind, must keep out of the way, and the one close-hauled must keep her course.

3. Where, in consequence of a collision, the injured vessel drifted ashore, and $1,600 was paid to salvors, the decree of the district court in awarding $483 on account of salvage was sustained.

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

Admiralty appeal in a cause of collision. The libel was in rem against the bark Radama [William Forbes and others, claimants], and the libellants [David Crowel and others] were the owners of the schooner Montezuma, of Beverly, in the district of Massachusetts. The bark sailed from the port of New York on the 10th of January, 1864, bound on a

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

[2] [Affirming Case No. 11,521.]

voyage to the port of Portland in this district, and the schooner from Salem on the following day, on a voyage to Cayenne in South America. The libel alleged that the officer of the deck, in charge of the schooner on the 11th of January, off Cape Cod, between seven and eight o'clock in the evening, discovered the bark off the weather bow, showing a red light; that the wind was west; that the schooner was heading southeast by south; that the bark was heading north-northwest; that the master seeing the light ordered the schooner to be kept off, which was done. Under this order, it was alleged, the schooner gave way sufficient to have cleared the bark, but when the two vessels had approached near each other, the master of the bark seized the wheel of his vessel and hove it hard up, which caused the bark to come down upon the schooner, carrying away her main rigging on the starboard side, and otherwise injuring her, so that she drifted ashore; that she was damaged to the amount of $300, and her càrgo to the same amount; and that the sum of $1,600 was awarded to the salvors of the vessel who got her off and run her into port. The owners of the bark alleged, in their answer, that the schooner was discovered when the vessels were about seven or eight hundred yards apart, and that she was three points on the weather bow of the bark; that the helm of the bark was put hard up, but that the helm of the schooner was put to starboard, and that the schooner attempted to run across the bows of the bark, and thereby occasioned the collision. The decree of the district court was to the effect that the collision occurred as alleged in the libel; that the bark was solely in fault; and the court awarded damages in the sum of $987 to the libellants. [Case No. 11,521.]

W. F. Choate and Fessenden & Butler, for libellants.

J. & E. M. Rand, for claimants.

CLIFFORD, Circuit Justice. Much less conflict exists in this case than is frequently found in cases of this description. The pleadings and proofs show that the two vessels were sailing in nearly opposite directions. The collision occurred at the time and place alleged in the libel. It was not a dark night, and the wind was west, and blowing a good smart breeze. Both vessels were well manned and equipped, and both had proper lookouts and sufficient lights, and the proof is full to the point that each saw the other in ample time to have avoided the collision. Any argument is, therefore, unnecessary to show that it is a cause of fault, as the collision occurred in the open sea, and without any circumstances appearing to indicate that it might not have been prevented by a proper observance of the usual and well-known rules of navigation applicable to the case. The bark was heading north-northwest, and the schooner was heading southeast by south, but the bark was close-hauled on the wind, and the schooner was running six points off, which made her somewhat free. The testimony shows that the schooner saw the bark before the bark saw the schooner, but the latter was seen by the former when they were half a mile apart, and in season to have adopted every proper precaution to have avoided a collision. Where two vessels are approaching each other from opposite or nearly opposite directions, the fact that each does not discover the other at the same moment cannot materially affect the question as to which was in fault, if each made the discovery of the approach of the other in season to adopt every necessary precaution. The bark was the larger vessel, and being without cargo, she was light in the water, and she was seen by the schooner when the two vessels were two miles apart. Those on board the schooner testify that her helm was put up as soon as the bark was seen, and that she immediately began to give way.

Doubts are entertained whether that statement can be regarded as entirely correct, but the proofs are satisfactory that the helm was seasonably put up, and that the schooner had given way five or six points, if not more, before the collision occurred. The respondents concede that when she was first seen by those on board the bark, she was heading southeast by south; and it is fully proved that when the collision occurred, or shortly after, she was heading east. A corresponding change was made in the course of the bark. When first discovered, she was heading north-northwest, and it is clearly shown that at the time the collision occurred she was heading northeast, or perhaps east-northeast. Both vessels gave way, and as they were sailing in opposite directions, it is not difficult to see how the collision occurred. Unquestionably there is some conflict in the testimony as to the bearing of the respective vessels towards each other at the time the one first discovered the other, but it is not material to determine that controverted point, as it is clear that both gave way, and that the bark struck the schooner at amidships on the starboard side. A discussion upon the law of the case is unnecessary, as the rule is well settled that a vessel which has the wind free or is sailing before or with the wind, where two vessels are approaching from opposite directions, must keep out of the way of the approaching vessel, if the latter is close-hauled. St. John v. Paine, 10 How. [51 U. S.] 557; The Catharine, 17 How. [58 U. S.] 170; The Osprey [Case No. 10,606]. The correlative duty of the vessel close-hauled is to keep her course, so that the vessel whose duty it is to keep out of the way may not be baffled or defeated in her attempt to perform her duty. Mail Steamship Co. v. Rumball, 21 How. [62 U. S.] 384. Exceptional cases may arise, as was admitted in that case, but there is nothing in this rec-

ord to take the case out of the general rule. On the contrary, the means adopted by the schooner to keep out of the way were the usual and proper means, and it is not doubted by the court that they would have been sufficient if the bark had held her course, as she was bound to do. She did not do so, and consequently it must be held that she was in fault and responsible for the consequences. The reasons for this conclusion might be very much extended, but as the question is merely one of fact, it is not thought necessary to pursue the investigation. The respondents also contend that the damages allowed in the district court were excessive. The complaint in that behalf is twofold: first, they contend that the amount allowed for the injuries to the vessel was more than sufficient to make good the damage; secondly, that the district court erred in allowing anything for salvage, because the crew unnecessarily and improperly abandoned the vessel. The positive testimony of one of the owners was, that he paid out for the repairs on the vessel the sum of $504, and the district court allowed that sum. The testimony of the owner was, that she was not as good after being repaired as she was before the collision. Suffice it to say that the allowance was substantially correct, if the witness was entited to credit. In view of all the circumstances, I am of the opinion thar I ought not to reverse the decree on that ground. The second ground of complaint is, that the district court erred in allowing the salvage. The amount allowed was only $483; and I am not able to see that there is any error in the decree of the district court.

One may now see that self-preservation did not require the crew to abandon the vessel, but they haa to determine that fact when the collision occurred, and at a time when the extent of the injuries to their vessel was not known. Believing that their vessel was very seriously damaged, they went on board the bark; and it does not appear that the officers and crew of the bark thought at the time that their course was an improper one. Looking at all the circumstances, I cannot say that their conduct was such as to impeach their motives, or their fidelity to their duty. The decree of the district court is, therefore, affirmed, with costs.

Case No. 3,443.

CROWELL v. A CHAIN AND ANCHOR.

[25 Leg. Int. 140;[1] 6 Phila. 478.]

Circuit Court, E. D. Pennsylvania. 1868.

SALVAGE—DERELICT.

A salvor is not entitled to compensation for labor and injury after he is informed that the property is not derelict.

[1] [Reprinted from 25 Leg. Int. 140, by permission.]

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

[In admiralty. Libel by the master of the steamship Norman against a chain and anchor.]

GRIER, Circuit Justice. The 35th section of the act of assembly of Pennsylvania of the 29th March, 1803 [5 Laws Pa. 564], was intended to encourage mariners to use their best endeavors to save derelict property, and also to protect it from the frauds of the salvors. The chain and cable in this case did not not come within the category of abandoned or derelict property. When the Norman was compelled to leave it near the wharf in Chester, it was left in charge of an agent, who, though not in the actual possession, was potentially so, and had made arrangements to bring the chain and anchor on shore. When the master of the schooner Brave had discovered the property, and commenced raising it, under the supposition that it was derelict, he was immediately informed of the fact that it was not derelict, and that the agents of the owners were preparing to remove it. This notice he disregarded, under pretence that the persons who gave it were drunk and used abusive language. He persisted in his endeavors until about two o'clock p. m., when the owner of the wharf, who had charge of the property, brought his attorney, Mr. Ward, on board, before the anchor was lifted. This testimony, which is not contradicted or disputed, is as follows: "I told Captain Mears that I came there with Mr. Reaney to see about that chain and anchor; that it belonged to the steamship Norman, and had been lost last winter in the ice; that the owner had requested Mr. Reaney to be on the lookout for it; and that their men had made arrangements to fish it up. I further told him that there was no disposition to do anything unfair or to deprive him of a just compensation for his services, but that he would not be allowed to take it away. Mr. Reaney said further, that any security required should be given for the proper compensation of those men for any labor they might have done about the chain," etc. Mr. Reaney proves that he told Captain Mears that if he would come alongside his (Reaney's) wharf he would have a rope thrown out to make fast to the chain, and said, "You are grumbling about straining your mast and injuring your shroud. Why do you lift it any more? You have enough raised to come alongside the wharf." He still kept on working, etc., etc.

1. It is clear that the property in question was not derelict. The captain of the schooner should have ceased to interfere with it after the notice given, and especially after the visit of Mr. Reaney and his attorney.

2. After the very fair offer of Mr. Reaney, the captain of the schooner acted wholly in the wrong, and was entitled to no compensa-

tion for labor and injury suffered by his vessel after that time. Hence, the testimony as to what occurred afterwards can not affect the result, and is wholly irrelevant. Fifty dollars would be a large compensation for any labor or injury to the vessel, up to that time. The claimants may have a decree for that sum, but without costs.

Case No. 3,444.

CROWELL v. HARLOW et al.

[3 Ban. & A. 478;[1] 18 O. G. 466.]

Circuit Court, D. Massachusetts. Sept. 20, 1878.

INFRINGEMENT OF PATENT—CURING AND PUTTING UP FISH—INJUNCTION.

The complainant's patent was for a process of curing and putting up fish, which in the claim was described to be to take out the principal bones and fins while the fish is fresh, and, when partly cured and dried, to remove the skin and with it the entire mucous membrane, and to pack in boxes of convenient size. The novelty consisted in the removal of the mucous membrane. Upon an application for a preliminary injunction, the evidence of infringement was very meagre, and quite insufficient, unless it was aided by the affidavit of the defendant himself, who said he prepared the fish by removing the skin, and then the bones, and then packed it in boxes. He did not say whether he removed the mucous membrane or not, and there was no evidence whether in removing the skin the membrane was necessarily removed; but he denied the novelty of the invention. *Held*, that the application must be denied.

[In equity. Bill by Elisha Crowell against Nathaniel E. Harlow, and by the same against George Harlow, to restrain infringement of letters patent.]

John R. Bennett, for complainant.
Charles H. Drew, for defendants.

LOWELL, District Judge. This suit and another like it (Same Complainant v. George Harlow) are brought against two persons who are said to infringe the patent of John Atwood, No. 90,334, granted May 25th, 1869, for an improved process of curing and putting up fish. The claim is for the whole process described, which is to take out the principal bones and fins while the fish is fresh, and when partly cured and dried to remove the skin and with it the entire mucous membrane, and to pack in boxes of convenient size. I understand the novelty, as claimed in argument, consists in the removal of the mucous membrane.

The evidence of infringement is very meagre and quite insufficient, unless it is aided by the affidavit of the defendant himself, who says that he prepares the fish by removing the skin, and then the bones and packs in boxes. He does not say whether he removes the mucous membrane or not, and there is no evidence whether in removing the skin the membrane is necessarily removed. If it is not, there is no infringement; if it is, then the remaining part of the defendant's affidavit is likely to be true that the process is old and was well known to him in Plymouth before 1869.

It is not the practice to grant a preliminary injunction, which often operates as a final determination of the cause, when the patent has never been passed upon, unless there has been acquiescence equivalent to a general admission of its validity, or there are some other strong reasons for such summary action, if it appears that the defendant in good faith intends to litigate the validity of the patent. I do not hold the rule quite so strictly with respect to a disputed question of infringement, because that may sometimes be determined as well by an inspection of the two things as it ever can be by evidence of any kind.

I do not pass at all upon the question of novelty, because the record is not such as to enable me to form a judgment upon it. The patent on one side is opposed to an affidavit of personal knowledge on the other, and I cannot say with sufficient certainty that the patent is undoubtedly valid.

Motion denied.

[NOTE. On the final hearing on the merits, there was a decree for the complainant in both cases. Crowell v. Harlow, 1 Fed. 140.]

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

Case No. 3,445.

CROWELL et al. v. KNIGHT.

[2 Lowell, 307.][1]

District Court, D. Massachusetts. Jan. Term, 1874.

VOYAGE ON LAYS—RIGHTS OF CREW—PAYMENT TO ASSIGNEE OF SHARE.

1. The sharesmen in a cod-fishing voyage are not to suffer loss by the bad debts contracted by the owner in the sale of the fish. The account is to be made up as cash.

2. Where the sharesmen gave an order upon the owners to pay their shares to A., and A. ordered payment to be made to B., which was done, and B. afterwards failed, *held*, the payment discharged the owners, though the order was not negotiable.

Libel for wages on a cod-fishing voyage from Marblehead to the Grand Banks, and elsewhere, during the season of 1872. The libellants [Coleman Crowell and others] were two of the four "sharesmen," the defendant [George Knight] was the owner of the vessel. The contract was that the sharesmen were to have five-eighths of the fish which should be caught, after deducting the general supplies and other supplies according to the custom and usage of the port of Marblehead; and the owner to have the right to sell all the fish and oil whenever he should think proper. Seven of the seamen shipped for specific wages in money. The

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

usage was admitted to be, to deduct from the gross proceeds of the voyage the great general charges; then from the balance to take the three-eighths belonging to the vessel; and from that balance the small general charges, including the wages of such seamen as were shipped for wages; and to divide the remainder among the sharesmen. The account rendered by the defendant, and not disputed, made the gross sum originally due each of the sharesmen $380.77, from which deductions were claimed for advances, which were admitted. A further sum of $105.93 was claimed for losses by the failure of a merchant who had bought part of the fish on thirty days' credit, he being then in good standing in the trade. The other question was whether the balance admitted by the defendant to be due had been duly paid. The plaintiffs, having gone on another voyage, sent orders in writing to the defendant to pay their shares to Captain David Morrissey, who was then on his way to Marblehead. The accounts not being ready, Morrissey gave a written order to pay the money to L. A. Surette, which was done, excepting the amount claimed to be deducted for the bad debt. Surette afterwards failed, and was in bankruptcy.

C. G. Thomas, for libellants.
H. W. Paine, for respondents.

LOWELL, District Judge. It has been repeatedly decided in the whaling business that the owners are to pay the lays or shares of the seamen according to the cash value of the oil and bone at the time of its arrival, and that the seamen have no concern with sales for credit, and are not chargeable with any losses that may be sustained by such sales. Some of these decisions have been reported. See Hazard v. Howland [Case No. 6,280]; Bourne v. Smith [Id. 1,701]. The reasons are, that the shares are wages; that the seamen have no ownership in the oil or other catchings, and no right to interfere in its sales; and that they ought not to be expected to assume, and have not assumed by their contract, the delays or risks of the mercantile part of the adventure.

The sharesmen in a fishing voyage do in some respects make a contract more resembling a joint mercantile adventure than those which are usual in whaling voyages; but in the essential matters which govern this case the difference does not seem to be material. They are seamen whose shares are substantially wages, and they are seamen who are to be cured of illness contracted in the course of their duty at the ship's expense. Knight v. Parsons [Id. 7,886]. They have a lien on the vessel, and in some circumstances on the fish; but it is not the lien of partners. They have no voice in the disposal of the catch in any respect; but are creditors of the owners, not bound to go into a court of equity for an adjustment of accounts.

A custom or usage of the port of Marblehead is pleaded, that sharesmen are to receive only their proportion of what may be realized from the sales of the fish and oil. The evidence to support the usage cannot be said to reach the precise point of this case, because the only losses by bad debts that any witness can recall occurred in this very year, 1872, and arose out of the failure of the same house to whom these fish were sold. Indeed, the impression left on my mind by the whole evidence was that the sales of fish had almost always been for cash, or else that there had been no failures in the business, so that no usage could have arisen on the subject. No one could recollect that any seamen had lost any thing by bad debts for a very great number of years; and if the course of business would have suggested any thing in particular to the mind of a person shipping on such voyage, it would be that the pay, at all events, was sure.

The other point is whether the payment to Surette discharges the defendant. There was nothing in the circumstances of the transaction, or in the usual course of business in such cases, that tended to prove either an express or an implied license by the plaintiffs to Morrissey to employ a subagent or substitute. It is therefore probable that Morrissey himself is bound to make good the loss by Surette's failure. But this consideration does not seem to me to be decisive of the question as between the parties here. An order to pay the money to Morrissey appears to import that the defendants may pay it to him in any way he may direct. For instance, if he wrote to them to deposit the money in a certain bank, or to send it to him by mail, it does not seem to me that they would be justified in inquiring whether Morrissey had a right, as between himself and his principals, to use those methods of collecting the money. If Morrissey had forwarded his receipt for the money, and ordered the defendants to make payment to Surette, it would be in accordance with the usual mode of doing business, that they should pay upon his order. And this is substantially what occurred. Any other rule would make the propriety of the payment depend on the form of the receipt, which is hardly in accordance with good sense. Indeed, by ordering them to pay Surette, Morrissey undertook to give the defendants a proper receipt whenever they should demand it. I cannot think that in such a matter as this any rule about the due execution of powers ought to govern the decision, but that I must hold the payment to be a good discharge pro tanto. The facts stated in the answer were admitted to be true, but there is a clerical mistake apparent in dividing the shares; one quarter of $1,547.08 is $386.77, and not $380.77.

From the figures given in the answer, I find myself unable to state the account to my own satisfaction. It should be made up

without charging to the libellants their share ($105.93 each) of the bad debts, but charging them with the actual payments to Surette. And they should have interest on the amounts due them for twenty months, i. e., from date of libel, say 10 per cent in all. I thought I had worked this out to give each about $100; but I cannot be sure that I understand the figures of the answer.

Interlocutory decree for libellants.

CROWELL v. ONE HUNDRED AND NINETY-FOUR SHAWLS. See Case No. 10,521.

Case No. 3,446.

CROWELL v. PARMENTER et al.

[3 Ban. & A. 480;[1] 18 O. G. 360.]

Circuit Court, D. Massachusetts. Sept. Term, 1878.

INFRINGEMENT BY LICENSEE—INJUNCTION.

1. Where the complainant licensed the defendant, and, as a part of the contract, agreed that he would sell no licenses for less than a certain price, and the defendant having failed to pay his royalties, the complainant filed his bill for infringement, and moved for a preliminary injunction, upon which motion, it was shown that the complainant had granted licenses for a less consideration and in such a way as to injure the defendant: *Held*, that the injunction should be refused.

2. Under such circumstances, a court of equity will not grant an injunction to the complainant in advance of the trial or hearing at which the accounts and damages may be properly adjusted between the parties.

[In equity. Bill by Elisha Crowell to restrain Henry A. Parmenter from infringing letters patent No. 90,334, granted to John Atwood, May 25, 1869, for an improved process of curing and putting up fish. The complainant moves in this and in nine other cases, the titles of which appear in the opinion herein, for a preliminary injunction.]

John R. Bennett, for complainant.

Charles Levi Woodbury and Charles P. Thompson, for defendants.

LOWELL, District Judge. The motions in this case, and several others (No. 944a, v. George G. Tarr; No. 945, v. George W. Adams; No. 945a, v. Sylvanus Smith; No. 946, v. Charles H. Pew; No. 946a, v. James G. Tarr; No. 947, v. J. J. Stanwood; No. 947a, v. James L. Shute; No. 948, v. Charles C. Cressey, and No. 948a, v. Samuel Lane), are founded on the same patent for curing and putting up fish which is relied on in Crowell v. Harlow [Case No. 3,444]. In the cases now under consideration, the several defendants had, as tenants in common, an exclusive license or grant, which, as they contend, gives them full power to use the invention to the end of the term. They admit a failure to pay the royalties agreed on, but contend that the license is not conditional, and that no right of resuming his grant has been reserved to the plaintiff, but that he must bring his action at law for the royalties, or his suit in equity for an account of those royalties, from time to time as he may be injured; a different and less stringent remedy than that which is sought by this bill.

I shall not discuss this issue at the present time. I shall assume that, under the frame of the bill, the plaintiff can have some remedy in this court as well as in a court of law. The reason why I refuse this preliminary and peremptory injunction moved for is, that by the contract between the parties, and as a part of it, in consideration of the agreements on the part of the defendants, the plaintiff agreed that he would sell no licenses for less than a certain price, and there are numerous affidavits which declare that he has sold such licenses for a very much smaller consideration, and in a way which seemed intended to deceive the defendants, and which would seem calculated to injure them in their exclusive rights. These affidavits are wholly uncontradicted, and must be taken at this hearing to be true. Under these circumstances, a court of equity cannot lend its most stringent remedy to the plaintiff in advance of the trial or hearing, at which the accounts and damages may be properly adjusted between the parties. Motion denied.

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

CROWELL (POTTER v.). See Case No. 11,-323.

CROWELL, The STEPHEN. See Case No. 13,362.

Case No. 3,447.

CROWELL v. UNITED STATES.

[21 Law Rep. 466.]

Circuit Court, D. Massachusetts. May Term, 1856.

FISHING BOUNTY — CONTRACT BETWEEN MASTER AND CREW—UNAUTHORIZED PAYMENT.

1. No fishing vessel is entitled to bounty unless the contract actually made between skipper and fishermen be such as by statute is made a condition precedent thereto.

2. Where, in addition to the usual written agreement to go on shares, the skipper made a private verbal bargain with the crew, to purchase their shares at a fixed price, it was *held* that this destroyed the right to bounty by leaving an important part of the contract in parol. It seems that such a contract in writing would not be a compliance with the requirements of the law.

3. A payment of bounty by a collector without the production of such a shipping paper as is required by law, although such paper exists, is a payment without authority, and may be recovered back.

[Error to the district court of the United States for the district of Massachusetts.

[Action at law brought by the United

States against David Crowell to recover back moneys received by defendant as fishing bounty. There was a judgment for plaintiff, and defendant brings error.]

T. K. Lothrop, for plaintiff.
Mr. Hallett, Dist. Atty., contra.

CURTIS, Circuit Justice. This is a writ of error to the district court in an action of assumpsit for money had and received, brought by the United States to recover from the defendant money alleged to have been wrongfully received by him from the collector of the customs for the port of Salem, as and for fishing bounty. A bill of exceptions was taken by the defendant to certain rulings of the court at the trial, and, a verdict having been found for the plaintiff, the defendant has brought the record here by a writ of error. The first error assigned is, that the judge refused to instruct the jury, on the prayer of the defendant to that effect, that the written agreement signed by the fishermen, to go on shares, was not avoided by a private verbal bargain with the master for the sale and purchase by him of the shares at a fixed rate per thousand fish, as neither the vessel nor the owners were bound by such a bargain, and it did not impair the right of the vessel to bounty. The eighth section of the act of congress of July 29, 1813 (3 Stat. 52), is as follows: "That no ship or vessel of twenty tons or upwards, employed as aforesaid, shall be entitled to the allowance granted by this act, unless the skipper or master thereof shall, before he proceeds on any fishing voyage, make an agreement in writing or in print, with every fisherman employed therein, according to the provisions of the act entitled 'An act for the government of persons in certain fisheries.'" The first section of that act (3 Stat. 2), requires the written or printed agreement to express, "that the fish or the proceeds of such fishing voyage or voyages, which may appertain to the fishermen, shall be divided among them in proportion to the quantities or number of said fish which they may respectively have caught; which agreement shall be endorsed or countersigned by the owner of such fishing vessel or his agent."

The instruction prayed for assumes that the real and true agreement made by the master with the fishermen was not wholly in writing or print; that in one material particular the actual agreement rested in parol, —that particular being that the fishermen were not to have their shares of the fish specifically delivered to them as their own property, nor were they to have their part of the actual proceeds of the voyage divided among them, but, in lieu of the latter, they were to have an agreed sum for each fish to which they would have been entitled if their shares of the fish had been specifically delivered to them. In other words, the fishermen's part of the proceeds of the voyage was not to be paid as the written or printed contract provided; but, in lieu thereof, they were to receive an agreed sum for each of their fish.

It has been argued that there is nothing in such an agreement inconsistent with the policy of the law, and that it is beneficial to the men, and is a lawful substitute for the fish, or the proceeds of the voyage. If this were conceded, it would not advance the argument; for it would still remain true that the agreement made was not in writing or print, signed by the master, and countersigned by the owner or agent of the vessel, and therefore, upon the express words of the law, there can be no title to bounty. And whatever may be said of the want of authority of the master, as between him and the owners, to make such a contract, cannot affect this case; for the sole question here is, whether the master did make such a contract, in writing or print, with the fishermen, as the law makes a condition precedent to the right to bounty. If he did not, it is immaterial whether he acted with or without authority from the owners. The title to bounty depends on his performance of this requirement; and whether he did right or wrong towards his owners in failing to perform it, is of no importance. Nor can I assent to the position that if this actual contract had all been expressed in writing, or in print, it would have been a compliance with the requirements of the law.

In the most favorable view which can be taken of it, it substitutes a mode of ascertaining the value of the fishermen's lays, materially different from that pointed out by the act of congress, and different from that in which the value of the owners' shares are ascertained,—and that is by actual sales in the market. I cannot admit that fishermen would be in as favorable a position, when bargaining with the skipper for the value of their fish before the commencement of the voyage, as they would be if they had the benefit of the skill and knowledge of business of the owners or the agent in selling the fish in the market; and if such contracts were allowed, the fishermen would, universally, I fear, be deprived of this advantage. But I do not pause to examine this more fully, because it is enough to say that such a contract is not within the provisions of the act of congress, and consequently bounty cannot be claimed when it is made.

The next exception raises the question whether the mere nonproduction of a shipping paper to the collector, before he paid the bounty, assuming that a lawful paper existed, would enable the United States to recover back the money paid. It is argued that the title to the bounty depends on the existence of certain facts, and not upon the kind or amount of proof of those facts produced before the collector. But it must be remembered that when an officer of the United States pays the public money to an

individual, he confers no title to that money, unless he paid it in the lawful exercise of his official power. If he exceeded that power, the money may be recovered back. And he does exceed it if the law has absolutely required a particular document to be produced before him as evidence of title, and he dispenses with the production of that document. A payment made by the collector without the production of such a shipping paper as is required by law is a payment without authority, confers no title to the money of the United States, and it may be recovered back. The defendant's counsel prayed the court to instruct the jury that this ground of recovery was not open to the plaintiff, because not specified in the bill of particulars. I am inclined to think it is sufficiently specified there, for payment by mistake is one of the grounds of claim there mentioned; but, however this may be, after the evidence in support of this ground had all been introduced without objection, it was too late to ask the judge to rule that this ground of recovery was not in the particulars of the demand. Besides, it was purely a matter of discretion in the court below, how far the court would require the plaintiff to give notice of the ground on which he intended to rest his claim; and a ruling in reference thereto is not the subject of a bill of exceptions.

Judgment affirmed, with six per cent. damages and costs.

CROWLEY, In re. See Case No. 11,644.

Case No. 3,448.

CROWLEY et al. v. MAXWELL.

[3 Blatchf. 383.][1]

Circuit Court, S. D. New York. Nov. 30, 1855.

CUSTOMS DUTIES—UNDERVALUATION—PENALTY.

1. Where on an entry of goods, the importer offered to write up the entry, by adding thereto a sum which would make it equal to what the custom-house considered to be the market value of the goods at the time of exportation, and the collector refused to permit such addition to be made, because the importer and owner was the manufacturer of the goods, and was not authorized by section 8 of the act of July 30, 1846 (9 Stat. 43), to add to his invoice, and imposed a penal duty on the goods, on appraisement for their undervaluation: *Held*, that the collector, having refused to allow the importer to add, on his entry, to the invoice prices, because he was the manufacturer of the goods, could not then impose a penal duty on the goods, as having been purchased in the foreign market.

2. The act of August 30, 1842 (5 Stat. 548), does not subject a manufacturer to penal duties for undervaluation, and the act of July 30, 1846 (9 Stat. 42), has the same restriction.

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

This was an action [by William Crowley] against [Hugh Maxwell] the collector of the port of New York, to recover back an excess of duties and a penalty. The jury found a verdict for the plaintiffs, subject to the opinion of the court on a case.

John S. McCulloh, for plaintiffs.
J. Prescott Hall, for defendant.

Before NELSON, Circuit Justice, and BETTS, District Judge.

BETTS, District Judge. This suit relates to an importation of needles. On the entry at the custom-house, the importers offered to write up their entry, by adding thereto a sum which would make it equal to what the custom-house considered to be the market value of the articles at the period of exportation. It appears in writing, on the entry, that the collector refused permission to the plaintiffs to make the proposed addition, because the importers and owners were the manufacturers of the goods, and were not authorized by the 8th section of the act of July 30, 1846 (9 Stat. 43), to add to their invoice. The goods were subjected to appraisement and reappraisement, the returns to which stated severally advances above the invoice valuation, of 38 and 29 per cent.

The statement of the case embraces a multiplicity of allegations against the regularity and authority of the custom-house officers and the merchant appraisers, in their proceedings on this entry, which we do not discuss, because, in our judgment, the collector, having refused to allow the plaintiffs to add, on their entry, to the invoice prices, because they were the manufacturers of the goods, could not then proceed and impose penal duties upon the goods, as having been purchased in the foreign market.

The act of August 30, 1842 (5 Stat. 548), does not subject a manufacturer to these additional or penal duties, and the act of July 30, 1846 (9 Stat. 42), has the same restriction. The official note on the entry, made by the collector, proves his knowledge of the fact that the importers and owners were the manufacturers, and the protest, written under it, is, with these facts in view, sufficiently distinct and precise to secure to the plaintiffs the advantage of the objection.

The valuation by the appraisement of the merchant appraisers, must be accepted as the dutiable value, the protest not possessing the qualities of precision and distinctness which would entitle the plaintiffs to call the validity of the appraisement in question. It is not stated in the protest that the appraisal was of the time of exportation.

We order judgment for the plaintiffs for the amount of the penal duty exacted, and interest thereon.

Case No. 3,449.

CROWLEY et al. v. MAXWELL.

[3 Blatchf. 401.][1]

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

CUSTOMS DUTIES—APPRAISEMENT—PROTEST.

1. Where a protest against the payment of duties, and of a penalty for undervaluation, after appraisement and re-appraisement, on an invoice of needles, only claimed that the invoice stated the fair value of the needles when procured abroad, and neither the protest, nor the invoice, nor the entry, stated when the needles were procured, or that they had been purchased, and the appraisements were based on the value of the needles when shipped, and exceeded the invoice value: *Held*, that although the needles were procured by purchase some time before they were shipped, and the price paid for them was the value stated in the invoice, and was their fair market value abroad at the time of their purchase, yet, under the protest, the importer could not claim that the needles were procured at any other period than the date of their shipment, and the appraisements were regular.

2. Under the 16th section of the act of August 30, 1842 (5 Stat. 563), a collector is justified in taking the time of the shipment from abroad of goods as the time of their purchase, unless he is notified, by the entry, or invoice, or protest, or in some other way, that some other time was the time of their purchase, and should be taken as the time for their appraisal.

3. The cases of Pierson v. Maxwell [Case No. 11,159]; Cornett v. Lawrence [Id. 3,241]; Focke v. Lawrence [Id. 4,894]; and Thomson v. Maxwell [Id. 13,983],—cited and approved.

4. A protest which merely claims that an appraisement was illegal, but does not state in what the illegality consisted, is insufficient, under the act of February 26, 1845 (5 Stat. 727).

This was an action [by William Crowley and others] against [Hugh Maxwell] the collector of the port of New York, to recover back an excess of duties, and a penalty for undervaluation, paid by the plaintiffs on a quantity of needles imported by them from England in January, 1851.

John S. McCulloh, for plaintiffs.

J. Prescott Hall, for defendant.

INGERSOLL, District Judge. The needles in question in this case were purchased by the plaintiffs in England at various times, between two and three months before they were shipped. Upon their arrival at New York, they were, by order of the collector, appraised by the appraisers, who valued them at a sum much greater than that stated in the entry. They valued them as of the time when they were shipped from Liverpool. The plaintiffs, being dissatisfied with this appraisal, demanded a re-appraisal, which was accordingly had, and the re-appraisers valued them at a sum a little less than the sum fixed by the first appraisers, but exceeding, by more than 10 per cent., the value set down in the entry. The last appraisal was also based upon the value of the goods when shipped from Liverpool. The duties were collected upon the last appraisal, and an additional duty of 20 per cent., for the undervaluation, was also imposed and collected. The value set down in the invoice and entry was the price paid for the needles at the time they were purchased. But there is no evidence to show that the price at the time of the purchase was different from what it was at the time of the shipment from Liverpool. The invoice of the needles, which was dated on the 9th of January, 1851, and exhibited at the custom-house, did not show that they had been purchased, or how they had been procured. The entry did not show this. And there was no document exhibited at the custom-house to show when they had been purchased.

Upon paying the duties demanded, the plaintiffs, in a letter addressed to the defendant, used the following language: "In making this payment, we reiterate our protest against the same, and against the illegal and oppressive appraisement which has been made, averring that our invoice states the fair value of the needles when procured in England, and we notify you that we shall hold you and the government responsible in damages for this exaction of excess of duties." After the two appraisements had been completed, the plaintiffs notified the defendant, by letter, under date of February 8th, 1851, that the needles were entered by them at the cost of about £271 2s. 1d.; and they tendered to the defendant $264, which they claimed was the whole duty, with legal interest, actually due, according to the fair value of the goods when procured by them in England, and at which fair value they claimed to have entered them, and also the sum of $370 for increased duty, and notified the defendant that they should resort to all proper means to recover back the monies tendered exceeding the duties on the valuation at which the goods were entered. Upon the payment of the duties, on the 10th of February, 1851, they again protested, and notified the defendant that the invoice stated the fair value of the needles when procured in England, and protested that the two appraisements were illegal, but did not state in what particular they claimed them to be illegal, except that the invoice stated the fair value of the needles at the time they were procured in England. Neither of the protests, nor the invoice, nor the entry states when the goods were procured in England—whether they were procured at the time they were shipped, or at some previous time.

The proof offered on the trial was, that the needles were obtained by the plaintiffs in England, where they were manufactured, by purchase, two or three months before they were shipped; that the price which they paid for the same was the fair market value of the same in the chief markets in England, at the time the purchase was made; and that that price was the value as carried out and stated in the invoice. As has been

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

already said, the two appraisements made by the appraisers were based upon their value at the time they were shipped. The 16th section of the act of August 30, 1842 (5 Stat. 563), and which was in force when the duties in question were imposed, provides, that it shall be the duty of the collector to cause the actual market value or wholesale price of goods, when purchased in a foreign country and imported into the United States, at the time when purchased, in the principal markets of the country from which the same shall have been imported into the United States, to be appraised and ascertained. There was no appraisement under the direction of the collector, of the value of the needles at the time when they were actually purchased. Indeed he had no document to show when they were purchased. Such appraisements as were made, were of their value at the time they were shipped. The price carried out in the invoice was the market value at the time they were purchased. Under these circumstances, if the collector had, before the imposition of the duties, been duly notified of the time of purchase, the plaintiffs would have been entitled to their goods upon the payment of duties based upon their value as set down in the invoice. Maxwell v. Griswold, 10 How. [51 U. S.] 242. And they would have a right, under such circumstances, to recover back the excess of duty and the penalty imposed and paid, provided they had made a proper protest. Id.

But it is claimed by the defendant, that the protest which the plaintiffs made was insufficient, on the ground that it did not state how and in what particular the appraisements made under the direction of the collector were illegal, nor when the needles were purchased; that, from any thing that appears in the protest, they might have been procured at the time they were shipped; and that, if they were procured at that time, the appraisements were legal.

The question presented by this claim of the defendant has, within a few years past, been frequently before this court. In the case of Pierson v. Maxwell [Case No. 11,159] the protests were "against the payment of duty on (the increased valuation specified) added to the entry value by the appraisers, because the original entry was the actual cost and full value at the time of purchase." The court, in giving its opinion in that case, says: "The protests designate no time of purchase different from that indicated by the invoices." "The plaintiffs cannot, under the protests, set up a different and long antecedent period of purchase; nor can they impugn the appraisement, by giving proof of any irregular acts of the appraisers or other officers in making it. Those particulars should have been distinctly and specifically pointed out to the collector by the protests, in order to enable him to rectify any thing erroneous in the manner of determining the value of the goods, or in the selection of the period at which that value was to be determined." In the case of Cornett v. Lawrence [Id. 3,241], the court, in speaking of what it is necessary for plaintiffs to set forth in their protest, in order to make it available, says that they must "set forth the specific objections, and refer him" (the collector) "distinctly to the facts on which their objections rest, in order to be enabled afterwards to avail themselves of them, in an action against him." In the case of Focke v. Lawrence [Id. 4,894], the court, in giving its opinion, says: "If they" (the plaintiffs) "supposed that the officers of the customs had committed any irregularity in ascertaining the dutiable value of the iron, or if they desired more formal action on the part of the collector, the protests should have called his attention to the particular omission or irregularity complained of." And again: "The collector is not personally subject to an action, unless he exacts them" (the excessive duties) "against the protest of the importer, 'setting forth distinctly and specifically the grounds of objection to the payment thereof.' This is demanded by the statute, and is a wise safeguard to a public functionary who exercises a very delicate and difficult trust, while it, at the same time, affords every reasonable protection to the rights of the importer." "The protests give no intimation to the collector that the purchases were at a time different from the dates of the invoices, or that the market prices at the periods of purchase were different from what they were at the times of the shipments or at the dates of the invoices." To the same effect are other decisions. Thompson v. Maxwell [Id. 13,983].

Testing the protest made by the plaintiffs by the rules of law laid down in the above cited cases, there is no difficulty in determining its insufficiency The subject-matters of complaint which the plaintiffs have against the defendant are—First, that he, as collector, caused an appraisement of their needles to be made, fixing their value at the time of their shipment at Liverpool, instead of at the time they were purchased, between two and three months before the shipment; and, second, that the appraisers and re-appraisers conducted irregularly and illegally, in other respects, in the performance of their duty.

As to the first cause of complaint, the protest designates no time of purchase different from that indicated by the invoice, which bears date the 9th of January, 1851, the day when the needles were shipped. The plaintiffs cannot, under this protest, set up a different and long antecedent period of purchase. If the plaintiffs intended, at the time the protest was made, to set up any such irregularity as this in the appraisement, they should have particularly pointed it out, so that the irregularity could be corrected by the collector. As has been shown, neither the invoice nor the entry, nor any document

in the custom-house, gave notice to the collector, before the appraisement was made, when the purchase was made. He could only judge of the time when the needles were procured, by the date of the invoice, which purported to be the time they were shipped. In the case of Focke v. Lawrence, before cited, where the purchase was in point of fact some time before the shipment, and where, as in this case, neither the invoice nor the entry showed the time when the purchase was made, the court says, that, "by the entries and the invoices, the collector was justified in taking the place and times of shipment, as those of the purchases of the goods in question." The duty imposed upon the collector, by the 16th section of the act of August 30th, 1842, to cause the actual market value or wholesale price of goods, when purchased in a foreign country and imported into the United States, at the time when purchased, in the principal markets of the country from which the same shall be imported into the United States, to be appraised and ascertained, presupposes that the collector shall have knowledge of the time when they were purchased. And, if he has no such knowledge, he is justified in taking the place and the time of shipment, as the place and time when the purchase was made. It is impossible for him to take any other time, unless such other time is made known to him. And no other time was made known to him, either by the invoice, the entry, the protest, or any other document in the custom-house. If any other time was the time of purchase, and the importer wished that such other time should be taken as the time for the appraisal, then it was the duty of the importer to give the proper information to the collector, of such other time, as the true time of the purchase. If an importer does not give such information, and suffers in consequence of such neglect of duty on his part, he cannot, in an action against an official who has conducted honestly in the performance of a delicate and responsible duty, and who may have been led into an error (if error it can be called) by the neglect of duty on the part of the importer, be permitted to take advantage of such neglect of duty and make such official suffer by it.

The other ground of complaint on the part of the plaintiffs is, that the appraisers and the re-appraisers, even if they took the proper time for making the appraisement, conducted, in other respects, irregularly and illegally, in the performance of their duty. But the protest does not state in what the irregularity and illegality now complained of consisted. They cannot impugn the appraisement, by giving proof of any irregular acts of the appraisers or other officers in making it, unless they have specifically pointed out to the collector, in their protest, the irregularity complained of. If it had been pointed out, the collector would have had an opportunity to correct it. He could not determine, from the protest, that the irregularity now complained of existed. If it did exist and was an irregularity, it is to be presumed that he would have had it corrected, if he had had notice of it. The act of February 26, 1845 (5 Stat. 727), commonly called the "Protest Act," is express, that the protest shall and must point out, distinctly and specifically, the grounds of objection to the payment of the duties demanded. This protest does not comply with the statute. Judgment for defendant.

CROWLEY (REED v.). See Case No. 11,644.

CROWLEY (WALTON v.). See Case No. 17,-133.

Case No. 3,450.

The CROWN.

CURRY et al. v. The CROWN.

[5 Adm. Rec. 675-681.]

District Court, S. D. Florida. March 16, 1857.

SALVAGE COMPENSATION.

[1. Fifteen vessels, aggregating 1,161 tons and carrying 152 men, worked, so far as boisterous weather permitted, for 13 days, and until the stranded vessel broke up, and succeeded in saving cargo of the net value of about $123,000. *Held*, that the salvors were entitled to 19 per cent. of such value as compensation.]

[2. A salvor is entitled to no more than a fair compensation for his work and labor. Any allowance beyond that is a premium or gratuity given by the court on grounds of public policy, but which the salvor has no right to exact.]

[3. The fact that a large number of vessels and persons are employed in a salvage service is no reason that a greater amount of salvage should be allowed therefor than would be allowed to a less number sufficiently performing the same service.]

[4. The acts of the captain of a steamer in signaling one of the rescuing vessels, and informing those on board of the wreck, though occupying but a few minutes, should be considered, from motives of public policy, a salvage service, for which, under the circumstances, he should be allowed $50.]

[In admiralty. Libel by Richard Curry and others against the cargo and materials of the British ship Crown for salvage service. Also, petition of Rollins, master of the steamer Isabel, to share in the salvage.]

Wm. R. Hackley and Winner Bethel, for libellants.

S. J. Douglas, for respondent.

MARVIN, District Judge. This ship, laden with a cargo of cotton and grain, bound from New Orleans to Liverpool, on the 19th of January last, ran ashore on Ajax reef, one hundred and twenty miles from this port; and soon after filled with water. On the 21st, the steamer Isabel, on her way from Charleston to Havana, arrived, and her commander attempted to jerk the ship off, but without success. On the 22d, the schooner Relampago arrived. At this time the

ship lay in 12 and 13 feet of water, she drawing 17 feet. She was evidently bilged. The master employed the Relampago to assist in saving the cargo and materials. Other vessels soon after arrived, and in a day or two there were, in all, fifteen vessels, possessing an aggregate tonnage of 1,161 tons, and carrying, in all, 152 men, employed in saving the materials and cargo. The ship lay upon an exposed reef and the weather was, at times, too boisterous to permit the salvors to work at the wreck, and although they appear to have been diligent, and to have lost no time when they could work, yet, before they had fully discharged the ship, she broke up and went to pieces, causing the total loss of the grain and about 300 bales of cotton. They were employed in rendering the service 13 days, several of the vessels making two trips. The schooner Florida, worth about $8,000, while receiving cotton, from the ship, took fire, by the accidental upsetting of a lamp, and was totally consumed, with 250 bales of cotton. The total cargo saved is 2,916 bales, 851 of which were wet and damaged. The gross value saved, as ascertained in part by sales and in part by estimation, may be put down at $131,000, and the expenses of wharfage, storage, labor in landing and storing, reshipping, and the costs and expenses of this suit, may be estimated at about $8,000, leaving the net value about $123,000.

The only question in the case is the amount of salvage to be allowed, and before deciding it I will refer to a few cases decided, in other courts, both in this country and Great Britain; not that the cases I shall refer to are precisely like the one before me, but they involve similar and analogous principles, and throw some light upon the present question. I shall cite no case of derelict, for this class of cases is governed by principles analogous, but different somewhat from the principles involved in cases like the present. The Emulaus, laden with mahogany, logwood, coffee, and hides, struck on a reef, in Vineyard sound, Massachusetts, and filled with water. Fourteen persons from the shore were employed by the master in getting the coffee, hides, and provisions on shore, and in getting out anchors. The next day, in a snow storm, the vessel was hove off by the master and his assistants, and anchored. During the next night she capsized. The next day the captain employed the pilot boat Superior and the sloop Hero to tow the Emulaus to Edgartown, a distance of from 20 to 25 miles. After they had towed her a considerable distance, she was carried back by the current. In the course of the towing she struck upon a shoal and righted. With a good deal of exertion and risk, during that day, they got her to Edgartown. The season of the year was unfavorable, but the weather was not boisterous. Value $5,722; salvage $850, of which $100 was given to the 14 shoremen. [Case No. 4,480.] The Elvira, laden with live oak, had encountered heavy weather, had been knocked down, lost both her masts, and blown off the coast. Under jury masts, she approached the Capes of Delaware, and was towed to Philadelphia in three days by a pilot boat. Value $2,700; salvage $300. [Case No. 6,015.] The Wm. Penn was ashore on an outside breaker off Charleston bar, in great peril. The steamer Gordon attempted to haul her off, but failed. Afterwards the steamer Jasper went out to her, in a stormy night, approached the ship at much peril, and hauled her off and brought her to Charleston. Justice Wayne, approving the principles established in 1 Hagg. 246, that salvage services rendered by steamers ought to be encouraged by larger rewards, on account of their great skill and power, gave for salvage $3,450 on a value of $23,000. [Case No. 1,965.] The Versailles, bound into Boston, struck a ledge of rocks in the night and was forced over and came to anchor. The wind was about northeast. The ship lay with both anchors out, her yards braced back with the larboard braces, with rocks about 50 feet off, under her larboard beam, which she was kept off of by her sails. Had the wind changed, she would have been in increased peril. Men from the shore came on board and assisted in pumping. In the afternoon a steamer went to her from Boston, and towed her in, she having nine feet of water in her. When hove out, it appeared that 30 feet of her keel was gone, two floor timbers, four or five naval timbers, and 20 futtock timbers were broken. Her plank upon these timbers were stove in, and the ceiling started inboard. Value $120,000; salvage $3,600. [Case No. 6,365.] The Blenheim, valued at £19,000, with 100 passengers on board, from Belfast to Liverpool, broke her shaft and was in a good deal of trouble. She made signal lights, and the steamer Nimrod, a valuable steamer, from Cork, approached her at 2 o'clock in the morning, lay by her until daylight, took her in tow, and carried her to Liverpool; time six hours. Value £19,000; salvage claimed £8,000, allowed £600. Four boats and 22 men, in a terrible storm, went out to save life in the harbor of Ilfracombe, beset with rocks, where the vessels were drifting against each other. One boat was stove; the men were saved by jumping on board the crashing vessels. The vessel saved valued at £6,000; salvage one-tenth. 1 Hagg. Adm. 83. Thirty salvors assisted the ship Vine, in distress near the Needles, three days and nights, and towed her into Portsmouth. Value £5,500; salvage £400. 2 Hagg. Adm. 1. Five boats and 22 men employed one month in getting off a stranded ship and cargo on —— sand. Ship and cargo valued at £1,000; salvage two-fifths, being £3 2s. a day for each boat, and 13 shillings 8 pence for each man. Id. 189. The Brothers struck upon the same sand, the same night. The ship was lost; the cargo saved by 15 boats and smacks, employed

14 days. Value £9,680; salvage awarded by commissioners confirmed by the court, £3,050, and £175 to a separate boat. Fifteen boats and 67 men. Id. 195. The General Palmer, anchored off Margate in a hurricane, had lost one anchor, and hoisted a signal for another. Two luggers went out to her, six men went aboard, and one lugger returned for an anchor and chain. By the advice of a pilot, the salvors ran the ship on a mud bank, where she lay in safety. The lugger which returned for the anchor being too small, a third one was employed which, at great risk, carried the anchor and chain to the ship. The ship was finally towed into port by a steamer, 50 salvors or lugger men. Value £30,000; salvage £500. Id. 323. The Oscar lost her anchors and unshipped her rudder on Long sand, off Harwick, and hoisted a flag of distress. Two smacks went to her assistance and assisted her five days, and got the ship into harbor. The master stated that they saved the ship by their exertions. Value £2,400; salvage £220. Id. 257. A lugger carrying five men, in a very squally dark night in the month of February, went into Dover for an anchor for the ship; was out all night in bad weather. Value £16,500; salvage £60. 3 Hagg. Adm. 90. The Marquis of Huntly was ashore on the Middle sand off Essex, in thick rainy weather. She hoisted a signal of distress, and eight smacks, valued at £200 each, with twenty-two men on the lookout in the ——, went to her assistance. In boarding, the salvors were in great danger from the surf and breakers. The master of one boat and a boy were washed out;—three boats were sunk, and three men drowned. The salvors threw overboard 40 tons of the cargo, and took all other means to get the ship off, and succeeded. Guns were fired on board the ship, for the smacks to keep near, during the night. The ship was loaded with government stores. Value £6,500; salvage £1,300. Id. 246. The Branken Moor was aground on a lee shore, without anchors, without a rudder, having more than four feet of water in her, and all hands working at the pumps. Several luggers worked at the ship. One went for an anchor, one took off the passengers, and most valuable articles. They got her into harbor. Value £10,500; salvage £2,000. Id. 373. The Salacia was driven on the rocks and thrown on her beam ends, in the Falkland islands, on the 20th of May, in which situation she was found by the ship Washington on the 12th of June. On the 17th and 18th, a survey was held by the masters of the two ships, and the master of the Washington undertook to get her off, and reshipped the cargo, and got her ready for sea on the 7th July, and carried her to Valparaiso, where she was bound. Value £40,000; salvage £2,100. As salvage, £1,000 for the loss of the sealing voyage by the Washington, and £200 to the master of the Washington for personal expenses incurred. 2 Hagg. Adm. 262.

To return to the case immediately under consideration. On the trial, the court was referred to the cases of The Brewster [Case No. 1,852], and The Yucatan [Id. 18,194], as being cases much like the one under consideration. The salvage decreed in both those cases has always been considered by the court as very liberal. The Brewster was much like the present. In that case the services were performed by twelve large vessels, carrying 133 men. The salvage was one-third, or $16,802, excluding $780 to divers. The men's shares were a fraction less than $50. In The Yucatan there were nine large vessels; the salvage was 43 per cent., which gave $15,116; the shares were about $62. In The Yucatan there was quite as much exposure and labor as in the present case. In The Emigrant [unreported], a late case, 19 per cent. upon the net value was allowed, making $13,863. In this case I think a larger salvage was given than ought to have been. The court was pressed for a decision at a time when it had a mass of business on hand, and it did not sufficiently take into consideration the facts that the services were rendered near this port, and that there was no danger of the ship's going to pieces, and that the cargo could not injure much more by any delay in saving it. The same rate of salvage allowed in The Emigrant applied to this case would be, in my judgment, reasonable and just. Nineteen per cent. on $123,000 gives a fraction over $23,000, which sum will be allowed for salvage. It will make the shares about $60. There ought not to be any increase in the general rates of salvages allowed in this court. When you have paid the salvor a fair compensation for his work and labor, you have done all that he has any right to demand. All that is allowed beyond that is a premium—a gratuity given by the courts on grounds of public policy—the promotion of which he has no more right to exact than any other person. That policy is to induce persons, by rewards, to perform salvage services, and, on this coast, to induce persons to engage in the performances of such services as a business; because it is supposed that their employment in this business will promote the interests of commerce. But no interest of commerce is promoted by the employment of more persons than are necessary to save the property that may be accidentally shipwrecked on this coast. And where as many persons are engaged in this business as are necessary for this purpose, it is evidence that the rates of salvage are sufficiently remunerative.

The present number of licensed wreckers on this coast is 33, possessing an aggregate tonnage of 1,733 tons, and carrying about 250 men. This number is undoubtedly sufficient, and probably more than sufficient, to save the property that may be shipwrecked at all ordinary times. And as for extraordinary emergencies, there is no more rea-

son for providing for these than when such emergencies happen upon any other coast. That the present rates of salvage are sufficiently remunerative is further shown by the facts that few persons once engaged in the wrecking business voluntarily leave it, and, whenever they do, their places are very soon supplied by others. Nor could any increase possibly result in any real benefit to the wrecking interest, for such increase would induce more persons to engage in the business, and an increase in the numbers would require a further increase in the rewards, and these, again, would increase the numbers, and so on toties quoties, until, in the end, the whole property might be taken for salvage, and, yet the interests of the persons engaged in the business advanced not one particle. Both the interests of commerce and of the wreckers require that the wreckers should be remunerated by a just, reasonable, and even liberal reward; but the interests of both commerce and the wreckers would be impaired by extravagant rewards; while, at the same time, such extravagance would be an unjustifiable invasion of the rights of property, evincing a disregard of all justice in the court.

It appears from the petition of Captain Rollins, of the steamer Isabel, that on his way down the reef he discovered, at a considerable distance ahead of him, the schooner Relampago, bound to Nassau. He thereupon hoisted his colors as a signal to speak the Relampago, and after the vessels had reached each other, he stopped the steamer and spoke to the master of the Relampago, informing him that the Crown was on shore. He was not heard distinctly by the people on board the schooner on account of the noise made by blowing off steam; otherwise the Relampago would have arrived about 10 hours earlier at the wreck; but as it was, in consequence of this information, the schooner, instead of crossing the Gulf to Nassau, went to the wreck, was the first vessel there, and rendered to the cargo important salvage services. Captain Rollins did not run out of course to give this information, but his acts consisted simply in hoisting his flag, stopping the steamer for a minute, perhaps two, and speaking to the people on board the schooner; and the question is, do these acts constitute a salvage service entitling him to be considered a salvor, with a lien on the cargo for his services? I was at first inclined to think they did not; that they were simply such acts as he was bound by the laws of common charity and humanity to perform without reward. But when I consider that all salvage rewards are given from motives of policy, to encourage the performance of services to the property of others exposed to peril on the sea; and that, whenever such services are rendered, they are rewarded as salvage services, although if similar services should be performed on land, they would not entitle the party by law to compensation, but it would be held that he had done no more than what the obligations of charity and the duties of a common humanity enjoined upon him, I cannot say that these of Captain Rollins are not stricti juris salvage services, they being performed at sea and contributing to save the property. And upon the same principle, I am disposed to think that whenever small boats, which perhaps could do no good at the wreck, go in search of larger vessels, with or without request, or procure, by any efforts of theirs, the assistance of larger vessels, and important salvage services are rendered through their instrumentality, they are entitled to be considered as salvors, and to be compensated according to the merit of their services.

It is therefore ordered and decreed that the principal libellants recover and receive, in full compensation for their services rendered the cargo and materials of the ship Crown, the sum of $23,000, to be divided among them according to their respective interests, and that it be referred to Commissioner Baldwin to make such division; that petitioner Rollins recover and receive $50 for his exclusive use in compensation for his services; and that, upon the payment of the sums and the costs and expenses of this suit, together with the wharfage, storage, labor bills, and other charges, the marshal restore the said cargo to Thomas Carrey, late master of said ship, for and on account of whom it may concern.

CROWNINSHIELD (CHOATE v.). See Case No. 2,691.

CROWNINSHIELD (DELAPLAINE v.). See Case No. 3,756.

CROWNINSHIELD (LE ROY v.). See Case No. 8,269.

Case No. 3,451.

CROWNINSHIELD v. ROBINSON et al.

[1 Mason, 93.][1]

Circuit Court, D. New Hampshire. Oct. Term, 1816.

BREACH OF CONTRACT—DAMAGES.

In an action for damages for negligence in keeping the plaintiff's sheep, founded on the breach of a special contract, the defendant will not be permitted to deduct from the damages the compensation, which he claims for keeping the sheep. Such compensation, if any be due, must be sought in a distinct action.

[Cited in Miller v. Smith, Case No. 9,590.]

Assumpsit upon a special written contract for keeping 100 sheep of the plaintiff [Richard Crowninshield] for one year at a stipulated price. The breach alleged that by reason of the negligence of the defendants [David Robinson and others], &c., the sheep were greatly injured, and some died. The cause was tried upon the general issue, and at the trial the principal controversy was as to the facts.

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

Mr. Mason, of counsel for defendants, however, contended that, if the jury should be satisfied that the plaintiff was entitled to damages, they ought to deduct from such damages the amount which, under a quantum meruit, or by the stipulations of the contract, the defendants would be entitled to recover for the keeping of the sheep, and, if this sum was equal to the damages sustained, they ought to return a verdict for the defendants. He further stated that an action was now pending in the state court by the defendants against the plaintiff, founded on such quantum meruit.

Mr. Sullivan, for plaintiff, on the other hand, contended that the jury were bound to give the full damages, without any reference to any supposed right of the defendants to be asserted under the quantum meruit for the keeping of the sheep.

BY THE COURT. We are fully aware of the opinions which have been entertained in the English courts upon this subject, and of the strong leaning of the later authorities in favor of the doctrine of the defendants' counsel. But, in our judgment, the true rule under the circumstances of this case is, to estimate the full value of the plaintiff's damages, without taking into the account the possible claims of the defendants for the keeping of the sheep. If the defendants are entitled to any thing for the keeping, they may recover it in another form of action, to the extent, to which they can show a performance of their contract, and a benefit derived by the plaintiff. A recovery in this action would be no necessary bar to such a suit; and, therefore, the plaintiff might be doubly charged, if the deduction were now made. Besides; if the defendants were entitled to a meritorious compensation, equal to the injury sustained by the plaintiff, then, upon the ground stated, notwithstanding such injury, the verdict of the jury ought to be, that the defendants are not guilty, which would throw the costs of the suit upon the plaintiff. And, certainly, in that event, a judgment for the defendants in this action would be no bar to an action on a quantum meruit for keeping the sheep; for it never could judicially appear, that the former verdict was given upon this special ground, and not upon the ground, that the plaintiff had sustained no injury. The verdict would affirm nothing, but a general finding in favor of the defendants; and the private grounds upon which the jury proceeded, could never be a fit subject of inquiry, even supposing, what might well be doubted, that they were all agreed on the same grounds.

After a good deal of reflection on the subject, we think it safest, though the point is certainly not free from difficulty, to adhere to the old doctrine, and to confine the later doctrine to such cases only, where it is incontestable, that the parties cannot be prejudiced. It is at most an equitable offset, which ought not to be admitted, when it may work against equity. The case might have admitted of a very different consideration, if the present defendants had brought an action upon the contract for compensation for keeping the sheep; for, to such an action, gross negligence and injury would be a complete defence, since they would establish the fact of a non-performance of the contract, according to the express engagement of the defendants. And even on a quantum meruit, such negligence or injury might, under circumstances, constitute a bar to the action, or be proper evidence to reduce the amount of the compensation.[2]

Verdict for the plaintiff.

CROZIER (UNITED STATES v.). See Case No. 14,896.

Case No. 3,452.

CRUDER v. PENNSYLVANIA INS. CO.

[2 Wash. C. C. 339.] [1]

Circuit Court, D. Pennsylvania. Oct. Term, 1809.

MARINE INSURANCE—DEVIATION—UNSEAWORTHINESS.

1. Although the unseaworthiness of the vessel, occasioned by want of men, at the time the risk commences, may not vacate the policy, provided she is seaworthy when the voyage commences; yet she cannot go out of her course, after the commencement of the voyage, to supply such want.

2. It is not an excuse for a deviation, that there was a sufficient number of hands to navigate the vessel to a port, where the necessary addition to the crew could be obtained for the whole voyage; such port not being in the course of the voyage, and the want of hands existing before the commencement of the voyage insured. The vessel should be fitted for the voyage insured, at the time of her departure.

This case—2 Wash. C. C. 262 [Case No. 3,453]—was tried again in this court, and argued upon the same evidence, much as on the former trial; except that on the part of the defendant, it was contended that it did not appear by any evidence in the cause, that the loss of the mate and men took place after the cargo was taken on board, and consequently while the property was at the risk of the underwriters.

The plaintiff's counsel insisted, that the brig was sufficiently manned at the time she left St. Lucia, to go to St. Bartholomew's,

[2] Upon this point see Baston v. Butter, 7 East, 479; Templer v. M'Lachlan, 5 Bos. & P. 136; Farnsworth v. Garrard, 1 Camp. 38; Fisher v. Samuda, Id. 190; Bilbie v. Lumley, 2 East, 469; Kist v. Atkinson, 2 Camp. 63; Morgan v. Richardson, cited in 3 J. P. Smith (Eng.) 486, and in 1 Camp. 40, note; Denew v. Daverell, 3 Camp. 451; Sheels v. Davies, 4 Camp. 119; Okell v. Smith, 1 Starkie, 107.

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

though not for the whole voyage, which was sufficient; and, besides, that the report in New-York, that she was going to St. Kitt's to get hands, was communicated to the underwriters when the order for insurance was given.

WASHINGTON, Circuit Justice (charging jury). When this case was formerly tried, the court stated to the jury, that if the accident happen while the property was at the risk of the underwriter, and cannot be repaired at the port of her departure, the vessel may go to the nearest port where the damages can be repaired, without prejudice to the insurance; and that, in doing so, the case is the same as if she had repaired at the place of departure. The deviation is as excusable as if the accident had happened during the voyage. To this opinion the court adheres. But, at that time, considering the fact agreed, that the loss of the men, in this case, did occur after the risk commenced, nothing was said by the court, as to the law, in case the want of seaworthiness existed at the time the risk commenced. As to this, it is our opinion, that though the want of seaworthiness at that time may not vacate the policy, provided she is seaworthy at the time the voyage commences, yet the vessel cannot go out of her course to supply such want. As if, at the time the cargo is taken on board, or the risk in other cases commences, the vessel is not sufficiently manned, she may afterwards, and before the voyage commences, supply that want, yet she cannot excuse a deviation for the purpose of procuring hands.

The court cannot yield its assent to two propositions laid down by the plaintiff's counsel: First; that the want of seaworthiness for the voyage forms no objection, if she was seaworthy to the port to which she deviated, and afterwards for the residue of the voyage. The answer is, that the deviation itself, in such case, is without excuse, because she ought to have been fitted for the voyage at the time of her departure, unless prevented by an accident, occurring after the risk commenced. Secondly; that the defendants had notice of the want of hands, before the insurance was made. But the report stated to the underwriters, as prevailing at New-York, that there was a deficiency of hands, was accompanied by the additional circumstance that this want was to be supplied at St. Kitt's, which was not true. The notice, therefore, amounted to nothing, unless in fact she had gone to St. Kitt's. Upon this point, then, the jury must be satisfied that the loss of the men happened after the risk commenced, or otherwise the deviation to St. Bartholomew's cannot be excused. If they are satisfied upon that point, in favour of the plaintiffs, they will then inquire whether, upon the evidence in the cause, St. Bartholomew's was the nearest port at which hands could be procured; and in deciding this point, some allowance ought to be made for the reasonable discretion which the captain, (though the agent of the owner,) is permitted fairly to exercise.

Case No. 3,453.

CRUDER v. PHILADELPHIA INS. CO.

[2 Wash. C. C. 262.][1]

Circuit Court, D. Pennsylvania. Oct. Term, 1808.

MARINE INSURANCE—DEVIATION—UNSEAWORTHINESS.

Insurance on the Jefferson, at and from St. Lucia to New-York, with liberty to touch and trade at St. Kitt's. The vessel, having lost some of her men at St. Lucia, went into St. Bartholomew's to supply the loss, and sustained an injury on her return voyage, she being run foul of by another vessel, the damages from which exceeded fifty per cent. The underwriters claimed to be discharged, on the ground of deviation, and sailing from St. Lucia without being sufficiently manned, which was unseaworthiness. If the accident happen whilst the property is at the risk of the underwriters, and cannot be repaired at the port of departure, the vessel may go to the nearest port for that purpose; and she continues in the same situation as to the insurance, as if she had been repaired at the port of departure. The insured are bound to prove, that it was necessary to proceed to another port, and that the vessel went to the nearest port, at which her wants could be supplied.

Insurance was effected, on the 17th November 1803, on goods on board the Jefferson, at and from St. Lucia to New-York, with liberty to touch and trade at St. Kitt's, declared to be on eighty hogsheads of sugar. The vessel having lost her mate and two mariners at St. Lucia, sailed to St. Bartholomew's, in order to procure a supply of men, on the 12th of October. She arrived there on the 18th, and, the next day, sailed on her voyage for New York. The captain, in his deposition, states, that he went to St. Bartholomew's, as the most likely place to get seamen, and because the port charges were lower there than at any of the English islands; that she could not, without such supply, have proceeded on her voyage to New-York, although, with the assistance of a passenger going to St. Bartholomew's, who worked his passage thither, she was sufficiently manned to go there. Being asked if the same end could not have been answered by going to St. Kitt's, he answered, that he could not determine as to that, as the wind would not have permitted him to fetch St. Kitt's, if he had been so disposed. On the voyage from St. Bartholomew's, she was run foul of by another vessel, and so much injured, that the crew abandoned her, and got on board a vessel then near. Part of the crew went on board the disabled vessel for water, and were by a storm pre-

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

vented from returning. They however brought her safely to New-York, with considerable injury to the cargo, which, with salvage, exceeded fifty per cent. A regular abandonment was made, and refused.

The objections to the recovery, made by Mr. Rawle, for defendants, were—First; that the calling at St. Bartholomew's was a deviation. Second; if not so, then, sailing without being sufficiently manned discharged the underwriters, on the ground of want of seaworthiness. Third; if it should be contended that the voyage began at St. Bartholomew's, then it was a different voyage from the one insured. He cited Park, 229.

Mr. Ingersoll, for plaintiff, insisted that the calling at St. Bartholomew's was from necessity; and that the going there to get a supply of seamen, did not expose the vessel to a charge of want of seaworthiness. He cited Park, 300, 305, 309.

WASHINGTON, Circuit Justice (charging jury). The question is, whether the calling at St. Bartholomew's amounted to a deviation. It is admitted, that if an accident had befallen the vessel on her voyage, the deviation, with a view to repair the loss, would have justified the act; but it is contended, by the counsel for the defendants, that if the accident happen before the inception of the voyage, it exposes the vessel to the objection of want of seaworthiness, if she break ground in that situation. The rule seems to be, that if the accident happen whilst the property is at the risk of the underwriters, and cannot be repaired at the port of her departure, she may, without prejudice to the insurance, go to the nearest port where the damage may be repaired; and that, in doing so, she stands in the same situation as if she had repaired at the place of departure. This principle is laid down in the case of Motteux v. London Assur. Co. [1 Atk. 544], and seems to be perfectly reasonable. If the vessel is injured in port, (being insured at and from that port, as in this case,) and she cannot be repaired there, to say that she should not be at liberty to go to the nearest port where she can be repaired, is to say that the voyage never shall commence; or, if it do, that the underwriters shall be discharged, although the accident happened whilst she was protected by the policy. It is for the benefit of all concerned, that the steps should be taken. But, in all these cases, it should appear fully to the satisfaction of the jury, that the measure was necessary; and this it is incumbent on the plaintiff to show, if he would excuse the deviation. The only witness, as to this part of the subject is, the captain, who states, that he went to St. Bartholomew's because he thought it more likely that he should complete his crew there, and that the port charges were lower. But he does not state, that he could not have got his crew at another port; and as to the port charges, this was no concern of the defendants, and therefore no excuse. Being asked, if he could not as well have got them at St. Kitt's, he answers that it was not in his power to determine the question, because, as the wind was, he could not have gone to St. Kitt's, if he had been so disposed. If he refers to the state of the wind when he left St. Lucia, he might have waited till it was more favourable; if he means, when he was off St. Kitt's, the observation would not apply. But one thing is obvious, that whether he could or could not have got to St. Kitt's, he never, from the moment he broke ground, intended to go there. It is unfortunate that the map offered in evidence by the defendants' counsel in his summing up, (and which, to preserve regularity in trials, we thought it improper to introduce at that stage of the cause,) had not been sooner offered. However, it is not incumbent on the defendants to show that the vessel did not go to the nearest place to get a crew; the plaintiff should satisfy you that St. Bartholomew's was the nearest port at which his wants could be supplied; and unless you can be thus satisfied, you ought to find for the defendants.

The jury could not agree, and the parties consented to withdraw one, and continue the cause.

[NOTE. For the charge to the jury upon the new trial, see the next preceding case, No. 3,452.]

CRUIKSHANK (UNITED STATES v.). See Case No. 14,897.

Case No. 3,454.

CRUM v. ABBOTT et al.

[2 McLean, 233.][1]

Circuit Court, D. Michigan. Oct. Term, 1840.

PROMISSORY NOTE—PARTNERSHIP LIABILITY.

Goods were purchased by one of the defendants, for which a promissory note was given; afterwards he entered into partnership with the other defendant, and by the consent of both partners and the holder of the note, the words, "and company," were added to make the note stand against the firm; *held*, the note was binding on the company.

Mr. Frazer, for plaintiff.
Mr. Abbott, for defendants.

OPINION OF THE COURT. This action is brought on a promissory note, signed by S. M. Layton & Co., and on account; the general issue was pleaded, and, on the trial, it was proved that the note was first signed by S. M. Layton, and that, some time after it was due, the defendants having entered into partnership, and received the goods, for which the note was given, into the firm, the signature of the note was altered, with

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

the consent of all parties, by adding, "and company." An objection was made to receiving the note in evidence, on the ground that the goods were purchased by Layton, in the first instance, and Abbott, though subsequently a partner, could not be held liable for them. In order to subject a person to liability, as a partner, he must have been a partner, or appeared so, at the date or issuing of the bill, or making the contract. Dalman v. Orchard, 2 Car. & P. 104; Saville v. Robertson, 4 Term R. 720.

The first of these cases arose on an acceptance of a bill, by one of a firm which had been dissolved, and the court, very properly, held that it was not binding on the late partners. The second case was an issue directed out of chancery, and it was held, that acts subsequent to the time of delivering goods on a contract may be admitted as evidence to show that the goods were delivered on a partnership account, if it were doubtful at the time of the contract. But if it clearly appear that no partnership existed, at the time of the contract, no subsequent act by any person, who may afterwards become a partner, not even an acknowledgment that he is liable, or his accepting a bill of exchange drawn on them as partners for the very goods, will make him liable for goods sold and delivered, though all the judges held that he would be liable on the bills of exchange. Lord Kenyon said he entertained no doubt, if the action had been on the bills of exchange, which had been accepted by the company, that the plaintiff might have recovered. And of this opinion were the other judges. That case involved the same principle as the one under consideration. When the contract was made for the purchase of the goods the partnership had no existence. It was afterwards formed, and included the property purchased, and, in payment of it, bills of exchange were accepted by the company. When the debt was contracted it was an individual debt, and for which the company formed subsequently were not responsible. A parol assumpsit of the company to pay this debt would not have bound them, as it was, technically, the debt of another; and the parol promise would have been void under the statute of frauds. But by the acceptance of the bills of exchange, by the company, there was a promise in writing, and there was a good consideration to support the promise. And so in the case under consideration. The goods were purchased by Layton, and the debt was his. But afterwards Layton and Abbott formed a partnership, and the same goods became the property of the firm. And with the consent of both partners, and the holder of the note given by Layton for the goods, the words, "and company," were added to make the note good against the firm. This was done after the note was due, but this can constitute no ground of objection. It was an undertaking by the firm to pay the note, and it was founded upon a valuable consideration. The transaction may be unusual, and certainly required explanation, but, when explained, it appears to have been fair and equitable. In the case of Westcott v. Price, Wright, 220, the court held that drafts may be drawn on a firm by name, in anticipation of a partnership, and if accepted, after one is formed, the acceptance binds the partnership.

Upon the whole, if the jury shall find the facts as above stated, they will find for the plaintiff, and a verdict for the plaintiff was accordingly rendered by them.

CRUM (WOODBURY v.). See Case No. 17,-969.

CRUMB (TODD v.). See Case No. 14,073.

Case No. 3,455.

CRUMP v. CHAPMAN.

[1 Hughes, 183; 15 N. B. R. 571; 1 Va. Law J. 309; 24 Pittsb. Leg. J. 169.][1]

District Court, E. D. Virginia. April, 1877.

FRAUDULENT CONVEYANCES — BILL TO SET ASIDE BY ASSIGNEE IN BANKRUPTCY — PLEADING AND PROOF.

1. A bill in equity brought to set aside a sale as fraudulent, under sections 5128 and 5129 of the Revised Statutes of the United States, as amended June 22, 1874 [18 Stat. 180], must charge that the defendant knew that the sale was in fraud of the provisions of the bankruptcy act, and this knowledge must be proved in evidence.

2. Where such an averment and such proof are wanting, the bill will be dismissed.

In equity.

J. M. Gregory and John S. Wise, for complainant.

John Lyon, for defendant.

HUGHES, District Judge. The firm of Hutcheon Brothers were engaged in business in two adjoining tenements on Seventeenth Street, Richmond, Va. In one of them they were conducting a barroom; in the other a family grocery store. The firm consisted of two brothers, Archibald and George Hutcheon. They lived in the upper rooms of the premises, and were unmarried; a maiden sister, until within a short time of the transactions connected with the bankruptcy proceedings in the case of Hutcheon Brothers, keeping house for them. In November, 1876, George Hutcheon suddenly disappeared, having on his person between three and four hundred dollars of the money of the firm; taking no baggage, and making no previous preparation or announcement of his purpose. He has never since been heard of. The probability is that he was waylaid and foully dealt with in this city, as no clue has ever

[1] [Reported for the Virginia Law Journal, reprinted in 1 Hughes, 183, and here republished by permission.]

been found to give the least indication of his fate. The surviving brother, Archibald, was naturally much disconcerted in his business and disturbed in mind by the occurrence. Whether from this cause alone, or this and others combined, this brother and the firm became insolvent. On or about the 23d of December, 1876, Archibald Hutcheon sold the stock in trade, lease, and good-will of the barroom to one James C. Shadbolt. On the 23d of December, 1876, he contracted with Alexander Chapman, the defendant in this cause, to sell him the stock in trade, accounts, lease, and good-will of the grocery store; and on the 25th of December he delivered to Chapman the store and contents. It was agreed between A. Hutcheon and Chapman that Hutcheon should remain as employé in the store on agreed wages for a month or more. There is no doubt that Hutcheon Bros. were insolvent at the time of this sale, and that Archibald Hutcheon had reason to believe that he and his firm were then insolvent, and that the assignments he made on that day were acts of bankruptcy. There is doubt from the evidence whether he made the sale with any design to defraud the bulk of his creditors of their right to equal distribution under the bankruptcy act.

On the 25th and 26th days of December, 1876, attachments were sued out of state court, of Richmond, against the firm as absconding debtors, though Archibald Hutcheon was in the city, at his usual place of business. These were levied, on the 25th of December, upon the contents of the barroom, then in the possession of Shadbolt; and they were levied on the 26th of December, on the contents of the grocery store. The property seized being perishable, the state court ordered its sale before the trial of the attachment suits; and the proceeds to be deposited in bank to the credit of the state court, which was done. At the trial of the attachment suits the plaintiffs were cast; but great damage had been done to Shadbolt and to Chapman by the seizure of the property which had been sold them by A. Hutcheon, and by its hurried sale by the sheriff. On the 25th of January, 1877, a petition was filed in this court by certain creditors of Hutcheon Bros., charging the sales which have been mentioned to have been acts of bankruptcy, and praying that the firm and each member of it might be declared bankrupts. Archibald Hutcheon answered the petition, denying with much feeling all intention of fraud. On the 20th of February, 1877, the firm were adjudicated as bankrupts, on technical grounds; the order of adjudication embodying a clause relieving the firm from the imputation of actual fraud. The assignee in bankruptcy of Hutcheon Bros. now brings this suit on the equity side of this court, charging that the sale to Chapman was made by an insolvent firm, under circumstances, as to Chapman, which constituted reasonable cause for his believing that they were insolvent, charging, therefore, that the sale or assignment was void, and praying the court for a decree declaring it null and void, and for the usual relief granted in such cases.

The evidence which has been taken in this case is quite voluminous, but I do not think it necessary for me to go into a detailed discussion of it. Chapman, the purchaser of the grocery business and stock of goods, seems to be quite a young man, without experience in that kind of business. His countenance strikes me as ingenuous, and his deportment as becoming. He denies with emphasis in his answer and in his depositions having had any knowledge of the insolvency of the firm of Hutcheon Bros. at the time of his purchase of the business, or any knowledge of any intention on the part of Archibald Hutcheon, in making the sale of the grocery business to him, to commit a fraud under the provisions of the law of bankruptcy. All his statements on these heads are consistent, positive, and very earnest. Most of the evidence which has been taken by the complainant goes to the point of proving the insolvency of Hutcheon Bros. I think that the evidence of that fact, which has been taken, is admissible against Chapman. But, of the evidence which was taken tending to prove that Chapman had reasonable cause to believe the insolvency, only such is admissible against him as is brought home to his personal knowledge before and at the time of his purchase, and as consists with the rules of evidence which are usually enforced in courts of justice. The evidence of this sort taken in this cause really admissible against Chapman is exceedingly meagre.

This is a suit in equity in which the plaintiff has put the defendant upon his answer under oath, and in which the averments of that answer, which are responsive to the charges in the bill, must stand as true, until overcome by the testimony of either two credible witnesses or one credible witness and strong corroborating circumstances. Now I do not think the evidence taken for the plaintiff in this cause tending to prove that Chapman had reasonable cause, on the 23d of December, 1876, to believe that the firm of Hutcheon Bros. was insolvent, and that Archibald Hutcheon made the sale to give him a preference and to evade the provisions of the bankruptcy law, is so strong and conclusive as to outweigh the positive, earnest, emphatic, reiterated, sworn denial of the charge, made by Chapman in his answer. This holding of mine, however, does not touch the real point on which the case turns, and it is unnecessary for me to dwell upon this part of the case. It is not worth while to examine critically the evidence on this point, or to weigh it in comparison with the averments and denials of the answer. The

case really turns upon another and quite different question. Nor is this bill to be treated as one brought under the first section of chapter 114 of the Code of Virginia, to set aside a sale as fraudulent in fact, or as a sale to be considered prima facie fraudulent from the fact that the vendor remained in custody of the goods sold. There is nothing in the frame or allegations of the bill to give it such a character. It is, therefore, not competent for me to consider the authorities cited by counsel for the plaintiff, ranging from Twyne's Case, in 2 Coke, 212, down to the Davis v. Turner Case, in 4 Grat. 422,—cases in which the effect of the vendor's retaining possession of the goods, after sale, upon the validity of the sale, is treated.

The bill in this case is founded purely and simply upon sections 5128 and 5129 of the Revised Statutes of the United States, as amended by section 11 of the act of June 22, 1874. Those sections, as amended, require that the person receiving the benefit of an assignment from an insolvent must not only have reasonable cause to believe the vendor to be insolvent, but must "know" that such assignment is made in fraud of the provisions of the bankruptcy law. Under the amendment of June, 1874, a sale which is an act of bankruptcy on the part of the insolvent is not void as to the vendee, unless the vendee "knows" that it is made in fraud of the provisions of the bankruptcy act. Singer v. Sloan [Case No. 12,898]; and [Id. 12,899]; Tinker v. Van Dyke [Id. 14,058]; and in [Van Dyke v. Tinker, Id. 16,849]; and Barnewall v. Jones [Id. 1,027]. Certainly, therefore, since that amendment has been made a part of the law of bankruptcy, has it become necessary in bills of this sort to charge that the person receiving the benefit of a preference or assignment knew that it was made in fraud of the provisions of the bankruptcy acts. Certainly it is necessary for the plaintiff, in his evidence taken in support of such a bill as this, to prove that the defendant knew that the assignment to him was made in fraud of the provisions of the bankruptcy act. Both of these prime essentials are wanting in this cause. The bill does not contain the material averment and charge required by the amending act of June, 1874. Though no advantage of this omission was taken in time by demurrer, no evidence has been brought to prove that this knowledge existed on the part of the defendant, no direct evidence at all, and no circumstantial evidence sufficient to establish the fact. Hutcheon and Chapman being both foreigners, knowing little of our law, it is not probable that either the one or the other of them had any knowledge of the bankruptcy act, or suspicion that their transaction was in fraud of its provisions. It is true that ignorance of the law excuses no one, but yet when a law in express terms makes it necessary that a citizen, in being passive party to an act, shall know that a law is violated in order that the act shall be declared void, the burden of proof is thrown upon the party complainant in a suit brought to set aside such an act to establish the fact of knowledge of the violation. I will sign an order dismissing this bill.

Case No. 3,456.

The CRUSADER.

[1 Ware (437) 448.][1]

District Court, D. Maine. Nov. 14, 1837.

PROOF OF PARTNERSHIP BETWEEN MASTER AND MATE—SEAMAN'S CONTRACT—TERMINATION—DESERTION.

1. The allegation of a partnership between the master and mate of a vessel is not sustained by proof that the mate shipped for a share of the profits unattended by other circumstances, and without proof of what that share was to be.

[Cited in Joy v. Allen, Case No. 7,552; Grant v. Poillon, 20 How. (61 U. S.) 169.]

2. How far the sworn answer of the respondent may be referred to, as in the nature of suppletory proof, or in aid of presumptions raised by other proofs in the cause.

[Cited in Hutson v. Jordan, Case No. 6,959; The Eagle, Id. 4,233; The Australia, Id. 667.]

3. A general coasting and trading voyage in which the vessel is trading at ports in different states is within the act of congress of July 20, 1790 [1 Stat. 136], requiring the contract to be in writing.

[Cited in The Osceola, Case No. 10,602; Joy v. Allen, Id. 7,552; The John Martin, Id. 7,357; The City of Mexico, Id. 2,756.]

4. If a seaman is shipped for such a voyage by a verbal agreement, he is entitled under the statute to the highest rate of wages paid at the port where he shipped, and parol evidence is inadmissible to prove that a lower rate of wages, or a different mode of compensation was agreed upon.

[Cited in Packard v. The Louisa, Case No. 10,652; Duryee v. Elkins, Id. 4,197.]

5. If a seaman ships on a general trading or freighting voyage without any limitation of time or any fixed terminus of the voyage, either party, that is the master or the mariner, may put an end to the contract at pleasure, provided it is not done at a time, or under circumstances particularly inconvenient or injurious to the other party.

[Cited in Thompson v. The Oakland, Case No. 13,971; The Mary Ann, Case No. 9,194; Cox v. Murray, Id. 3,304; The Atlantic, Id. 620; Snow v. Wope, Id. 13,149; The Gem, Id. 5,304; The Pawashick, Id. 10,851; Worth v. The Lioness No. 2, 3 Fed. 925; Marsland v. The Yosemite, 18 Fed. 333; The Pacific, 23 Fed. 155.]

6. A mariner is not in such a case chargeable with desertion for quitting the ship without leave of the master, in a place where the master may easily obtain another man if wanted.

This was a suit for subtraction of wages by Charles Sweetsir, mate of the schooner Crusader. The libel alleges that he shipped as mate, at Portland, on the 15th of Decemer, 1836, at the rate of twenty-five dollars per month wages, for a coasting voyage from Portland to Eastport, thence to New York,

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

and thence to several ports in the southern states, enumerated in the libel, and thence to Boston, where he was discharged on the 7th of July, 1837, when there was due to him a balance of wages amounting to $141.-39, which was unpaid. The master in his answer admits that Sweetsir shipped as mate of the vessel for Eastport, that the schooner went from that port to New York, and thence to various ports in the southern states, but denies that there was any certain port of destination from Eastport, determined upon when they left Portland. He denies that any fixed rate of wages was agreed upon, and alleges that he had himself taken the vessel to employ her on shares, he to victual and man her, and pay to the owners for charter, or the hire of the vessel, two fifths of her gross earnings; that he agreed with Sweetsir to take him as mate, and to share with him the profits of the voyage; that is, the expenses of the vessel being first paid out of the three fifths of the gross receipts, the balance, or net profits, were to be divided equally between them. There is a further allegation, that the libellant did not faithfully perform his duty as mate, but was lazy, indolent, and grossly ignorant of his duty, and finally, that on their arrival at South Boston he deserted the schooner without leave. The master also alleged that while at New York he requested Sweetsir to sign the shipping articles, who refused to do so, assigning as a reason, that he and the captain being partners, there was no reason for his signing any papers, and that Sweetsir has already received more than his share of the profits of the several voyages, and that there is nothing due to him.

Fessenden & Deblois, for libellant.
Codman & Fox, for respondent.

WARE, District Judge. A preliminary question is raised by the pleadings in this case, and has been insisted upon at the argument, which goes to the jurisdiction of the court. It is admitted that Sweetsir, the libellant, was engaged and went in the vessel as mate, but it is contended that the contract which intervened between the parties was not a contract of hiring, but a contract of partnership, by which he and the master were to be equally interested in the profits and losses of the adventure. The agreement set forth in the answer was that Sweetsir should perform the duties of mate, and that "they should share the profits of the voyages as they should chance to be; that no fixed rate of wages was agreed upon; but that the expense of sailing the vessel being first paid out of the three fifths of the gross amount of the receipts, the balance was to be divided equally between them." If the respondent had intended to rely on the incompetence of the court to take cognizance of the matter, he should in correct pleading have specially excepted to the jurisdiction, and concluded with a prayer that the libel might be dismissed for this cause. This would have put the question of jurisdiction directly in issue. The rules of the admiralty do not demand all the technical formalities and exactness in pleading that are required by the common law, but the grounds of defence should be presented in the answer by clear and distinct averments, and when the respondent proposes to insist on several distinct and independent grounds of defence, they should not be embraced in a continuous statement or narrative, but each should be presented in a distinct and separate article. If, however, there be a defect in the pleadings, it is not too late to cure it by an amendment, provided the case made out in the proof sustains the objection.

If the contract between the parties were in truth a contract of partnership, it is not easily to be perceived how it can be brought within the cognizance of the admiralty. For though the admiralty has a general jurisdiction over maritime contracts and matters done on the seas, it does not follow that it has jurisdiction over all contracts leading to maritime adventures, and to employment on the high seas. If two persons engage as partners in maritime commerce, the contracts which they make with others for marine service, and other contracts in which the consideration is essentially maritime, as contracts of affreightment, or contracts with materialmen for the supplies or repair of the vessel, fall within the jurisdiction of the admiralty. But the contract of partnership between themselves, though it may exclusively have for its object maritime commerce, belongs ordinarily at least to another forum.

There is indeed a class of cases bearing an analogy to what this is contended to be, over which the admiralty holds an undisputed jurisdiction. I allude to fishing voyages in which it is common for the fishermen to be engaged for a share of the proceeds of the voyage, instead of wages at a fixed rate. Act Cong. June 19, 1813, c. 2, § 2 [3 Stat. 2]. This kind of engagement, does, indeed, constitute a species of imperfect partnership. 1 Valin, Comm. 676; Abb. Shipp. 442. The men become directly interested in the fruits of the adventure, and depend for their remuneration on its success. But the fishermen are not in such cases considered as partners with the owner in the proper sense of the word. The shares for which they contract are in the nature of wages, and an action of assumpsit lies at common law, or a libel may be brought in the admiralty for their share of the proceeds or profits of the adventure to be ascertained by a final settlement of the voyage. Wilkinson v. Frasier, 4 Esp. 182; Macomber v. Thompson [Case No. 8,919]; The Frederick, 5 C. Rob. Adm. 8.

Supposing, however, the question of jurisdiction to be put directly in issue by proper averments, how far will the proof sustain

the answer? The only evidence in the case relating to this point is derived from certain acknowledgments said to have been made by Sweetsir. Taking them in their utmost extent they amount to nothing more than that he engaged for a share of the profits. What that share was the evidence does not disclose. An agreement by seamen to receive as a compensation for their services a share of the freight or the profits of a voyage does not constitute them partners with the owners. An agreement between parties to share in certain proportions the profits of an adventure or enterprise, or of a particular kind of business, does not in the common transactions of business necessarily make them partners in relation to each other, not even under circumstances which may render them liable as such to third persons. Rice v. Austin, 17 Mass. 197; Waugh v. Carver, 2 H. Bl. 235; Colly. Partn. p. 44. A man may agree for a certain proportion of the profits as a compensation for his personal services, or in lieu of commissions or brokerage, without subjecting himself to the responsibility of a partner. Id. pp. 14, 15; 3 Kent, Comm. 25. The master, according to the statement in his answer in this case, took the vessel on an agreement to divide with the owners the gross earnings of the vessel in certain proportions. But this participation in the fruits of the voyage does not make them partners with him. The settled construction of such a contract is, that a share of the earnings is allowed as the hire of the vessel, in lieu of a fixed and certain sum as charter. Thompson v. Snow, 4 Greenl. 264.

If an agreement to receive as a compensation a share of the profits does not in the transaction of ordinary business necessarily create a partnership, there is less reason for allowing it to have, as a matter of necessity, that effect in contracts for maritime service, in which from the fact that in all times agreements of this kind have been more common and familiar, a partnership would be less easily presumed. The custom in the cod and whale fisheries to engage the fishermen for a share of the fruits of the voyage has been already mentioned. It is not unusual to engage seamen in freighting and trading voyages for a share of the freight, or profit. Such contracts are not only known with us, but are common in other maritime countries. The ordinance of the marine of Louis XIV. enumerates four modes in which mariners are engaged, that is, for wages by the month, or for the voyage; for a share of the freight, or profits. Liv. 3, tit. 4, art. 1. Valin in his Commentary, says, that in all times the engagement for a part of the freight has been customary (volume 1, p. 670); and it still continues to be a usual mode of hiring seamen in that country for coasting voyages (2 Boul. P. Dr. Mar. p. 170). In all maritime countries it is the ordinary mode in which seamen are engaged for cruising in privateers, and from very early times, it appears from the old maritime ordinances that the engagement of mariners for a share of the freight was one of the most common forms of seamen's contracts. Jus Navale Rhodiorum, par. 2, cc. 1, 8, Edit. Pardessus; Jugemens d'Oleron, art. 16, and Cleirac on art. 8, note 34; Laws of Wisbuy, art. 30; Roccus, note 43. But it was never doubted that the contracts of seamen in all these cases were properly contracts of hiring and not of partnership. The share which they receive of the fruits of the adventure, to be ascertained at its final settlement, is in the nature of wages.

The naked fact alone, therefore, that the libellant engaged not for a fixed and certain rate of wages, but for a share of the profits, unconnected with other circumstances and without proof of what that share was to be, raises but a very slight presumption of a partnership between him and the captain. The answer, indeed, alleges that the share of the libellant was a moiety, and if it were in this particular supported by the evidence, the allowance of so large a portion of the profits would strengthen very much the presumption that the libellant engaged in the enterprise as a partner rather than on a contract of hiring. The testimony does not, however, in this particular support the answer. But as it is established by independent proofs that the libellant was to be compensated by a share of the profits, it may be contended that the answer should be received as in the nature of suppletory proof to show what that share was. It is admitted that the sworn answer of the respondent stating in detail and with exactness the matters of defence, though not evidence in the strict sense of the word, may be referred to, to explain ambiguities in the testimony and, in aid of presumptions arising from the evidence, to supply connecting links in the proof; and that it is ordinarily entitled to more consideration than the naked statement of a party unsupported by his oath. But the degree of credit allowed to an answer in this respect must depend on the apparent good faith with which it is made. The credit of an answer in the admiralty is not measured by any technical rule, as it is in equity. And as it derives its credit from the good faith of the respondent, we may look for the evidence of that good faith, not only to the answer itself but to all the facts in the cause bearing on that question. Now there is one fact in proof drawn from the examination, on the stand, of a witness, whose deposition the master himself offered in the cause, which does most clearly and directly impeach the good faith and integrity of the respondent. It is proved by this witness that the master, after the termination of the enterprise, deliberately altered the entries in the books in which he kept an account of the receipts and disbursements of the vessel, for the avowed purpose of ex-

hibiting a less amount of profit, and thus defrauding the libellant of a part of what, upon the very case he has made in his answer, would be justly his due. A fact of this kind being established is quite enough to destroy all credit which might be claimed for the answer. Upon the whole case I think that the allegation of a partnership is not made out by the proofs.

Assuming that the contract in this case is a contract of hiring and not of partnership, the parties are at issue with respect to its terms, the libellant alleging that he shipped for wages at the rate of twenty-five dollars a month, and the respondent that he shipped for a share of the profits. There was no contract in writing, nor is it certain that there was any shipping paper on board the vessel when she left Portland. Notice was given to the master to produce it, and one is put into the case, but it is dated at New York, and bears the names of only two men, who were shipped at that place in the month of April. Some of the witnesses say that during the latter part of the time, there were three or four shipping papers on board, but it does not appear when or by whom they were signed. It is not pretended that any one was signed by the libellant.

There having been no contract in writing, it is contended by the counsel for the libellant that the master is precluded by the act of congress of July 20, 1790, c. 56, § 1, from proving the terms of the contract by parol evidence. That act provides that "every master of a vessel bound from a port in the United States to any foreign port, or of any vessel of the burden of fifty tons and upwards bound from a port in one state to a port in any other than an adjoining state, shall before he proceeds to sea make an agreement in writing or in print with every seaman or mariner on board (except his own or the owner's apprentices) declaring the voyage or voyages, term or terms of time for which such mariners are shipped." If he fails to do it, he shall pay, to every mariner shipped without signing such an agreement, the highest price or wages which shall have been given, for a similar voyage, at the port where he was shipped within three months next before the time of shipping, for the whole period of the voyage, or for such time as the mariner shall have served, and shall in addition be liable to a penalty of twenty dollars, and the seaman shall not be bound by the regulations nor subject to the penalties of the act.

There does not appear to have been any shipping paper at the commencement of the engagement, describing the voyage or voyages upon which the vessel sailed; but it is sufficiently apparent and is admitted that the engagement was for a general coasting and trading voyage, the original intention having been to go first to Eastport, thence directly or through some intermediate port to New York, and thence to engage in a series of coasting voyages to various ports in the southern states. The contemplated voyages and those for which the libellant shipped are clearly within the words of the statute, and its language is express that if there is no written contract the highest wages shall be paid. For what purpose, then, can evidence be offered of a parol agreement for a different rate of wages, when the law dictates the judgment of the court? It is difficult to imagine what form of words the legislature could have chosen more effectually to exclude the admissibility of a parol contract to control the operation of the law. The statute not only declares that the highest rate of wages shall be paid, but imposes a personal penalty on the master for neglecting to comply with its injunctions. Nor can the construction of this section be affected by the provisions of the eighth section which will undoubtedly, in the case provided for, let in parol proof. By that section the master is required in a suit by the seamen for their wages "to produce the contract and log-book to ascertain any matters in dispute, otherwise the complainants shall be permitted to state the contents, and the proof of the contrary shall lie on the master." But this is in a case where there has been a written contract, and upon common principles, when it is lost or has been destroyed by accident, the parties are admitted to give secondary evidence of its contents. The first section contemplates a case where there has been no written contract. The language appears as clear and explicit as it can well be, and where the intention of the legislature admits of no doubt, the only duty the court has to perform is to carry that intention into effect.

The counsel for the respondent referred to a note in 1 Pet. Adm. 213 [Jameson v. The Regulus, Case No. 7,198], in which that learned judge states it as his opinion that an agreement although verbal supersedes this provision of the statute. No case is referred to, where this has been decided. The note is quoted in the American edition of Abbott on Shipping (page 434, note), where the learned editor expresses in very pointed terms his doubts as to the correctness of this opinion. "Before such a decision should be made it would require very grave consideration how far such a verbal agreement, in contravention of the statute, should be admitted to supersede the positive direction of the statute as to the highest wages." The language of the statute appears to me to be too clear and unequivocal to be made to yield to the supposed equity of particular cases; and in my judgment it is as wise in its policy as it is clear in its meaning. There are few contracts in the ordinary business of life which it is more important should be plain and certain, and from which it is more desirable to exclude the uncertainties of parol proof, than those of seamen. Mariners, as a class, though in some respects sufficiently tenacious of their rights, are habitually and proverbially careless, rash,

and improvident, variable in their temper, and peculiarly liable to be imposed upon and overreached by practising on their characteristic weaknesses, and, for that reason, perhaps quite as accessible as others to suspicions of unfair dealing. All maritime nations have felt the importance of giving to these contracts the greatest degree of certainty, and it may, I think, be said that the maritime law, as a general principle, requires them in ordinary cases to be evidenced by writing. The law of England does not declare a verbal contract absolutely void, but it imposes a penalty on the master for not reducing it to writing. Abb. Shipp. 440. The law of France requires also the contract to be in writing. It does not subject the master to a penalty for not putting it into writing, but the established rule of jurisprudence is, that if there be no written contract the terms of a verbal agreement cannot be proved by parol testimony, preuves par temoins, but they are determined by the usage, or what is customary in the place where it was made. Ordinance de la Marine, liv. 3, tit. 4, art. 1; Code de Commerce, No. 250; 1 Valin, Comm 676, 677; Poth. Contracts Maritimes, No. 167; 2 Boul. P. Dr. Mar. p. 168. Our statute combines the principles of both the English and French law. It subjects the master to a penalty for shipping a seaman without a contract in writing, and determines the rate of wages when the contract is verbal. But if a mariner ships by a verbal contract for a share of the freight or profit, it may be a question whether or not the highest rate of remuneration under a contract in that form is not to be taken. My opinion is that the law does not intend to regard these distinctions, but the usual form of the contract being for a certain rate of wages in money, this must be the rule of decision in all cases.

Another point insisted on in the defence is, that the libellant was ignorant and negligent of his duties, and finally that he forfeited by desertion whatever wages he might otherwise have claimed. With respect to the allegation of incapacity and negligence, it is unnecessary to inquire how far these can be relied upon as a ground for allowing a diminished compensation in a case where the rate of wages is determined, not by the agreement of the parties but by the statute, because the allegation is not, in my opinion, satisfactorily made out by the proof. But the alleged desertion involves a question of some difficulty. The counsel for the libellant contended that as there was no contract in writing there can be no forfeiture for desertion, the statute expressly declaring that the seamen who have signed no agreement in writing, "shall not be bound by the regulations nor subject to the penalties or forfeitures contained in the act." But it is very clear and well settled that the statute does not repeal the general maritime law in cases which are not within the purview of the act. The Regulus [supra]; Cloutman v. Tomison [Case No. 2,907]. The libellant would not forfeit his wages by the statute desertion of absence for more than forty-eight hours without leave, nor is he subject to any of the penalties and forfeitures specifically provided by the act. But in all matters not within the scope of the statute, the general, maritime law is left in all its efficiency. The unarticled seaman not being within the act, his rights and obligations are to be determined by the general law. They are precisely what they were before the act was passed. But by the general law, independent of any statute regulation, desertion works a forfeiture of all wages antecedently earned. Abb. Shipp. 463–468, and note to page 464; 1 Valin, Comm. 535; Consulat de la Mer. cc. 157, 158–268; Cleirac, Jurisdiction de la Marine, art. 60, note 3.

Was there then a desertion? It is proved and admitted that Sweetsir left the vessel at Boston without the consent of the master, and did not return to her. Desertion in the sense of the marine law is absconding, or abandoning a vessel by a seaman with the intention of not returning. But it must be an abandonment in violation of his contract and while he was under an obligation to remain. That Sweetsir left the vessel without the knowledge or permission of the master, and that when he left, his intention was not to return, is apparent from the evidence, and is not denied. The only question then is, whether he was bound by his contract to remain, and it is one not free from difficulty. In the libel Boston is described as the terminus of the voyage, and this is contradicted by the answer, rather by way of inference than by a direct denial. As there was no shipping paper at the commencement of the voyage, or at least none that has been produced, we are left to ascertain what the intended voyage was, from the testimony of the witnesses. From this it appears that the voyage for which the libellant shipped was a general trading and freighting voyage, without any particular designation of the ports to be visited, without any certain terminus of the voyage, and without any limitation of the time for which the engagement was made. Is such an indefinite and unlimited engagement valid and binding on the parties? And if so, how far? Society may condemn a man to perpetual servitude, as a punishment for his crimes. But I take it to be perfectly clear that a man cannot bind himself to a perpetuity of service, or servitude for life by his own voluntary act. The policy of the law will not admit of such a contract. Though it may be valid to determine the rights and obligations of the parties while both choose to adhere to it, in its nature it is liable to be dissolved at the pleasure of either party. And if a contract is made for personal service without any limitation of time, which may be

prolonged indefinitely, the law will either affix to it a reasonable limitation or provide some mode by which a limit may be put to it. This cannot be by mutual consent only, the ordinary mode in which contracts are dissolved, for then it would be in the power of either party to render it perpetual. Such a contract must be liable to be dissolved by either party at his pleasure, subject to the equitable restriction that this shall not be done under circumstances, or at a time particularly inconvenient or injurious to the other party. See 19 Droit Civile Francais, Continuation of Toullier (by Duvergier), Nos. 284, 288.

If these principles are correct, their application to the case is obvious. When a seaman ships on a general trading and freighting voyage without any limitation of time, and without any certain destination or fixed terminus of the voyage, and which may at the pleasure of the master be prolonged indefinitely, the legal construction of the agreement is, that it is a contract which may be terminated at the will of either party. The master has, at least, the power of putting an end to it at any time, by putting an end to the voyage. And it is the dictate of common sense and common justice that the mariner should have the same right of dissolving the contract, by leaving the vessel at any time when this will not be productive of special injury to the master. Such, it appears to me, must have been the construction if the agreement had been in writing, the statute requiring that the "voyage or voyages, term or terms of time" shall be stated in the contract. It will not admit an indefinite agreement for service without limitation. The master appears to have been fully sensible of it, for in the shipping paper dated at New York, the only one produced of the three or four said to have been on board during the period of the libellant's service, the voyage is described as from New York to some port in North Carolina, and thence back to New York, to be employed in the coasting trade for the term of three months, unless sooner discharged as the master shall see fit.

Allowing that the libellant was not bound by his contract to remain in the vessel as long as the master choose to employ him, but that he might at any suitable and convenient time put an end to it by his own act, it is not pretended that any inconvenience resulted to the master by his leaving the vessel at Boston. She was on her return and within one day's sail of her home port, and it does not appear that it was even necessary to supply his place by another hand. Upon the whole, my opinion is, that there has been no desertion within the meaning of the law, and I therefore pronounce for the wages, deducting all payments which have been made in the course of the voyage.

Wages decreed for six months and twenty-three days.

CRUSE (CRAWFORD v.). See Case No. 3,-367.

CRUTTENDEN (THOMAS v.). See Case No. 13,895.

Case No. 3,457.

The CUBA.

[2 Spr. 168.][1]

District Court, D. Massachusetts. Aug. Term, 1862.

PRIZE—PRACTICE—PROCEEDINGS—PROOF.

1. Documents found on board a prize are not to be inspected by any person before the claims have been filed, and the evidence in preparatory completed.

2. A vessel documented as neutral, condemned as enemy's property, and for an attempted breach of blockade, on circumstantial proof,—simulated papers, false log-book, false testimony, &c.

3. A motion for leave to take further proof must set forth the specific facts to be proved, the sources of evidence, and the reasons for expecting it. Such motion refused to persons who had shown themselves unworthy of trust and belief.

The master of the prize schooner Cuba, Dominick Querin, filed a petition, sustained by an affidavit, stating that he desired to claim the vessel and her cargo in behalf of the owner, one John McLarnand, a British subject residing in Havana, and praying for leave to inspect the ship's papers, and other documents taken by the captors, and in the custody of the court, to enable him to state the claim correctly.

C. L. Woodbury, for petitioner, relied on The Port Mary, 3 C. Rob. Adm. 233.

R. H. Dana, Jr., U. S. Atty., for the United States and the captors, resisted the petition, and cited The San Jose Indiano [Case No. 12,322].

SPRAGUE, District Judge. The practice of prize courts is to keep under seal all papers found on board the prize, as well private papers, sailing directions, &c., as the regular documents of the ship, to be seen by no person until the claims have been put in, the evidence of the crew of the captured vessel taken, and the cause ready for a hearing. Publication is then ordered, and the papers are open to counsel on each side. One object of this practice is that the master and crew of the prize shall testify to what is in their own knowledge, and not be able to shape their testimony so as not to contradict the documents. Another is, that persons coming forward to claim captured property shall state their claims according to the facts, without the opportunity to shape them according to documents or papers on board. If the ship's papers are true, and the claims true, there will be no material variation, and no injustice is done to claimants, for mere

[1] [Reported by Hon. Richard H. Dana, Jr., and here reprinted by permission.]

formal or verbal mistakes in claims may always be freely corrected, if the examination shows them to be bona fide, and no claim is ever rejected for an error that is amendable. The San Jose Indiano [Case No. 12,322]. But, if the papers are false, simulated, equivocal, or contradictory, the obligation to put in the claims without opportunity to inspect the papers, will almost always lead to detection of the fraud. Another reason given for the practice is, that, if the papers were open to all, persons might come forward who had no actual interest, and represent the interests indicated by the papers.

The only case which has been found, where the court allowed inspection of documents, is that of The Port Mary, 3 C. Rob. Adm. 233. But in that case the claims had been filed by the master, the positions of the claimants taken, and their consequences assumed; and the master only asked to inspect the manifest to ascertain the name of the shipper of a part of the cargo, about which he was uncertain, the ship being a general ship, with a variety of shippers, whose names he could not be expected to know. In the present case, no claim has been filed, or even prepared and presented; and the petitioner states, without a question, the name of the sole owner of the vessel and all the cargo, except certain articles which he specifies, and which he says are his own venture. Indeed, he states no reason whatever why he should inspect the papers, except those which have led to the policy of excluding them from inspection. The argument of his counsel, in fact, gives up all claim to see any papers, except a power of attorney, said to have been given to the master by the owner. The argument is that the master, under this special power, should follow only his authority, and not exceed it, or fall short of it, which he cannot be sure of doing unless he can inspect it. But the petition states the power to be a general power to do all things with the vessel and cargo, which the principal, McLarnand, could do if personally present, and does not intimate any ignorance of its extent and character. The master, as agent of the owners, and lawful bailee of the ship and cargo, must make his claim bona fide, to the best of his knowledge. If the voyage is a hostile one, or if an attempt is made to cover the ship or cargo by false papers, this power of attorney may be the very paper the master ought not to inspect before stating his claim; and if, after publication of testimony, there appear no grounds for condemnation, errors in a bona fide claim work no loss or injury. It seems, that a part of the cargo of this vessel was taken, at Ship Island, on appraisement, for the use of the army, and only the residue sent into this district. This court has jurisdiction over the whole, and has been requested by the libel to adjudicate upon the whole. The petition does not intimate that the master is ignorant what part is here, and what was left; but that he may not even appear to be at a disadvantage as to what cannot affect the question of the character of the vessel and cargo, as prize or no prize, the court will suggest to his counsel that the return of the prize commissioners, showing what cargo was brought here, and the papers showing the taking and appraisement at Ship Island, are open to inspection, not being of the class of excluded papers. The petition is refused.

In November, 1862, the following decision was given on the merits of the case:

SPRAGUE, District Judge. This vessel and cargo are claimed by John McLarnand, a British subject, who, at the commencement of this enterprise, resided at Havana. This claim, in the name of McLarnand, is made by the master, Dominick Querin. Condemnation is asked by the captors on two grounds: First, that the property was enemy's property; second, that there was an attempt to violate blockade.

As to the vessel, it appears that the Cuba was built at Mobile, and that she sailed from that port on the 21st of March last, with a cargo of cotton, ran the blockade, and arrived at Havana on the evening of the 24th of March, and on the 26th the crew were employed in discharging the deck-load. In this voyage, from Mobile to Havana, Dominick Querin was the master, and Charles White was the mate. On the 31st of March, McLarnand, in whose behalf this claim is made, took out a provisional register, as it is called, in his own name, as sole owner; and, on the 4th of April, the vessel sailed from Havana with this cargo on board, ostensibly for Matamoras. When two days out, she was boarded by the United States gunboat R. R. Cuyler, and duly warned of the blockade, and permitted to proceed. On the 10th of April, she was captured by the United States gunboat Kanawha, off the coast of Florida, between Pensacola and Mobile, and, as the mate says, about fifty miles from the latter place. Some of the papers indicate that the cargo was shipped by several Spanish houses at Havana, but the manifest states the whole was shipped by one Santa Maria, and consigned to Dominick Querin, the master. No other consignment appears, no instructions to Querin or to any correspondent, and no bills of lading have been found, and not a paper that indicates that McLarnand was the shipper or owner of any part of the cargo, or had any thing to do with it, except that it was on board a vessel documented in his name. Yet, not only the whole of this vessel, but almost all the cargo, is claimed as his property. These circumstances call for explanation.

If this vessel was sold to McLarnand, the sale and transfer must have been made between the 25th and 31st of March, inclusive. By whom was the sale made? For what

consideration? And for whose use was McLarnand to hold the title? What became of the cargo of cotton and its proceeds? All these questions Querin must have been able to answer. But, instead of doing so, he has, in his deposition, sworn that he knew nothing of the voyage from Mobile to Havana; that he never saw this vessel until about the 27th of March; that he does not know when the cargo, laden at Havana, was put on board; and that he never knew McLarnand until just before he took the command, which was on the 2d or 3d of April. White, the mate, also testifies that he had no knowledge of the previous voyage, or of the lading of the cargo, and that he joined the Cuba at Havana only twenty-four hours before she sailed. Yet there can be no doubt that Querin was the master, and White the mate, on the voyage from Mobile to Havana. There were found on board, after the capture, two log-books of the voyage from Havana, one in ink, and the other in pencil, both in the handwriting of White. There was also found a log-book in pencil of the voyage to Havana in the same handwriting. In this same book there was, in ink, a description of the cargo from Mobile, and a declaration that Querin was the master, all in the handwriting of White. Besides this, there was found a bill of goods sold to Querin, dated at Mobile on the 11th of March; and it is proved that he had a family residing at that place.

The log-book in ink, which we have before spoken of, was mutilated by tearing out several leaves. One of these leaves, however, was found, and described a part of the voyage from Mobile to Havana. This also was in the handwriting of White. But the master and mate closed all inquiry into the previous history of this vessel by a bold and positive denial of any knowledge prior to the time when she had her cargo on board, at Havana, for the voyage on which she was captured, thus effectually cutting off all questions respecting the transfer of the vessel, and the purchase and lading of the cargo. The first day on which McLarnand appears to have had any connection with this vessel is the 31st of March, when the provisional register was taken out; and on the same day he gave a power of attorney to Dominick Querin to sell the vessel, or any part of her. The authority conferred by this instrument is without restriction; so that Querin could have disposed of the vessel when and where, and for such consideration, as he should see fit. He might have sold the major part, leaving McLarnand only the minor interest, to be entirely controlled by strangers and foreigners. The cargo also was consigned to Querin, and subject to his absolute control; and Querin testifies that the cargo belonged to McLarnand, as he believes that McLarnand so told him; yet, according to his testimony, he never knew McLarnand until just before he took command, on the 2d or 3d of April. Here, then, we find Dominick Querin, an inhabitant of Mobile, sailing from that port on the 21st of March, as master of this vessel, with a cargo of cotton, and on the 4th of April we find him sailing on board the same vessel, as master, with a cargo peculiarly adapted to the wants of the Southern Confederates, and with absolute control over both vessel and cargo, having authority to dispose of either or both at his pleasure by power of attorney and consignment from the ostensible owners. Yet this same Querin has given no account of the transfer of the vessel, or of the disposition of the cotton, or of the purchase of the new cargo; but effectually prevented the prize commissioners from requiring answers touching those and other important particulars, by an audacious denial of any previous knowledge of this vessel. This same Querin is the only person who has taken any interest in the vessel or cargo since their capture. He arrived in Boston as early as the 14th of May last, five months ago. It was his duty to have immediately informed his employers at Havana, if any such there were, of his situation, that they might furnish aid and instructions for the protection of their property.

The intercourse between New York and Havana is frequent, and the transmission of intelligence regular; and yet not one word has been heard from McLarnand or any other person in Havana. The test affidavit, in support of the claim, is made by Querin alone. His oath is of no value. There are seven documents signed by Spanish officials, four of which appear to be invoices, and the other three permits to lade certain goods on board the Cuba. Five are given to one Santa Maria, and two to Cahusac Brothers. Six of them describe the vessel as the Confederate schooner Cuba, and one only as the English schooner Cuba. Some bear date the 1st, and others the 2d, of April. The name of the vessel was nowhere to be found upon her, except on the inside of the companion way to the forecastle. The master testifies that a part of the crew were English. In this he is contradicted by the crew list. As before stated, the Cuba sailed from Havana on the 4th of April, ostensibly bound for Matamoras. On the 6th, she was boarded by the United States ship R. R. Cuyler, and permitted to proceed, after due warning of the blockade. Previous knowledge of the blockade was also abundantly proved. On the 10th of April, she was found off the coast of Florida, far from her true course to Matamoras, sailing directly toward Mobile. These are very untoward circumstances, and call imperatively for an explanation. This has been attempted. It is said that there was a gale of wind for nearly three days, during which she was compelled to lay to, and that she drifted toward the coast of Florida. It was testified by a very competent nautical expert, the only one whose testimony has been offered, that if she had laid to, as

stated, the drift would not have been as alleged. This, however, is but opinion, and might require careful scrutiny, if it stood alone. But, as already stated, there were found on board this vessel two log-books, one in ink and the other in pencil. The former was evidently made for exhibition to belligerent cruisers; the latter, to show the true run of the vessel, and her actual position, so essential to be known by the navigator. Both these logs were in the handwriting of the mate, yet they differ materially. The ink log makes the track of the vessel to diverge toward Matamoras, and describes a gale of wind which compelled them to lay to, and thick weather in which no observation could be taken. The track described in the pencil log is such as would have been made by a vessel bound from Havana to Mobile, first coasting the island of Cuba, by reason of the current, and then making directly for that destination. This course was pursued until eleven o'clock at night on the eighth, when she put about, and sailed in an opposite direction, about fifty-four miles, when she again put about, and resumed her former course toward Mobile. The reason for this manoeuvre is not given. It may have had reference to the blockading squadron, and an opportunity for eluding it, or to a better time for making the land, as the wind was south-west, which on that coast threatens bad weather. In the pencil log there is no gale of wind compelling the vessel to lay to, no drifting, and observations are noted every day. And further, this log, both on the 8th and 9th of April, states the bearing of Mobile point, and the distance from that place, thus clearly showing that the nautical calculations were made with reference to Mobile, as the port she was approaching. This pencil log-book, upon the accuracy of which the safety of the vessel and all on board depended, more than countervails all other evidence respecting the actual course and management of the vessel. But the Cuba was not only far out of her course to Matamoras, and in very suspicious proximity to a blockaded port, but she was discovered sailing, in fine weather, directly for that port. To account for this, the master asserts that he was short of provisions, and was endeavoring to find some of the blockading squadron in order to obtain a supply. Now this vessel, with the same master and mate, had sailed from Mobile and run the blockade only twenty days before, an exploit very likely to be notorious; and is it credible that he was now seeking this blockading squadron? Was he, in fact, short of provisions? He had been only six days from Havana; and an average passage from that place to Matamoras, his pretended destination, is seven and a half days; yet he swears that he was out of meat, and had bread for only three days; that is, that he left Havana without provisions for an average passage, knowing, as he must, that the voyage was liable to be protracted much beyond that time by the ordinary contingencies of the sea.

After a full hearing upon the evidence in preparatory, the counsel for the claimant filed a motion to be admitted to further proof. The objections to this motion seem to be insuperable. Where the difficulties presented by the evidence in preparatory are out of the reach of any rational solution, further proof will not be admitted; and even if doubts exist, which might, perhaps, be removed by collateral evidence, still an order for further proof will not be granted to a person who, by his mala fides and actual attempts at deception, has shown himself capable of abusing it. The Alexander [Case No. 164]; The Dos Hermanos, 2 Wheat. [15 U. S.] 80; The Juffrouw Anna, 1 C. Rob. Adm. 126; 1 Wheat. [14 U. S.] Append. 505; The Betsy [Case No. 1,364]; The Graaff Bernstorf, 3 C. Rob. Adm. 117; The Vrouw Hermina, 1 C. Rob. Adm. 163. By whom is this requested? Dominick Querin. He is the sole actor. No other person has taken any step, made any communication, or in any way connected himself with this claim. And Querin and his mate have deliberately sworn that they knew nothing of the voyage from Mobile to Havana, although they were both on board, one as master and the other as mate. And to this falsehood they have added several others. This motion is very brief, and in the most general terms. Querin merely moves the court for leave to exhibit further proof that the said schooner and her cargo are bona fide property of the said McLarnand, and entitled to the rights of neutrals. In support of this motion, we have only a single affidavit made by the proctor for the claimant. Neither the motion nor the affidavit suggests any explanation of the circumstances which bear so strongly against this claim. The affidavit states an expectation to obtain evidence to maintain the issue of ownership and destination, but gives no detail of facts; and, as to the sources of proof, it says that he expects testimony from McLarnand and Santa Maria and other persons, and by various papers. The proctor who made this affidavit must have derived all his information from Querin, who has undergone a searching examination before the prize commissioners to extract all his knowledge respecting the vessel, the cargo, and the voyage. No reliance is to be placed upon Querin's statements. The court is asked to give to Dominick Querin a roving commission to go in search of evidence, without limitation as to persons or papers, and without specification of facts. There is no reason to suppose that any further proof can be obtained material to the present inquiry, much less that any reliable evidence is to be expected through such instrumentality. The papers found on board, taken in connection with the other evidence, have so developed the course of this voyage,

from its inception at Mobile to its termination by the capture, that no rational doubt can remain that this cargo was the proceeds of the outward cargo of cotton; that the transfer and provisional register at Havana, and the clearing for Matamoras, were all colorable, for the purpose of deception, and that her real destination was Mobile.

The motion for further proof must be refused, and the claim rejected, and the vessel and cargo condemned as enemy's property, and for attempting to violate the blockade.

There are also separate claims by Querin and White for a few articles alleged to be their private adventures. Querin was a permanent resident in Mobile, and his claim must be dismissed, and the property embraced in it condemned as enemy's, and for attempt to violate the blockade. The claim of White must also be dismissed, and his goods condemned for an attempted breach of blockade, and for his misconduct in making a false log-book, and taking a false oath to conceal the character of the voyage, and protect enemy's property.

A decree of condemnation was made, and afterwards a decree of distribution, giving half the value of the vessel and cargo to the gunboat Kanawha, and half to the United States.

Case No. 3,458.

The CUBA.

[3 Ware, 260.][1]

District Court, D. Maine. May Term, 1860.

FREIGHT—NON-DELIVERY—DANGERS OF THE SEAS—SPECIAL CONTRACT.

1. By the general maritime law, the contract for freight is an entirety, and includes both carriage and delivery.

2. The exception, dangers of the seas, excuses the master for a non-delivery, but does not authorize a demand of freight.

3. By a special contract, by which the amount of freight was made to depend on the gross gauge of the casks delivered, it is immaterial how the loss was occasioned, whether by ordinary leakage or the dangers of the seas.

Shepley & Dana, for libellants.

Mr. Rand, for respondents.

WARE, District Judge. By the charter-party, dated February 23d, 1860, the brig was to proceed to Portland, and there, at the expense of the charterers, to take in a cargo or ballast and thence proceed for Matanzas or one other port on the north side of the island of Cuba, and there receive a full return cargo of molasses, "both under and upon deck," for her port of discharge in the United States, north of Cape Hatteras, and not east of Portland. The charterers were to pay all port charges, to advance what should be necessary for her disbursements at Cuba, and pay $3.62½ per hogshead "of 110 gallons gross gauge of the casks delivered, which is to be in full of the voyage out and back." The brig proceeded on her voyage successfully, received her cargo at Portland, and delivered it at Matanzas, there took in a full cargo of molasses, both on and under deck. But on her return to the United States, she encountered a violent gale, and for the safety of the vessel, and the lives of all on board, she was obliged to sacrifice her deck load, consisting of 60 hogsheads of molasses. These were voluntarily stove by the crew, and the contents allowed to escape into the water, they cutting the hoops at one end, and breaking the heading. Of these casks, 56 were brought to her port of discharge at Portland, and four were lost overboard. The violence of the storm was such that 26 of the casks under deck lost either the whole or part of their contents, and were found by the custom-house gaugers to be empty. The parties not being able to agree on the amount of freight due, this libel is brought, claiming freight on all the casks brought home, according to their gross gauge. The respondents resist this claim, but offer freight for all the molasses actually delivered.

It is clear that by the general maritime law, freight, whether by charter-party or bill of lading, is due only for articles delivered. The contract, though it consists of two parts, is necessarily one, unless otherwise provided. It is both to convey and deliver, and is not completed until the delivery. It may be agreed that freight shall be paid on all the goods received on board, as is frequently done in the case of live stock, which is much exposed in the transportation; but, unless the parties otherwise agree, freight is due only for that which is delivered, or for which there is a lawful excuse for non-delivery. 3 Kent, Comm. 225, 226; 1 Pars. Mar. Law, 142–219. If casks or boxes in which goods have been packed arrive empty, or nearly so, so that the goods are not worth the freight, though it was formerly a much disputed question, it is now settled that they cannot be abandoned by the shipper for freight, when this is by ordinary leakage or the natural vice of the articles. 3 Kent, Comm. 324; 1 Valin, Comm. 670; Poth. Chart. No. 57; Abb. Shipp. (Am. Ed.) 433–435. But if lost not by ordinary leakage, but by the dangers of the seas, no freight is due. This will excuse the carrier from paying the price of the goods, but not from a delivery. In the case of ordinary leakage, the carrier has performed his contract, so far as depended on him; in the latter his contract is to carry and deliver the goods, the dangers of the seas excepted, and as he is prevented from a delivery by these dangers, his freight is not earned.

In this case, it is not disputed that the molasses was lost by the violence of the ele-

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

ments, and the que 'on is, whether the special terms of the contract control the general law, for that governs unless excepted by the contract. This is a libel, not on a bill of lading, but a charter-party. The vessel at the time of the charter was lying at Boston, and by its terms she was to proceed to Portland and take in cargo or ballast, and thence to proceed to Matanzas or one other port on the north shore of the island of Cuba, and there receive a full return cargo of molasses, both under and upon deck, for her port of discharge in the United States. The whole compensation was to be dependent on her return cargo; for she was to receive nothing for that bound outward. The master stipulated for a full cargo. No question has been made but that a full cargo was received. The amount of this for which freight was to be paid might be ascertained by the amount received at the port of lading, or delivered at the port of discharge. But the parties to this contract have adopted neither. But $3.62½ were to be paid for the casks, delivered, gross gauge of the casks, and 110 gallons of this gross gauge was equivalent to a hogshead. The counsel for the defence contends that those casks only were to be measured from which no more liquors were lost than what might be considered as the usual leakage, and not what was occasioned by the dangers of the seas. But the contract contains no words limiting the freight in that way. They are casks delivered, whether they contain much or little, or none at all, and whether the leakage was occasioned by the dangers of the seas or not. And we are not at liberty unnecessarily to introduce words, which the parties have not seen fit to use, when these are free from ambiguity and have a plain sense by themselves. If these show a contract, not prohibited by law, they are binding on the parties according to their ordinary meaning. As the whole freight of this vessel was to be paid on her return cargo, and she was to have nothing for her outward trip, it was natural that this should be stipulated on the most advantageous terms. Such, we are entitled to presume, was the common intention. I can see no reason why freight should not be allowed on the twenty-six casks which arrived below deck. For the four on deck, which were lost overboard, no freight is claimed. The fifty-six came in a dilapidated state. They were not measured by the custom-house gauger, but were by Mr. McAllister, the city gauger. According to his account the hoops were cut at one end and the heading stove, so that they could not be gauged with perfect accuracy. He gauged the capacity of the hogsheads as near as he could, and for the residue he made an estimate. It is contended that these were delivered in such a state as not to entitle them to be measured as empty casks. This must be determined by the terms of the special contract. The words of the charter-party are "casks delivered." The object of the parties could not be the casks themselves, for these could be of very little value. The object of the shipper undoubtedly was the contents of the casks, and casks are referred to merely to determine the quantity of molasses. That was to be ascertained by the gross measure of the casks, and the shipper took on himself the risk of loss, by whatever cause it might be, by the dangers of the seas, unavoidable accident or ordinary leakage. Though they could not be gauged with perfect accuracy, they could be nearly so, and I think sufficiently so to entitle the master to his freight under this contract; for, it is to be recollected, that the master's whole compensation was to be on the return cargo. Commercial contracts are to receive a reasonable, not a technical construction. This is more consonant to the minds of merchants, and an exact technical meaning of words is not to be given to them, unless that was clearly intended.

Case No. 3,459.

The CUBA v. The AUGUSTA.

[Nowhere reported; opinion not now accessible.]

CUBA, The (STROUT v.). See Case No. 13,549.

CUBA, The (UNITED STATES v.). See Case No. 14,898.

CUBANA, The (FLETCHER v.). See Case No. 4,863.

Case No. 3,460.

CULBERG et al. v. The CONTINENTAL.

[3 Woods, 32.][1]

Circuit Court, D. Louisiana. April Term, 1877.

COLLISION—TOW AND TUG AT ANCHOR—SIGNALS.

1. A tug with two tows descending the Mississippi river caused one of her tows to collide with another tug anchored within 500 feet of the bank, at a place where the river was three-fourths of a mile wide. *Held*, that these facts unexplained throw the fault on the descending tug.

2. When a boat is lying at anchor it is not necessary or proper for her to respond to the signals of passing steamers.

[Appeal from the district court of the United States for the district of Louisiana.

[In admiralty. Libel by Andreas Culberg and others to recover damages sustained by collision. There was a decree for libelants in the district court, and the claimants of the Continental appeal.]

Jos. P. Hornor and W. S. Benedict, for libelants.

B. Egan, for claimant.

WOODS, Circuit Judge. The libelants, who were the owners of the Swedish bark Mar-

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

guerite, brought this libel to recover $28,500, the estimated damage which was caused to their bark by a collision which they allege took place through the fault of the officers and crew of the tow-boat. On the afternoon of March 3, 1874, the Continental left the city of New Orleans for the mouth of the Mississippi river, having in tow the bark Bygdo lashed to her starboard side and the bark Marguerite lashed to her port side. About four o'clock the next morning the Continental with her tows ran into another tow-boat, the Rio Grande, which was lying at anchor in the river with two tows lashed to her, one on each side. The result of the collision was a considerable damage to the bark Marguerite.

The fact that the collision occurred with a boat lying at anchor, if she was in her proper place, would seem to make a prima facie case of negligence against the Continental, and, without explanation, to establish a claim for damages. The respondent has attempted to excuse the fault of the collision by throwing the blame upon the Rio Grande. It is alleged by way of excuse that the tow of the Rio Grande was anchored in the middle of the river at a place where the river was three-quarters of a mile wide, instead of being anchored near one or the other of the banks. This is disputed by libelants. The witnesses who speak directly to this point are Captain McClellan, of the Rio Grande, John Robinson, Theodore Crowell and J. E. Esnort. That she was not so anchored, but on the contrary, was anchored within four or five hundred yards of the right bank of the river is shown by the decided weight of the testimony. To rebut this evidence, the captain of the Continental, Robert West, says that the Rio Grande was anchored at the time of the collision about the middle of the river as near as he could judge. Reyberg, the master of the bark Marguerite, also testifies that the general course of the Continental was down the middle of the river. The libel itself alleges that the Continental was running down the middle of the river; that she descried lights ahead which were discovered soon after to be borne by a tow at anchor, consisting of the tow-boat Rio Grande with her tows; that some time thereafter, the said tow-boat Continental ran the said bark Marguerite into the said tow lying at anchor. It is on the evidence of these two witnesses and the averments of the libel that respondent relies to rebut the proof that the Rio Grande was near and within four or five hundred yards of the right bank of the river. The libel and the witness Reyberg both speak of the position of the Continental some time before the collision occurred. West, the captain of the Continental, is the only witness who speaks of the place in the river where the collision occurred, and he qualifies his testimony by saying "as near as I could judge."

This evidence can not overcome the testimony of so many witnesses who say that the Rio Grande was within four or five hundred yards of the right bank of the river. It seems to me that this point settles the case. If the Continental had kept her proper place in the river, had followed its thread as was her duty, the collision could not have occurred. But I am satisfied, from a perusal of the evidence, that the other faults charged against the Rio Grande are not sustained. The decided weight of the evidence is against the charge that the Rio Grande and her tows kept up their running lights while at anchor and thus deceived the officers of the Continental. Complaint is made that the Rio Grande did not answer the whistle of the Continental. Being at anchor it was not necessary or proper for her to respond.

Complaint is also made of the management of the Rio Grande by her officers when the collision was imminent. Even if there had been mistakes made, which is strenuously denied, there is no question that when the officers of the Rio Grande saw the danger of collision they did their best to avoid it. The fault lies further back, with the officers of the Continental, who seem to have been bewildered and to have lost their reckoning, and instead of keeping the middle of the river, veered over to the starboard side and ran into a tow at anchor. In my judgment, the sole fault is with the Continental, and her owners must pay the loss. There seems to be no dispute about the amount of damage suffered by the Marguerite. It was placed in the district court at $2,500. Let there be a decree for that sum, and costs of both courts in favor of libelants.

Case No. 3,461.

CULBERTSON v. ELLIS et al.

[6 McLean, 248.][1]

Circuit Court, D. Indiana. Nov. Term, 1853.

FORFEITURE OF CONTRACT—ACTION FOR DAMAGES—PLEADING AND PROOF—FALSE ARREST.

1. Where, in a contract for the construction of a public work, the contractor undertakes to complete it by a specified time, and it contains a clause authorizing the engineer, if at any time he has reason to believe the work will not be so completed, to declare a forfeiture of the contract, and the engineer in good faith annuls it, and such annulment is confirmed by the directors of the company, no liability to the contractor is thereby incurred on the part of the engineer or the directors, though it should subsequently appear that the contractor was not in default, and that the forfeiture was declared under a mistaken view of the facts.

2. But the declaration of forfeiture, in such case, will not prevent the contractor from recovering the amount due him on the contract at the time of forfeiture.

3. If the declaration avers, as the foundation of the claim for damages, that the forfeiture was wrongfully and maliciously declared by the engineer, and affirmed from like motives by the

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

defendants, then being directors of the company, the plaintiff must prove facts from which the inference of bad motives may be drawn.

4. Proof that some of the defendants had expressed the opinion, prior to the forfeiture, that it would result in a large saving to the company, is not a sufficient ground for inferring corrupt motives, in the absence of other facts showing that such motives were the influential cause of their acts.

5. If, from the evidence, there are reasonable grounds for the inference that the plaintiff, by retaining the contract, would have been a loser by it, or would have made no profit, the forfeiture, though declared or assented to from wrong motives, will not entitle him to damages.

6. If the evidence justifies the conclusion that the plaintiff would not have finished the work within the contract time, had no forfeiture been declared, as the contract would then have been terminated, and the plaintiff, by its terms, would have been liable to a deduction of one-sixth upon the whole of the work performed, he cannot recover for any alleged injury from the forfeiture.

7. The allegation of a malicious arrest of the plaintiff's person, on a warrant of the peace sued out by one of the defendants, not being set forth as a distinct cause of action, is not a proper basis for a verdict against the defendants; but, if the averment of malicious motives in the forfeiture, and the assent given to it, is sufficiently proved, the malicious arrest may be considered in aggravation of damages.

8. If the jury are satisfied that, in the prior suit brought by the plaintiff against the Wabash Navigation Company [Case No. 3,464], the jury took into consideration and included in their verdict, the loss which they supposed the plaintiff had suffered by the forfeiture, he cannot recover any thing in this action for such loss, even if the jury should conclude from the testimony that there was an actual loss to him.

[This was an action by Samuel Culbertson against Abner T. Ellis and others to recover for damages sustained by reason of the forfeiture of a contract.]

Kilgore & Smith, for plaintiff.

Judah, Crawford & Crittenden, for defendants.

LEAVITT, District Judge. This is a special action on the case, brought for the recovery of damages, on grounds set forth in the plaintiff's declaration, and which will be indicated with sufficient clearness by the following brief statement: A company had been incorporated by the legislatures of the states of Indiana and Illinois, by the name of the Wabash Navigation Company, for the improvement of the navigation of the Wabash river at the Grand Rapids, by means of a crib lock and dam. On the 21st of August, 1847, the president and directors of said company entered into a written contract with the plaintiff, and one Isaac Culbertson, since deceased, by which the Culbertsons agreed to construct the lock and dam, in the manner and upon the conditions specifically stated in said contract. One of the conditions was, that the work should be completed by the first of November, 1848, with a clause to the effect that if the work was not prosecuted with the force and diligence necessary to ensure its completion by the time stated in the contract, it should be competent for the engineer of the company to declare it forfeited, and take possession of the work in behalf of the company. It was also agreed, in case the Culbertsons failed to complete the lock and dam within the contract time, they were to be subject to a deduction of one-sixth of the amount of the work done by them. Soon after the execution of the contract, the Culbertsons procured tools, implements and other property, and commenced the execution of the work, and continued their operations during the autumn of 1847, and the summer of 1848; and, on the 2d of September, in the last named year the engineer declared the contract to be forfeited, and the company took possession of the work and carried it on to its completion.

The averments in the declaration are, in the substance, that the plaintiff had faithfully performed his part of the contract, up to the time of the forfeiture, having made all the progress therein that was practicable, and was then engaged on the work in the vigorous prosecution of the same; that the engineer, at the instance of the defendants, wrongfully and without any sufficient reasons, declared the contract to be forfeited; and that the defendants, being at the time directors in said company, corruptly conspiring together to injure the plaintiff, wrongfully and maliciously urged the engineer to declare the forfeiture, and with the same purpose and motive affirmed the act of the engineer, and wrongfully took possession of the tools, implements and other property of the plaintiff; and as a means to accomplish their unlawful purpose, maliciously filed a false affidavit that they were in fear of personal injury and violence by the plaintiff, and on the 7th of September, 1848, sued out a warrant of the peace against him, and procured him to be arrested and held in custody thereon. The plaintiff claims damages for the loss, which he alleges he sustained by reason of the forfeiture of the contract, and the illegal proceedings of the defendants in getting possession of his property and arresting and imprisoning his person. The defendants plead, first, not guilty, thereby putting in issue all the allegations in the plaintiff's declaration; and secondly, that the plaintiff, in a prior suit against the Wabash Navigation Company, tried in this court, obtained a verdict and recovered judgment for nearly ten thousand dollars, in which was included his claim for the injury sustained by him arising from the annulment of the contract. [Culbertson v. Wabash Nav. Co., Case No. 3,464.]

It is not deemed necessary, in committing this case to the jury, to re-state, or minutely analyze, the great mass of evidence which has been introduced on this protracted trial. It will be my purpose to bring to the notice of the jury, with as much brevity as possi-

ble, the legal principles involved, and leave them in the discharge of their rightful duties—to apply these principles to the facts before them.

Upon the first issue made by the parties, two principal enquiries arise: First, whether, in the forfeiture of the contract by the engineer, the affirmation of that forfeiture by the defendants, and the acts consequent thereon, the defendants were influenced by the malicious or improper motives imputed to them by the plaintiff; and, secondly, whether the forfeiture resulted to the injury of the plaintiff, by depriving him of profit which otherwise would have enured to him from the fulfilment of the contract. In relation to the first of these enquiries, it will be noticed by the jury, as a fact not controverted in the case, that the contract between these parties contains an explicit provision to the effect, that in case the Culbertsons shall not prosecute the work in such a way as to ensure its completion within the time stated, the engineer may declare it forfeited, and take possession of the unfinished work in behalf of the company. It is not pretended that any fraud or undue means were used, to induce the plaintiff to become a party to this contract. It was voluntary on his part. The clause of forfeiture is one usually inserted in contracts for the construction of important public works, and is obligatory on the parties to it, not being against law, or condemned by any principle of public policy. For the purpose indicated by this clause in the contract between the parties, they constitute the engineer their mutual agent, and are bound by his decision, if made in good faith. It has been held by the supreme court of the United States, in reference to a clause of forfeiture in a contract similar to this, that if the engineer declares a forfeiture under the belief that the contractor was not prosecuting his work with proper diligence and energy, and an apprehension that the work would not be completed within the contract time, damages are not recoverable for the forfeiture, though it should appear that the contractor was not in default, and that the engineer acted under a mistaken view of his conduct. [Philadephia, W. & B. R. Co. v. Howard] 13 How. [54 U. S.] 307. This principle is, however, stated by the court, with the limitation, that the forfeiture shall not deprive the contractor of what was previously earned by or due to him under the contract.

As the result of this doctrine, thus settled by the supreme court, it will be observed, the plaintiff in this action has no legal claim for damages arising from the act of forfeiture, unless the engineer, with the knowledge and approbation of the defendants, and from corrupt and malicious motives, annulled the contract, and the act of annulment, from like motives, was sustained and affirmed by the defendants. The motives of the engineer and defendants, in this transaction, are proper for the consideration of the jury; and these can only be inferred from their acts, as adduced in evidence. If there was reasonable or probable cause for the declaration of forfeiture, it affords at least a prima facie presumption that it was done in good faith, and without any improper motive. In the consideration of this subject, it will be the duty of the jury to scrutinize the evidence, and decide according to the light which it affords. The work which the plaintiff contracted to perform, was one of very considerable magnitude; and it was obviously important to the company of which the defendants were the representatives, as well as to the public, that it should be completed within the time stated in the contract. The work, while in progress and in an unfinished state, would be a hindrance to the navigation of the Wabash river, in those stages of water when it could be used for that purpose; and if unnecessarily protracted, would subject the company to damages for its obstruction. Hence the propriety and necessity of the clause of forfeiture in the contract, to secure the prompt and timely completion of the work. The contract, as already stated, was dated in August, 1847, and the locks and dams were to be completed by the first of November, in the following year. The declaration of forfeiture was made the second of September; leaving but two months from that date, for the completion of the work. The testimony of a number of witnesses is before the jury, touching the manner in which the work had been prosecuted, prior to the forfeiture, and the amount of work then to be done. It also appears, that the season of 1848 was not favorable to the prosecution of the work, owing to the occurrence of frequent floods in the river, and to the sickness of both the Culbertsons, resulting in the death of one of them. I do not propose to advert specially to the testimony on these points. The engineer who superintended the work from its commencement, and by whom the forfeiture was declared, has been very closely examined on all the points involved in this controversy. He is wholly unimpeached as a witness, and appears to be a gentleman of great intelligence and candor. It will be for the jury to decide what weight shall be given to his testimony. He has stated very clearly the progress of the work, up to the time of the forfeiture, and what then remained to be done. With a full knowledge of all the facts, he gives it as his opinion, there was not even a remote probability, that the work would be completed by the first of November; and that under this conviction, and wholly uninfluenced by the defendants or others, and solely on his own responsiblity, he declared the annulment of the contract. It moreover appears from his testimony, that so far from any act being done to obstruct the progress of the work, he and the defendants evinced the greatest anxiety for its rapid advancement, and its completion by the plaintiff within the contract time. And to this end, it ap-

pears the board of directors, during the summer of 1848, passed several resolutions of a conciliatory character, enjoining upon the plaintiff to apply more force to the work, and prosecute it with greater energy.

Some testimony has been introduced by the plaintiff, proving that some of the defendants, on different occasions, and to different persons, expressed the opinion that by annulling the contract, a considerable saving would result to the company; and it is insisted in behalf of the plaintiff, that this was the motive in declaring the forfeiture. If such an inference is fairly sustainable, the jury will be fully justified in finding the allegation of evil motive, as alleged in the declaration, to be true, and returning a verdict accordingly. If a wrong has been committed in this transaction, with the low and mercenary design of benefiting the company, it affords a fair implication that the annulment was wrongful and malicious, and the plaintiff is well entitled to recover the full amount of any injury which he has thereby sustained. The jury, however, must be satisfied beyond a fair doubt, that the defendants were actuated by a motive so dishonorable and fraudulent. And they will not be justified in such a presumption, by the fact, that some of the defendants expressed an opinion that the forfeiture would result in a saving to the company. Such an opinion may have been entertained, without presuming that it necessarily induced the act of forfeiture. Indeed, such an inference is in direct contradiction to the testimony of the engineer, who, as before stated, testifies that he declared the forfeiture from a conviction of duty, and on his sole responsibility. He also swears, that in his judgment, no saving would accrue to the company by the annulment of the contract.

In no aspect of this case, can the plaintiff's alleged loss from the forfeiture of the contract, be taken into consideration by the jury, in estimating damages, if they are satisfied that by retaining the work he would have realized no profit, or that there would have been an actual loss. Some of the witnesses for the plaintiff express the opinion, that the plaintiff would have made some profit on his contract, if he had been permitted to complete it. Others, among whom is the engineer, having an accurate knowledge of all the facts necessary to a correct judgment on this point, say the plaintiff would have lost money by holding on to the contract, and completing the work. It will be for the jury to decide, as to the preponderance of the testimony relating to this point of the case. Whether, on the supposition of a loss to the plaintiff from the forfeiture, he is not barred from recovering it in this action, by his recovery in the prior suit, will be a proper subject of inquiry, in considering the second plea of the defendants.

With reference to the question of loss or profit by the plaintiff, if the contract had not been annulled, there is evidence which is entitled to the consideration of the jury proving that the plaintiff had no hope or expectation of completing the work, within the contract time. By the terms of the contract in the event of a failure to finish the work according to its requirements, he was subject to a deduction of one sixth upon the entire value of the work done; and his profit, if any, would be reduced by this amount. And moreover, without question, failing to complete the work by the first of November, 1848, the contract would then be at an end, and the work pass into the company's hands. These suggestions are submitted to the jury, to aid them in coming to a just conclusion in reference to the probabilities of profit to the plaintiff, if the contract had not been annulled.

With reference to the issue on which the jury are to pass in this case, it is perhaps not necessary to decide, whether the sickness of the plaintiff and his brother, during the summer of 1848, and the prevalence of high water in the Wabash, during that season, which may have retarded the progress of the work, would have afforded a legal excuse for not completing it, within the contract time, if there had been no annulment of the contract. These contingencies were not provided for, in the clause of forfeiture, and did not affect the right of the engineer to annul the contract, if, without reference to these, the facts justified the act. In the posture in which this case is before the court and jury, the question is not, whether the plaintiff is excusable for not prosecuting the work with more diligence and energy, but whether the plaintiff's allegations of malicious motives in the forfeiture, are sustained by the evidence.

As to the arrest and imprisonment of the plaintiff, on a warrant of the peace, issued at the instance of one of the defendants, with the alleged malicious purpose of compelling a transfer or sale of the plaintiff's tools, implements, etc., to the company, which, it is insisted by counsel, is of itself a sufficient ground to justify a verdict of damages in this action: it will be noticed, that it is not set forth in the declaration as a distinct and substantive cause of action. It is stated, as one of a series of acts showing the malicious purpose of the defendants in the entire transaction. Isolated from the other facts of the case, it can not constitute a legal basis for a general verdict against the defendants; but, if the jury believe the main fact charged, namely, that the defendants maliciously procured the declaration of forfeiture and subsequently affirmed the act, and that the arrest and imprisonment of the plaintiff were without probable cause, and with a bad purpose, the latter facts may properly be taken into consideration in aggravation of damages.

The views of the court on the plea of former recovery, interposed by the defend-

ants, will now be briefly stated. As before noticed, it is insisted by counsel that the jury may include in their verdict the prospective profit of the plaintiff, on his contract with the company, if there had been no annulment, even if the jury in the former suit estimated such profit in their verdict. The court, on this point, has no hesitancy in saying, if the jury are satisfied the supposed profit on the contract was taken into consideration by the former jury, and was included in their verdict, it can not be embraced in the verdict to be returned in this case. It is a plain principle of law, and an obvious dictate of justice, that a party shall not have two recoveries for the same cause of action. The former action, as appears from the record, was in debt, against the Wabash Navigation Company, and the amount recovered was nearly ten thousand dollars. Three of the jurors in that case testify that their recollection is distinct,—that the prospective profit of the plaintiff on his contract with the company was included in their verdict. In addition to this, it is proved by two gentlemen who were of counsel in that case, on opposite sides, that this claim was insisted on in argument to the jury; and they have no doubt, from the amount of the verdict, that it was considered and allowed by them. This evidence would seem to be satisfactory on this point. But the present action against the defendants as individuals, is not barred by the recovery in the former action. If the jury find that the acts charged in the declaration are proved, and were done with the malicious motives imputed to them, it will be competent for them to return a verdict for such damages as they may deem just, excluding from their computation the amount of any supposed loss to the plaintiff, from the forfeiture of the contract.

Case No. 3,462.

CULBERTSON v. The SOUTHERN BELLE.

[1 Newb. 461.][1]

District Court, E. D. Louisiana. Feb. Term, 1854.[2]

TOWN ORDINANCES — COLLISION — STEAMER AND FLAT-BOAT AT PIER.

1. The corporations of cities and towns on the Mississippi river, when authorized by the legislatures of the different states, within which those cities and towns are situated, have the right to pass rules and regulations relative to their landings; and it is the duty of this court to respect them.

2. Testimony introduced to show that the ordinances of the town of Grand Gulf, fixing the places of landing for steamboats and flat-boats, are rarely enforced by the authorities of the town, can have no influence with this court; for if the fact be so, it may serve to show a gross dereliction of duty on the part of those who have been charged with the execution of those ordinances, but can afford no ground for this court to decree that they are to be totally disregarded.

3. Whether the libelant, in taking a position for his flat-boat at the landing, did so voluntarily or in accordance with the orders of the proper officer having a supervisory control over his actions, is not material. If he brought himself within the pale and under the protection of the local regulations, he was in his proper position; and the attempt of a steamboat to land there, must be considered as an intrusion.

[See note at end of case.]

4. Precaution and vigilance on the part of the officers of vessels propelled by steam, should be increased in proportion to the difficulties of navigation in particular localities, and in proportion to the dangers of collisions to which they are liable to expose the property of others.

[See note at end of case.]

[In admiralty. Libel by William B. Culbertson, owner of the flat-boat Rainbow, against the steamboat Southern Belle (Henry B. Shaw, William M. Shaw, Elam Bowman, Sidney A. Lacoste, and John D. Sebastian, claimants) to recover damages sustained by collision.]

L. Hunter, for libelant.

Benjamin, Bradford & Finney, for respondent.

McCALEB, District Judge. This suit has been instituted to recover damages which, the libel alleges, were sustained by the libelant as owner of a flat-boat which was sunk by the steamboat Southern Belle. The flat-boat was moored at the usual and prescribed place of landing for flat-boats, and was stove by the steamer, while the latter was attempting to land at the same place. The collision occurred at Grand Gulf, Mississippi. The rules and regulations of the selectmen of Grand Gulf, have been brought to the attention of the court, and conclusively establish the fact that the flat-boat was in its proper place. The corporations of the cities and towns on the Mississippi, when authorized by the legislatures, undoubtedly have the right to pass rules and regulations with respect to their landings; and it is the duty of this court to respect and uphold them. Testimony has been introduced on the part of the respondent, to show that the ordinances of the town of Grand Gulf, relating to the landing, are rarely if ever enforced. Such evidence can have no weight with the court, for if the fact be so, it may serve to show a gross dereliction of duty, on the part of those who have been charged with the execution of the ordinances, but can afford no ground for this court to decree that they are to be totally disregarded. Until they are repealed by the authority that enacted them, they will be presumed to be in full force, and adequate to the purpose for which they were passed. And it is a matter of no importance, whether the libelant in taking his position at the landing, did so voluntarily or in ac-

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

[2] [Reversed by circuit court (case unreported). The decree of circuit court was reversed by supreme court in Culbertson v. The Southern Belle, 18 How. (59 U. S.) 584.]

cordance with the orders of the proper officer having the supervisory control over his actions. If he was within the pale and under the protection of the local regulations, the court will hold him justified. If he was right in the position he occupied, the attempt of the steamer to land there must be regarded as an intrusion.

It has been contended on behalf of the respondents, that the collision was the result of an unavoidable accident caused by the violence of the wind, which was blowing at the time hard on shore. I have examined the evidence most confidently relied on, in favor of the respondents, that of the pilot, who was at the wheel of the steamer at the time of the collision, and who as usual with pilots, testifies strongly in justification of his own conduct; and I am by no means satisfied, that the collision was unavoidable. This is a common plea, set up by officers of steamboats, and is seldom even plausibly sustained by evidence. In the present instance the plea is unavailing. It is not pretended that the violence of the wind was too great for the resistance of steam. If such were the fact, the boat would have been driven to the shore before the attempt to land was made. She could not have proceeded with safety on her voyage. The force of the wind undoubtedly increased the difficulties of landing; but this was only a reason for increased care and caution. This court has repeatedly held that the precaution and vigilance on the part of officers of vessels propelled by steam, should be increased in proportion to the difficulties of navigation in particular localities, and in proportion to the dangers to which they are liable to expose the property of others.

It has also been contended on behalf of the respondents, that there was no light on board of the flat-boat at the time of the collision, and that she could not, therefore, be seen from the steamer until it was too late to prevent the occurrence. On this point there is a conflict of evidence. The witnesses on behalf of the respondents, testify that they saw no light, while those who were on board the flat-boat at the time of the collision, testify most positively that a light was brought upon deck, about the time the steamboat commenced backing down from the wharf-boat. That there was a lantern exhibited on the flat-boat before the collision, I have no doubt. If it was not seen on the steamer, I can only account for the fact upon the supposition, that the greater glare of the torch light from the latter, was such as to dim if not entirely to obscure in the darkness of the night the lesser lights near the shore. But besides the existence of a light on the flat-boat, we have the evidence of the respondents' witnesses, that there was clear starlight, and some of the witnesses testify that the moon was shining at the time.

An attentive examination of the evidence and the arguments of counsel, has led my mind to the conclusion that by the observance of proper prudence and precaution on the part of the officers of the steamer, the collision could have been avoided; and that no blame can be fairly thrown upon those who had charge of the flat-boat. I therefore pronounce for the damage sustained by the libelant to be definitely ascertained by a reference to R. M. Lusher, Esq., commissioner, upon the coming in of whose report, a final decree will be entered.

NOTE [from original report]. This decree was sustained by the supreme court of the United States, on appeal from the judgment of the circuit court [decision not reported], by which it was reversed.

[NOTE. The opinion of the supreme court, delivered by Mr. Justice McLean, set forth, as the reasons for sustaining the decree of the district court, that, the regulation as to the landing places at Grand Gulf being generally known, it was immaterial whether it was established by ordinance or by general usage; that the Rainbow was not negligent in failing to carry a light; and that the fault lay with the Southern Belle, in not landing above the wharf boat, in failing to keep up sufficient steam to control her, and in failing, through the lack of vigilance of her officers, to see the wharf boat in time to take measures to avoid the casualty. Culbertson v. The Southern Belle, 18 How. (59 U. S.) 584.]

Case No. 3,463.

CULBERTSON v. STILLINGER.

[Taney, 75.][1]

Circuit Court, D. Maryland. April Term, 1846.

BOND BY EXECUTOR TO SURETY—ACTION—CONDITIONS—SET-OFF — SUBSEQUENT AGREEMENT BY SURETY—ENFORCEMENT IN EQUITY.

1. An action at common law, upon a bond, must be determined according to the rules at common law, and without reference to the relief which the defendant might obtain in a court of equity.

2. A bond given by an executor for the payment, to his surety, of one-half of his commissions, from time to time, as they may be allowed, in consideration of his consenting to become such surety, is a valid instrument.

3. The law will not annex to such a bond a condition precedent, that the surety shall continue solvent till the estate is finally settled, before he will be entitled to any of such commissions.

4. The premium paid by the executor to the new surety, if additional security be required by the orphans' court, is not a legal set-off to an action on such bond.

5. But counsel fees paid by the executor, in establishing the amount of his commissions, will be a proper credit on the portion of commissions to be paid to the surety, in proportion to the share of said commissions which the surety is to receive.

6. An agreement by the surety, not under seal (executed after the bond), not to claim any part of the commissions which may accrue during the lifetime of the testator's widow, will not

[1] [Reported by James Mason Campbell, Esq., and here reprinted by permission.]

be considered a condition annexed to the bond, nor a release or defeasance thereof.

7. Such agreement would be enforced in a court of equity.

8. Upon proceedings in equity the question would be open, as to what deduction ought to be made, for a premium paid by the executor, to procure a new surety required to be given by him in consequence of the first surety becoming insolvent.

9. And upon such proceedings in equity, the question also would be open, as to whether the bond given to the first surety would create a liability to pay any part of the commissions accrued after the said surety had become insolvent.

This was an action of debt, brought the 9th December, 1844, upon a bond executed by the defendant Thomas Chambers, whose assignee in bankruptcy [Samuel D. Culbertson] was the plaintiff in the suit. The condition of the bond was as follows: "Whereas, by the last will and testament of Michael Riddlemoser, late of Baltimore county, deceased, the above-bound Michael Stillinger was appointed one of the executors of said last will and testament, and, by the renunciation of the other persons named as co-executors in said last will and testament, since its execution and admission to probate in the orphans' court of Baltimore county, has become sole executor: and whereas, the said above-bound Michael Stillinger has found much difficulty in procuring such security for the faithful discharge of his duties as executor as aforesaid, as would be received as sufficient by said orphans' court, and has applied to the said Thomas Chambers to become one of his said securities, and in consideration of the risk, and trouble and responsibility, that would be incurred by the said Thomas Chambers, in becoming one of his said securities as executor as aforesaid, has agreed to account for and pay over to the said Thomas Chambers, from time to time, as the same may be received and allowed by the said orphans' court, one-half of the sum or amount of money, that may be allowed to the said Michael Stillinger, for his commissions, as executor as aforesaid, by the said orphans' court, for the sole use and benefit of the said Thomas Chambers: and whereas, the said Thomas Chambers has agreed to become one of the securities of the said Michael Stillinger, as executor as aforesaid: Now the condition of the above obligation is such, that if the above-bound Michael Stillinger shall well and truly account for, and pay over to, the said Thomas Chambers, his executors, administrators or assigns, for his and their sole use and benefit, from time to time, as the same may be received and allowed by the said orphans' court, one-half of the sum or amount of money, that may be allowed to the said Michael Stillinger, for his commissions, as executor as aforesaid, by the said orphans' court; and shall well and faithfully, in all respects, discharge his duties as executor as aforesaid, then the aforegoing obligation to be void and of none effect, otherwise to be and remain in full force, virtue and effect in law. Michael Stillinger. (Seal.) Signed, sealed and delivered in presence of James Kernan."

On the day of the date of this bond, the said Chambers and Stillinger signed the following agreement: "It is agreed and understood between the subscribing parties, that the said Chambers releases all his claim and right to certain commissions on the rents and proceeds of the estate of Michael Riddlemoser, vested in him by agreement, executed this day, between the said parties, during the lifetime of the widow of said Michael Riddlemoser. Witness our hands, this 15th day of January, 1833. Thomas Chambers. Michael Stillinger. James Kernan."

The defences taken by the defendant were —(1) The above agreement was a defeasance of the bond to the extent of the commissions allowed anterior to the death of the widow of said Riddlemoser. (2) That additional security upon the bond of Stillinger was ordered by the orphans' court, in consequence of the reputed insolvency of Chambers; that Chambers was called upon to furnish such additional security, but failed to do so, and the same was procured by Stillinger himself, prior to the death of Mrs. Riddlemoser (for which he had to pay $2000), and therefore, the plaintiff was not entitled to recover for any of the commissions allowed after such new security was given. (3) That the said Chambers was insolvent at the time of the execution of the bond sued on. (4) That said Chambers became a bankrupt before the settlement of the estate, and that he ceased to be a security on the bond of Stillinger, after such bankruptcy, and his assignee was not entitled to recover any part of the commissions accrued after such bankruptcy. (5) That the defendant was entitled to a credit of $700, being one-half of fees paid to counsel, employed by him to establish the amount of commissions received by him.

William Schley, for plaintiff.

G. L. Dulaney and Wm. Meade Addison, for defendant.

TANEY, Circuit Justice. This being an action at law upon a bond, the questions which arise upon the case stated, must be decided according to the rules at common law, and without reference to the relief which the defendant might obtain in a court of equity.

1. We think the bond is a valid contract, and not contrary to the policy of the law; undoubtedly, any agreement to pay money, in order to obtain an appointment to a public office, would be void; but if this principle extends to the appointment of an administrator by the orphans' court, yet it will not embrace the case before us; for the money was not to be paid to assist the party in

procuring the appointment. He had already been selected and appointed executor by the testator, who had, unquestionably, a right to make the appointment; and the money was to be paid for the purpose of enabling him to execute the duties of his appointment, and to carry into effect the wishes and intentions of the testator.

2. Neither is the continued availability of the security given, until the estate was finally settled, a condition precedent, to be performed by Chambers, before he became entitled to any part of the commissions; on the contrary, his share was to be paid to him, from time to time, as the commissions accrued and were allowed by the orphans' court, and it was not to wait for the final settlement, before it became due and payable.

3. The premium paid to the new surety, when additional security was required by the court, is not a legal set-off in this action. Chambers did not contract to furnish it, if called for; nor make any contract, express or implied, to reimburse the amount paid by the defendant. And, sitting in a court of law, we cannot apportion the premium contracted to be paid to Chambers, upon the ground that there has been an accidental failure of a part of the consideration for which this premium was to be paid.

4. The executor had, undoubtedly, a right to employ counsel, and there is no evidence to show that the fee paid was unreasonable or unusually high. It is, therefore, a legal credit against the present claim, in proportion to the share of the commissions to which Chambers is entitled.

5. The agreement between Chambers and Stillinger, as to the commissions in the lifetime of the testator's widow, is not a condition annexed to the bond. It is not endorsed upon the bond delivered to Chambers, but is a separate instrument, and upon the face of it, was executed after the bond, although upon the same day; for it refers to certain rights, which Chambers had acquired upon the bond, and agrees to release them. And as this instrument is not under seal, it cannot operate as a release or defeasance.

Undoubtedly, it would be enforced in a court of equity; and, upon a proceeding there, the question would also be open as to the deduction proper to be made on account of the new security required by the court; and whether, upon principles of equity, Chambers was entitled to any share of the commissions which accrued after his name had ceased to be available as a surety, and his credit become insufficient to protect the executor in the possession of his letters testamentary.

But upon the case stated we think the defendant has no defence at law, and therefore direct the judgment to be entered on the verdict, with interest until paid, deducting first the one-half of the counsel fee. Verdict and judgment for the plaintiff.

Case No. 3,464.

CULBERTSON v. WABASH NAV. CO.

[4 McLean, 544.][1]

Circuit Court, D. Indiana. May Term, 1849.

JURISDICTION—CORPORATION OF TWO STATES—PLEADING DEMURRER.

1. A company incorporated by a law of Indiana, and also a law of Illinois, to improve the navigation of the Wabash, which constitutes, to some extent, the boundary between the two states, the general place of meeting of the directors to do business being in Indiana, the records being kept there, suit may be brought by, or against the corporation in that state.

2. If a plea answer only a part of the count in the declaration, it is demurrable.

[At law. Action by Samuel Culbertson against the Wabash Navigation Company to recover for a breach of contract.]

Smith & Marshall, for plaintiff.

Judah & Sullivan, for defendant.

OPINION OF THE COURT. This action is brought on a contract to improve the navigation of the Wabash river, by various works specified, which were to be completed on the 1st of November, 1848, dated 24th of August, 1847. And it was provided that if at any time the party of the first part, shall refuse or neglect to push the work in a manner that will warrant its completion within the time specified, or to do the same in a workmanlike manner, and agreeably to said writing, the engineer may, at his discretion, declare said writing forfeited, which declaration of forfeiture should exonerate the defendants from all obligations and liabilities arising from said writing; and that one-sixth per centage on the whole work then due shall be forfeited to the said defendants. And it was agreed that the decision of the engineer should be final. The right to change the contract was reserved in the company, and the plaintiff alleges, that the contract was so changed as greatly to increase the labor, expenditure and materials, so that the work could not be completed within the time limited.

The defendant filed: (1) A plea to the jurisdiction of the court—that the defendant is not a corporation created by, and transacting its business within the state of Indiana, but was constituted by the states of Indiana and Illinois. By the act of 13th January, 1846, made dependent upon the consent of Illinois. That the consent of Illinois was given 30th January, 1847, whereby the above company was incorporated, and that the company was organized under both laws. (2) That of the six directors, two of them reside in Illinois and are citizens of that state. (3) That the business of the company, the erection of certain works on the Wabash river, the banks of which are within the peculiar jurisdiction of each of said states, and

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

the other part is within the concurrent jurisdiction of the said states. (4) That the directors have met as well in the state of Illinois as in the state of Indiana, for the transaction of their business, as its nature rendered it convenient. And that there is no particular place of business established for said company by the act or by the laws of the company. (5) That the stockholders are citizens of Indiana and Illinois. (6) That Culbertson, the plaintiff, is a stockholder. Replication that the president and secretary reside in Indiana—directors were there elected, and that Vincennes is the place of business, etc. Demurrer, etc.

The defendant filed a special demurrer to the declaration. And the plaintiff demurred to the sixth and seventh pleas, filed by the defendant. The declaration avers the plaintiff to be a citizen of Pennsylvania, and complains of the "Wabash Navigation Company, a citizen of the state of Indiana," etc.

By the decision of the case [Cincinnati, L. & C. R. Co. v. Letson] 2 How. [43 U. S.] 497, the right of a corporation, to sue in the courts of the United States, as a citizen of the state in which its business is done, is recognized, without regard to the citizenship of its stockholders. Under the prior decisions, jurisdiction was taken from the citizenship of the stockholders, which created embarrassment and deprived many corporations from suing in the courts of the United States. To give them the rights of citizens of the state where their business is done, carries out, more perfectly, the intention of congress, by enabling citizens of different states to sue in the federal courts.

The question now before us is one that has not, it is believed, arisen in any of the federal courts. It is argued that as the corporation derives its function from both states to accomplish an important work, on a river, which is the boundary of both, at least, to a certain extent, that the courts of the United States can not take jurisdiction, as the place of business of the corporation is in both states, and not, exclusively, in either. Illinois having assented to the work, and conferred on the corporation the necessary powers, so far as its jurisdiction is concerned, there can be no doubt as to the powers of the corporation. And the question is, as to the locality of the place in which the business of the corporation is done. Under the joint act of two states, the powers conferred to be exercised for the benefit of both, may be exercised in either. The act does not require the business to be done in either state, as regards the action of the directors; the work is to be done in both. But we are not now speaking of the manual labor required, whether it be on one side of the river or the other, but as to the power to make the contract, and to superintend the work. In this respect it would seem the claim of Indiana is paramount to that of Illinois. The act was first passed in Indiana, the company was organized in it, the president and secretary have constantly resided in Indiana, and a majority of the directors, and their principal business, at least, has been done at Vincennes, the residence of the president and secretary. And if, in one or more instances, the directors have met, in Illinois, to judge of a work to be constructed, it does not affect the general residence in Indiana. The books of the company are kept in Vincennes, in Indiana, which is the general place of meeting, and where the business of the directors is partially done. This, we think, is sufficient to make the defendant responsible to the jurisdiction of Indiana, and would enable the corporation to bring suit in that state. And we suppose that the corporation might also sue in Illinois. On the principle of comity a corporation may sue in a state, other than that which creates the corporation; and in this case there is more than comity. There is a legal sanction to the corporation by the laws of Illinois. We think, therefore, that the jurisdiction of this court may be sustained in this case. The plaintiff is alleged to be a stockholder in the corporation, but this, we suppose, does not prevent him from suing the company under the contract. His interest in the company extends to the stock he has subscribed and the consequent rights of one of the corporators; but he is individualized in the contract, and whilst he would be held, under it, individually responsible, he must have a remedy against the corporation for any failure on its part.

A special demurrer is filed to the declaration. After stating the power by the defendant to alter the contract, the declaration avers, "that after the making and delivery of said writing obligatory the said defendant altered said specifications and greatly increased the amount of work to be done by said plaintiff under said contract, to wit: in the sum of five thousand dollars, and thereby so increased the amount of labor to be done and materials to be furnished by plaintiff and said Isaac, that they could not perform the same within the time specified therein." The cause of demurrer assigned is a want of certainty in the excuse, for not performing the contract within the time limited. On a general demurrer we suppose the declaration might have been sustained, but it is not good on a demurrer where the causes are assigned. The specifications may be considered more a matter of form than substance. But it is proper that the defendant should have reasonable notice of the alterations in the contract by way of excuse, that the defendant may meet them by proof. In this respect, we think, the declaration is defective and that the demurrer must be sustained. The sixth plea alleges that the defendant did not alter the contract so as to increase the amount of work to be done, so that the same could not be completed within the time limited. This plea answers only a part of the second count in the declaration.

The plaintiff alleges that he was prevented from going on with the work. To this important allegation no answer is given. The plea, therefore, that the alterations did not so increase the labor of the defendant so that the same could not be completed within the time limited, answers only a part of the allegation in the count, and the plea is, therefore, defective. The demurrer to it is sustained. On the same ground the demurrer must be sustained to the seventh plea. That plea avers that the alterations mentioned in said second count did not require any extension of the time, but does not answer the other and important averment in the count, that the plaintiff was prevented from going on with the contract.

On application, leave is given to plaintiff and defendant to amend their pleadings.

[NOTE. On the trial of this cause on the merits, the plaintiff had a verdict, and recovered a judgment for an amount approximating $10,-000. See the statement in Case No. 3,461.]

Case No. 3,465.

CULL v. ALLEN.

[1 Cranch, C. C. 45.][1]

Circuit Court, District of Columbia. Dec. Term, 1801.

PRACTICE—PLEADING—FOREIGN JUDGMENT.

Oyer of the record of a judgment of another state will not be given if not prayed before the expiration of the rule to plead.

Debt on a judgment of a court in Vermont. A rule to plead was laid at June term, 1801. THE COURT at September term was wholly occupied in the trial of the cause of Forrest v. Hanson [Case No. 4,942].

The defendant now prays oyer of the judgment and record of the recovery. And the plaintiff moves for judgment on the rule to plead.

THE COURT refused to compel the plaintiff to give oyer of the record; permitted the defendant to plead by ten o'clock the next day; and continued the cause.

CULLERTON (UNITED STATES v.). See Case No. 14,899.

CULLEY (DONOHUE v.). See Case No. 3,-991.

Case No. 3,466.

CULLY v. BALTIMORE & O. R. CO.

[1 Hughes, 536.][2]

District Court, D. Maryland. Nov. Term, 1876.

CIVIL RIGHTS—PUBLIC CONVEYANCE—CITIZEN.

1. The act of congress of March 1, 1875 [18 Stat. 335], entitled "An act to protect all citizens in their civil and legal rights," so far as it seeks to inflict penalties for the violation of rights which belong to citizens of a state, as distinguished from citizens of the United States, was the exercise of a power not authorized by the constitution of the United States.

2. The privilege of using for local travel any public conveyance, is in general a right which belongs to a person as a citizen of a state, and not as a citizen of the United States; and the denial of that privilege (except where it is charged in the pleadings, and proved in evidence to have been on account of race, color, etc.), does not subject to the penalties of the said act of congress.

This case [brought by Harriet E. Cully] was one of eighteen suits brought against the company in which each of the plaintiffs sought to recover the penalty of $500 imposed by the supplemental civil rights act of 1875, on the ground that the company had discriminated against them on account of their color by refusing them admission to a car with white passengers, but compelling them to occupy a separate and inferior car. On several prayers for instructions to the jury, submitted by counsel on either side, the judge gave the following opinion.

Archibald Stirling, Jr., U. S. Atty., and Henry C. Wysham, for plaintiff.

John H. Latrobe, J. K. Cowan, and Jas. A. Buchanan, for defendant.

GILES, District Judge. The case of Cully v. Baltimore & O. R. Co. is one of considerable importance, and the interest taken in it by a large class of our fellow-citizens induced me to do what I very seldom do—postpone the decision from yesterday until such time as I could carefully review the authorities bearing upon the subject. This I had an opportunity of doing last night, and I will now announce the conclusion at which I have arrived:

Allusion has been made by the learned district attorney to two previous decisions of this tribunal. I will remark that a case similar to the one now being tried was never at any previous time before this court. The cases to which the learned district attorney alluded, were those of Thompson v. Baltimore City Pass. R. Co. [Case No. 13,941], and Field v. Baltimore City Pass. R. Co. [Id. 4,763], in both of which cases recovery was had. In the Case of Thompson it was an action brought by a citizen of Virginia against the City Passenger Railroad Company for ejecting him from one of its street cars, upon the ground that he was a colored party, and had no right to ride inside of the car. I held in that case that since the colored race was made citizens of the United States by the first section of the fourteenth amendment, any discrimination of that kind made by any public conveyance against them, gave them a right of action for such damages as they may have suffered. That case was brought in this court, and its juris-

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

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

diction sustained, because while the plaintiff was a citizen of Virginia, the company was a company incorporated by the state of Maryland, and I should so hold again. The case of Field v. Baltimore City Pass. R. Co. was a similar case. It was the case of a colored person, a citizen of New Jersey, who had been denied the right to ride in the City Passenger Railway cars. He brought his action against the passenger railroad company and recovered. I held the jurisdiction to be perfectly clear, that no carrier of passengers, no public conveyance, after the colored people were made citizens of the United States, could deny them the privilege which other passengers received. Those are the only two cases of that character that have ever come before me.

There were two cases with regard to the fifteenth amendment, or right of suffrage. The case of U. S. v. Mason [Case No. 15,734], from Kent county, and U. S. v. Schumenant [Id. 16,236], in Anne Arundel county. I held in those cases that while the right of suffrage had not been granted by the fifteenth amendment, yet there had been granted a right not to be discriminated against, and the learned pleader of this court, with his usual caution, had embraced in these indictments the fact that they were rejected because they were colored people, and on account of their race, color, and previous condition of servitude, and I held, therefore, that while the congress could not give the right of suffrage they could protect it. I held, although the section looked to hostile legislation by the states, yet that under the last clause of the section, which gave them the right to enforce it by appropriate legislation, while they could not act criminally upon the state, they could punish those persons who denied to them the right to be protected against discrimination, the article in the constitution of the United States guaranteeing protection to the citizens in that regard. In that view I think I am sustained by the late decisions on that point. I merely allude to this, as my friend, the learned district attorney, alluded to the decisions of this tribunal in former cases. The question presented in the present case is a very different one. You will now observe the reason why I inquired of the district attorney, before the argument proceeded, upon what article of the constitution of the United States he founded the right to ride in cars engaged in the local travel of the state. You will observe the point of that question and its pertinency. Now what does it say? "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state where they reside." That makes them citizens. They are all citizens entitled to every right which a white citizen has in the states, and entitled to all rights which citizens of the United States possess in each. "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States." Now the supreme court has held—and these decisions have all been since I decided the cases to which I have referred—in the case of U. S. v. Reese [92 U. S. 214], and the Slaughterhouse Cases [16 Wall. (83 U. S.) 36; 10 Wall. (77 U. S.) 273; 111 U. S. 746, 4 Sup. Ct. 652], that this article of the constitution only protected such rights as belonged to a citizen of the United States. We all know the history of the Slaughterhouse Cases. There the legislature had undertaken to provide an abattoir, covering all the city, and saying no hogs, and no cattle, etc., should be slaughtered in any other place than within this inclosure, and that every butcher should carry his animals there to be slaughtered. The parties, who were butchers in New Orleans, thought this was an infringement, and that they were protected. They thought, as no doubt the pleader in this case thought, that all rights of a citizen were protected under this article of the constitution, and suits were brought to test the validity of this act.

The supreme court (and that was a case that came up under this very section) held there that the first clause of the fourteenth article was primarily intended to confer citizenship on all persons born or naturalized in the United States, and to declare them citizens of the United States, and citizens of the state wherein they resided, and it recognized the distinction between citizens of a state and citizens of the United States. The second clause, and the one we are dealing with here, protects from the hostile legislation of the states the privileges and immunities of citizens of the United States as distinguished from the privileges and immunities of citizens of the states, and they go on therefore to declare in that decision that the law of Louisiana in regard to the Slaughterhouse Case was no violation of the fourteenth amendment, and the party there had no protection under it; that for all privileges and immunities guaranteed to a citizen by the laws of his state, he must look to the state and her tribunals for protection and for redress, but for immunities and privileges which belong to him as a citizen of the United States, as such, this article protected him, and he could seek his recovery in the courts of the United States. And the court in its opinion (and it is a very able opinion) say, "It may be asked what, if any, are the rights of citizens of the United States as such?" The court enumerated a great many. The right to travel to the national capital on business of the government, the right to proceed to a port of the United States for foreign travel, and many others of a similar character, are rights which belonged to a citizen of the United States, from the organization of the government, and from its inception, independent of any special legislation, and it is only such rights that this article intended to protect. I need not go through with all the cases. It is carried out

in the cases of U. S. v. Reese [supra], and U. S. v. Cruikshank [92 U. S. 542]. But the Saughterhouse Case was the first one that announced this doctrine, and it was the first one that called the attention of the people of this country to the distinction between rights that belonged to citizens of the states, and the rights which belonged to the citizens of the United States as such.

Now, gentlemen, if that is the law, and certainly no one can read those authorities without being convinced, for the supreme court have never been clearer than they have been on this subject; whatever might have been my views before, it has always been my privilege and my pleasure, as it is my duty to carry out the decisions of that high tribunal. Taking, therefore, this view of the case, gentlemen, I shall give one instruction which ends the case, and the jury will render the verdict for the defendant. Here is my instruction: I reject all the other prayers. I would remark that I have not considered one proposition argued by the learned counsel for the defendant here, and argued by the learned district attorney with regard to the character of this action. I should rather be inclined to think that the district attorney, in his argument, was right; that while it is an action for a penalty, it is an action at law, and the parties, therefore, would have the same rules applied to them as they would in any other action at law. But I have not looked at the authorities on that point. The act of congress of March 1, 1875, under which this action is brought, so far as it seeks to inflict penalties for the violation of any or all rights which belong to citizens of a state, and not to citizens of the United States as such, was the exercise of a power not authorized by any provision of the constitution of the United States, and as the privilege to use for local travel any public conveyance is not a right arising under the constitution of the United States, there can be no recovery of the penalty sued for in this case, and the jury will render their verdict for the defendant.

Exceptions to the ruling of the court were reserved by the United States attorney, and the case went to the supreme court of the Unied States.

The jury were then polled, and in accordance with the instructions of the court rendered their verdict for the defendant. The cases of the seventeen other plaintiffs were disposed of by this result.

CULPEPER COUNTY (JENKINS v.). See Case No. 7,261.

Case No. 3,467.

CULVER v. CALENDER.

[The case reported under above title in 5 Law Rep. 125, is the same as Case No. 2,307.]

Case No. 3,468.

CULVER et al. v. CRAWFORD COUNTY.

[4 Dill. 239;[1] 4 Cent. Law J. 198; 4 N. Y. Wkly. Dig. 145.]

District Court, W. D. Arkansas.[2] Nov., 1877.

JURISDICTION OF UNITED STATES CIRCUIT COURTS —AMOUNT IN DISPUTE.

1. To give the circuit court jurisdiction, the matter in dispute must exceed, exclusive of costs, the sum of $500, and, in actions upon a money demand, the court, in passing on the question of jurisdiction, will look to the amount stated in the body of the complaint, and will not be governed alone by the amount in the prayer for judgment.

2. In a suit seeking to recover an amount that is not fixed, and which amount can be ascertained only by trial, the plaintiff can obtain a standing in court by laying his damages at the requisite sum.

Yonley & Whipple, for plaintiffs.

Hugh F. Thomason, for defendants.

PARKER, District Judge. The complaint in this case contains four counts, each one being based upon a written promise of the county to pay a sum of money therein specified, such promise in writing being what is commonly called and known as county scrip, or a county warrant. The warrants sued on are set out in the several counts in haec verba. From these warrants, so set out and made a part of the complaint, it appears that the whole amount which the plaintiffs could recover would be less than five hundred dollars. The plaintiffs pray judgment for six hundred dollars. The defendant files a motion to dismiss the suit, for the reason "that it appears upon the face of the complaint that the sum in controversy does not exceed the sum or value of five hundred dollars."

The plaintiff claims in argument that the jurisdiction of the United States circuit court, as to the subject matter of the suit, is fixed by the amount claimed in the prayer of the complaint. Section 1 of the act of the 3d of March, 1875 [18 Stat. 470], provides "that the circuit courts of the United States shall have original cognizance, concurrent with the courts of the several states, of all suits of a civil nature at common law or in equity, where the matter in dispute exceeds, exclusive of costs, the sum or value of five hundred dollars;" and, of course, when the action is between certain parties therein named. The question presented in this case is: How is the sum or matter in dispute to be ascertained?—by going to the whole complaint, or to the prayer alone?

The sum or matter in dispute must exceed, exclusive of costs, the sum of five hundred dollars. There are no very recent decisions bearing directly upon the point in controversy in this case. We find, however, that the law regulating the removal of causes

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

[2] The district court for the western district of Arkansas has circuit court powers.

from state courts to federal courts, has a provision in regard to the amount in controversy, in the precise language of the one set out above. Judge Dillon, in his "Removal of Causes from State Courts to Federal Courts," while treating of the law in regard to removal of causes, page 24, says: "The value of the matter in dispute for the purposes of removal is to be determined by reference to the amount claimed in the declaration, petition, or bill of complaint. In actions on a money demand, the value in dispute is the debt and damages claimed, as stated in the petition or declaration, and in the prayer for judgment. For example, if the action be on a note for a fixed sum, and the principal and interest and damages do not altogether exceed five hundred dollars, it is not removable, although the prayer for judgment may be for an amount greater than five hundred dollars." The prayer for relief is generally regarded as forming no part of the cause of action, and as having no effect upon it, and as furnishing no test or criterion by which its nature may be determined. Pom. Rem. & Rem. Rights, p. 630, § 580.

This is either true or false. If it is true, a court of limited jurisdiction must go to the statement of the cause of action contained in material parts of the complaint or declaration, in a case where a suit is upon a money demand or fixed amount. If it is not true, then the prayer is bad, because it is inconsistent with the other parts of the complaint or declaration. If it is bad, it is surely a very uncertain test from which to ascertain jurisdiction. Of course, in a suit for unascertained damages, the only test of the amount in dispute is found in the prayer for relief. But, under the rules of pleading, the plaintiff, when he sues upon a money demand, if it be on a written promise to pay, or an account, must at least set out the substance of his written promise or his account in his complaint, and must make such written promise or account a part of his pleading. Then, in that case, there is no trouble in ascertaining the true amount in controversy, by looking at the body of the complaint. In the case of Judson v. Macon Co. [Case No. 7,568], the same being a suit upon coupons of a county, Judge Dillon evidently went to the whole complaint to ascertain the total amount in controversy. It is true that the jurisdiction is not to be determined by the amount of the judgment recovered. By matter in dispute is meant the subject of litigation—the matter for which the suit is brought and on which issue is joined. In an action on a money demand, the matter in dispute is the debt claimed; and its amount as stated in the body of the complaint, and not merely the damages alleged in the prayer for judgment at its conclusion, must be considered in determining the question whether the court can take jurisdiction.

In the section of the law regulating the appellate jurisdiction of the supreme court of the United States, it is provided that the matter in dispute shall exceed the sum of (now) five thousand dollars. Upon a statute similar to this, it was held by the supreme court, in Lee v. Watson, 1 Wall. [68 U. S.] 337, that "the matter in dispute, in an action upon a money demand, is the debt claimed and its amount as stated in the body of the declaration, and not merely the damages alleged in the statement, in the prayer for judgment at its conclusion." The same rule is found in 1 Abb. U. S. Pr. p. 336; Phil. Pr. 78; Conkl. Pr. 132.

In this case, the amount is a sum certain fixed by contract, which the plaintiff is obliged to set forth, and from which it may be seen that the sum sued for is less than the requisite sum to give this court jurisdiction. In such a case the court, in determining a matter of so much importance as its jurisdiction, must look to the whole complaint, and not to the prayer alone.

In a suit to recover an amount that is not fixed, and which amount can be ascertained only by trial, the plaintiff can obtain a standing in court by laying his damages at the requisite sum.

Motion sustained.

Case No. 3,469.

CULVER et al. v. WOODRUFF COUNTY.

[5 Dill. 392.][1]

Circuit Court, W. D. Arkansas. 1878.

FEDERAL JURISDICTION — TRANSFER OF COUNTIES FROM ONE JUDICIAL DISTRICT TO ANOTHER.

1. The act of congress of January 31, 1877 [19 Stat. 230], taking certain counties out of the western district and placing them in the eastern district of Arkansas, is silent as to cases then pending in the western district against residents of these several counties; such cases remain and are to be tried by the United States court for the western district.

2. Where the status of parties is such as to give a federal court jurisdiction, a change of such status pending the suit does not affect the jurisdiction.

The plaintiffs in this cause [Culver, Page, Hoyne & Co.] file their motion for an order transferring this case to the district court of the United States for the eastern district of Arkansas, for the reason that the county defendant has, by act of congress, been transferred to said eastern district. This case was pending in this court on the 31st of January, A. D. 1877, the date of the passage of the law of congress transferring Woodruff, with other counties in the state, to the eastern district of Arkansas. Woodruff county, prior to that time, was in the western district. The plaintiffs were nonresidents, and this court at the time of the bringing of this suit had jurisdiction of the same.

Yonley & Whipple and J. H. Clendenning, for plaintiffs.

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

PARKER, District Judge. On the question raised by this motion, the court holds the law to be, that, when jurisdiction has once attached, no subsequent change in the relation or condition of the parties in the progress of the cause will deprive the court of jurisdiction over the cause, or over any proceeding touching the execution of the judgment. It is clear that the jurisdiction depends on the state of things existing at the time the action is brought, and that after it is once vested it cannot be ousted by subsequent events. Now, if a suit is brought in this court by a non-citizen of the state against a citizen of the state and resident of the district, and the non-citizen afterwards becomes a citizen of the state pending the suit, or the resident of the district becomes a non-resident before the determination thereof, neither one of these changes in the status of the parties will divest the court of jurisdiction, because the same has attached, and the condition or relation of the parties at the time of bringing the suit is the test of jurisdiction.

The case of this county presents a case of a change of residence from this judicial district to another by operation of law since this suit was brought, and after jurisdiction had attached. This principle is directly decided in the case of U. S. v. Dawson, 15 How. [56 U. S.] 467. This was a case that went to the supreme court of the United States from this district, or, rather, what had then just become the eastern district of this state. A new district had, in the year 1851, been created, called the western district of Arkansas, consisting of nine counties in the state and the Indian country, and a case was pending in the old district from the Indian country. It was claimed for the defendant that he could not be tried in the eastern district, but that his case must be sent to the other district. The court says: "We do not, therefore, perceive any objection to the jurisdiction of these courts over cases pending at the time the change took place, civil and criminal, inasmuch as the erection of the new district was not intended to affect it in respect to such cases, nor has it, in our judgment, necessarily operated to deprive them of it." The law was silent as to cases pending in the old district. Therefore, the effect of the decision is, that, unless the law changing the district provides that pending cases shall be removed to the new district, the mere passage of the law does not work a removal.

The point raised by the motion in this case is directly decided in the case of Rhoades v. Selin [Case No. 11,740]. The same question is inferentially decided in Dunn v. Clark, 8 Pet. [33 U. S.] 1; Mollan v. Torrance, 9 Wheat. [22 U. S.] 537; Morgan's Heirs v. Morgan, 2 Wheat. [15 U. S.] 110; Hatfield v. Bushnell [Case No. 6,211]. The law in this case being silent as to cases pending in the district court for the western district of Arkansas against counties which have been placed by its terms in the eastern district, and against persons living in these counties, they must be tried in that court whose jurisdiction had attached at the time of the passage of the law. Congress, of course, could have provided for a transfer of these cases. It has not done so. The mere passage of the law does not work a removal of the cases. Motion overruled.

CULVERSON (GIMMY v.). See Case No. 5,454.

CULVERTSON (PARKER v.). See Case No. 10,732.

Case No. 3,470.

The CUMBERLAND.

District Court, D. Massachusetts. 1815.

SALVAGE—OWNER OF RESCUING VESSEL—COMPENSATION.

[Cited in The Henry Ewbank, Case No. 6,376, and in a note to The Waterloo, Id. 17,257, to the point that, in cases of extraordinary merit or extraordinary peril to the rescuing ship, the owner of the latter should be allowed a moiety of the salvage.]

CUMBERLAND COTTON CO. (WHIPPLE v.). See Case No. 17,515.

CUMBERLAND MANUF'G CO. (WHIPPLE v.). See Case No. 17,516.

Case No. 3,471.

The CUMBRIA.

[Nowhere reported; opinion not now accessible.]

Case No. 3,472.

The CUMBRIA.

[3 Ben. 334.][1]

District Court, S. D. New York. June Term, 1869.[2]

COLLISION IN HAMPTON ROADS BETWEEN STEAMERS—PARALLEL COURSES—LOOKOUT.

1. Where two steamers, the F. bound into Hampton Roads, and the C. bound out, were approaching a guardship at which each was required to report, both vessels heading on courses nearly parallel with the keel of the guardship, and the C. had the guardship on her starboard side, and made the white and red lights of the F. on her port bow, and the F. then changed her course, by starboarding, and slowed and stopped her engine for the purpose of speaking the guardship, and blew two blasts of her whistle, but the C. kept on, and struck the F. on her starboard side and sank her: *Held*, that the F. was in fault in not keeping a proper lookout, and also in changing her course across the bows of the C.

2. It was her duty to pass to the right, and let the C. pass between her and the guardship.

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

[2] [Affirmed by the circuit court (case unreported).]

Townsend Scudder, for libellants.
Edward H. Owen, for claimants.

BLATCHFORD, District Judge. This libel is filed by the owners of the propeller Fannie, to recover the sum of $50,000 as the damages sustained by them by the sinking of that vessel by a collision between her and the steamer Cumbria, shortly after 8 o'clock p. m., on the 6th of May, 1864, near Fortress Monroe, in the Chesapeake bay. The Fannie was in the employ of the government, and carrying troops. She had come from Gloucester Point, in the York river, and was bound to Norfolk, Virginia. The Cumbria was also in the employ of the government, and had come from a wharf to the westward of Fortress Monroe, and was bound to Washington city. There was a guardship stationed between Fortress Monroe and the Rip-Raps, at which every passing vessel was required to report her name and voyage. The night was such as not to obscure lights, and the tide was flood at the time, running into Hampton Roads at the rate of from three to four knots an hour. The wind was from the eastward, blowing in the same direction in which the tide ran, and the guardship was lying with her head to the course of the tide. The collision took place when the Fannie was heading quartering across the stern of the guardship. The Fannie was struck on her starboard side by the Cumbria abaft her midship, and soon sank.

The case made by the libel is, that, as the Fannie approached the guardship, her engines were first slowed and then stopped; that, at that time, she headed about south southwest, and diagonally across the stern of the guardship; that when the Fannie had slowed her engines, the Cumbria was discovered coming out of the Roads, towards the starboard side of the Fannie; that, as the Cumbria approached nearer, the engines of the Fannie were stopped, for the purpose of speaking the guardship; and that the Fannie thereupon gave a signal by two blasts of her whistle, but the Cumbria came on, and struck her starboard side, cutting her down to the water's edge, and sinking her. The whole case made by the libel is, that the Fannie had a right to and did signal the Cumbria to starboard her helm, and that the Cumbria had time and room enough to do so, and failed to do so, and was in fault in thus causing the collision.

The case set up in the answer is, that the Fannie, before she arrived abreast of the guardship, was running with the tide, and heading about west, upon a course which would have left the guardship at a considerable distance on her port side, and would also have left the Cumbria, in passing, at a safe distance on the port side of the Fannie; that the Fannie, as she came up abreast of the guardship, took a sudden and rank sheer to the southward, and crossed the bows of the Cumbria diagonally between her and the stern of the guardship; that, when the Fannie signalled her intention to cross the bows of the Cumbria, and pass between her and the guardship, the Cumbria was too near to change her direction, in conformity with the signal, in time to avoid the collision; and that the Cumbria, on hearing the signal, instantly reversed her engine.

I am satisfied, on the evidence, that the Fannie and the Cumbria were approaching each other on courses that were substantially parallel to each other and to the keel of the guardship, and nearly end on, but yet that the course of the Fannie, if unchanged, would have left the Cumbria between her and the guardship. The Cumbria was steering a course parallel to the keel of the guardship, but so as to leave the guardship on her starboard side, when she saw the lights of the Fannie from one and a half to two points on her port bow, the guardship bearing about one point on her starboard bow. She saw at that time only the white light and red light of the Fannie. The signal from the Fannie soon afterwards came, and the green light of the Fannie came into view, and her red light was shut in. This indicated that she was starboarding. Her signal indicated her starboarding. She was coming with the tide, and even after she stopped her engines she had on a great deal of headway. The fact is, that the Fannie kept no proper lookout, and that she had lapped two-thirds of her own length on the guardship, and had stopped her engines, as testified to by her master, before she discovered the Cumbria. She sheered across the bows of the Cumbria, and went quartering across the stern of the guardship, from a course parallel to the keel of the guardship, without any regard to the approach of the Cumbria, or to the fact that the Cumbria was on her port bow. In any aspect, it was her duty to pass to the right, and to let the Cumbria pass unembarrassed between her and the guardship.

I do not credit the testimony of the pilot of the Fannie, that he saw the green light of the Cumbria before the Fannie sheered so as to bring her across the bows of the Cumbria to the starboard side of the latter. He was not examined until five years after the occurrence. His testimony does not agree with that of the master of the Fannie, which was taken only seventeen days after the collision, and he is contradicted by the witnesses who were on the Cumbria. I see no fault on the part of the Cumbria.

The libel must be dismissed, with costs.

This case was affirmed by the circuit court, on appeal, in February, 1871 [case not reported].

CUMMINES (BOALER v.). See Case No. 1,-584.

CUMMING (MERCHANTS' NAT. BANK v.). See Case No. 9,453.

CUMMING (PARSONS v.). See Case No. 10,-775.

Case No. 3,473.

CUMMINGS et al. v. AKRON CEMENT & PLASTER CO.

[6 Blatchf. 509.][1]

Circuit Court, N. D. New York. June Term, 1869.

SERVICE OF SUBPŒNA—WITNESS FEES.

1. A service of a subpoena on a witness, in a civil suit, by a private person, not the marshal or his deputy, is a proper and legal service of a subpoena issued by this court.

2. A person who attends this court as a witness, on the request of a party, without the actual service of a subpoena, is entitled to his fees, and such fees may be taxed against the defeated party, under the act of February 26, 1853 (10 Stat. 161).

[Cited in Dennis v. Eddy, Case No. 3,793; Wooster v. Handy, 23 Fed. 62; U. S. v. Sanborn, 28 Fed. 304; In re Williams, 37 Fed. 326.]

Several witnesses for the defendants [the Akron Cement & Plaster Company] attended on the trial of this cause, without having been served with a subpoena by the marshal or his deputy, and it was on that ground insisted, that the fees of such witnesses could not be taxed against the plaintiffs [Uriah Cummings and others].

HALL, District Judge. Under the acts of congress, and the rules and practice of this court, the forms of process and modes of proceeding therein are, substantially, such as were in use in the state courts, under the Revised Statutes; and subpoenas issued for the purpose of compelling the attendance of witnesses, in civil cases, are not directed to the marshal, but to the witnesses themselves. In the state courts, the practice has always been to enforce obedience to a subpoena, when served by a private person; and it is believed that such service would, in this state, be a proper and legal service of a subpoena issued by this court.

I cannot doubt that a person who attends this court, as a witness, on the request of a party, without the actual service of a subpoena, is entitled to his fees; and that such fees may be taxed against the defeated party. That, under former acts of congress, the witness was entitled to his fees against the party on whose behalf he had attended, has been decided in several cases. Dreskill v. Parish [Case No. 4,076]; U. S. v. Williams [Id. 16,709]; Power v. Semmes [Id. 11,360]. And, as the service of process is, in fact, necessary only for the purpose of inducing such attendance, there is, in my judgment, no good reason, in the absence of legislation to that effect, for requiring the issuing of a subpoena, and its service by the marshal, in order to justify the taxation of the fees of a necessary witness, who attends, in good faith, without a subpoena. If the party is liable for the fees of such a witness, and succeeds in his suit, he is, I think, clearly entitled to tax such fees as costs, or as a disbursement, against the opposite party, notwithstanding the case of Dreskill v. Parish, ubi supra, which may have been decided upon some ground peculiar to the law and practice of the Ohio courts.

The phrase, "pursuant to law," found in the act of February 26, 1853 (10 Stat. 161), must be held to apply to the attendance of witnesses before commissioners only; for, the punctuation of the statute seems to disconnect this phrase from the prior part of the sentence, relating to attendance in court; and the subsequent provision of the same act, which provides that "the amount paid printers and witnesses * * * shall be taxed," &c., "and be included in, and form a portion of, a judgment or decree against the losing party," without any restriction or limitation, must entitle the party to tax such fees. See McMillan v. Scott [Case No. 5,620].

I am not aware that this question has ever before been argued or formally decided in this district; but, witnesses in criminal cases, who have actually attended without a subpoena, have been frequently paid, and, I think, with the knowledge and concurrence of Mr. Justice Nelson.

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

Case No. 3,474.

CUMMINGS v. The EMILY JOHNSON.

COLE v. The KATE HUNTER.

[N. Y. Times, Sept. 30, 1853.]

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

COLLISION—BETWEEN SAILING VESSELS.

[A schooner sailing west, half south, close-hauled, approaching a ship heading north north-east, with the wind free, apprehending a collision, immediately before its occurrence put her helm hard down, which threw her in the way of the ship, and a collision took place. The wind was south southwest. *Held*, that it was the ship's duty to have avoided the schooner by porting her helm, and that the maneuver of the schooner was excused by reason of the nearness of the danger.]

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

[In admiralty. Libels by George B. Cummings and others against the schooner Emily Johnson, and by Abraham Cole and others against the ship Kate Hunter.]

Cross suits arising out of a collision between the ship and the schooner, which occurred November 27, 1850, off the Highlands of Navesink. The wind was south south west. The schooner was steering west, half south, closehauled, and the ship north northeast, having the wind free. The schooner, in the moment before the collision, put her helm down, which threw her yet more in the way of the ship. But Judge Betts, in the [district] court [case unreported], held that she was excused from that, by the near-

ness of the danger, and that it was the duty of the ship to have ported her helm, and kept out of the schooner's way; and gave a decree in favor of the schooner.

Betts & Donohue, for appellants.
Platt, Gerard & Buckley, for appellees.

NELSON, Circuit Justice. After hearing argument, the decree of the district court was ordered to be affirmed on the same grounds.

CUMMINGS (GILLESPIE v.). See Case No. 5,434.

Case No. 3,475.

CUMMINGS v. GRAND TRUNK RY. CO.

[2 Hask. 101.][1]

Circuit Court, D. Maine. Sept. Term, 1876.

JURISDICTION—ALIEN CORPORATION.

1. The presence of an alien corporation in a state other than that of its creation may be established by acts and conduct in business transactions.

2. The defendant corporation is proved to be present in the district of Maine from operating a railroad therein under a lease ratified by the legislature of the state.

3. Jurisdiction of an alien corporation by the federal courts, at the suit of an inhabitant in the district where the suit is brought, may be gained by proof that the corporation is present by its officers or agents, transacting its business within such district.

Case to recover damages for personal injuries sustained by the plaintiff [Oliver P. Cummings] from the defendant's negligence, while acting as its servant in driving an engine upon its railway.

At the return of the writ, defendant moved that it abate for want of jurisdiction by the court over the defendant, an alien corporation created by the laws of Canada.

The plaintiff insisted that it appeared from the writ and officer's return thereon that the defendant corporation was found within the district and duly served with process as required by the act of March, 1875 [18 Stat. 470].

By consent of parties, proofs were taken and the question raised was considered stripped of technicalities.

George F. Holmes and Almon A. Strout, for plaintiff.
John Rand, for defendant.

Before CLIFFORD, Circuit Justice, and FOX, District Judge.

FOX, District Judge. The plaintiff, a citizen of Maine, has brought this action of the case for the recovery of damages for personal injuries sustained by him in March, 1875, on the defendant's train, between Danville and Portland.

The writ was returnable at the last term of this court, and the defendant is described therein "as the Grand Trunk Railway of Canada, an alien corporation duly existing under the laws of the dominion of Canada, and having a place of business at Portland." Service was made by the marshal, by delivering in hand to John Porteous, agent of the company, a true and attested copy of the writ. Mr. Porteous is understood to be the general agent of the defendant.

At the return term, the defendant appeared to object to the jurisdiction of the court, and filed its motion that the suit might be dismissed for the want of jurisdiction, to which the plaintiffs have replied that at the commencement of the suit, the defendant was found in this district, and that service of the writ was made upon it within the district.

By the act of congress of March 3, 1875, it was enacted, "that no civil suit shall be brought before either the district or circuit court, against any person by any original process or proceeding in any other district than that whereof he is an inhabitant, or in which he shall be found at the time of serving such process or commencing such proceedings, except as hereinafter provided."

It is not claimed that the present case falls within such exception, and to sustain the jurisdiction, it must appear that the defendant is an inhabitant, or was found in the district at the time of serving the process or commencing the suit.

It is admitted or established to the satisfaction of the court for this hearing, that the Atlantic & St. Lawrence Railroad Co. constructed its road from Portland to the line of the state and thence to Island Pond, a distance of about 150 miles, there connecting with the St. Lawrence & Atlantic Railroad constructed to Montreal; that the defendant, a corporation existing by the authority of Canada in 1855, leased this road with all its chartered rights, fixtures and property, for 999 years, and entered into possession of said road and all its estates, and has ever since been in the entire and sole use and improvement thereof, constantly operating the same and receiving the profits and earnings therefrom; that its principal place of business in the United States is at Portland, in this district, where it has its general agent and manager and other officers for the carrying on its extensive business as a railroad corporation, Portland being the ocean terminus of this road, which extends for hundreds of miles into Canada.

It is also shown that this lease was sanctioned by the legislature of Maine, by an act approved March 29, 1853, and that the defendant has ever since its acceptance of the lease enjoyed the benefit of this act; that the corporation has in very many instances when suits have been commenced against it in courts of this state appeared in the action, in the state courts, sometimes submitting to the jurisdiction of the state tribunal,

[1] [Reported by Thomas Hawes Haskell, Esq.]

and in other instances transferring the cause to the federal courts under the provisions of the acts of congress; that in State v. Grand Trunk Ry. Co., 58 Me. 176, and 59 Me. 189, this corporation was indicted for having by its negligence and carelessness, caused the death of a party; that it appeared, answered to the indictment and submitted in all respects to the jurisdiction of the courts of this state in that prosecution. The writ in the present case also charges that the plaintiff was injured within this district by reason of the negligence of the defendant corporation.

We are of opinion, that for the purposes of this cause, this corporation must be considered as being within this state and subject to the process of this court. The fact that it is an alien corporation, created by the authority of Canada, conferred on this court jurisdiction over it when it came within this district, and for more than twenty years has assumed the entire management and control of this railroad, and more especially, when it has invoked the authority of the state of Maine in support of its proceedings, and has obtained the sanction of the state to its acquiring and enjoying all the benefits and privileges which the state had bestowed upon a domestic corporation. By its subsequent conduct in submitting to the state and federal tribunals in this district so frequently without question, it has for this long space of time acknowledged itself as being present within the state and subject to its control and jurisdiction.

It is only the alien corporation which is subject, under the provisions of the act, to the suit of one of our citizens; and if the presence of such corporation could only be established by its being incorporated under the laws of this state, such incorporation would entirely remove the alienage, and thereby defeat the rights of our citizens to redress in this court, against a corporation carrying on such extensive and diversified business relations with so many citizens of this state. We hold, as a corporation must act by and through its general officers and managers, that the presence of a foreign corporation in this state may be established by proof that, with the consent of the state, through the presence of such officers and agents, it has been for a long term of years here constantly engaged in the transaction of its legitimate, ordinary and regular business; and more especially, in the present instance, by assuming the duties in such place of so important a character as the entire control and operation of a railway for one hundred and fifty miles, and for so doing having obtained the authority by an act of the state legislature.

If the presence of a corporation within a state other than that of its creation can be established by its acts and conduct and its business transactions, we hold that the facts here shown are certainly sufficient for that purpose; and in our opinion this corporation was, at the time of the service of this writ, found within this state for the purposes of this suit.

None of the authorities cited in behalf of this motion afford us much aid upon the precise question when a corporation is found within a state other than that by which it was incorporated.

In Day v. Newark India Rubber Manuf'g Co. [Case No. 3,685], the defendant was a corporation established under the authority of the state of New Jersey; there were its manufactories, and it there carried on its principal business, having a store in New York under the charge of an agent for the sale of its goods; and it was held by Nelson, J., that the circuit court of the United States in the New York district had no jurisdiction of a suit against this company, as it could not be said to have been found within that district. All that appeared in that case to sustain the jurisdiction was simply that this New Jersey corporation had a store in the city of New York for the sale of its productions.

If jurisdiction was taken under such circumstances, it might be claimed in every state where a corporation had an agent for the transaction of any branch of its business, however slight and unimportant, a condition of things very different from the present case, where the entire business of this vast corporation for this end of its route has here been transacted for more than twenty years by its general agents and managers under legislative authority; and where it has assumed to perform the duties and claim the benefits which before that time belonged to a corporation created by this state, and which could not confer on the defendant the rights and privileges it has so long daily enjoyed without the assent of the state.

Motion denied.

[NOTE. This case was originally commenced in the Cumberland county superior court, Maine, and was removed by the defendant to the United States circuit court for the Maine district. Plaintiff had a verdict, which was set aside, and on a new trial he again obtained a verdict, upon which judgment was entered for the sum of $10,791.

[Defendant brought error, and the supreme court affirmed the judgment, Mr. Chief Justice Waite delivering the opinion. Grand Trunk Ry. Co. v. Cummings, 106 U. S. 700, 1 Sup. Ct. 493.]

CUMMINGS v. The IRMA. See Case No. 7,-064.

Case No. 3,476.

CUMMINGS v. MEAD.

[6 Am. Law Reg. 51.]

District Court, D. Wisconsin. 1857.

PROMISSORY NOTES — SETTLEMENT OF PRE-EXISTING DEBT—BONA FIDE HOLDER—FRAUD.

1. Where negotiable paper has been put in circulation by fraud, proof of the circumstances may be given; when it is incumbent on the

holder to show that he is a holder bona fide, and for a valuable consideration.

2. If a negotiable note is accepted in satisfaction of a previous debt, the person so receiving it is a holder for value, and is protected. But not so when a note is handed over to a creditor, with directions to collect it and to retain the surplus, and afterwards the debt was settled. It then reverted to the former holder.

3. Unless a note is taken in good faith for a valuable consideration, the holder is considered as being in privity with the endorsee. A merchant having purchased a note at an extraordinary rate of discount, after he learned that the payees, as merchants, had failed, and that the money was wanted to pay preferred debts, is not a bona fide holder against the previous lien of a judgment creditor's bill,—particularly if the parties to the negotiation are relatives. He should have inquired into the circumstances of the holders.

[This was a bill in equity by Patrick Cummings and William Murray against William D. Mead.]

MILLER, District Judge. William D. Mead paid into court the amount of this judgment, when Jacob Shear and others and Samuel F. Pratt and others made their several applications that it be paid to them. These parties had obtained judgments in this court against John C. Burr and Morgan Craig; and, after the return of executions unsatisfied, they filed creditors' bill in equity against said Burr and Craig, and also against Mead. Injunctions were issued and served, restraining the defendants from disposing of or in any manner parting with any money, promissory notes of, or other property belonging to, said Burr and Craig. The injunctions were issued and served on the fourth of August, 1856, and an order of reference for the appointment of a receiver. [Pratt v. Burr, Case No. 11,373.] On the second of December following, Cummings and Murray recovered a judgment in this court against Mead, upon a promissory note made by him to said Burr and Craig, or bearer, the amount of which is now for appropriation by this court. These creditors of Burr and Craig allege that the promissory note on which the judgment was rendered against Mead was in the hands of Burr and Craig, or one of them, at the time their bills in equity were filed and injunction issued, and that Cummings and Murray are not bona fide holders for a valuable consideration.

The deposition of Robert H. Maynard was read at the hearing, in which he states that he is a merchant in the city of Buffalo, in the state of New York. He received the note of Burr about the middle of August, 1856, at Buffalo. He took two notes of Mead to Burr and Craig, of one thousand dollars each, for which he gave fifteen hundred dollars. He knew Burr before that. He had married his (Burr's) sister. He had, before that, understood that the firm of Burr and Craig had stopped payment; he did not know they were in litigation with any person at Beloit, Wisconsin (where they had been in business as merchants), or elsewhere. He did not know or inquire for what consideration the notes were given. He gave Burr his check on the Bank of Attica for fifteen hundred dollars, bearing date September 8th, 1856. He delivered this note to Cummings and Murray, whom he owed about five hundred dollars, and told them to credit him with it—to collect it and credit it to him, and the balance he would take. The account of Cummings and Murray has since been settled, and the note is not settled yet. The purchase of the two notes of Burr was absolute. The note he let Cummings and Murray have, had about twenty or thirty days to run, after he bought it. The other note had about four months to run. Burr attempted to sell the notes at a broker's, in Buffalo; but he could not sell them without an endorsement. He then proposed to him to sell the notes, at fifteen hundred dollars. Burr said the notes were good; that the maker was worth twenty thousand dollars, and had real estate in the state of New York. Burr said he wanted to pay some confidential debts with the money. The broker offered, if he (Maynard) would endorse the notes, to take them at the usual rates, of from three to five per cent. per month for western paper, which he refused. The judgment creditors' bills having been filed, while the note was in the hands of the judgment debtors, Burr and Craig, an equitable lien was thereby created on the note in their hands, and on the debt secured by it, in the hands of Mead the maker. Subsequently, Burr, one of the defendants and one of the payees in the note, committed a fraud upon those creditors, and also upon the court, by transferring the note to Maynard, in the city of Buffalo. Those creditors claim the money collected on the note, by virtue of their bills in equity. And they contend that the note was put in circulation by the payees, Burr and Craig, fraudulently; and that Maynard was not a bona fide purchaser of it from Burr and Craig; and also that it was not transferred to Cummings and Murray in the regular course of commercial business, for a valuable consideration. Burr and Craig have not made an answer, nor given any explanation of the matter. Nor have they attempted to show what was done with the fifteen hundred dollars received for the notes. This case stands as a bill in equity, at the suit of the creditors, against Burr and Craig, and also against Mead, Cummings and Murray, taken as confessed against Burr and Craig. The rule is "that when negotiable paper has been stolen, or lost, or obtained by duress, and is put in circulation by fraud, proof of these circumstances may be given against the plaintiff; and, on such proof being given, it is incumbent on the plaintiff to show himself to be a holder, bona fide and for a valuable consideration; otherwise, he is considered as standing in no better situation than the former

holder, in whose hands the instrument received the taint." Part only of this principle is applicable to the present case; for the note is paid,—and the question of the holder's title is raised, not to let in a defence of the debtor, but to meet a hostile claim of title to the money, which the creditors assert by virtue of their bills in equity. That the note was put in circulation fraudulently by the payees, there is no doubt.

I shall first inquire into the nature of the transfer of the note to Cummings and Murray by Maynard. It is well settled that, if a negotiable note is accepted in satisfaction and discharge or extinguishment of a previous debt or liability, the person so receiving the note is a holder for value, and is protected against equities. Swift v. Tyson, 16 Pet. [41 U. S.] 1, 1 Am. Lead. Cas. 191. But that is not this case. Maynard only owed Cummings and Murray five hundred dollars, which he ordered paid out of the avails of the note, and the residue to be returned to him. There is no allegation that the note, or any part of it, was intended to pay future advances to Maynard. And it appears that the account of Cummings and Murray against Maynard has been settled. Maynard continued to claim an interest in one-half of the avails of the note, which he was to draw from Cummings and Murray when collected. But in the settlement of the account the whole note reverted to Maynard. If the claim of these creditors did not interpose, Maynard would be entitled to draw out this money. I am clear that Cummings and Murray are not entitled to the money in their own right. If those creditors are not entitled to it, Maynard is; and Cummings and Murray may be considered as mere parties in the record in trust for, or for the use of Maynard. Promissory notes carry their whole evidence of title on their face; and the law assures the right to him who obtains them for valuable consideration, by regular endorsement or delivery, and without actual notice of an adverse claim, or of such suspicious circumstances as should lead to inquiry. The doctrine of implied notice by lis pendens is inapplicable to such cases generally of attachments and garnishee process. Such proceeding has been held unavailable against a bona fide holder of negotiable paper, who claims it after attachment, before maturity, and without notice. Kieffer v. Ehler, 6 Harris [18 Pa. St.] 388. An attachment is a special proceeding issued by any court or magistrate for a debt. In a case of bankruptcy, notice may be implied, because that refers to the general circumstances of a previous holder, into which a purchaser is expected to inquire. If a man becomes a bankrupt, all his property, in which he is beneficially interested, is vested by the assignment in the assignees, by relation to the act of bankruptcy, so as to defeat all intermediate acts done by him to dispose of his property; and consequently the right of transfer of a bill or note is in general vested in them from the time of the act of bankruptcy; and the defect of title in the endorser may be taken advantage of under the plea of non assumpsit. Chitty, Bills (London Ed.) 149. And on page 618 it appears that bills of exchange and promissory notes endorsed by a bankrupt after he had dishonored bills, and been otherwise irregular in his payments, may be retained by the endorser, unless it were known to him at the time that the insolvency of the bankrupt was decidedly a general inability to answer his engagements. The proceeding in equity, by judgment creditors' bill, is not a commission in bankruptcy, but in effect as to the property of the debtor, it is similar to it. In both cases the property of the debtor is a fund in court for the payment of debt. The court retains possession of the fund, for distribution among creditors according to principles governing the proceeding. And while the property is in the custody of the court, no sale of it can be made, either on execution, or otherwise, without leave of the court. By this proceeding in equity, all the estate of the debtor is bound from the filing of the bill and service of process, and is virtually sequestered. Even a judicial sale of real estate, under execution upon a prior judgment is void. Wiswall v. Sampson, 14 How. [55 U. S.] 52. This proceeding against failing merchants is as common here, as bankrupt commissions in England. But whether an endorsee as purchaser of negotiable paper of a merchant, after the filing of a creditors' bill against a payee or endorser, should be held to stand in the same situation as the endorsee of a bankrupt, I need not determine. This proceeding almost uniformly follows the failure of mercantile firms; and it is confined to the circuit courts of the state, and to this court. Burr and Craig were merchants in Beloit, in this state, and Maynard was informed that the firm had stopped payment, at the time he purchased the notes of Burr, and thereby he supplied him with money to pay confidential or preferred debts of the firm. One note was payable thirty days after the date of Maynard's check for the purchase money, and the other had but three months to run after that date. The usual rate of discount of western paper was from three to five per cent. per month; but the rate at which these notes were purchased was ten per cent. per month, upon the assurance that the maker was perfectly good and owned real estate in the state of New York. Unless a note is taken in good faith, for a valuable consideration and without notice, the holder is considered as being in privity with the endorsee. This privity is created when the note is taken under suspicious circumstances, such as ought to have put the endorsee on his guard, and would have alarmed a man of ordinary prudence. Such is the rule of the American cases generally, and of the early English cases; but it is restricted by later English cases to such

circumstances as not only show gross negligence on the part of the endorsee, but actual mala fides. 1 Smith, Lead. Cas. in notes, 447, etc., and cases there cited.

I do not think there is any difference in principle, whether the circumstances of suspicion arise from a note over due, or a bill dishonored, or from marks or characters on the face of the paper, as in Fowler v. Brantly, 14 Pet. [39 U. S.] 318; or from facts communicated and made known dehors the paper. Maynard had notice of the general inability of Burr and Craig to pay their debts, which would defeat his claim to the money as against an assignee in bankruptcy. He had notice of sufficient facts to induce him, as a prudent man, to inquire more into the circumstances of Burr and Craig, before purchasing the notes. From the notice he had, and the extraordinary discount allowed by Burr, the suspicion of a prudent and careful man would naturally be excited; and he should feel it his duty to ask questions, which, in the ordinary and proper manner in which trade is conducted, he ought to ask respecting the holder's circumstances. To protect the endorsee, a valuable consideration paid, with due and reasonable caution, is necessary. If Maynard, after receiving notice of the failure of Burr and Craig, and that the notes were for sale at a discount of ten per cent per month, to pay preferred debts, had inquired of Burr, he might have learned of the proceedings in this court, and of the escape of Burr from this jurisdiction, to avoid the service of process, and the assignment of his property to a receiver. To place Maynard in the most favorable position, he is a voluntary purchaser of the note for a valuable consideration, but not in good faith, as he did not use the caution necessary to inform himself of the circumstances of Burr and Craig, the payees, and of their right to negotiate the note.

So far I have treated Maynard as a stranger to Burr; but he was not. Burr and he are brothers-in-law. Maynard could legally purchase a note, or anything else, from his brother-in-law; but the relationship existing between them is a fact which holds him to stricter proof of the bona fides of the transaction than is required of a stranger, when the right to make the negotiation is disputed by creditors. The transfer of property by a relative in failing, in embarrassed circumstances, to a relative, is a suspicious circumstance, that must, in all cases, be clearly and satisfactorily explained. The money will not be paid to Cummings and Murray, but to these creditors of Burr and Craig.

CUMMINGS (SMITH v.). See Case No. 13,034.

CUMMINGS (UNITED STATES v.). See Case No. 14,900.

CUMMINGS, The WILLIAM. See Case No. 17,690.

CUMMINS (BADISCHE ANILIN & SODA FABRIK v.). See Case No. 720.

CUMMINS (CHRISTY v.). See Case No. 2,708.

CUMMINS (CRAIG v.). See Case No. 3,331.

CUMMINS (ERWIN v.). See Case No. 4,525.

CUMMINS (McCLINTICK v.). See Cases Nos. 8,698 and 8,699.

CUMMINS (UNITED STATES v.). See Case No. 14,901.

CUMPTON (UNITED STATES v.). See Case No. 14,902.

CUNARD (JEWETT v.). See Case No. 7,310.

CUNARD, The JOSEPH. See Case No. 7,535.

Case No. 3,477.

CUNDELL v. PARKHURST.

[1 McA. Pat. Cas. 63; Cranch, Pat. Dec. 128.]

Circuit Court, District of Columbia. May Term, 1847.

POSITIVE AND CIRCUMSTANTIAL EVIDENCE.

[Circumstantial evidence tending to raise doubts as to the time of invention is overcome by positive testimony fixing the time definitely.]

Chas. M. Keller, for Cundell.
Geo. Gifford, for Parkhurst.
Mr. Fitzgerald, for commissioner.

CRANCH, Chief Judge. Appeal from the decision of the commissioner of patents refusing a patent to William Cundell because it interferes with an application by Parkhurst, the prior inventor of the same improvement of a machine for cleaning sheeps' wool from burrs, &c., the commissioner having decided that Parkhurst was the first inventor of the improvement. The commissioner's decision is as follows: "The improvement in dispute between the parties is the application of the zigzag or pointed guard to the furring machine. The testimony of James T. Johnston proves that the said Parkhurst showed the guard in question as early as the spring of 1845; and none of the witnesses testify to its invention by the said Cundell earlier than the summer of the same year. Priority of invention is therefore decided in favor of Ziba Parkhurst. This view of the case renders the decision of the interlocutory questions which have been raised in taking the testimony wholly unnecessary. February 2d, 1847." From this decision Mr. Cundell has appealed and assigned his reasons of appeal as follows: "Although the witness referred to does testify that Ziba Parkhurst described to him the improvement in question in the spring of 1845, and at a time anterior to the alleged invention of William Cundell, yet it will appear from the testimony on both sides that this witness erred in his statement of the time at which this communication was made to him; for it is clearly proved by the tes-

timony that this improvement was made in consequence of the imperfect working of the original machine and to remedy a defect which was discovered after this machine was put in operation; and the whole of the testimony shows that this machine was not put in operation until the month of July, 1845, subsequent to the time at which the witness testifies the said improvement was described to him by Parkhurst. They therefore say, first, that the improvement which was the result of and suggested by the defective working of a machine could not have been described before the said machine was constructed and put in operation; and that, therefore, the commissioner of patents erred in giving credence to the statement by a witness of a date which all the circumstances of the case established by the testimony adduced on both sides clearly shows was the result of error."

By the act of March 3d, 1839, § 11 [5 Stat. 355], the commissioner of patents is to "lay before the judge all the original papers and evidence in the case, together with the grounds of his decision, fully set forth in writing, touching all the points involved by the reasons of appeal, to which the revision shall be confined." The only point involved in the reasons of appeal is the date of the conversation between Ziba Parkhurst and Joseph C. Johnson, in which the former showed the latter a drawing similar to Exhibit D, of a machine called a shipper or guard, to be applied to a burring-machine. Mr. Johnson thinks it was the latter part of the spring of 1848, but says he cannot name dates. He fixes the date, however, by recollection of another fact, to wit, that in May, 1845, Ziba Parkhurst went out to Erie county, Pennsylvania, and Ohio, and bought fifty or sixty thousand pounds of wool, and drew upon Johnson's house for it, who sold it on commission for him, and that that is his reason for knowing the time, and that he saw the machine before Ziba left Erie county, Pennsylvania. This witness, who is a merchant, appears to have testified fairly and impartially. No attempt is made to discredit him, unless by showing that he has mistaken the date of conversation. This is attempted to be done by proving facts supposed to be consistent with the testimony of this witness. None of the other witnesses carry the invention farther back than a few weeks after Stephen R. Parkhurst first departed from England, which appears to have been about the 1st of August, 1845; but they speak of the time when the invention was first applied to a machine in operation, not to the time of the invention itself, which necessarily precedes it. There is, therefore, no irreconcilable discrepancy between Mr. Johnson and the witnesses as to the time. But it is said by Mr. Cundell's counsel that the defects of the machine at No. 60 Vesy street led Ziba to suggest the improvement, and that the machine was not put into operation until the 18th of July, 1845. But I have not found any evidence that it was the defect in the working of that particular machine that suggested the improvement. Other burring machines had been before in use to which the new stopper might be an improvement and the defects of which might have suggested the improvement. Other circumstances have been given in evidence tending to throw some doubts as to the time of invention, but none which, in my opinion, outweigh the positive testimony of Mr. Johnson. I am, therefore, of opinion that Ziba Parkhurst has established his priority of invention of the zigzag guard to the burring machine, and is entitled to a patent therefor, and that the decision of the commissioner of patents be affirmed.

[NOTE. Patent No. 4,023 was granted to Stephen R. Parkhurst, May 1, 1845; reissued February 12, 1861 (No. 1,137). For other cases involving this patent, see note to Parkhurst v. Kinsman, Case No. 10,757.]

Case No. 3,478.

In re CUNNINGHAM.

[9 Cent. Law J. 208;[1] 19 N. B. R. 276; 20 Alb. Law J. 257.]

District Court, D. Iowa. Aug. Term, 1879.

GARNISHMENT—CUSTODIA LEGIS.

The rule that money in custodia legis is not subject to process is applicable to the case of funds in the hands of an assignee in bankruptcy, which another is attempting to secure by garnishment.

[Cited in Re Chisholm, 4 Fed. 527.]

Gilmore & Anderson and Joseph G. Anderson, for Alexander.

James & Frank Hagerman, for intervener.

LOVE, District Judge. The case before the court is this: On the —— day of ——, 1876, Cunningham & Mason were by this court adjudged bankrupts, and Harry Fulton chosen assignee. This court, in bankruptcy, of the 22d day of September, 1877, declared a dividend of said estate, and ordered the assignee to pay the same to the creditors. Among the creditors were Matthews & Co., to whom the court adjudged a dividend of $488.38. Subsequent to the order declaring the dividend, and directing the assignee to pay the same, but before the assignee made the payment,—that is to say, on the 29th day of September, 1877,—Miller Alexander, to whom Matthews & Co. were indebted by note, commenced a suit in the circuit court of Lee county, Iowa, and garnisheed Harry Fulton, the assignee, seeking to obtain satisfaction out of the dividend in his hands which had been adjudged to Matthews & Co. Miller Alexander transferred his right of action to

[1] [Reprinted from 9 Cent. Law J. 208, by permission.]

Fontaine Alexander, who was duly substituted as plaintiff in the state court, and who, in due course, obtained judgment against Matthews & Co. in the state circuit court for the full amount of his claim, and against Harry Fulton, as garnishee, for said sum of $488.38. The judgment against the garnishee, Fulton, was somewhat peculiar. It provided that no execution should issue until the district court of the United States for the district of Iowa should order said Harry Fulton, assignee, to pay said sum to plaintiff. On the 16th day of January, 1878, Miller Alexander presented his petition to this court, praying that Harry Fulton be ordered to pay the sum due from him to said Matthews & Co. to the sheriff of Lee county, to abide the judgment of the state court. It further appears that, on the 28th day of April, 1879, said Matthews & Co., for a valuable consideration, transferred and assigned, to one Elbert G. Roberts, who intervenes in the case, the said dividend, amounting to said sum of $488.38, authorizing him to collect the same, etc. Harry Fulton also intervenes, answering petitions of plaintiff and said Roberts, asking to be protected.

It is well settled that money or property in custodia legis cannot be reached by garnishment on execution in the absence of statutory authority. This doctrine has been applied in numerous cases; to various classes of legal custodians, such as receivers, sheriffs, clerks of court, executors and administrators, treasurers, assignees in bankruptcy, etc. Patterson v. Pratt, 19 Iowa, 358; Drake, Attachm. (5th Ed.) c. 22, §§ 493–516. Property in the hands of a receiver is in custodia legis, and is exempt from execution or attachment: Martin v. Davis, 21 Iowa, 537; Wiswall v. Sampson, 14 How. [55 U. S.] 52; Columbian Book Co. v. De Golyer, 115 Mass. 69; Glenn v. Gill, 2 Md. 1; Taylor v. Gillean, 23 Tex. 508; Fields v. Jones, 11 Ga. 413; Nelson v. Conner, 6 Rob. (La.) 339; Langdon v. Lockett, 6 Ala. 727; Farmers' Bank v. Beaston, 7 Gill & J. 421; Gouverneur v. Warner, 2 Sandf. 624; Yuba Co. v. Adams, 7 Cal. 35; Bentley v. Shrieve, 4 Md. Ch. 412; Freem. Ex'ns, 129; Drake, Attachm. 509; Robinson v. Atlantic & G. W. Ry. Co., 66 Pa. St. 160. Same rule applies to garnishment: Glenn v. Gill, 2 Md. 1; Taylor v. Gillean, 23 Tex. 508; Columbian Book Co. v. De Golyer, 115 Mass. 69; High, Rec. 151. Applied to trustee appointed by the court: Bentley v. Shrieve, 4 Md. Ch. 412. See Jones v. Gorham, 2 Mass. 375; De Coster v. Livermore, 4 Mass. 101, in which assignees, under the bankrupt law of 1800 [2 Stat. 19], were charged. But the question was not raised nor considered, and the cases were afterwards overruled in Colby v. Coates, 6 Cush. 558. The rule was applied to sheriffs: Wilder v. Bailey, 3 Mass. 289. To county treasurers: Chealy v. Brewer, 7 Mass. 259. To executors and administrators: Brooks v. Cook, 8 Mass. 246. Colby v. Coates, 6 Cush. 558, decided that an assignee, under the insolvent law of Massachusetts, cannot be reached by trustee process; approved and followed in Columbian Book Co. v. De Golyer, 115 Mass. 69; Dewing v. Wentworth, 11 Cush. 499. Assignees in bankruptcy cannot be charged as garnishees in state courts: In re Bridgman [Case No. 1,867]; Jackson v. Miller, 9 N. B. R. 143. The remedy to reach this fund is to have a receiver appointed to represent this fund in bankrupt court: Jackson v. Miller [supra]. Or by creditors' bill before judgment: Pendleton v. Perkins, 49 Mo. 565; Thompson v. Scott [Case No. 13,975]. The state court has no authority to bring an assignee before it who is acting under the orders of the United States court: Akins v. Stradley (Iowa) 1 N. W. 609. The reason of this doctrine seems to be that the court, having the money or property in its custody under the law, holds it for some purpose, of which that court is exclusive judge. To permit property or money thus held to be seized on execution, attached or garnisheed, would, therefore, defeat the very purpose for which it is held, and, in many cases, enable some other court to dispose of property or money, and wholly divest it from the end or purpose for which possession has been taken. A conflict of jurisdiction and decision would, in many cases, thus ensue. Thus, the court in possession of the property or money might order it to be distributed or paid in a certain way, while the court issuing the process of garnishment might order and adjudge a wholly different designation of the property or money. To attempt a seizure of property by attachment in some other court would necessarily bring the two tribunals into collision, and would, if successful, wholly withdraw the property from the power of the court in possession, and divert it from the purpose for which possession has been taken.

The true doctrine is that, when property or money is in custodia legis, the officer holding it is the mere hand of the court; his possession is the possession of the court; to interfere with his possession is to invade the jurisdiction of the court itself; and an officer so situated is bound by the orders and judgments of the court whose mere agent he is, and he can make no disposition of it without the consent of his own court, express or implied. How can such an officer, when garnisheed, know what answer he can make with safety to himself, in advance of the orders and judgments of the court having possession of the property and jurisdiction of his person? How could such an officer safely expose himself by his answer as garnishee to the danger of a personal judgment in some other court, before the determinations of the court having control of him and the property? Suppose the court, whose hand and agent he is, should order and direct him, in a given case, to make one disposition of the property or money, and the court issuing the process of garnishment should

enter judgment against him, requiring a wholly different disposition of it, which judgment should he obey? He would be like a soldier between two fires, and he would inevitably fall under one or the other. But by far the deadlier fire of the two would be that of his own court, since he would not only, by a disobedience of its orders, expose himself to a suit upon his official bond, but to punishment for contempt. In this view of the subject, it has been held in some cases that, when the court having charge of the property, money or funds makes final orders for its distribution, the officer whose duty it is simply to turn over to each individual distributee the amount awarded to him by the final judgment of the court, may be garnisheed by a creditor of a party to whom the dividend or distributive share has been adjudged. Thus, in New Hampshire, Delaware and Missouri, while the principle announced in Massachusetts was recognized as sound, it was considered to be inapplicable when an administrator had been, by the proper tribunal, adjudged and ordered to pay a certain sum to a creditor of the estate, and in such case the administrator was charged as trustee of the party to whom the money was ordered to be paid. Adams v. Barrett, 2 N. H. 374; Fitchett v. Dolbee, 3 Har. (Del.) 267; Curling v. Hyde, 10 Mo. 374; Richards v. Griggs, 16 Mo. 416. The reason of this exception was given by the superior court of New Hampshire, and adopted by the supreme court of Missouri, in the following language: "An administrator, till he is personally liable to an action in consequence of his private promise,—the settlement of the estate, or some decree against him, or other cause,—cannot be liable to a trustee process; because, till some such event, the principal has no ground of action against him in his private capacity, and he is bound to account otherwise for the funds in his hands. The suit against him, till such an event, is against him in his representative capacity, and the execution must issue to be levied de bonis testatoris and not de bonis propriis. But in the present case, the trustee was liable in his private capacity to the defendant for the dividend. The debt has been liquidated, and the decree of payment passed. The debt was also due immediately. Execution for it ran against his own goods, and the trustee process would introduce neither delay nor embarrassment in the final settlement of the estate." The doctrine of this case is that where the court having custody of the money, fund or property, and jurisdiction of the subject-matter, makes a final determination of the matter, and awards judgment as to the amount to be paid to each individual distributee, the officer thus required to make payment may be made personally liable for his failure to make the payment, and therefore a garnishment against him, resulting in a personal judgment, is no invasion of the jurisdiction of the court having the property in custody, and no encroachment upon the possession of that court. On the contrary, the garnishment recognizes the action of the court ordering the payment or distribution, and founds itself upon the judgment of that court. When the judgment in the garnishment proceedings must needs be against the garnishee in his representative capacity, the proceedings must fail, because it could be levied neither upon the garnishee's private property nor upon the property he represents; not upon the former, because the judgment is not personal, nor upon the latter, because the property which he represents is in the possession and under the control of another court, whose possession and jurisdiction cannot be invaded.

It might be supposed, upon a hasty glance, that the principle laid down in the new Hampshire, Delaware and Missouri cases is applicable to the case now before the court. Here the court of bankruptcy has declared a dividend, and determined specifically what each creditor is entitled to. It has ordered the assignee to pay a specific sum to the judgment debtor in the state court from which the process of garnishment issued. If the assignee failed to pay that sum, he would be liable to a personal action; why, therefore, may he not be garnisheed? Why may not a personal judgment be rendered against him, as garnishee, for the amount of the dividend, since a personal action could be maintained by the judgment creditor against him for the same cause? There is, in my judgment, an insuperable difficulty in recognizing this view in the present case, growing out of the peculiar jurisdiction in bankruptcy. It cannot for a moment be doubted that the court of bankruptcy has exclusive jurisdiction of the bankrupt's estate, and of its administration from the time of the adjudication to the final discharge of the estate, and the discharge of the assignee. This jurisdiction does not, by any means, cease with the order of distribution. It is clearly within the power of the court, and its duty, to see that its assignee pays over to the distributees the dividends awarded to them. The assignee failing to perform this duty, the court will punish him for contempt; order a suit upon his official bond, and refuse to give him a final discharge. This jurisdiction is exclusive. No other court can touch, or bind the assets of the bankrupt, or authorize any suit against the assignee, who is the officer of the court. It follows that any action in any other tribunal, aiming to control the action of the assignee, or directly or indirectly compel the assignee to dispose of the assets or pay over money in his hands belonging to the estate, must be utterly without jurisdiction, and therefore null and void. What is the effect of a garnishment of the assignee? It either compels him to suspend payment to the distributee in bankruptcy, in pursuance of the order and judgment of the bankrupt court, or it is without any legal

efficacy whatever. The nature of every garnishment is that the garnishee must, upon receiving the notice, keep the property, money or debts in statu quo, to await the final judgment of the court issuing the process. The notice of garnishment to the assignee in this case had that effect, or it was wholly nugatory. But how could the state court, without any jurisdiction whatever, issue any process to arrest the action of the assignee in the payment of the dividends ordered by the court of bankruptcy. How could a court manifestly without jurisdiction, thus, by its process and judgment, effect the administration of, and final distribution of, the bankrupt's estate? To sum up the argument, the court of bankruptcy, having exclusive jurisdiction, orders its assignee to distribute the estate to the creditors, in dividend declared by the court; but a state court, without any jurisdiction whatever, sends its process to the assignee, commanding him, in substance, not to pay over the dividends, but to await the final judgment of the state court. Which of these commands shall the assignee obey? And if this could be done, it might result in postponing, almost indefinitely, the final settlement of bankrupts' estates; for there might be numberless suits against the creditors in bankruptcy, and, of course, there could be no final settlement and distribution until the final action and judgment in the state courts in the principal actions. Hence the proceedings in bankruptcy would have to be stayed, to await the slow and tedious course of justice, which might prove to be long protracted litigation in the state courts.

It was argued that this court, seeing the justice of the petitioner's claim as a creditor, would, by a sort of comity, recognize the judgment of the state court, and order the assignee to pay the dividend upon it. Comity is a vague and undefined principle in our jurisprudence. I do not know of any law or usage which would justify the court in making such an order. If the question were between the original parties, there would be less difficulty; but other rights have intervened. The dividend has been assigned, and the assignee is before the court claiming under his assignment. Seeing that the garnishment was without jurisdiction, and therefore absolutely null, there was no lien, and nothing pending in the nature of a judicial proceeding of which the assignee of the dividend was bound to take notice. I cannot, therefore, see but that he had a perfect right to purchase the dividend, and take a transfer of it. And if he did, and paid his money for it, his equity is at least equal to that of the attaching creditor. There is, therefore, no overruling consideration of equity to induce the court to resort to some extraordinary remedy unknown to the law, to aid the attaching creditor as against the assignee of the dividend. The fund should be paid to Roberts, the intervener.

Case No. 3,479.

CUNNINGHAM et al. v. BELL et al.

[5 Mason, 161.][1]

Circuit Court, D. Massachusetts. Oct. Term, 1828.[2]

BREACH OF ORDERS BY CONSIGNEE — LIABILITY— DAMAGES—RATIFICATION.

1. Where a voyage was undertaken to Havana, and thence to Leghorn and back, and the owners ordered the consignees at Leghorn, to apply their funds, estimated at 4600 pezzos, to the purchase first of 2200 pezzos value of tiles, and the residue to invest in paper; and the consignees accepting the orders, invested the whole funds in paper, because they fell short of the estimated sum, although a sum of 1750 pezzos might have been so invested; it was *held*, that the consignees were liable in damages for the breach of orders.

[See note at end of case.]

2. The damages, in such case, are not to be confined to the transactions at Leghorn; but are to be calculated upon the actual injury to the plaintiffs, in the events of the voyage, taking into consideration the markets at Havana, and all the other circumstances.

[Cited in Heinemann v. Heard, 50 N. Y. 37.]

[See note at end of case.]

3. The receipt of the proceeds of the paper after sale, by the master at Havana, is not, in point of law, per se, a ratification of the purchase, and investment in paper by the owners.

[See note at end of case.]

4. What circumstances amount to a ratification of a breach of orders. The omission to answer a letter acknowledging the breach of orders, or the omission to state to the party in a letter of complaint, that he will be held responsible, is not, per se, a ratification; but the question is open to the jury, as a matter of fact, whether such ratification ought under all the circumstances, to be presumed.

[Cited in Perkins v. Currier, Case No. 10,985.]

[See note at end of case.]

5. Where a bill of exceptions is taken at the trial, a motion for a new trial will not be entertained, unless the bill of exceptions is waived.

[Cited in Marine City Stave Co. v. Herreshoff Manuf'g Co., 32 Fed. 824. Limited in Preble v. Bates, 37 Fed. 773.]

Assumpsit brought by the plaintiffs [John A. Cunningham and William J. Loring], who are merchants in Boston, Massachusetts, against the defendants [James C. Bell and others], who are merchants in Leghorn, in Tuscany, for breach of orders as factors and commission merchants. The declaration contained various counts. Plea, the general issue. The material facts as they appeared at the trial, upon the points of law in controversy, are summed up in the charge of the court; and it is thought unnecessary to report them, or give them more in detail.

Hubbard & Webster, for plaintiffs.
William Sullivan, for defendants.

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

[2] [Affirmed in Bell v. Cunningham, 3 Pet. (28 U. S.) 69.]

STORY, Circuit Justice, in summing up to the jury stated as follows: The present action is brought to recover damages for a supposed breach of orders, in a commercial transaction undertaken by the defendants at the request of the plaintiffs. The plaintiffs having planned a voyage from Boston to Havana, and thence to Leghorn and back to Havana, for the brig Halcyon, commanded by Captain Skinner, on the 15th of September, 1824, wrote a letter addressed to the defendants at Leghorn of the following purport: "Boston, September 15, 1824. Duplicate. Messrs. Bell, De Yang & Co.—Gent'n: This will be handed to you by Capt. J. Skinner, Jr., master of the brig Halcyon, belonging to us. We have contracted with Messrs. Atkinson & Robbins of this place, to furnish 600 boxes from Havana to Leghorn, on freight of £4. 10s. and 5 per cent. primage, payable in a bill on London, or in Leghorn currency, at the option of the master, and 600 boxes on half profits for freight, 1000 pezzos to be paid in Leghorn, on account of said profits. As the goods are to be consigned to you, we mention the terms of the contract, to avoid misunderstanding. The whole amount of freight receivable at Leghorn will be about pezzos 4600. Please invest 2200 pezzos in marble tiles, of 12, 14, and 16 ounces; the whiter they are the better. We believe, but are not certain, that the oz. corresponds to the English inch. We annex a copy of our invoice, received by Loring, Cunningham & Co. in 1818–19. The balance, after paying disbursements, please invest in wrapping paper, to cost from 35 to 50 pezzos per 100 reams. Captain Skinner is to return to Havana from Leghorn. We wish you to obtain for him some freight, if possible, (excepting tiles and wrapping paper,) with liberty to touch at Marseilles, should letters we have requested Messrs. T. H. Rogers & Co. to lodge with you, induce him to stop there on his return. With much respect," &c. After annexing the invoice, there was a postscript as follows: "September 20, 1824. The above is duplicate of our respects per Halcyon. Please forward the enclosed as soon as received. We send the above, that if time is necessary to furnish the articles therein ordered, you may receive it before the arrival of the Halcyon." The original letter, without this postscript, was sent by the Halcyon, with the following postscript on it: "P. S. We have further engaged whatever may be necessary to fill the brig, on half profits, on account of which 700 pezzos are to be paid in Leghorn. After purchasing the tiles and paying disbursements, you will invest the balance in paper as abovementioned. In previous orders, the reams have been deficient in the proper number of sheets. We will thank you to pay particular attention to this, as well as having all the sheets entire." The foregoing duplicate, with the postscript of the 20th of September was received by the defendants on the 30th of November following, who on the 9th of December following, replied as follows:—"The order you are pleased to give us for paper and marble tiles, to be paid for out of the freight of the Halcyon's cargo from Havana, to our consignment, has our particular attention. You have done very right to send us this order, as the wrapping paper cannot be got in readiness before the end of January; and therefore, had it been delayed longer, could not have been in time for your brig Halcyon. We have contracted for 5000 reams, at as near your limits as possible, the article being just now in great demand. The tile shall be collected also; and for your future regulation we will note at foot a scale of comparative measurement 'twixt ounces and English inches." It is material to remark, that nothing is here said as to the price, at which the tiles were contracted for, so as to put the plaintiffs in possession of the exact sum.

The Halcyon sailed from Boston for the Havana on the 16th of October, and having performed that part of the voyage, and taken in a cargo of 1330 boxes of sugar for Leghorn, arrived at the latter port on the 20th of January, 1825, and there the cargo was delivered to, and sold by the defendants, who received the proceeds of the same. From the state of the market the funds realized for the plaintiffs fell short of the expected amount of 4600 pezzos, the net amount of freight, including the advance of the 1000 pezzos provided for by the original contract, being, as appears by the account current, only about 3450 pezzos. The disbursements of the brig amounted to 647 pezzos. No tiles were purchased: and no investment at all was made of the 700 pezzos provided for in the postscript; but the whole of the other proceeds, deducting the disbursements, viz. 2801 pezzos, were invested in 437 packages of wrapping paper and sent in the Halcyon to the Havana. After the arrival at the Havana, the paper was sold and the proceeds received by the plaintiffs. The tiles would have been a far more profitable investment. These are the facts, upon which the plaintiffs have founded their action for damages for a breach of orders, in not investing 2200 pezzos in tiles, as required by the original letters of the 15th and 20th of September.

The first question arising in the case is, as to the nature and extent of the contract between the parties; for there can be no doubt, that the orders of the plaintiffs, and the acceptance thereof by the defendants, constituted a valid contract upon commission, binding between the parties. It appears to me, that there was a clear undertaking on the part of the defendants to apply the proceeds of the freight, and advances coming into their hands from the cargo of the Halcyon, in the manner pointed out in the orders. I mean, that in the first place, the defendants were to appropriate 2200 pezzos to the purchase of marble tile, and the balance, after deducting the disbursements of the brig, and

the balance only, was to be applied to the purchase of wrapping paper. I agree, that the defendants were not bound to execute the orders, unless funds came to their hands; for they did not stipulate to make any advances out of their own monies. But on the other hand, there was no stipulation, that 4600 pezzos should at all events come into their hands, constituting a condition precedent, so that if a less sum should come, the defendants were at liberty totally to disregard the orders of the plaintiffs. The reasonable interpretation of the orders is, that the funds received on account of the plaintiffs should, as far as they would go, be applied to the purchase, first, of marble tiles, and afterwards, if any balance remained, pro tanto, of wrapping paper. If, therefore, the whole funds should be absorbed by a purchase of marble tiles, to the extent of 2200 pezzos, there was to be no investment in paper.

The estimate of the probable amount of the freight and advances at 4600 pezzos was undoubtedly designed to direct the discretion of the defendants in the purchase of paper. They had a right to act with reference to that, as the probable funds, which would be realized. If it were necessary in order to secure the paper ready for the return voyage at the proper period, that a preliminary contract should be made with dealers in that article, the defendants were at liberty so to do, and were not obliged to wait the ship's arrival, before they took a step. They were, in this respect, authorized to do whatever the custom of trade, or sound discretion might require, to accomplish the objects of the plaintiffs. And their acts, so done, were obligatory upon the plaintiffs, whether funds afterwards came into their hands or not. It is clear, from the subsequent correspondence, that the parties so understood the matter. When, therefore, the defendants received the orders of the plaintiffs, they had a right to act upon the presumption of receiving funds to the amount of 4600 pezzos. They were then to consider 2200 pezzos of this sum appropriated to the purchase of tiles. They were to make a deduction of the probable amount of disbursements, which might fairly be calculated at the sum ultimately paid, say 650 pezzos; and they had a right to contract for paper to the amount of the balance remaining of the 4600 pezzos, say to the amount of 1750 pezzos. If they had so done, they would in every event have been justified; and if no more funds had come into their hands than would have paid for the paper so contracted for, and the disbursements, they would have been exonerated from all responsibility for not making any investment in tiles. And if a balance, less than 2200 pezzos had remained, they would have been bound to apply that balance only to an investment in tiles. This is stated upon the presumption, that it was necessary to make a contract for the paper before the arrival of the brig; and that such a contract could not be reasonably made upon the condition, that the paper should be wanted; but, for the interest of the plaintiffs, must be absolute. For if such contingent purchase of the paper could have been securely contracted for, it was the clear duty of the defendants so to have contracted, and not to run the hazard of defeating the primary object of the plaintiffs in the purchase of tiles. In point of fact, the defendants did purchase paper to the amount of 2801 pezzos, and thus exceeded the orders by the difference between that sum and 1750 pezzos, which was the utmost presumable balance applicable to the purchase of paper. That difference is 1051 pezzos, which might at all events have been invested in tiles.

In order to meet this state of the facts, the defendants contend in the first place, that in their letter of the 9th of December, they communicated to the plaintiffs, that they had purchased 5000 reams of paper for them; and that the plaintiffs ratified the purchase. Let us see, how that statement is borne out by the facts. The defendants, on the 14th of January 1825, wrote a letter to the plaintiffs stating:—"The wrapping paper ordered by yours of the 15th of September will be in readiness by the end of this month, and we shall have by that time ready to ship, 10,000 marble tiles of 12 ounces, 7600 do. of 14 ounces, and 6200 do. of 16 ounces, which will be about the investment you desire of the freight from the Halcyon." This letter, it is to be recollected, was written before the arrival of the Halcyon. The plaintiffs, on the 7th of March, answered this letter; and though they had doubtless then received the preceding letter of the 9th of December, no direct reference is made to it. The plaintiffs say, "We have received your much esteemed favour of the 14th of January, and are gratified with the investment you have directed of the freight for the Halcyon." It may be assumed, that the plaintiffs, when they wrote this letter, knew that 5000 reams of paper had been purchased on their account by the defendants. But as no price was mentioned, it is impossible for them to ascertain, that this was beyond the amount authorized by their orders. The defendants did not give them any information, that it was a deviation from their orders; and the language of the letter of the 14th of January shows, that the defendants contemplated no deviation; for they say, that they shall have the tiles in readiness to ship to the amount of the investment desired by the plaintiffs. So the plaintiffs must have understood them; and if their letter of the 7th of March is a ratification of the act of the defendants in the purchase of the paper, it can be deemed so, only as made in compliance with their orders, unless some information of a deviation is brought home to them. No evidence is of-

fered for this purpose, except what arises from the letter itself; and in it I can find no such information. However this, as a question of fact, will be left to the jury. But I am of opinion, that the funds received under the original contract of shipment were not only to be applied to the purchases directed by the plaintiffs, but that the additional 700 pezzos advance, notified in the postscript of the letters of the 15th and 20th of September, which came by the Halcyon, were also to be applied by the defendants as supplemental funds to the same purpose. The object of that postscript was, not to change the original orders for purchases; but to confirm them, and authorize and require the investment of the additional 700 pezzos in pursuance of them. Why it was not done by the defendants is not explained, otherwise than by the defendants' statement, that there were ultimately no half profits on the sale. But I understand, that the 700 pezzos were to be a preliminary advance before the sale, and not to await the event. If there should be no half profits, this advance would be reimbursable by the plaintiffs. The vessel was not to wait for a sale. As to this additional advance, then, the case, as to the non-investment, must stand upon the same ground, as the original funds. Unless, then, there has been a ratification by the plaintiffs of the purchase of the 5000 reams of paper, at the actual price paid, with a full knowledge of the facts, the ground of defence, to which I have referred, fails. And if there was such a ratification, it does not exonerate the defendants from liability for the non-investment of the funds not covered by the purchase of the 5000 reams of paper.

It is in the next place contended by the defendants, that the 5000 reams of paper having been received on board the Halcyon, and carried to the Havana, and sold there on the plaintiffs' account, that receipt and sale amount, in law, to a ratification of the purchase of the paper, and also of the actual application of the whole funds by the defendants at Leghorn. I am not prepared to admit, that the facts stated do, per se, in point of law, amount to such a ratification. Whether there has been such a ratification is matter of fact for the consideration of the jury under all the circumstances of the case. It is not sufficient, that the paper was carried to the Havana, and there sold by the master on account of the plaintiffs; for that might have been done, and indeed seems to have been done by him, in the ordinary course of his employment in the voyage, without any communication with the owners. And, surely, they could not be bound by his acts in a case of this nature, if they had no knowledge of any actual or intentional deviation from their orders in the shipment, at the time of the sale. The mere receipt of the proceeds after the sale is not decisive. And, indeed, the jury must decide from all the circumstances, whether the plaintiffs have, in any manner, ratified the proceedings of the defendants. If they have, there is an end of the present action.

In the next place, it is contended by the defendants, that the subsequent conduct and proceedings of the plaintiffs amount to a virtual ratification of these transactions. The correspondence between the parties is mainly relied on for this purpose. The letter of the defendants, dated on the 21st of January, 1825, speaks of the arrival of the Halcyon, and then adds, "He (Captain Skinner) has brought samples of marble tiles, and of wrapping paper, &c. We shall compare them with the goods fixed for you, and then act for the best." There is no pretence, that any thing in this letter admonished the plaintiffs of any intended deviation from their orders. The next letter of the defendants is dated on the 21st of February 1825, and after stating, that the Halcyon had sailed yesterday for Marseilles, it adds, "The samples of wrapping paper sent us, &c. we found much inferior to any made in this state, and have executed your order with a much better article, although the difference in price bears no proportion. As your account current, after purchasing the paper, which Captain Skinner told us was the better article for investment, gave only a small balance, we increased a little the quantity of paper, and sent no tiles." And after stating the account current, and amount of the invoice of the paper, &c., it farther adds, "Captain Skinner has been made aware of the superior quality of this parcel of paper, and that each ream is composed correctly of 20 quires of 24, and not 16 sheets, each, as has been occasionally shipped, so that he will no doubt mark an adequate price for it, because, in reality, the prices, at which it is invoiced, are reduced, by this difference, below those mentioned in your order." Here, then, we have the first notice of the omission of the purchase of tiles, and the reason given for it. The paper, (if we are to believe this statement,) considering its extra quality and quantity, is purchased below the plaintiffs' limits. If so, the first error of the defendants was in originally contracting for the purchase of too large a quantity. They purchased to the value of 2801 pezzos, when they were limited to the value of about 1750 pezzos. For this difference no reason is given; except, that it is said, that a small balance only remained in their hands. But if they had purchased only to the extent of the limits of the orders, they would have had 1050 pezzos, beside the advance of the 700 pezzos, equal to 1750 pezzos, to apply to the purchase of the tiles. The plaintiffs, in their reply to this letter, dated the 18th of April, 1825, after quoting their original orders, say, "We are exceedingly disappointed, that such positive directions were not complied with; they were given for sufficient reasons, and without authority to

alter them. You omitted to invest the 700 pezzos on account of the freight of the 150 boxes marked T, which we regret, as we wished the funds at Havana. With this, you would have had 4240 pezzos, which would have furnished the tiles, paid disbursements, and have left 1393 pezzos to be invested in paper." The defendants replied, on the 27th of June, 1825, stating, "We are extremely hurt, that what we did for your account by the Halcyon, in February last, should not have met your approbation, because we acted for the best of our judgment for your interest. Your instructions would have been executed literally, had not the premises, under which they were given, changed. The sum of 700 pezzos, which were to be advanced here on account of half profits of the Halcyon's cargo of sugar, not having been due from a default of profits, we considered ourselves authorized to act with a discretionary power; otherwise, be assured, that we never deviate from orders." This letter was never answered. Now, the question for the jury is, under these circumstances, whether this omission of the plaintiffs to make an express declaration, that they would hold the defendants accountable for the breach of orders, and their subsequent silence and delay in bringing the suit, are to be construed as an implied acquiescence in, or ratification of, the acts of the defendants, or a waiver of the claim of the plaintiffs for damages. If so, then the plaintiffs cannot now, upon any after thoughts, reinstate themselves in any right of action. It is a question of fact, and must be decided by the jury upon the whole evidence. They will take into view the subsequent transactions to explain the delay in bringing the suit; and draw their conclusions accordingly. (The judge here commented on these transactions.)

If the jury shall be of opinion from the whole evidence, that the orders of the plaintiffs have been broken, in not purchasing the tiles, in the manner stated in the declaration, and that there has been no subsequent ratification by the plaintiffs, of the acts and proceedings of the defendants, then the plaintiffs are entitled to recover, and the remaining question is, as to the amount of damages. The counsel for the defendants contend, that the plaintiffs have suffered no damages; that the 2200 pezzos were actually invested in paper on the plaintiffs' account, and were thus received by the plaintiffs at Leghorn, and therefore he has lost nothing; and that, at all events, the measure of damages is the value of the 2200 pezzos at Leghorn, and not at the Havana. My opinion is, that no certain rule of damages can be laid to govern all cases of this nature. The plaintiffs are entitled to recover (if any thing) the real damages sustained by them. What those damages are the jury must decide upon all the circumstances of the case. In estimating them, they are not bound to confine themselves to the state of things at Leghorn, and are not precluded from taking into consideration the nature of the return voyage to the Havana, the safe arrival of the Halcyon at that port, the state of the markets, and the profits, which might have been made by the plaintiffs, if their orders as to the tiles had been complied with. I can lay down no other rule for the government of the jury than this, that they are at liberty to compensate the plaintiffs for their actual damages sustained as a consequence from the default of the defendants; but they are not at liberty to give vindictive damages. They of course will deduct any benefit derived by the plaintiffs from the investment in paper, as an offset in the damages.

At the close of the case, I have been called upon to give certain directions to the jury, which are so very complicated, that I am not quite sure, that I exactly comprehend them. If I do, they are, with a single exception, embraced in the preceding remarks. That exception is, as to supposed variances between the declaration and proofs. So far as those variances depend upon the parol proofs in the cause, it is no part of my duty to decide upon them, for they are matters of fact for the consideration of the jury. The question of a variance between a paper declared on, and that offered in proof, is matter of law; but whether the proofs generally in the case support the declaration, especially when there are parol proofs on both sides, is matter of fact for the jury.

It is contended, by the defendants' counsel, that the first new count in the declaration contains a material variance from the written proofs, because that count sets forth the letter of the 15th of September, 1824, as containing the special contract between the plaintiffs and the defendants, and as the postscript to that letter contains a material part of the contract, and this postscript is not set forth in that count, as a part of the letter, but is wholly omitted, that the evidence offered by the plaintiffs in this behalf does not support, and prove the contract, as in that count is alleged. I have not, at this moment, an opportunity to compare the count closely with the letter, and therefore I may mistake its exact import. But as I understand the postscript of the letter, there is no variance, in point of law, between the contract set forth, and the written evidence in the case. The postscript does not change the nature of the contract; but only shows, that 700 additional pezzos are applicable, as an advance, to the purchase. But the point is rather a matter of fact for the jury upon the whole evidence, and as such I shall leave it to them. (The judge then gave his answer to the respective questions propounded by the defendants' counsel.)

Verdict for the plaintiffs, $3439.24.

After the verdict, a bill of exceptions was tendered to the court and signed; and a mo-

tion for a new trial was also made by the counsel for the defendants. On its coming on for argument

STORY, Circuit Justice, said,—The motion for a new trial cannot be entertained, according to the practice of the court, unless the bill of exceptions is waived. The party has his election, either to proceed upon a writ of error to the supreme court, in order to have it determined there, whether the points were correctly ruled at the trial; or waiving that remedy, to apply here for a new trial. But he cannot be permitted to proceed both ways. The ground for granting a new trial is, that the party is without other remedy. But that is not the case, where he files a bill of exceptions; for upon that he can take the opinion of the supreme court. It is most convenient for the due administration of justice, that where a party means to apply to the appellate court for a final decision of the law of his case, he should so do with the least delay. The other party ought not to be burthened with the expenses of successive trials, until the law of the case is definitively settled by the final tribunal. Motion overruled.

[NOTE. Defendants sued out a writ of error to the supreme court, where the judgment herein was affirmed. The reasons urged for reversal were alleged erroneous instructions, and the refusal to give certain other instructions to the jury; but the court held, per Chief Justice Marshall, that the trial court erred in neither respect. Bell v. Cunningham, 3 Pet. (28 U. S.) 69. Subsequently defendants filed a bill in equity for relief against the judgment on the ground of surprise, and the court granted a perpetual injunction, restraining the collection of the judgment in so far as related to the damages awarded on account of the noninvestment of the 700 pezzos. Bell v. Cunningham, Case No. 1,246.]

CUNNINGHAM (BELL v.). See Case No. 1,246.

Case No. 3,480.

CUNNINGHAM v. CADY.

[13 N. B. R. (1876) 525;[1] 8 Chi. Leg. News, 165; 4 Am. Law. Rec. 510.]

District Court, N. D. Ohio.

Bankruptcy—Fraudulent Conveyance—Intent—Proof of Claim—Practice—Depositions.

1. A deposition to an act of bankruptcy consisting of a fraudulent conveyance, must allege or show the fraudulent intent of the debtor in making the conveyance.

2. A deposition to a proof of a claim in involuntary bankruptcy must show whether the claim is secured or unsecured.

3. A petition will not be dismissed, because the depositions in support thereof are defective; but the petitioning creditor, on motion, will be allowed to file supplemental depositions.

4. When the depositions are defective, the order to show cause will be set aside, but a new order may be issued on supplemental depositions.

[Petition by John Cunningham for an adjudication in bankruptcy against Alson Cady.]

WELKER, District Judge. On the 8th of January, 1876, John Cunningham filed in this court his petition against said Cady, debtor, containing the necessary allegations required by the bankrupt act, and duly verified. Depositions were also presented in support of the allegations of the petition, and filed with the same. Thereupon an order to show cause was made against the debtor, and served on him as required by the act. The debtor, by his counsel, now moves the court to dismiss the petition and proceedings for the following reasons: First. That the deposition in proof of the act of bankruptcy charged is insufficient in law. Second. That the deposition in proof of the petitioner's claim against the debtor is also insufficient in law.

The first insufficiency complained of is: that while the deposition sets forth the fact of a conveyance by the debtor of his property to his father-in-law, it fails to show or allege that it was done with an intent of a fraudulent nature under the provisions of the bankrupt law. The second insufficiency alleged is: that the deposition in support of the petitioner's claim, fails to show whether the claim is secured or unsecured; or if secured, to what extent—whether it is not wholly secured—so that the court can judge of the amount provable.

As to the act of bankruptcy, the deposition is defective in failing to allege or show fraudulent intent of the debtor in making the conveyance. But as to the second specification of the motion, the petitioning creditor insists that the proof is sufficient; that he need not prove that his claim was not secured; that if he were so secured, the fact should have been pleaded in an answer and not by preliminary motion. There is some authority for holding that, unless it appears that the claim is fully secured, it is still a provable claim under a proper interpretation of the bankrupt law. But without undertaking to determine that question, it is sufficient to say, that it is the better practice to set out in the deposition all the material facts concerning the claim; in other words, to "give a particular description of the debt," as prescribed in the form given by the supreme court. It follows that, owing to the defects of the proofs, they must be amended before the debtor can be required to answer the petition; and that the order to show cause was improvidently issued. The question now arises, whether the debtor's motion to dismiss the petition, and the whole proceedings, on that account, shall be allowable. At this stage of the matter, the petitioning creditor interposes his motion for leave to file further and supplemental depositions in proof of his debt, and of the act of bankruptcy in support of his motion.

[1] [Reprinted from 13 N. B. R. 525, by permission.]

I think this motion should be allowed for the following reasons: The jurisdiction of the court over the subject-matter of the proceeding is acquired by the filing of a petition framed and verified in accordance with the provisions of the act, and the rights and liabilities of all the parties relate and are determined by the time at which the petition is filed. On the filing of the petition, it is provided by the act that, "if it shall appear that sufficient grounds exist therefor," an order to show cause shall be entered against the debtor, etc. How the sufficient "grounds" shall be made to appear is not shown in the text of the statute; and in the absence of any other construction of this portion of the section, it would be naturally inferred that it would be by an inspection of the petition itself. But the supreme court has seen fit to require proofs of the truth of the principal allegations by separate depositions as a condition precedent to the order to show cause, and in fulfilment of the requirements of the language in question. No defect in the petition is complained of, but the defect is in a subsequent and incidental matter. That defect may be cured without prejudice to the regularity or the sufficiency of the petition, in the mode proposed by the motion of the petitioner, and thus the rights and liabilities created by the filing of the petition are preserved without any hardship upon the debtor. The petition, and the depositions in support thereof, are not so intimately connected with each other that, if the depositions are defective, the petition must necessarily be dismissed. It may be sustained while the proofs may not be held sufficient.

The order to show cause is set aside at the cost of the petitioner, and he has leave to file supplemental proofs in support of his allegations as to his claim, and as to acts of bankruptcy, on the filing of which, if found sufficient, an alias order to show cause will be entered.

CUNNINGHAM (DRAKE v.). See Case No. 4,060.

Case No. 3,481.

CUNNINGHAM et al. v. HALL.

[1 Cliff. 43.][1]

Circuit Court, D. Massachusetts. May Term, 1858.[2]

ADMIRALTY JURISDICTION—LIBEL BY SHIPOWNERS FOR BREACH OF CONTRACT.

1. District courts have no jurisdiction of a libel in personam against the builder, to recover damages for the non-completion of a ship, according to a written contract under which the ship was built and sold, for defects in the construction, discovered after the ship was sold and employed on a voyage.

[Cited in Edwards v. Elliott, 21 Wall. (88 U. S.) 556; Doolittle v. Knobeloch, 39 Fed. 41. Explained in Endner v. Greco, 3 Fed. 412.]

2. The jurisdiction of the district courts is not limited to the particular subject over which it was exercised in the English courts of admiralty, when the federal constitution was adopted; neither does it extend, under the constitution and laws of congress, to all cases which would fall within its cognizance, according to the civil law and the practice and usages of continental Europe.

3. The intent and meaning of the provision of the federal constitution, that the judicial power shall extend to all cases of admiralty and maritime jurisdiction, must be determined in a great measure from the maritime law, as it was known and understood in the jurisprudence of the states when the constitution was adopted.

[Cited in New England Mut. Marine Ins. Co. v. Dunham, Case No. 10,155.]

4. Discussion of the extent of the admiralty jurisdiction in the United States.

[Cited in Diefenthal v. Hamburg-Amerikanische Packetfahrt Actien-Gesellschaft, 46 Fed. 399; The Manhattan, Id. 798.]

This was an appeal from a decree of the district court [of the United States for the district of Massachusetts] sitting in admiralty. A libel in personam was filed by [J. H. Cunningham and others] the purchasers and owners of the ship Flying Childers, to recover compensation for damages and expenses of repairs, alleged to have resulted from the non-completion of the ship, by the respondent [Samuel Hall] according to the terms of a written contract between the parties. When the agreement for purchase and sale was entered into, the ship was in the course of construction, and the respondent contracted to complete her in a particular manner, and when finished to deliver her to the libellants, for a specified sum. Upon the completion of the vessel she was delivered to and accepted by the libellants, who coppered, fitted, and sent her immediately to sea. It was alleged that, soon after sailing, the vessel proved to be leaky, and was subsequently found unseaworthy, in consequence of defects in her planks and calking. After a hearing exclusively upon the merits, the district court pronounced in favor of the libellants. [Case No. 3,482.] Between the time of the appeal and the argument thereon, the opinion of the supreme court in People's Ferry Co. v. Beers, 20 How. [61 U. S.] 402, was announced, and the attention of the circuit judge was only called to the question of jurisdiction.

F. C. Loring, for libellants.

The admiralty jurisdiction of the United States courts is not limited to that exercised by the same court in England. Waring v. Clark, 5 How. [46 U. S.] 454; The Genessee Chief, 12 How. [53 U. S.] 443; Ward v. Peck, 18 How. [59 U. S.] 267; The New York, 18

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

[2] [Reversing Cunningham v. Hall, Case No. 3,482.]

How. [59 U. S.] 223. The jurisdiction never depends upon the existence of a lien. If the cause of action be maritime in its nature, it may be enforced by a suit in personam, in all cases, and if the maritime or local law gives a lien, in rem. The General Smith, 4 Wheat. [17 U. S.] 438; Peyroux v. Howard, 7 Pet. [32 U. S.] 341; Andrews v. Wall, 3 How. [44 U. S.] 572; New Jersey Steam Nav. Co. v. Merchants' Bank, 6 How. [47 U. S.] 392. The contract of material-men, that is, of those who furnish materials or perform labor, in the building and repairing of ships, is in its nature maritime. In re Hull of a New Ship [Case No. 6,859]; Davis v. Child [Id. 3,628]; The Sandwich [Id. 13,409]; The Jerusalem [Id. 7,294]; The Nestor [Id. 10,126]; The Young Mechanic [Id. 18,180]; The Ellen Steward [Id. 11,594]. A material man may sue in rem, if he has a lien, and always in personam in the jurisdiction where the party is liable to be sued.

C. P. Curtis, Jr., for respondent.

No precedents to support the jurisdiction over a suit in personam, against the builder of a ship, to recover damages for a breach of warranty, can be found either in this country or in England. All the analogous cases show that such jurisdiction does not exist. Cutler v. Rae, 7 How. [48 U. S.] 729; The Orleans, 11 Pet. [36 U. S.] 175; Minturn v. Maynard, 17 How. [58 U. S.] 477; The John Jay, Id. 399; Vandewater v. Mills, 19 How. [60 U. S.] 83; Plummer v. Webb [Case No. 11,233]. It does not follow that admiralty has jurisdiction over the suit, because the business relates to a ship. Cox v. Murray [Case No. 3,304]; Gurney v. Crockett [Id. 5,874]; Bradley v. Bolles [Id. 1,773]; Andrews v. Essex Ins. Co. [Id. 374]; Clinton v. The Hannah [Id. 2,898]. A contract to build a ship is a contract made on land, to be performed on land. Beers v. The Jefferson, 20 How. [61 U. S.] 393.

The right to entertain jurisdiction for repairs in a home port depends upon the question whether a lien is given by the local law. Read v. Hull of a New Brig [Case No. 11,609]; Turnbull v. The Enterprise [Id. 14,242].

CLIFFORD, Circuit Justice. Whether the district court had jurisdiction of the cause as set forth in the libel is now the only point to be decided. Contested questions of long standing yet exist, touching the nature and extent of the admiralty jurisdiction of the district courts, and in respect to some of those questions there is still a great diversity of opinion, which may be seen even in the reported decisions of the supreme court. Some points, however, in this controversy have been authoritatively settled by that tribunal; and it is believed that a proper application of the principles already established by that court will be sufficient to determine the present question, without entering at large into a consideration of those which remain open to dispute. Assuming the facts to be as they are stated in the libel, it appears that the contract was made in Boston, where all the parties reside and where the service, whether maritime or otherwise, was performed. After the service was performed, an unconditional delivery was made of the vessel, and she was duly accepted by the libellants, who paid the consideration, and thereby became her unquestioned owners. More than seven months elapsed after the vessel was delivered before the libel was filed, and during all that time the libellants had the exclusive possession of the ship, which they still of right retain. Their claim, therefore, if it can be entertained at all in admiralty, can only be enforced by a proceeding in personam, such as they have instituted, for the plain reason that a proceeding in rem, on their part, would involve an absurdity, as they already have the absolute property in the ship, discharged of all claim on the part of the respondent. Having the absolute property in the ship, they could have no lien to be enforced, and nothing of the kind is pretended by the libellants. They contend that a contract to build a ship is a maritime contract, and that a breach of such a contract, by a failure to complete the ship, according to its terms, constitutes a cause of action within the admiralty and maritime jurisdiction of the district courts; and that in all cases, where the cause of action is maritime, it may be enforced by a suit in personam. That proposition, broad as it is, must be supported to its full extent, in order to uphold the jurisdiction in this case. And the argument proceeds upon the ground, that the mere existence of a lien only affects the remedy in admiralty, and can never give jurisdiction to an admiralty court independently of the character of the contract and the nature of the service performed; and as an original question, that may be the better opinion, although there are some decisions of the supreme court not quite reconcilable with that view of the law. Granting it to be so, then the admiralty can in no case enforce a lien, unless the cause of action be maritime, and one which might be prosecuted by a suit against the person. That question in one of its aspects is now before the supreme court, and a decision in the case may be expected during the next term. Regarding the question as an important one, and believing that it does not arise in this case, no opinion will be expressed on the subject. A single question is presented in the argument, and it is the only one which will be decided; and that is, whether the purchaser of a ship, constructed for him, under a written contract, after he has paid the consideration and accepted the ship, and fitted her as a seagoing vessel, may maintain in the district court a suit in personam for damages against the builder for the non-completion of the ship, according to the contract, on account

of defects in the construction, which were discovered subsequent to her delivery and employment on a foreign voyage. Ship-building is an occupation requiring experience and skill, and, as ordinarily conducted, is an employment on land as much as any other mechanical pursuit, and men engage in the business for a livelihood just as they do in other mechanical employments and for the same purpose. Shipwrights are seldom ship-owners, and not more frequently interested in commerce and navigation than other mechanics; unlike the seamen, their home is on land and not on the seas. Ships are bought and sold in the market, after they are constructed or partly constructed, and before they are fitted as sea-going vessels, just as ship-timber, engines, anchors, or chronometers are bought and sold; and no reason is perceived why a contract to build a ship, when there is no lien to be enforced, any more than a contract for the materials of which a ship is composed, or for the instruments or appurtenances to manage a ship, should be regarded as maritime. Such contracts are made on land and are usually performed on land, and when they are based upon the personal responsibility of the parties, as they are when there is no lien, their remedy is most conveniently and appropriately sought in the courts of the common law. No distinction in principle is perceived between a contract to build a ship, as in this case, and a contract for the materials, as the latter are included in the former, and both fall within the same principle under the rules of the civil law. These propositions lead necessarily to the conclusion, that contracts for ship-building, and contracts for repairs and supplies, in the home port, must stand upon the same footing, in respect to the question of jurisdiction, and be governed by the same principles. Whether the admiralty has or has not jurisdiction to enforce a lien created by the local law, it is not necessary now to decide, as no such question arises in the case. Every one who had repaired or fitted out a ship, whether at home or abroad, or lent money to be employed in those services, had by the civil law a privilege or right of payment, in preference to other creditors, upon the ship itself, without any instrument of hypothecation, or any express contract or agreement, subjecting the ship to such a claim; and that privilege still exists, in those countries which have adopted the civil law as the basis of their jurisprudence. That rule was never adopted in England, in respect to repairs and supplies in the home port, and is not included in the recent act of parliament, passed in the present reign. According to the law of that country, a shipwright, who had taken a ship into his own possession to repair it, was not bound to part with the possession until he was paid for the repairs, any more than any other artificer, unless there was a special agreement to give credit for a definite period; but a shipwright who had once parted with the possession of the ship, or had worked upon it without taking possession, or a tradesman, who had furnished materials or supplies for a ship, was not preferred to other creditors, and had no particular claim or lien upon the ship itself, for the recovery of his demand. Work, therefore, done for a ship in England, was supposed to be on the personal credit of the employer. Wilkins v. Carmichael, 1 Doug. 101; Abb. Shipp. (5th Am. Ed.) 187. But it is now settled by statute in that country, that the court of admiralty shall have jurisdiction to decide all claims and demands whatsoever, for necessaries supplied to any foreign ship or sea-going vessel, and to enforce the payment thereof, whether such ship or vessel may have been within the body of the country or upon the high seas at the time when such necessaries were furnished in respect of which such claim is made.

Admiralty courts in England, for a long time, held that repairs and supplies created a lien upon the ship, until the doctrine was finally overthrown by the common-law courts, in the reign of Charles the Second, and this statute was passed to restore the jurisdiction in respect to such claims, when the services were rendered for foreign vessels. More consistency has been preserved by the courts of this country. Here a lien is admitted, as arising from the necessity of the case, for such repairs and supplies as are reasonably fit and proper while the ship is abroad or in a port of a state to which she does not belong. When the ship is in a port of a state other than the one to which she belongs, the master, in the absence of the owners or employers of the ship, becomes their general agent by virtue of his appointment for providing necessary repairs and supplies for the preservation of the ship and the prosecution of the voyage; and such contracts are maritime and create a lien on the ship, which may be enforced in admiralty by a suit in rem. Thomas v. Osborn, 19 How. [60 U. S.] 22; The Aurora, 1 Wheat. [14 U. S.] 102. No such rule has ever prevailed in this country, in respect to repairs and supplies in the home port, except it be in favor of the shipwright who has repaired the vessel and has not parted with the possession. In that case it is undeniable that he is entitled to retain the vessel until he is paid for his services. A somewhat broader doctrine was formerly maintained in some of the district courts, denying that any distinction existed between foreign and domestic ships, and holding that material-men had a lien on the ship for repairs done in domestic as well as in foreign ports, and might sue therefor in the admiralty.

This was held by Judge Winchester, in the case of The Sandwich [Case No. 13,409]; and a like opinion was intimated by Judge Peters, in Gardiner v. The New Jersey [Id. 5,233], though the learned judge admitted that his own practice had been to refer parties ex-

hibiting such claims to the state jurisdictions. Other district courts fully admitted the distinction, and it was applied by them in practice in determining the question of jurisdiction. Clinton v. The Hannah [Id. 2,898]; Shrewsbury v. The Two Friends [Id. 12,819]; Boreal v. The Golden Rose [Id. 1,658]; Prichard v. The Horatio [Id. 11,438]. Such was the state of the decisions in this country, when the case of The General Smith, 4 Wheat. [17 U. S.] 438, was carried to the supreme court; and it was there held, that where repairs have been made, or necessaries furnished, to a foreign ship or to a ship in a port of a state to which she does not belong, the general maritime law, following the civil law, gives the party a lien on the ship itself for his security; but that repairs and necessaries furnished in the port of a state to which the ship belongs were governed altogether by the municipal law of that state, and that no lien in such a case was implied by the maritime law; and accordingly the court denied the lien in that case, because the law of the state where the repairs were made did not give it for repairs on a domestic ship. Where the repairs are made or the supplies furnished for a vessel in a port of a state to which the vessel does not belong, she is considered a foreign vessel, and the rule of the general maritime law prevails; and for the plain reason that repairs and supplies in a foreign port are no less essential than the services of the mariner to furnish "wings and legs" to the ship, for the purpose of enabling her to complete the voyage for the benefit of all concerned. Necessity constitutes the foundation of the maritime lien for repairs and supplies, and that is made evident from the consideration, that if the owners are present, no lien is implied. On the other hand, where the vessel, through stress of weather or other accident, puts into a foreign port, and repairs or supplies are required, either for the safety of the ship or the prosecution of the voyage, the master, in the absence of the owners, has the right ex necessitate to procure them on the security of the vessel; and it is that necessity which confers the right to create the lien, and consequently where no such necessity exists, no such right can be exercised by the master; and it is because it does not exist in respect to repairs and supplies in the home port that no maritime lien is implied. And accordingly it was held by the supreme court, in People's Ferry Co. v. Beers, 20 How. [61 U. S.] 402, that where the owner is present, no lien is acquired by the material-man, nor is any lien acquired where the vessel is supplied or repaired in the home port; and it was said that the lien attaches to foreign ships and vessels only in favor of the carpenter, who repairs in a case of necessity and in the absence of the owner. Pratt v. Reed, 19 How. [60 U. S.] 359.

Such jurisdiction in cases of contract depends principally upon the nature of the engagement, and is limited to such as are purely maritime and have respect to rights and duties appertaining to commerce and navigation. 3 Story, Cont. 528. A contract to build a ship has much less reference to a voyage than a contract for repairs and supplies in the home port, and furnishes much less reason to imply a maritime lien. Judge Story admitted, in Andrews v. Essex Ins. Co. [supra], that such a contract could not be enforced in admiralty; and it was expressly held in Clinton v. The Hannah [supra], decided in 1781, that a shipwright could not sue in the admiralty for his contract wages for building a ship, and that case was cited and approved in the recent opinion of the supreme court,—People's Ferry Co. v. Beers [supra],—where it is emphatically declared, that "at no time since this has been an independent nation has any such practice been allowed." No case is cited in the argument, like the one under consideration, where jurisdiction has been entertained in the admiralty, and it is believed none can be from the decisions in this country which are recognized as authority at the present day. Such contracts are regarded as contracts made on land, and to be performed on land, as much as contracts for steam-engines, anchors, or chronometers; and as the circumstances attending these engagements usually afford the parties the amplest opportunity to know each other's pecuniary standing, they are supposed to be based upon personal responsibility, and consequently create no maritime lien upon the ship.

By the second section of the third article of the constitution, it is declared that the judicial power shall extend to all "cases of admiralty and maritime jurisdiction"; and it was doubtless the intention of congress, by the ninth section of the judiciary act, to confer the exclusive original cognizance of all causes of "admiralty and maritime jurisdiction" upon the district court; and the words of the act are to that effect, being "in terms exactly coextensive with the power conferred by the constitution." In order, therefore, to determine the limits of the admiralty jurisdiction, it becomes necessary to ascertain the true interpretation of the constitutional grant. On this subject two propositions may be assumed as settled by authority, and to those it will be sufficient to refer on the present occasion, without any particular discussion of the principles on which the decisions rest:—

First, it is well settled that the jurisdiction of the district courts is not limited to the particular subjects over which the English courts of admiralty exercised jurisdiction when the federal constitution was adopted.

Secondly, that the jurisdiction in admiralty, under the constitution and laws of congress, does not extend to all cases which would fall within it according to the civil law and the practice and usages of continental Europe.

Both these propositions are so firmly established, or so necessarily result from the decisions of the supreme court, that further discussion upon the subject appears to be unnecessary. 1 Kent, Comm. (9th Ed.) 402-419; Abb. Shipp. (5th Am. Ed.) 180-192. All the powers of the government of the United States, under the federal constitution, were derived from the people of the states who framed the constitution and put the government itself into operation. Maritime laws, and appropriate tribunals to administer them, existed in the states at the time the federal Union was formed. Those tribunals had their origin in colonial times, long before the confederation, and were continued until the constitution was adopted and the judicial system of the United States was organized. When the colonists immigrated here, they brought with them the laws of the parent country as their birthright, and, so far as they were applicable to their local condition, they were adopted and reduced to practice. After their organization as colonies, they assumed and exercised all the powers of government. New laws were made, and those in operation were modified. Judicatories were created and empowered to hear and determine causes, as well those of a maritime character as all other civil and criminal cases; and when, in the progress of time, they found it necessary and proper to frame the federal constitution, and saw fit to provide that the judicial power shall extend to all cases of admiralty and maritime jurisdiction, it was to the admiralty jurisdiction as it was well known and understood in the jurisprudence of the states that the framers of the constitution referred. That jurisprudence in all its branches was largely borrowed from the parent country, and was administered in tribunals fashioned after models drawn from the same source. These facts cannot be successfully controverted, as they are written on every page of the history of those times. That the admiralty jurisprudence of the states embraced some subjects not at the time admitted to be within it, according to some of the decisions of the king's bench, there can be no doubt, and hence is the correctness of the proposition, that the jurisdiction of the district courts is not limited to such subjects only as were allowed by those decisions to be of a maritime character.

Jurisdiction in admiralty under the constitution of the United States and laws of congress must be, therefore, determined by a just reference to the laws of the states and the usages of the courts prevailing in the states at the time when the constitution was adopted. No other rules are known, which it is reasonable to suppose could have been in the minds of the men who framed the constitution and organized the judicial system of the United States, than those which were then in force in the respective states, and which they were accustomed to see in daily and familiar practice in the state courts. Many of the laws and usages were the same as those then acknowledged in England, and to that extent the admiralty decisions in the state courts and those made in the courts of the parent country and of the commercial countries of continental Europe, when analogous, furnish a common guide. Waring v. Clark, 5 How. [46 U. S.] 454; Shrewsbury v. The Two Friends [supra]; People's Ferry Co. v. Beers, 20 How. [61 U. S.] 393; Grant v. Poillon, Id. 162.

Apply these principles to the present case, and there can be but one conclusion. Suits in personam for the non-completion of contracts for building a ship on land, and in a locality where all the parties reside, were never entertained in the admiralty before the constitution was adopted; and so far as appears, no such practice has been allowed since that time. Absence of all authority in adjudged cases after so long a period, and in a country so highly commercial as that of the United States, furnishes strong reason to conclude that the jurisdiction does not exist. Contracts for the building of ships, where a lien is given under the local law, have heretofore been regarded as maritime, and in repeated instances the lien so created has been enforced by a proceeding in rem, and the practice appears to be fully sanctioned by the twelfth admiralty rule.[3] The Calisto [Case No. 2,316]; Read v. Hull of a New Brig [supra]; Davis v. New Brig [Case No. 3,643]. Those cases are clearly distinguishable from the one under consideration, and cannot affect the question now to be decided. Here there is no lien to be enforced, and the suit is one against the person and for damages for the non-completion of the contract. Such suits, it is believed, are unknown in the admiralty practice of the country, and analogous cases support the proposition that the jurisdiction cannot be sustained. Admiralty jurisdiction is conferred by the constitution, and cannot be enlarged or diminished; and in this point of view, the decisions of the courts of this country upon jurisdictional questions, and the analogies to be drawn from them, are the safer guide, as, after all, such questions must be determined in a great measure by the maritime law of the United States, as it was known and understood in the courts of the states which formed the Union at the time the constitution was adopted. Other analogous cases may be referred to, tending to show that the jurisdiction in this case cannot be sustained. When a master was instructed, in his home port, to sell a cargo at the port of destination according to his judgment, and he landed the cargo there and proceeded to dispose of it on shore, it was held by Judge Betts, that this was not a maritime contract cognizable in an admiralty court; and again, where a master, so employed, abandoned a sale of the cargo in

[3] The twelfth admiralty rule then in force is now repealed.

order to effect a salvage service in a vessel procured by pledging the proceeds of the cargo, it was also held, that this was a breach of contract, for which no action would lie in a court of admiralty. Waterberry v. Myrick [Case No. 17,253]; The Harriet [Id. 6,097]. Judge Betts also held in Cox v. Murray [Id. 3,304], that a court of admiralty has no jurisdiction to afford a remedy, either in rem or in personam, for the breach of an executory contract for personal services to be rendered to a vessel in port, in lading or unlading her cargo. And the same learned judge remarked, that if such suits can be maintained, "the master or owner might resort to the same tribunal for the violation of agreements to build or repair a vessel to supply her with stores, or to provide her with a stipulated cargo." And he declared, that "the strong current of authority runs against the existence of any such powers in admiralty courts." Cox v. Murray [supra]; Gurney v. Crockett [Case No. 5,874]; Bradley v. Bolles [Id. 1,773]; Ransom v. Mayo [Id. 11,571]. Wherever jurisdiction of contracts between parties residing in the same state, for work and materials in the building of a ship, has been entertained, the proceeding has been in rem, and the supposed right of jurisdiction has been regarded as depending upon the question, "whether a lien is given by the local law of the state." Jurisdiction was placed expressly on that ground in Read v. Hull of a New Brig [Id. 11,609], where it was admitted that "the right to maintain jurisdiction depends upon the fact, whether there is a lien when the suit is commenced." Similar views are held also by Judge Conkling, in Merritt v. Sackett [Id. 9,484], where he says, that it is only in virtue of the lien given by a state law, that the admiralty jurisdiction is held to attach at all; and if the question had not actually been determined, it might be worth while to consider whether it would not be better to leave such liens to be enforced by the state tribunals alone. The suit in that case was in personam, and, there being no lien under the local law, it was held that the district court had no jurisdiction. And Justice Johnson, in Ramsay v. Allegre, 12 Wheat. [25 U. S.] 614, held the same doctrine, in an elaborate opinion, where the whole subject is very fully considered.

For these reasons, I am of the opinion that the district courts have no jurisdiction of a libel in personam against the builder, to recover damages for the non-completion of a ship, according to the written contract under which the ship was built and sold, for defects discovered in the construction after the ship was delivered and employed on a voyage. Remedies for the breach of such contracts, under such circumstances, appropriately belong to the courts of the common law.

The decree of the district court is therefore reversed, and the libel dismissed for want of jurisdiction.

Case No. 3,482.

CUNNINGHAM et al. v. HALL.

[1 Spr. 404;[1] 21 Law Rep. 18.]

District Court, D. Massachusetts. April Term, 1858.[2]

PERFORMANCE OF CONTRACT.

1. Where one contracts to make and finish a specific article, as for instance, a ship, he impliedly undertakes that the thing shall be reasonably fit for use.

2. If she be not so fit, the contractor will not be exonerated, although the unfitness was occasioned by secret defects in the materials used.

3. Where the contract was for the making and delivery of a ship, and the ship was made and delivered, and immediately sailed on a foreign voyage, and it was found upon examination, at one of the ports at which she arrived in the course of that voyage, eight months after her delivery, that the planks on her bottom were very much split, and she had leaked much in the course of the voyage, and had met with no disaster or strain sufficient to account for the damaged state of the planks; it was *held* that this was sufficient evidence that the vessel was improperly built, and not reasonably fit for use.

[In admiralty. Libel in personam by J. H. Cunningham and others against Samuel Hall to recover damages for a breach of contract.]

F. C. Loring, for libellants.

R. Choate and C. P. Curtis, Jr., for respondent.

SPRAGUE, District Judge. This libel is brought by the owners of the ship Flying Childers, to recover the expense of repairs and demurrage at Whampoa, on her first voyage. Although perfectly new, this vessel leaked so badly, that on her arrival in China she was put into dock and her copper stripped off, when it was found that several of the planks upon her bottom were so badly split that it was necessary to take them out and put in new, and her seams were generally so slack, that it was necessary to recaulk them.

After the respondent had commenced the building of this ship on his own account, the libellants made him an offer for her when completed, which was accepted. This offer and acceptance were in writing. A question has been made, as to the true construction of this contract. The respondent insists that he engaged only for the exercise of professional skill and labor. The libellants contend that it was a contract for the manufacture and delivery of a fabric. The price to be paid was a round sum. The offer was for the ship, and Mr. Hall, in accepting the proposal, agreed that "it should be right in all respects." It was a contract for a completed fabric. And the rules of law relating to the exercise of professional skill,

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

[2] [Reversed in Case No. 3,481.]

are not applicable. What, then, was the legal obligation of Mr. Hall? The case of Shepherd v. Pybus, 3 Man. & G. 868, is not distinguishable from this. It was there decided that the ship must be reasonably fit for use, and the same rule is laid down in other cases.

It is attempted to distinguish those cases from the present, on the ground that the articles were there ordered for some special purpose. But that only required an extended application of the rule. The maker may be bound to add peculiar qualities for a special purpose, but this by no means shows that he is not bound to furnish the common qualities for the usual purposes for which the vessel is destined. On the contrary, it shows that she is to be fit for her purpose, whether that be common or peculiar. The rule of law applicable to this case is, that the fabric shall be reasonably fit for use, and not merely that the maker will use his best skill to make it so. He warrants the accomplishment of that result.

The libellants admit that this ship was well built and satisfactory in all respects, except in the particulars complained of. She was launched in November, sailed in December, immediately began to leak, and in July it was necessary to take her into dock and strip the bottom, when it was found in the condition before stated; and the complaint made is that some of the planks used were originally defective, and that the caulking was not sufficient. There is no contradiction as to the state of the bottom at Whampoa, though the witnesses differ somewhat as to details. [The testimony of Cowper, the shipwright, is entitled to more weight, as it was originally taken to be used by the respondent, and is not materially affected by the testimony of his subsequent declarations.] [3]

This being the state of the vessel, how is it to be accounted for? Several causes are assigned. One is, that hard pine planks are liable to defects, which cannot be discovered on careful examination, such as heart-shakes and run-rounds, which do not come to the surface, and which are opened by the nails used in coppering. The evidence shows that this is not infrequent, and the suggestion would be entitled to weight, if the rule of law applicable was that for which the respondent contends; but if the fact were proved, I think the respondent must nevertheless be liable. The other alleged causes are heaving out, touching bottom at Boston and San Francisco, and gales of wind.

The only evidence of her taking ground in Boston is an incidental statement by the mate in his deposition, taken two years ago. It was not drawn out by the respondent, nor did he cross-examine respecting it, and no expert has been inquired of as to its effect; it is evident that the respondent did not consider that a sufficient cause, and the same may be said of the touching at San Francisco. There is no proof that this could account for the state of the bottom at Whampoa, and the leak began long before she arrived at San Francisco. As to gales at sea, the master and mate testify strongly that she never strained, and that she encountered no weather sufficient to strain her, that the leak was steady and gradually increased. The log-book does not corroborate their testimony as to the gradual increase of the leak, but does as to its occurring immediately after sailing. Pumping is not always mentioned in the log-book, and the account given of the weather is much stronger. But it is to be remembered that the log-book and protest are the usual proof of loss where claims are made on insurers, and it is to be expected that the accounts of gales and seas will therein be stated, at least as strongly as the truth will admit. It does not mention that any accident or damage happened, or that the ship strained, or carried away even a spun-yarn. I cannot, therefore, set aside the testimony of the master and mate, especially as, at Whampoa, no sign of straining appeared on the bottom, and the copper was so smooth and unwrinkled that it was put on again, which is conclusive evidence that she had not been strained.

As to the heaving out. The vessel was not coppered on the stocks, and it was known to the respondent that the copper was to be put on after she should be launched. It is argued that this was an unfair use of the vessel, and subjected her to unusual tests. But Mr. Hall himself put on the copper. The vessel was hove down, under his eye, and with his knowledge, and no complaint was made by him, at the time, that she was to be hove out, or of the manner in which it was done, and at that time the copper could not have been put on without it. There is no proof that she was strained in the process, and the weight of testimony is that, if carefully done, a good vessel ought not to be strained in heaving out, and that splits in the bottom plank could not be caused by it, and that a ship ought to be able to bear it. Railways and dry docks are inventions of recent years, and even now are not to be found in many places where vessels are built and repaired.

I am of opinion that the condition of the bottom planks and seams at Whampoa is not accounted for by any cause suggested in defence, and must be attributed to original defects, and therefore this vessel was not, when delivered to the libellants, reasonably fit for use. The libellants must prevail. The case must be sent to an assessor, unless the parties agree upon the amount of damages.

Upon appeal to the circuit court [the decree herein was reversed and] this action was dismissed for want of jurisdiction. [Case No. 3,481.]

CUNNINGHAM (HAMILTON v.). See Case No. 5,978.

[3] [From 21 Law Rep. 18.]

Case No. 3,483.

CUNNINGHAM v. MACON & B. R. CO. et al.

[3 Woods, 418.][1]

Circuit Court, S. D. Georgia. Nov. Term, 1878.

STATE AID—CONSTRUCTION OF STATUTE—JURISDICTION—SUIT AGAINST STATE.

1. The purpose of the provisions of the act of the legislature of Georgia, passed December 3, 1866, which established a statutory mortgage on all the property of the Macon & Brunswick Railroad Company, to secure the payment of the bonds of the company, indorsed by the governor, was to protect the state from loss on account of such indorsement, and their effect was not to make the state a trustee for the bondholders.

2. A bill in equity which seeks to take from the possession of a state, property possessed and claimed by it, and to subject it to the payment of bonds, which the bill alleges were indorsed by the state, but which indorsement the state denies, though nominally brought against the governor and other state officers, is in substance a suit against the state, and cannot be maintained in a court of the United States on the theory that the state has assumed the duties of a trustee for the holders of said bonds.

In equity. Heard on demurrer of Alfred H. Colquitt to the bill of complaint.

The bill was filed by George A. Cunningham, a citizen of Virginia, against the Macon & Brunswick Railroad Company, and "J. W. Renfroe, treasurer of the state of Georgia; Alfred H. Colquitt, governor of the state of Georgia," and against Edward A. Flewellyn, W. A. Loftin, and George S. Jones, who styled themselves "directors of the Macon & Brunswick Railroad Company," John H. James, and others [and the First National Bank of Macon], all citizens of the state of Georgia.

The averments of the bill were substantially as follows:

On December 3, 1866, the general assembly of Georgia passed an act authorizing the governor to indorse certain bonds of the Macon & Brunswick Railroad Company. This act (Laws 1866, pp. 127, 128) declared that the governor was thereby authorized "to place the indorsement of the state" upon the bonds of the said railroad company to the amount of $10,000 per mile for as many miles of said road as were then completed, and the like amount for every additional ten miles as the same might be completed and put in running order, on the following terms and conditions, to wit: "Before any such indorsement shall be made, that so much of the road as the said indorsement shall be applied for, is completed," etc., "and that said road is free from all liens or mortgages or other incumbrances which may in any manner endanger the security of the state, and upon the further condition and express understanding that any indorsement of said bonds, when thus made, shall not only vest the title to all property of every kind, which may be purchased with said bonds, in the state, until all the bonds so indorsed shall be paid, but the said indorsement shall be and is hereby understood to operate as a prior lien or mortgage on all the property of the company, to be enforced as hereinafter provided." The act then proceeded to declare that "in the event any bond or bonds indorsed by the state, as provided in the first section of this act, shall not be paid by said railroad company at maturity or when due, it shall be the duty of the governor, upon information of such default by any holder of said bond or bonds, to seize and take possession of all the property of said railroad company and apply the earnings of said road to the extinguishment of said bond or bonds or coupons, and sell the said road and its equipments and other property belonging to said company, in such manner and at such time as in his judgment may best subserve the interest of all concerned."

Subsequently the general assembly of the state passed a series of joint resolutions, which were approved December 4, 1866 (Laws 1866, p. 220), which declared that said railroad company should not sell or dispose of the said bonds, to be indorsed by the governor at a discount greater than ten per cent.; that the indorsement of the state upon the bonds should not exceed one million of dollars until an amount of capital equal to the additional indorsement should be bona fide subscribed and paid into said company, and that in order more fully to secure the payment of the said bonds, it should be the duty of the railroad company to set apart annually two per cent. of the amount indorsed for as a sinking fund, which should be invested in state bonds and deposited with the governor, to be held in trust for said company, and which should be applied exclusively to the payment of the bonds of said company. Under these provisions of law, the bill averred that the railroad company issued bonds to the amount of $1,950,000, which were indorsed by the governor, and afterwards negotiated by the railroad company, and that said indorsement operated as a statutory mortgage upon all the property which said railroad company held at the time of the indorsement, to the holders of said bonds to secure the payment of the bonds held by them.

On October 27, 1870, the general assembly passed an amendment to the act above mentioned, authorizing the governor to indorse additional bonds of said company to the extent of $3,000 per mile. This amending act (Laws Ga. 1870, p. 336) is entitled "An act to amend an act to extend the aid of the state to the completion of the Macon & Brunswick Railroad and for other purposes," and declares "that the above recited act be so amended as to authorize the governor to place the indorsement of the state, to the

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

extent of $3,000 per mile, upon the bonds of said Macon & Brunswick Railroad Company, in addition to ten thousand dollars, as recited in the act of which this is amendatory." After the passage of this last named act, and by its authority, the governor indorsed additional bonds of said company to the amount of $3,000 per mile of said company's road, amounting in the aggregate to $600,000, which were put in circulation by the company for a valuable consideration.

The complainant is the bona fide holder, for a valuable consideration, of nineteen of said second series bonds, of the denomination of $1,000 each.

On July 1, 1873, and on November 1, 1873, the said railroad company failed to pay the coupons on both said series of bonds which fell due at those dates respectively, and has not at any time since paid said coupons, nor any coupons falling due at subsequent dates. On July 2, 1873, the governor, by virtue of the provisions of the act of 1866, seized the railroad and all other property of said company, on account of the default in the payment of said interest coupons. On March 6, 1875 (Laws 1875, p. 371), the general assembly passed a series of resolutions declaring the indorsement of the state upon said second series of bonds, amounting to $600,000, to be unconstitutional, null and void, and re-affirming the validity of the indorsement of the governor on the first series of $1,950,000, and authorizing the governor to sell the railroad, with its franchises, equipments, etc., upon such terms and for such price in money or first mortgage indorsed bonds (naming the series of $1,950,000) of the Macon & Brunswick Railroad, or of the bonds of the state, as in his judgment might be consistent with the interests of the state. On the first Tuesday of June, 1875, the road and other property of said company was, by the orders of his excellency James M. Smith, who was then the governor of Georgia, sold, after due advertisement, and was by him purchased for the state for the sum of $100,000, and was afterwards conveyed by deed of said governor to the state of Georgia.

The bill averred that the said sale was void, because (1), the governor excluded the bonds of the $600,000 series from being used as cash in the purchase of the road at their face value; and (2), because the governor was not authorized to bid on said property for the state, and had no constitutional power to make the purchase; that if said sale was not void, it was voidable, because, on the facts, the state was a trustee of the mortgaged property for the benefit of the bondholders, and had no right to buy at her own sale as such trustee, without incurring the risk of having the sale set aside at the instance of any beneficiary under the trust, and the complainant, as such beneficiary, elected to set said sale aside. The state of Georgia has voluntarily taken up all of the $1,950,000 series of bonds for which she became liable by the indorsement, by issuing therefor her own bonds, dollar for dollar, and the defendant Renfroe, as treasurer of the state, is regularly paying the interest on the bonds so substituted as it falls due. The state purchased at said sale certain property of the railroad company which was not covered by the said statutory mortgage, to secure the said series of bonds amounting to $1,950,000, because said property was acquired by the railroad company with funds other than the proceeds of said bonds, but was covered by said mortgage so far as to secure the $600,000 series of bonds having been bought subsequent to the indorsement of said last-named bonds. The bonds indorsed by the governor, to the extent of $3,000 per mile, under authority of the act of 1870, are entitled to the benefit of the statutory mortgage created by the act of 1866, after the payment of the bonds indorsed by authority of the latter act, and as these have been voluntarily paid by the state, the second series of $600,000 now constitutes the first lien, and are entitled to have said mortgage foreclosed for their payment. By a deed dated June 30, 1873, the Macon & Brunswick Railroad Company conveyed certain property to L. N. Whittle, Esq., and another in trust, to sell the same, and out of its proceeds to pay certain fare tickets issued by the company; that said trust was never executed, but said fare tickets were paid out of the earnings of the railroad after it had been seized by the state, and part of said property, consisting of three bonds of $1,000 each of said first series of the Macon & Brunswick Railroad bonds, indorsed by the state, and four hundred and forty shares of stock of the Southern & Atlantic Telegraph Company were transferred to the defendant Renfroe, as treasurer of the state, and certain real estate in the city of Macon, also included in said trust-deed to Whittle, is held and claimed by the First National Bank of Macon. All of said property was seized by the governor and sold by him at the sale above mentioned.

The bill further stated that it was filed for the purpose of foreclosing said statutory mortgage to pay the said second series of indorsed bonds, upon the assumption that the mortgage to the governor of Georgia was to him as trustee for the bondholders, to secure the payment of the bonds indorsed by the state, and was not a mortgage of indemnity to the state to secure her harmless against liability incurred by said indorsement, but if the court should be of opinion that the statutory mortgage was one of indemnity to the state, and the sale of the railroad property and its purchase by the state were valid, then the bill insists that both series of indorsed bonds stand upon the same footing, and are entitled to be paid pro rata out of the proceeds of said sale, and that the sums paid by said Renfroe, as treasurer of state, in taking up the coupons of the state bonds, which have been ex-

changed for the $1,950,000 indorsed railroad bonds, represent a portion of their proceeds, and should be paid pro rata on both series of indorsed bonds, and that when the legislature of Georgia appropriates any sum for the payment of the principal of the state bonds so exchanged, such sum should, in like manner, be divided pro rata among the holders of both series of indorsed bonds, and that the bonds so exchanged should themselves be treated as the proceeds of the sale of the railroad property, and divided pro rata among all the holders of both series of the indorsed bonds. The bill further averred that the defendant John H. James, and many others unknown, were holders of said state bonds so exchanged as aforesaid.

The bill prayed for the appointment of a receiver for all the property covered by said statutory mortgage, and that said statutory mortgage might be foreclosed and the property embraced therein sold, and the proceeds applied to the payment of the $600,000 series of bonds indorsed by the state, or if the court should be of opinion that said mortgage was a mortgage of indemnity, and said purchase of the railroad by the state valid, then, that any of said property not covered by said mortgage, might be required to be delivered by the holders to the receiver, to be apportioned, and that said Renfroe might be enjoined from paying any further coupons on the bonds of the state exchanged for the $1,950,000 series of indorsed railroad bonds, and that the holders of the exchanged bonds, when discovered, might be compelled to account to the complainant and other holders of bonds of said $600,000 series for their pro rata of such exchanged bonds, and that said defendant James might be restrained from disposing of said exchanged bonds held by him.

To this bill, Alfred H. Colquitt, governor of the state of Georgia, filed his demurrer, claiming that the court could not take cognizance of the matters and things set up in said bill, as against him, because he had no personal interest in the suit, and the same was an attempt to reach the state of Georgia through him, as governor, and to make it a party to said proceedings, so as to bind it by the decree of the court, and praying that the bill be dismissed as to him.

A. G. McGrath and W. W. Montgomery, for complainant.

R. N. Ely, Atty. Gen. of Georgia, and R. F. Lyon, for defendants.

WOODS, Circuit Judge. If, upon the facts of the bill, the statutory mortgage was intended as an indemnity to the state to secure it against its indorsement of the bonds of the railroad company, the question raised by the demurrer has already been considered and decided by this court adversely to the case made by the complainant. See Branch v. Macon & B. R. Co. [Case No. 1,808].

That such was the purpose of the act of December 3, 1866, is, in my judgment, clear. The constitution of the state of Georgia, in force at the time of the passage of this act, declared, "Nor shall the credit of the state be granted or loaned to aid any company, without a provision that the whole property of the company shall be bound for the security of the state, prior to any other debt or lien, except to laborers." The act of December 3, 1866, and the resolutions of December 4, were unquestionably framed in view of this constitutional provision. The act declares that before any indorsement of the railroad bonds is made by the governor, he shall be satisfied that the road is free from all liens, etc., which may in any manner endanger the security of the state. The state, through the legislature, provided this statutory mortgage to secure herself against her indorsement of the bonds of the railroad company. That was the prime and obvious intent of this legislation. Its purpose was not to put upon the state the duties of a trustee for the benefit of the holders of the bonds of the railroad company. If this view is correct, the question raised by the demurrer is settled, so far as this court is concerned, by the case above mentioned.

To say that the state, under the facts, is a trustee for the bondholders, does not change the case; because every surety who holds property for his own indemnity, may be called upon by the creditor to apply the property to the payment of his debt. The surety, however, is still a surety, and holds the property primarily for his own protection. But concede that the legislation above referred to makes the state a trustee for the holders of the railroad bonds indorsed by the state. Does that view relieve the bill from the objection raised by the demurrer?

The state denies, as appears by the bill, the validity of its indorsement upon the bonds held by complainant. She says it is without constitutional warrant, and null and void. If this is true, then the state has assumed none of the duties of a trustee for the holders of these bonds. She denies, in effect, that she is under any obligation as trustee, or otherwise, to these bondholders. The complainant seeks to hold the state to this indorsement, and having done that to compel her to appropriate to the payment of the indorsed bonds property which she claims as her own. As remarked by Mr. Justice Bradley in the case of Branch v. Macon & B. R. Co., supra: "To sustain the complainant's case the court would be compelled to decide upon the state's liability on its indorsement of the second issue of bonds. * * * The court is asked to make a decree operating directly upon the rights of the state, and transferring them to the complainant and the other bondholders. It is not merely the possession of its agents, but the actual right and title of the state itself which are sought to be affected or transferred. We think this

cannot be accomplished without making the state a party to the suit, and that cannot be done."

The entire property mentioned in the bill was seized by the state as covered by the statutory mortgage. It was sold, and bought for and conveyed to the state, and the state is in possession, asserting title to all but a small part of the property. The main purpose of the bill is to dispute the title of the state to the property possessed and claimed by her, and by the decree of this court to transfer the property to the holders of a series of bonds with whom the state claims she never entered into any valid obligation whatever. That is the case made by the bill, when stripped of the plausible theories with which the genius of counsel has clothed it.

The bill is, to all intents and purposes, a suit against the state. It is mainly her property, and not that of Alfred H. Colquitt, or J. W. Renfroe, that is to be affected by the decree of the court. It is the title of the state that is assailed. The attack is not made against the state directly, but through her officers. This indirect way of making the state a party is just as open to objection as if the state had been named as a defendant. But there is a part of the property mentioned in the bill, and as against which relief is sought, to wit: Lots numbers one and seven, in block ten, southwest common, city of Macon, which is not now in possession of or claimed by the state of Georgia, but is held and claimed by the First National Bank of Macon, as purchaser from the state, which is made a defendant to the bill. In sustaining the demurrer of Alfred H. Colquitt, that part of the bill relating to the property claimed by the First National Bank of Macon is left untouched. Demurrer of Alfred H. Colquitt sustained.

[NOTE. Complainant appealed, and the decree dismissing the bill was affirmed by the supreme court.

[Mr. Chief Justice Waite, in delivering the principal opinion, assigned as the grounds of affirmance that the state of Georgia was an indispensable party to the controversy, and in fact the only proper defendant, and, as the circuit court had no jurisdiction of a suit against the state, the bill was rightfully dismissed. Cunningham v. Macon & B. R. Co., 109 U. S. 446, 3 Sup. Ct. 292, 609.]

Case No. 3,484.

CUNNINGHAM v. OFFUTT.

LINTHICUM v. SAME.

[5 Cranch, C. C. 524.][1]

Circuit Court, District of Columbia. Nov. Term, 1838.

FIERI FACIAS—LIEN—PRIORITY.

1. A fieri facias binds the goods only from the time of its delivery to the marshal; and if it be returned without being levied upon the goods, its lien ceases; and a subsequent fieri facias, issued at the suit of another creditor upon a subsequent judgment, and levied upon the goods, must be satisfied before a second fieri facias afterwards issued by the first creditor upon the prior judgment.

2. The execution first delivered to the marshal must be first served.

This was a motion by [William] Remington to order the marshal to pay over to him $69, which he had made under a fieri facias at the suit of [Otho M.] Linthicum against [Zachariah M.] Offutt; and the matter was submitted to the court upon the following case stated: On the 26th of May, 1835, a fieri facias was issued at the suit of [Samuel] Cunningham against Offutt, which came to the hands of the marshal on the next day, and was levied upon a negro boy appraised at $350. The boy was replevied by William Remington, claiming him under a bill of sale from Offutt. On the trial of the action of replevin, judgment was rendered for the defendant in replevin, and a return of the boy awarded. After which, it was agreed between Offutt, Remington, and Cunningham, that the latter should take the boy in part of his execution, without a public sale, at a sum which left a balance of $69 unpaid on the execution; which balance Remington paid to Cunningham, and took an assignment of his judgment for a like amount. Before this arrangement was made, namely, on the 15th of August, 1837, a fieri facias was issued at the suit of Otho M. Linthicum, against the said Offutt, which came to the marshal's hands on the 1st of September, 1837, and was, on the 11th of November, 1837, levied on sundry household furniture, &c., not including the negro boy. On the 17th of November, 1837, Remington caused a fieri facias to be issued for his use, upon the judgment of Cunningham against Offutt; which execution came to the hands of the marshal on the 18th of November, 1837; and was levied on the same property upon which the fieri facias of Linthicum against Offutt had been levied; and which was sold by the marshal. Remington claimed a priority of payment of his $69 out of the proceeds of the sale, and notified the marshal to retain that sum for his use, and to pay it over to him; to which Linthicum objected. The question was submitted to the court without argument.

[Before CRANCH, Chief Judge, and MORSELL, Circuit Judge.]

CRANCH, Chief Judge. The execution of Cunningham, for the use of Remington against Offutt, which was issued on the 17th of November, 1837, purports to be an original fieri facias; not an alias. It contains no reference to any former execution, and is for the whole amount of the original judgment. The execution of Linthicum against Offutt, which was issued on the 1st of September, 1837, appears, also, to be an original fieri facias, and was delivered to the marshal on the same day, who levied it upon certain

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

property of the defendant, Offutt, on the 11th of November, 1837. The execution of Cunningham, for the use of Remington, was delivered to the marshal on the 18th of November, 1837, and levied on the same property. The execution of Linthicum, having first come to the hands of the marshal, must be first satisfied. But it is said that Cunningham's execution for the use of Remington was an alias fieri facias, the first having issued on the 27th of May, 1835, and delivered to the marshal on the same day, and levied upon a negro boy, who was replevied out of the marshal's hands by Remington, but afterwards delivered to Cunningham, at a certain price, in part satisfaction of his judgment, and that a balance of $69 was paid to Cunningham by Remington, who took an assignment of the judgment to that amount, and issued the above-mentioned fieri facias on the 17th of November, 1837. I think this makes no difference. The first execution was not levied upon this property on which Linthicum's execution was levied; and although the personal property is bound by the delivery of the execution to the marshal, yet, if that execution be returned it is functus officio, and if a new fieri facias be issued, it binds the goods only from the time of its delivery to the marshal.

By the statute of frauds and perjuries (29 Car. II. c. 3, § 16), "no writ of fieri facias, or other writ of execution shall bind the property of the goods against whom such writ of execution is sued forth, but from the time that such writ shall be delivered to the sheriff, under-sheriff, or coroners to be executed." The fieri facias of Cunningham for the use of Remington, therefore, could not bind the property of the goods against which it was sued forth, but from the 18th of November, 1837, the day it was delivered to the marshal; whereas Linthicum's fieri facias bound the property of the goods from the 1st of September, 1837. I am, therefore, of opinion, that the sum of $69 which the marshal has retained, to abide the opinion of the court upon this question, ought to be paid over to Mr. Linthicum.

CUNNINGHAM (OLIVER v.). See Case No. 10,493.

Case No. 3,485.

CUNNINGHAM v. OTIS.

[1 Gall. 166.][1]

Circuit Court, D. Massachusetts. May Term, 1812.

COMMISSIONS TO TAKE TESTIMONY ABROAD—PRACTICE IN GRANTING.

Practice as to granting commissions to take evidence in foreign countries. See 1 Greenl. Ev. §§ 320-326.

The tenant [Susannah Cunningham] moved for a special commission to Great Britain, to take the deposition of John S. Copley, Esq., with instructions: (1) That the interrogatories should be filed in the court here by both parties, previous to the issuing of the commission. (2) That the commissioners should be directed not to admit any additional interrogatories. (3) That neither parties nor counsel should be permitted to appear before the commissioners. (4) That the witness in consideration of his great age, (75 years), should be allowed a friend to attend and assist him before the commissioners. The motion was grounded upon the facts contained in the return of the commissioners, as to the embarrassments, which arose in taking the deposition of the witness under a former commission, and the misunderstanding of the legal rights of the parties before them.

It was argued by the tenant's counsel, in support of the motion, that as there were no rules of this court on this subject, the rules in chancery formed proper precedents to be adopted. That in chancery, when a commission issued, the interrogatories were always considered in point of law, as filed at the issuing of the commission, though where the commission was to be executed within the realm, the practice had been relaxed, and it was held sufficient to file the interrogatories at the time of opening the commission, and they cited 1 Har. Ch. Pr. 323. But that this relaxation had never been extended to commissions to foreign countries, and for obvious reasons, as the interrogatories would be wholly without the power and control of the court, and grossly scandalous or impertinent matter might be contained therein.

The counsel for the demandant [Harrison G. Otis] contended, that the practice, as to filing interrogatories at the opening of the commission, and not before, was a reasonable practice, and founded in good sense, and was applicable to foreign, as well as domestic commissions. They cited Bart. Suit Ch. 170, and argued that there were peculiar circumstances, in this case, requiring such an indulgence.

Prescott, Davis & Blake, for demandant.
Otis, Dexter & Jackson, for tenant.

THE COURT (STORY, Circuit Justice, and DAVIS, District Judge) were of opinion, that the motion was to the discretion of the court. They had no doubt of the authority of the court to allow interrogatories or commissions to be filed at any time, when a proper case shown. In many case unless this were allowed, as to foreign countries, there would be a complete failure of justice. The rule, that these interrogatories should be filed here, was in general reasonable, as it preserved the decorum and propriety of the inquiries. Under all the circumstances of the present action, they granted the motion as to every part, but the fourth, and as to that, denied it.

CUNNINGHAM (UNITED STATES v.). See Case No. 14,850.

[1] [Reported by John Gallison, Esq.]

CUNNINGHAM (WATSON v.). See Case No. 17,280.

CUPPLES (LAWRENCE v.). See Case No. 8,135.

Case No. 3,486.

CURE v. BULLUS.

[1 Abb. Adm. 555;[1] 7 N. Y. Leg. Obs. 345.]

District Court, S. D. New York. Oct. Term, 1849.

EXONERATION OF BAIL IN ADMIRALTY.

1. The practice of courts of admiralty does not admit of a surrender of the principal in exoneration of bail.

2. In order to be discharged from a bail bond or stipulation given in admiralty, the party must establish fraud, deceit, duress, illegality of consideration, or other matter such as at law or in equity would avoid a common money bond, or would entitle a party to be relieved from it.

This was a libel in personam by Peter Cure, assignee of Benson F. Town, libellant, against William A. Bullus, to recover for supplies furnished by libellant's assignor to a vessel owned by respondent.

The defendant was arrested in the cause on a warrant against his person, pursuant to the rules of the supreme court applicable to cases of like description, and one Farnham, a resident of the village of Newburgh, became fidei jussor, or stipulator, for the respondent. Application was now made to relieve the stipulator from his undertaking. The condition of the undertaking was, that "if the respondent should personally appear before the district court of the United States for the southern district of New York, on the 11th day of September instant, at the city hall in the city of New York, to answer the said libel, and abide by all orders of the court, interlocutory or final, and pay the money awarded by the final decree in the suit," then the undertaking should be void. It appeared by affidavits read on behalf of the stipulator, that the respondent was arrested at Newburgh by one Brown, a deputy marshal, who, at the time of the arrest, represented that the undertaking was merely for the appearance of the respondent at court, and that the respondent had twelve days to appear; that the stipulator was thereby deceived and induced to sign the undertaking, which he would not have done had he been aware of his true position under it; that the respondent, his principal, was entirely insolvent and unable to respond to the stipulator in case he was rendered liable on this undertaking; and that Proudfit, an attorney, resident in Newburgh, and who was consulted by the stipulator at the time of signing the undertaking, told him that the marshal was correct in his representations as to the effect of the bond. It appeared by affidavits read in opposition to the motion, that no instructions had been given to the deputy marshal by the libellant or his proctor to make any such representations; that Proudfit, the attorney consulted by the stipulator, had been present when the latter executed the bond, and had advised him in respect to the matter; and that Proudfit and the stipulator had both of them read over the bond before the execution of it. The stipulator offered to surrender his principal. There were two other bonds given under like circumstances in two other causes; in respect to which like motions were also made; all being heard as one.

E. C. Benedict, contended, that the court under its general equitable powers, had the right to relieve the bail from his undertaking in a case like this, where it was evident that there had been, to say the least, a mistake of his liability.

D. McMahon, opposed.

1. The undertaking of the bail in admiralty is in the nature of a stipulation for the debt, and he becomes thereby a fidei jussor for the principal. Neither the surrender of the principal, nor even the death of the party, can discharge the bail. 2 Browne, Civ. & Adm. Law, 412; Hall, Adm. Pr. 25, note.

2. The representations of the deputy marshal were not directed to be made by the libellants, and they were nothing more than the representations of a third party. The libellants, consequently, are not bound by them.

3. It appears that the stipulator read the conditions of the bond, which were plain and easy to be understood. He cannot complain of a mistake which has happened through his own carelessness.

BETTS, District Judge. The defendant moves that three bail bonds, entered into by him and one Farnham to the marshal of this district, be vacated, or that the bail be relieved therefrom on the surrender of the respondent to be committed in the respective suits.

The respondent was arrested on the 10th day of September last, at Newburgh, upon three warrants in personam, returnable in this court on the 11th of September, and on the same day gave the bonds in question to the marshal.

The condition of each bond is made conformable to rule 3 of the supreme court; and is, that the respondent, Bullus, "shall personally appear before the district court of the United States for the southern district of New York, on the 11th day of September instant, at the city hall of the city of New York, to answer the said libel, (the filing of which is previously stated, together with the cause of action,) and abide by all orders of the court, interlocutory or final, and pay the money awarded by the final decree of the said court," &c.

[1] [Reported by Abbott Brothers.]

The bonds were duly signed and sealed by the respondent and his bail, and thereupon he was discharged from arrest in the three suits. The bonds, (except names of parties, dates, and the sums of money in demand, $52.97 in one, $246.69 in one, and $49.50 in the other, with designation of the particular cause of action in the respective suits,) are in print.

The respondent, by his own affidavit, sets up in avoidance of the bonds, that he inquired of the deputy marshal who served the warrants, what the effect and obligation of the undertaking was, and the officer informed him and his bail that it was nothing more than to secure the personal appearance of the respondent, who had twelve days after the return day of the process to come into court and perfect his appearance in the cause. The bail swears to the same statement of facts, and asserts that he subscribed the bonds in reliance upon those representations, and he would not have undertaken for the debts.

A lawyer in the village of Newburgh was consulted by the principal and bail before the bonds were executed, who says he questioned the deputy marshal, and was informed by him that the respondent had twelve days after the return day of the process within which to enter his appearance, before judgment would be entered against him, and that by signing the bail bonds the bail would become liable no further than for the appearance of the defendant; and upon that information deponent told the bail he would be safe in signing the bonds. The attorney further swears that he is not a proctor of this court, or familiar with its practice, but in glancing over the bail bonds, he was of the impression that the obligors were only bound for the appearance of the defendant, and he so informed them. He further says, he is counsel for the respondent, and knows his affairs intimately, and that he is entirely insolvent.

An affidavit of the deputy marshal is also added, stating that he supposed a defendant had a certain number of days to enter his appearance after the return day of the writs, and so represented it to the defendant and his bail, in good faith and solely for the purpose of giving them information to which he supposed they were entitled.

After the above papers were served and notices of the motion given, the deputy marshal drew up a statement in his own handwriting, and made oath to it, detailing with more particularity the representations he made on the subject. He says he had no conversation at all, he believes, with the bail, who began signing the bonds as soon as he came into the room where the parties all were, the attorney reading over to him a part of the bond while he was in the act of signing. That the attorney inquired of the witness what was the meaning of return day of the warrants, and whether the defendant had not some days after that to enter his appearance, and if it was not twelve days. The witness answered that he was new in the business and could give no certain information, but he supposed that was the effect of the undertaking, although he could not say that it was twelve days to which the party would be entitled; and that he did not attempt to give any advice or certain information on the subject. It was a casual talk with the lawyer and deponent, and he certainly did not intend to mislead any of the parties. The attorney intimated that he understood the nature of the undertaking, and said he thought time was given the respondent after the return day, and that the time was twelve days.

The effect of the application upon these facts is, that the bail be now allowed to surrender the principal, to which the principal assents; or, that he be discharged from the bonds as having been executed by him under an entire mistake, induced by the deputy marshal, of the nature of their obligations.

The admiralty practice does not admit of a surrender of the principal in exoneration of bail. The appearance of the party arrested, which the bail stipulation guarantees, is not for the purpose of having the person of the respondent present to satisfy the final decree of the court. It is to secure his attendance to submit to interrogatories or sanction intermediary proceedings to which his concurrence may be necessary in the progress of the suit, or to put in and perfect the bail for the respondent, which the stipulation in the arrest may be only preliminary to. Clarke, Prax. tits. 4, 5, 12; 1 Browne, Civ. & Adm. Law, 256; 2 Browne, Civ. & Adm. Law, 361, note. In maritime courts, the stipulation and the appearance of the party is denominated praetorian, that is, an undertaking to the court, and not to the adversary party. Clarke, Prax. tit. 9; 2 Browne, Civ. & Adm. Law, 355, 357. But when bail by bond or stipulation is given, the obligation imposed on the fidei jussores is judicatum solvi; that is, to see the costs and condemnation paid at all events (3 Bl. Comm. 292; Hall, Adm. Pr. 12, 29; 2 Browne, Civ. & Adm. Law, 356), and this obligation enures to the creditor or actor as an absolute security for his debt. Wood, Civ. Law, bk. 3, c. 3, § 2. In our practice, this obligation may be entered into on arrest. Sup. Ct. Rules, 3. This undertaking is not discharged or affected by the surrender of the principal bodily, as in common-law actions (Hall, Adm. Pr. 25, note; 2 Browne, Civ. & Adm. Law, 412; Conk. Adm. Pr. 458), and it matters not whether the obligation is assumed on the arrest by bond, or on appearance in court by way of stipulation. In the sense of the common law applicable to bail, the bail in admiralty are absolutely fixed from the time the bond or stipulation is entered into. There is no alternative in the undertaking, as at common law, which being performed acquits the obligation. Nor will the bankruptcy of the parties, or laches in

prosecuting the suit, discharge the bail. The Vreede, 1 Dod. 2; The Harriett, 1 W. Rob. Adm. 195. The stipulation rests on the doctrine of principal and surety in positive contracts, and is governed by the rules of law and equity applicable to those contracts (The Harriett, Id. 197), with the additional consideration, that as the undertaking is not only to satisfy the action but to abide the adjudication of the court in the matter, it is entitled to a more enlarged consideration in admiralty than at law, and when given as a substitute for the thing arrested, may be enforced beyond the mere money amount recovered by the promovent. The Nied Elwin, 1 Dod. 50.

In asking a discharge, therefore, from a bail bond, the parties must, in admiralty, place their claim upon the same footing as if the release sought was from a money bond of any other denomination and absolute in its terms. Fraud, deceit, duress, or illegality of consideration, or some matter showing the obligation void ab initio, or rendered inoperative by something subsequently occurring, must be established to affect its validity.

Courts of admiralty are governed by equitable principles (2 Woodb. & M. 60 [Packard v. The Louisa, Case No. 10,652]), but equity will not cancel an obligation because the contracting party misapprehended the extent of his liability under it, unless he has been misled by the acts or declarations of the one benefited by it. Mistake in the law resulting from the inattention or ignorance of the party bound, will not be regarded in equity as a reason for avoiding a contract. 1 Story, Eq. Jur. §§ 111, 113; 6 Johns. Ch. 169.

Here there can be no reasonable ground for alleging a mistake or misapprehension of any facts connected with the transaction. The bail bond received by the parties, stipulated that the respondent should appear in court on a day designated, and that the stipulators would pay the money awarded by the final decision of the court. These two facts were directly brought home to their notice, at least the evidence that they were so must be regarded as conclusive against the obligors. The mistake and ignorance alleged in their behalf then is, that they did not understand the legal effect of their contract, and supposed it was limited to the personal appearance of the party in court. Even if this excuse rested upon an engagement complex or equivocal in its terms, there would be great difficulty in bringing it within any recognized principle of courts of equity, affording relief to obligors against their contracts. But when the stipulation is explicit and plain, and the mistake set up is, that the interpretation given the contract by others, and not the words themselves, was confided in, the whole reason for interference of equity is taken away.

It must, moreover, be considered that the misapprehension asserted here, was no way induced by the libellant or his proctor. Neither was present when the bond was executed, nor had taken any part in bringing the obligors into the agreement. It was wholly voluntary with them, and sought for independent of his concurrence or knowledge. Nor were the representations of the deputy marshal, in fact or law, chargeable upon the libellant.

If that officer had chosen to say the bail bond was an idle formality, that the respondent was not in law bound to give bail, that the court would cancel the bond on its presentation before them, and that no liability whatever could be incurred by the bail in signing it, such representations, however confidingly accepted by the obligors, could never in law or equity operate to release them from their formal signature and execution of it. In any such suggestions the deputy could not be acting officially, or as agent of the libellant, and both as to him and the marshal, and as to the respondent and bail, he would be a mere stranger making representations upon his individual responsibility alone. His representations, however, if erroneous, it is conceded, were made innocently and from ignorance on his part, and with no purpose to mislead the respondent or his bail. Misrepresentations of that character, even if made by an agent empowered to form a contract, do not invalidate the engagement as to his principal (Early v. Garret, 9 Barn. & C. 928, 17 E. C. Law, 522; Cornfoot v. Fowke, 6 Mees. & W. 358); more especially, if his principal is innocent of any misstatement or concealment leading to the contract.

The deputy marshal, after making the first deposition, drew up in his own handwriting a more detailed and explicit statement of the part he took in the transaction, and it certainly would appear from this amended oath, that he all the while gave the attorney and party who referred to him, to understand he had no knowledge of the practice of the court in this respect, and merely coincided with suggestions made to him by the attorney, that the undertaking of the bail was not absolute, and said nothing with intent to persuade or incline the parties to sign the bonds; and that the attorney seemed satisfied with his own construction of the bonds, and his impressions of the practice of the court, and that the bonds were signed in pursuance of his advice and assurance, and not upon any representations of the deputy.

Without placing this decision upon the facts put forth by the respective affidavits, as to the conversation with the deputy, I hold that no deceit or misrepresentation is proved, which in law or equity entitles the obligors to be relieved from the bonds; that the undertaking of the bail is absolute and not conditional, and cannot be discharged by producing the principal in court. He stands before this court on these bail bonds, precisely as he would at common law, or on his recognizance on the lapse of eight days after the returns of the capias against him, absolutely responsible for the judgment. 1 Johns. Cas.

329, 334; 2 Johns. Cas. 483; 2 Johns. 101; 9 Johns. 84; 1 Tidd, Pr. 620.

The motion does not raise the question whether the libellant is entitled to exact bail in these cases. That matter will more properly come up when an attempt is made to enforce the bonds; or it may be presented on a distinct motion to the court. As the case stands, and upon the assumption that the respondent was bound to give bail, I am compelled to say, no authority exists in this court to interfere with the rights acquired by the libellant under the respective bail bonds executed in these causes, and the motion must therefore be denied.

The parties having acted in good faith in making this application, and as it presents a new point of practice, I shall not order costs. Order accordingly.

CURETON (PETERS v.). See Case No. 11,-019.

Case No. 3,487.

CURRAN et al. v. MUNGER et al.

[6 N. B. R. 33.] [1]

Circuit Court, W. D. Michigan. Dec., 1871. [2]

PRACTICE IN BANKRUPTCY — DEMURRER TO PETITION FOR REVIEW — COMPROMISE WITH CREDITORS—INSOLVENCY—PREFERENCE.

1. When the petition for review under the rules in the sixth circuit is demurred to, its statements, like those of any other pleading, will be taken as true and the appeal determined upon its averments. If the facts therein are sufficient, the demurrer will be overruled and the decree below reversed.

2. When an agent is sent by an insolvent debtor to compromise with creditors, and some of them, through him, return different terms than those submitted, such agent does not thereby become that of such creditors but remains the agent of the debtor, and his knowledge, mistakes and acts are those of his principal—the insolvent. The same effect would be produced if he were deemed the common agent of both parties.

3. When a debtor and a preferred creditor know of the insolvency, but erroneously suppose all other creditors have compromised for thirty-five cents in time paper, a transfer so securing the creditor as to create a preference financially is an act of bankruptcy. If insolvency is once known all parties act at their peril, when such condition actually exists, whether known or unknown.

4. When proceedings were pending in bankruptcy, and a preferred creditor and the insolvent settle the petitioning creditor's debt and employ the attorney who conducts such proceedings to compromise with the other creditors, authorizing him to pay some one price and others another, and it appears that such discrimination was in fact made, such scheme is prima facie fraudulent and the burden is upon the actors to show that all the creditors consented to such preferences. It will not be presumed. But if any one creditor does not consent it is a fraud upon him, although all the others are satisfied.

[1] [Reprinted by permission.]

[2] [Reversing Case No. 9,923.]

[Petition to review the action of the district court of the United States for the western district of Michigan, sitting in bankruptcy.

[Curran, Goodwin, Walker & Co. petitioned the district court for an adjudication in bankruptcy against the firm of Munger & Champlin. The petition was dismissed (In re Munger, Case No. 9,923), and the matter now comes before the circuit court on a petition for review.]

Don M. Dickinson, for creditors.
Bates & Hodges, for debtors.

EMMONS, Circuit Judge. The petition of appeal is demurred to, and I infer from the perusal of the opinion of the district judge that its statements materially vary the facts from those which were before him. All the leading and more important conclusions upon which he dismissed the petition are fully negatived in the case as it comes before this court. A separate outline of the very voluminous facts is unnecessary. The opinion will be understood by parties without it, and the rulings upon them are not important as precedents. The court below held that the compromise was lawful, and that as the respondents believed it included all creditors save Colt, the transfer to him was not with the intent demanded by the statute to make it an act of bankruptcy. Upon this ground it dismissed the petition. Upon the case as it stands in this court the compromise is clearly fraudulent. The respondents knew that representations had been made to some of the creditors, that others had settled for thirty-five cents, when in fact they were secretly to receive more. This ground alone would compel an entry of a decree against the respondents. Hodges was the agent of the respondents only. He had no authority to represent the appellants. It is the common case of an agent bringing back the replies to his principal. His frauds, knowledge, negligence and misunderstandings are those of the men who employ him. This familiar general rule has been fully applied in many cases under this act. 4 N. B. R. 106 [In re Marshall, Case No. 9,123]; 4 N. B. R. 92 [In re Gunike, Case No. 5,868]; 4 N. B. R. 178 [In re Alexander, Case No. 161]; 2 N. B. R. 137 [In re Meyer, Case No. 9,515]. There are many other similar judgments. But there is no necessity for a resort to a rule which might legally charge them with knowledge they did not in fact have, and so decide this appeal upon technical grounds at variance with actual truth. Upon the facts here there is no reasonable ground for any belief on their part, or that of Hodges, that petitioners had accepted their terms. All knew they had been rejected. They told Hodges they would receive thirty-five cents cash. He so told the debtor. Subsequently Clark, Colt's partner, wrote that they said precisely the same thing—that they would take thirty-five cents

There was nothing in this having the slightest tendency to encourage, much less justify, the extraordinary and sudden change of opinion that the rejected terms had been accepted. The petitioners swear positively that Hodges was not their agent. He was not sworn, and nowhere is there a scintilla of proof of such fact. But grant the unwarrantable assumption that he was alike the agent of the debtors who sent him and the creditors who made replies. It is still but the case of a common agent, where his knowledge binds both alike. And if this were, not so, still there must be an adjudication of bankruptcy upon the case here, because the respondents had all the facts before them that Hodges had. The ground is that Hodges represented that he had authority to accept the terms for the appellants. But all knew why he so said; that he interpreted the letter of Clark as they themselves professed to have done. They knew he had no further authority than what he fully reported as their agent on his return. It is not a case of reliance upon representations where the facts upon which opinion rests are unknown. The case might well be disposed of upon the foregoing and other views which might be taken of the facts in the petition of appeal. But we place the reversal upon different grounds. From the argument made by the respondents' counsel we infer they misapprehend the practice or they would have answered the petition and procured a settlement of the facts. No rights are lost, however, for we hold that when debtors once know of hopeless insolvency they are in the law bound also to know whether that condition continues; and the belief whether well or illy founded, that all other creditors have settled when they have not so done, is no justification for a transfer which in fact operates as a preference.

In a learned and most careful argument the counsel for the appellants has collected and analysed the judgments, holding that when insolvency is known and a preference is made, the intent is a presumption of law. They are useful as inducements to the conclusions arrived at, but the precise point here decided does not demand their citation and discussion at length. I quite approve in this regard all that is actually decided in the recent judgment of Hopkins, J., 5 N. B. R. 182 [Hall v. Wager, Case No. 5,951]. He says substantially section thirty-nine has far less reference to the condition of mind of the insolvent debtor than to the condition of insolvency as a fact. But whatever difference may exist in relation to the debtor's duty of knowing his financial condition originally, there should be none concerning the very different obligation, when he once knows his insolvency, of waiting before he secures his relatives and endorsers, until he knows that his condition is changed, or that his creditors have consented to the preference. When a party with full knowledge of his insolvency makes a preference, it seems but a play upon terms to say that he did not in a legal sense intend it because he erroneously supposed his creditors had consented to it. It is not even the case where there was a mistaken belief of full payment, which though it could not justify the transfer, would, we grant, in a literal but immaterial sense, disprove an actual intention to prefer. A man who believes he has but one creditor cannot intend to make a preference. While on the one hand we do not assent to this merely formal argument to show no preference was intended within the meaning of the law, so on the other we do not go on its literalisms, which are satisfied if there was a preference in fact which in the accidents of this case was contemplated by the parties. This may strengthen the justice of the particular judgment here, but is by no means necessary to sustain it. The sale was unlawful, no matter what the actual intention of the parties may have been. It is held broadly as a general principle to which there should be no exceptions, that where the parties know the insolvency they must act at their peril if they appropriate the trust fund which the law devotes to the equal payment of all, before they know, also, that creditors have ceased to be such, or that they consent, after the most full and fair disclosure of all the facts, to the discrimination which is made. Without this it is an act of bankruptcy. It is an irrelevant fact that they erroneously supposed the creditors had consented. Their carelessness, rash and interested conclusions, or never so well warranted misapprehensions, can give them no power over the statutory vested rights of innocent and non-concurring creditors. Establish the doctrine that an unjust preference is lawful, because the debtor was ignorant of his insolvency; add, also, that it is so when he knew it, but had reasonable ground to believe he had compromised at thirty-five cents on the dollar in time paper, and go forward in the application of the principle in these rulings to all the analogous exigencies of failing business men, and the bankrupt law would require immediate and important amendments. Some reliance was made upon the absence of the other creditors. Of course one, in principle, presents the same legal questions as if all but one were here. In re Williams [Case No. 17,703]. But non constat the other creditors are satisfied. There is no proof that they are, and no presumption of such fact arises upon such a record as this.

There is a mode of construing judgments by arguing from their implications and deducing conclusions of law because dissents are not uttered, that makes it proper to say further, that were it necessary in this case we should hold the entire scheme of this settlement, as set forth in the petition of appeal, a fraud upon the act, irrespective of the affirmative proof that misrepresentations

were made to the compromising creditors. The case here, and as set forth in the printed judgment of the learned district judge, with which we have been furnished by the appellants' counsel, substantially shows that a petition had been filed against the debtors; that the claim was settled by them, and the hostile attorney who conducted the proceedings in the district court, employed by the joint consultations of Colt the preferred creditor, and the debtors, to compromise with all the others. It was agreed by all that it would be necessary to pay some one price, and some another, as it has been done in the attempted settlement. Colt agreed if this could be brought about for forty cents in the aggregate, he would then buy the goods, give his note for the compromise money, and pay his endorsements in full. They all enter into the scheme of discrimination and preference. They withhold the assets from the bankruptcy court, where in law they belong the moment the debtor becomes insolvent and proposes liquidation, and attempt through the agent just what the law prohibits. Hardy v. Bininger [Case No. 6,057]; 3 N. B. R. 99 [Hardy v. Clark, Case No. 6,058]; Cookingham v. Morgan [Case No. 3,183]; Driggs v. Moore [Id. 4,083]; In re Drummond [Id. 4,093]; In re Smith [Id. 12,974]; In re Silverman [Id. 12,855]; and numerous similar judgments. That when the act is necessarily a preference, and insolvency is known, it is per se an intent to prefer, or to defeat the act. In this case the intention was not actually to consummate these unlawful preferences until by their contemporaneous execution every creditor would be bound by the acceptance of the paper and so precluded from objecting to it. The intention was not to abstain from making preferences gross and unjust, but to secure such a settlement as would cut off the power of complaint. But the preference has been made just as was intended, and the creditors were not precluded. In these circumstances I think the proceedings relied upon to sustain the transfer to Colt are themselves acts of bankruptcy, because they show an intentional preference by an insolvent debtor.

There is another view upon which I think decree below should have been in favor of the creditors. Hodges has not been sworn, and the proof is meagre in reference to misrepresentations to creditors; but he who is conversant with such matters, and knows the keen sense of wrong which every merchant feels when he learns that his liberality has been successfully appealed to for an acceptance of thirty-five cents, when his fellow-trader has unjustly gotten seventy-five or a hundred, will not fail to make the presumption that full disclosure was not made by the attorney here. We venture to say such a thing as an unequal settlement, some receiving a hundred cents and others thirty-five, was never voluntarily made without fraud and misrepresentation, in the whole history of American business. In the circumstances of this case a condition is presented where the onus probandi is upon the actors. We do not think it the duty of the appellants in a case like this to prove that creditors have not consented to the injustice which has been done them. There is none that the apparent fraud ever came to their knowledge, that they might complain. Every familiar principle in this department of the law compels the presumption that they did not assent. The letter of Clark, Colt's partner, saying he thought the scheme would fail because he feared the creditors had learned of the inequality, is by no means necessary to help this legal conclusion. 1 Phil. Ev. 615, note; 3 Starkie, Ev. 48; and other similar authorities. It is never necessary to prove affirmatively that a man has not assented to that which is to his disadvantage. The presumption of the law is that he has not. Nor is this at all at war with the rule that fraud shall not be presumed. It is the quite different doctrine that when such facts are presented as make it an irresistible inference of common reason the law will presume it, unless the apparently guilty actors do what any innocent man in his senses would do, if it were in his power —explain the suspicions. It is their duty to prove how a fact so extraordinary occurred as that creditors having equal rights in a common fund, turned by law into a trust for their benefit, were seduced into action so anomalous as the surrender of this right to Colt, and the other creditors receiving full pay. And when the agent in all this sits in court and is not examined by the respondents, a duty is omitted which the law casts even upon the criminal in similar cases. U. S. v. Chaffee [Case No. 14,774]; [Clifton v. U. S.] 4 How. [45 U. S.] 242; Starkie, Ev. 820. Decree below dismissing petition reversed and adjudication of bankruptcy ordered.

Case No. 3,488.

CURRANEE v. McQUEEN.

[2 Paine, 109.][1]

Circuit Court, Second Circuit.[2]

CONTRACTS BETWEEN MASTER AND SLAVE.

1. One held in slavery abroad, and who becomes free by being brought into the United States, in violation of the acts of congress, and afterwards remains in the service of his previous owner, cannot recover a compensation for such service upon an implied promise, but only upon an express promise to pay.

2. But if under an agreement to purchase his freedom after his arrival in this country, he has paid money to his previous owner for that purpose, he may recover back such money as having been paid without consideration.

3. The plaintiff, when brought into this country, was eleven years of age, and remained in the service of his previous owner, the defendant,

[1] [Reported by Elijah Paine, Jr., Esq.]

[2] [The date is not given in 2 Paine, 109; the cases therein contained were decided between 1827 and 1840.]

until he was —— years of age; at the age of twenty-five he made an agreement to purchase his freedom, and paid three hundred and twenty-five dollars towards it. *Held*, that he could recover back the money, but not for his services rendered after he was twenty-one years of age.

4. But *held*, that as this was an equitable action, and as the money was paid by the plaintiff and received by the defendant, under the impression and belief that the defendant had a right to claim the plaintiff as her slave, the latter ought not to recover interest for the money he had paid.

5. The sum recovered being under five hundred dollars, costs allowed to neither party.

[Cited in Hamilton v. Baldwin, 41 Fed. 430.]

The plaintiff [Curranee, alias Bennett], a colored man, born a slave in the Island of Jamaica, came into the state of Georgia with the defendant, she claiming and holding him as a slave, he then being a minor under the age of twenty-one years. He became of age in January, 1824, and in January, 1826, entered into an agreement with the defendant to purchase his freedom for a certain stipulated price—upon which agreement considerable sums of money were paid at various times, though not to the full amount of the stipulated purchase; and the present action is brought to recover a compensation for his services after he arrived at the age of twenty-one years, and before the agreement entered into to purchase his freedom, and also to recover back the money paid by him on the contract for his manumission.

The first question that arises in this case is, whether the plaintiff, being brought into the state of Georgia in the year 1814 or 1815, became free by operation of the act of congress of the 2d March, 1807 (4 [Bior. & D.] Laws, 94 [4 Stat. 426]), entitled "An act to prohibit the importation of slaves into any port or place within the jurisdiction of the United States, from and after the 1st day of January, in the year 1808:" that being the time limited by the constitution, in which congress have the power to prohibit the importation of slaves. By the first section of that act, it is declared that from and after the 1st day of January, 1808, it shall not be lawful to import or bring into the United States, or the territories thereof, from any foreign kingdom, place or country, any negro, mulatto or person of color, with intent to hold, sell or dispose of such negro, mulatto or person of color as a slave, or to be held to service or labor: and by the fourth section it is declared, that neither the importer nor any person claiming from or under him, shall hold any right or title whatsoever to any negro, mulatto or person of color, nor to the service or labor thereof, who may be imported or brought within the United States or territories thereof, in violation of this law; but the same shall remain subject to any regulations not contravening the provisions of this act, which the legislatures of the several states or territories at any time hereafter may make, for disposing of any such negro, mulatto or person of color. The case does not furnish any evidence that the state of Georgia has at any time passed any law at all embracing cases like the present; and, indeed, there could be no state law which would give the defendant a right to hold the plaintiff as her slave. Any such law would directly contravene the act of congress, and would be void. It follows, then, as matter of course, from this act of congress, that the plaintiff became free on being brought into Georgia, and would be no longer held there as a slave.

The next inquiry is, what were his rights on arriving at the age of twenty-one years? He clearly might have left the defendant, and she would have had no right to reclaim him, and hold him as a slave. But, according to the evidence, he voluntarily remained with the defendant. No contract or agreement of any description whatever was made between them until January, 1828; and we have only the simple, naked fact, that he remained in the service of the defendant during that time. There is, therefore, the want of any express promise to pay him for his services; and the circumstances are not such as to raise any implied promise to pay. Indeed, they repel any such implied promise, for they show that the defendant claimed and considered the plaintiff as her slave, and she cannot, therefore, be presumed to promise to pay him wages. This is the rule which governed the case of Alfred v. Marquis of Fitzjames, 3 Esp. 3, where it was held that a servant who comes from the West Indies, where he was held as a slave, and who enters into the service of his master in England without any agreement for wages, is not entitled to any, unless there has been an express promise to pay. All claim to wages, under any implied promise, arising from the mere fact of service, is excluded. We think this a sound principle, and adopt it as such, although it is not in any measure binding upon this court. The claim, therefore, to wages prior to the agreement for manumission in 1828, is not sustained; but we think the plaintiff is entitled to recover back the money paid under that agreement, on the ground that it was paid without any consideration. The case states that the money was paid by the plaintiff, and received by the defendant, under one or more agreements made by the defendant with the plaintiff to manumit and set him free, she then claiming and holding him as a slave. The pretended consideration, therefore, was the manumission of the plaintiff. It was paid towards the price of his freedom. But if he was already free under the act of congress, the right of the defendant to hold him as a slave was at an end; and she did not, and could not do any act beneficial to the plaintiff in this respect. There was, therefore, a total failure of consideration. 1 Term R. 732; 6 East, 241; 2 Bos. & P. 467. There was some parol testimony

given at the trial, of certain payments which had been made, but it was too vague and indefinite to be relied upon. The amount of the money paid must be ascertained from the written evidence in the case; and as it is a mere matter of calculation, can be made by the parties. But we think no interest ought to be recovered—not on the ground, however, that interest is not recoverable at law in an action for money had and received, as has been contended at the bar, but on the ground that this being an equitable action, a jury would have had a right, in their discretion under the circumstances of the case, to allow interest or not; and as the court in this case is substituted for the jury, we may, on the question of interest, govern ourselves by the equitable circumstances of the case. This seems to be the view taken by the supreme court of this state, in the case of Pease v. Barber, 3 Caines, 267, the court decided the general question that interest may be recovered in the action for money had and received; that there may be cases in which the defendant ought to refund the principal money, and there may be others in which he ought, ex aequo et bono, to refund the principal with interest; that each case will depend upon the justice and equity arising out of its particular circumstances to be disclosed at the trial. There was not in this case anything like oppression, or extortion, or taking an undue advantage of the plaintiff's situation. The money was paid by the plaintiff, and received by the defendant, under the impression and belief that the defendant had a right to claim the plaintiff as her slave. The judgment must, therefore, be entered for the amount of the money paid, as appearing by the documentary evidence in the cause, without interest.

NOTE [from original report]. After emancipation the slave is free as against the emancipator and all the world beside, excepting only bona fide creditors of some other person who had a better right to the slave than the emancipator. Ferguson v. Sarah, 4 J. J. Marsh. 105. Rights of creditors do not nullify the act of emancipation nor otherwise affect it, further than as a lien for the ultimate security of their debts. Id. A slave emancipated forms no part of assets in the hands of the administrator of the emancipator. The administrator has no right, either for the purpose of paying the debts or any other cause, to the possession or control of the slaves emancipated by his intestate. Id. The act of 1798 saves the rights of the creditor of the emancipator only as the statute of frauds protects the rights of the creditors. Therefore, if a creditor consents to, and urges the emancipation of a slave, he waives his right to subject him after emancipation, to the satisfaction of his debt. Id. 106. In a suit for slaves, if it be proved, whether alleged or not, that the persons in contest are free, the claimant fails. Bush v. White, 3 T. B. Mon. 105. If a fact be stated in a bill which shows that the persons claimed as slaves are free, it will be fatal, though the defendants also claim them as their property. Id. If the persons sued for as slaves, are proved to be free, and the suit fails, as to them there can be no hire recovered. Id. 106. In Massachusetts, a negro boy eight years old, who was born and reared a slave in Arkansas, came into this state with the consent of his master, as a personal attendant of his master's wife, who was here on a visit to her friends. On his being brought before the court, by habeas corpus, it appeared that the master's wife did not claim the custody of the boy as a slave here, nor intend to carry him back to Arkansas against his will, but did intend to carry him back if he should consent to go. The court held, that the consent of so young a child would not authorize his removal into a state of slavery, and ordered him to be delivered to the guardians who had been appointed for him, by the judge of probate, under the Revised Statutes, p. 79, § 1. Com. v. Taylor, 3 Metc. [Mass.] 72. The act of South Carolina, of 1841, rendering void any bequest, &c., of slaves to be removed without the state, with a view to their emancipation; held, not to destroy the legal title of a legatee vested in slaves previous to its passage; but only to render void the condition of the bequest, that he should remove them into a free state at a period subsequent to its passage. Finley v. Hunter, 2 Strob. Eq. 208. It is competent for a slaveholder of Mississippi, during his lifetime, to take his slaves to Liberia, or elsewhere without the state, there to remain free from the condition of servitude. Ross v. Duncan, 1 Freem. Ch. 587. The statute of Mississippi, regulating the manumission of slaves, does not prohibit, either in letter or spirit, a citizen from directing by will, that his slaves should be removed out of the state to Liberia or elsewhere, even though the consequence or avowed design may be emancipation. The right to manumit slaves is not thereby taken away; its exercise within the limits of the state only is qualified. Id. Where white persons, or native American Indians, or their descendants in the maternal line, are claimed as slaves, the onus probandi lies on the claimant; but it is otherwise in respect to native Africans and their descendants who have been and are now held as slaves. Hudgins v. Wrights, 1 Hen. & M. 133. It seems that no native American Indian could be made a slave under the laws of Virgina, since the year 1691. Id. If a female ancestor of a person asserting a right to freedom, is found to have been an Indian, it seems incumbent on those who claim such person as a slave, to show that such ancestor, or some female from whom she descended, was brought into Virginia between the years of 1679 and 1691, and under circumstances which, according to the laws then in force, created a right to hold her in slavery. Id.

Case No. 3,489.

CURRAY v. McMUNN.

[2 Cranch, C. C. 51.][1]

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

ACCOUNTING OF EXECUTOR.

The executor, upon plene administravit, is not to be charged with lands devised to him to be sold, if necessary, to pay debts.

The defendant [McMunn's executor] pleaded plene administravit.

E. J. Lee, for the plaintiff, contended that the defendant was to be charged with the lands devised to the executor to be sold, if necessary, to pay the debts.

But THE COURT (THRUSTON, Circuit Judge, absent) was clearly of a contrary opinion. A bill of exceptions was taken, but no writ of error prosecuted.

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

Case No. 3,490.

CURREY v. FLETCHER.

[1 Cranch, C. C. 113.][1]

Circuit Court, District of Columbia. Dec. Term, 1802.

JURISDICTION.

If the verdict be for less than twenty dollars, in assumpsit, a nonsuit must be entered.

[Cited in Hays v. Bell, Case No. 6,270.]

Suit brought for £8. Defendant proves payment of £6. Verdict for £2.

Judgment of nonsuit. St. 3 Jac. c. 15; 23 Geo. II. c. 33, § 19; Woolley v. Cloutman, Doug. 245, 448; Pitts v. Carpenter, 1 Wils. 19; Act Md. 1785, c. 46, § 7; Act Md. 1791, c. 68, of "Small Debts."

MARSHALL, Circuit Judge, absent.

Case No. 3,491.

CURRIE v. JORDAN et al.

[4 Biss. 513.][2]

Circuit Court, N. D. Illinois. April, 1869.

REDEMPTION—FRAUDULENT CONFESSION OF JUDGMENT.

Where a judgment creditor, to protect his interest, has purchased the property on foreclosure of a prior mortgage, and the debtor had fraudulently confessed a judgment to enable a third party to redeem the property for his benefit, this court has jurisdiction of a bill for relief filed by the creditor.

[Bill in equity by John Currie against Allen Jordan and others for relief against an alleged fraudulent judgment.]

DRUMMOND, District Judge. This is a demurrer to a bill. The only question in the case is whether the demurrer is well taken, and I think it is not.

The facts in the case, briefly stated, are that in 1865 the plaintiff recovered a judgment against Allen Jordan, upon which judgment an execution was duly issued and delivered to the marshal, and a levy made on the property in controversy in this case, but it was not sold, in consequence of Jordan having made a mortgage upon it prior to the time the judgment was obtained. A bill was filed in the state court to foreclose the mortgage, and upon the decree of foreclosure this plaintiff and another party became the purchasers, and after this was done Allen Jordan confessed a judgment in favor of a certain person, and that person came in and redeemed from the decree of foreclosure. Thus it will be seen an attempt was made to cut off the judgment which the plaintiff had obtained in this court, and to prevent it from operating upon the property. The object of the plaintiff in purchasing the property, in this foreclosure suit, being, as he says, simply to protect his interest therein.

The bill alleges that this judgment confessed was fraudulent, and for the benefit of Jordan, to whom the property really belonged.

Whatever might be the legal conclusion, as to the right of redemption, if this judgment were for a bona fide debt, it is clear where it is a fraudulent judgment, given for a fraudulent purpose, that the party affected by that fraud can file a bill in a court of equity, and ask for relief. That is the claim set up here. I have no doubt, therefore, that a court of equity has jurisdiction of the case to determine the rights of the parties.

The demurrer must be overruled, with leave to the defendant to answer.

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

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

Case No. 3,491a.

CURRIE et al. v. The JOSIAH HARTHORN.

[Betts' Scr. Bk. 710.]

District Court, S. D. New York. Oct. 30, 1862.

PARTIES — INHABITANTS OF STATES IN REBELLION —SUSPENSION OF SUIT.

[1. The proclamation of the president, issued under authority of congress, declaring the inhabitants of certain states in rebellion to be in a state of insurrection, and forbidding all commercial intercourse with them, is binding on the federal courts, and will prevent such inhabitants maintaining suits therein.]

[2. Where, in case of cross libels for collision, the owners of one of the vessels are citizens of a state which afterwards enters into rebellion, the court will suspend the case until after the government of the United States is re-established in such state.]

[In admiralty. Cross libels for collision between the schooner Josiah Harthorn, her tackle, etc., Lemuel Bradford and others, claimants, and the schooner Gallego, her tackle, etc., David Currie and others, claimants.]

HALL, District Judge. On the 23rd day of November, 1859, David Currie and others, describing themselves in the libel as "of Richmond, in the state of Virginia, owners of the schooner Gallego," filed their libel in the suit first above entitled for the purpose of recovering the damages sustained by the Gallego in a collision with the schooner Josiah Harthorn, on the evening of the 19th of November, 1859. On the 19th of the same month Lemuel Bradford and others, describing themselves as "of Bangor, in the state of Maine, and owners of the schooner called Josiah Harthorn," filed their cross libel to recover the damages sustained by the latter vessel in the same collision. The libellants in each suit are the claimants in the other respectively, and answers were filed in both suits. On these pleadings, and on the proofs taken in the cause the original and cross suits were brought to a hearing in the month of December, 1861. On that hearing it was insisted, upon the final argu-

ment, that the libellants in the first or original suit ought not to be allowed to proceed therein, for the reason that they were then residents of the eastern part of Virginia, the inhabitants of which were in rebellion against the United States, and therefore were not entitled to sue in our courts. My attention was not then called to the act of congress of July 13, 1861, c. 3 (12 Stat. 255), as to the proclamation of the president issued in pursuance of that act (Id. Append. No. 9, p. 5), and the counsel for the respective parties were heard at length upon the merits.

Before the case was taken up for examination my attention had been called to the act of congress, and to the proclamation of the president, and the examination and the decision of the case were therefore postponed from time to time in the hope that the existing insurrection would be abandoned or suppressed, or that Richmond and its neighborhood would be "occupied and controlled by the forces of the United States engaged in dispersing the insurgents" and suppressing the insurrection. So much time has now elapsed that it may not be expedient to postpone for a longer period the decision of the preliminary question ensuing under said act of congress and proclamation, as one or the other of the parties may desire to know the cause of the delay in making a final decision. I propose therefore, to dispose of the preliminary question, and to leave the final decision of the case (as it was commenced before the Rebellion) to depend upon a future examination of the pleadings and proofs, if the action of the executive and legislative department of the government shall at any time hereafter be such as to render it proper to dispose of the case upon its merits. The proclamation appears to be authorized by the act of congress, and (after proper recitals) declares "that the inhabitants of the said states of Georgia, South Carolina, Virginia, North Carolina, Tennessee, Alabama, Louisiana, Texas, Arkansas, Mississippi and Florida (except the inhabitants of that part of the state of Virginia lying west of the Alleghany mountains, and of such other parts of that state, and the other states hereinbefore named, as may maintain a loyal adhesion to the Union and the constitution, or may be from time to time occupied and controlled by forces of the United States engaged in the dispersion of the said insurgents), are in a state of insurrection against the United States, and that all commercial intercourse between the same and the inhabitants thereof, with the exceptions aforesaid, and the citizens of other states and other parts of the United States, is unlawful and will remain unlawful until such insurrection shall cease or has been suppressed," &c.

When these states, by their regularly constituted state authorities and governments, assumed to withdraw from the Union and to become independent sovereign states; when in their assumed character of independent sovereign states they determined to cast off all allegiance to the constitution and government of the United States; when they denied the authority and disclaimed the protection of the constitution and waged war against the government, formed in accordance with its provisions, and thereby made it impossible for the executive and judicial departments of the United States to exercise their appropriate functions or discharge their constitutional duties in the insurgent states, the executive and legislative departments of our government (having authority to determine its political relations) had the right to decide whether the inhabitants of those states should be considered as public enemies, and consequently prohibited from suing in our courts until the authority of our government should be re-established in such state or parts of states. By the act of congress, and the proclamation to which I have referred, the agreements for the exchange of prisoners of war, and the actual and continual exchange of such prisoners by the blockade of the ports of the insurgent states, and by many other acts of congress and of the president, I understand that the inhabitants of the states and parts of states in rebellion, and not under the control of our troops or government, with the exception declared in the proclamation (have been and until the rebellion is suppressed or shall otherwise cease) are to be held to be public enemies of the United States; and such is the settled and declared policy of our government. As such public enemies they are not entitled to sue in our courts, and the question of their relations to the government being purely a political one, this judicial department must regard the decisions of that question made by the political departments of the government as conclusive. This case will, therefore, be suspended until the authority of the government of the United States is re-established at Richmond, or some change in the relations of the parties, or some action of our government, shall render it proper to decide the case upon the merits.

Case No. 3,492.

In re CURRIER.

[2 Low. 436;[1] 13 N. B. R. 68.]

District Court, D. Massachusetts. Oct. Term, 1875.

BANKRUPTCY—PREFERRED CREDITOR—SURRENDER—PROOF OF DEBT.

1. The claim of a preferred creditor is not to be reckoned in determining whether or not the requisite proportion of creditors have joined in an involuntary petition.

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

2. A preferred creditor cannot prove his debt, or any part of it, until he has voluntarily or by compulsion surrendered his preference.

[Cited in Re Broich, Case No. 1,921; Re Aspinwall, 11 Fed. 138.]

[3. Followed in Re Reed, 3 Fed. 799, in respect to the statement that under the amendment of 1874 (18 Stat. 181), relating to proofs by creditors whose preferences have been set aside, such a creditor may prove his whole debt after recovery against him for the preference, in the absense of actual fraud.]

4. A mere repayment to the debtor, after a petition in bankruptcy is filed, cannot, for this purpose, take the place of a surrender to the assignee.

5. A preferred creditor cannot proceed for adjudication against his debtor for the act of preference to which he was a party, and therefore ought not to be reckoned in computing the number or amount of those who have or have not petitioned.

[Cited in Re Saunders, Case No. 12,371; Re Bouton, Id. 1,706.]

6. An involuntary petition must be signed by one-third in value of all the creditors, and by one-fourth in number of creditors whose debts exceed $250; if there are none such, or if a sufficient number of them do not petition, the one-fourth in number may be made up from the smaller creditors.

[Followed in Re Woodford, Case No. 17,972. Cited in Re Broich, Id. 1,921; Re Lloyd, Id. 8,429. Approved in Re Hall, Id. 5,923.]

7. It is not necessary that the larger creditors should refuse to sign; it is enough that they do not sign.

[Approved in Re Hall, Case No. 5,923.]

[This was a proceeding in bankruptcy in the matter of J. R. Currier.]

C. P. Greenough, for petitioners.

J. B. Richardson, for defendant.

LOWELL, District Judge. In this petition for adjudication against the defendants, one act of bankruptcy alleged, and the only act relied on at the hearing, is a preference to T. Dana & Co., by a transfer to them, out of the ordinary course of the debtor's business, of the whole proceeds of his stock in trade, tools, &c., which, to be sure, amounted, after providing for a valid mortgage, to less than three hundred dollars, and which still left Dana & Co. large creditors of the defendant, for the balance of their running account. The questions for decision are, whether the transaction amounted to a preference which would be voidable by the assignee, and if so, whether the balance remaining due to Dana & Co. is to be reckoned in ascertaining whether the requisite amount of debt is represented by the petitioners.

1. It was hardly denied at the hearing that, upon the facts shown, the preference was one that could be avoided by the assignee, though, of course, that point will not be concluded by any decree made at this time.

2. It has been twice decided that the debt due a preferred creditor under such circumstances ought not to be reckoned in a proceeding of this sort. Clinton v. Mayo [Case No. 2,899]; In re Israel [Id. 7,111]. The original statute, re-enacted in Rev. St. § 5084, forbids proof by a preferred creditor unless he shall surrender his preference; and the surrender must be voluntary, that is, before final judgment against him for the amount of the preference. I speak of that statute as it has been construed in this court, and by what I consider the weight of authority. The new statute enacts that if the preference is set aside at the suit of the assignee, the creditor, in case of actual fraud, shall not be permitted to prove more than a moiety of his debt. St. 1874, c. 390, § 12 (18 Stat. 181). This undoubtedly provides, by necessary intendment, that if there has been no actual fraud he may prove his whole debt, even after a recovery has been had against him for the preference; and if there has been fraud, one-half thereof. But it is nowhere said that if he has received a preference he may prove his debt, or any part of it, until he has either voluntarily or by compulsion surrendered his advantage.

I do not care to enter into any question whether a preferred creditor may at the first meeting surrender, or whether he must wait till the assignee is appointed. See In re Saunders [Case No. 12,371]. There has been no offer of surrender here, nor any one to whom a surrender could be made. It is plain that a mere repayment to the debtor, after proceedings are begun, with intent, perhaps, to defeat them, cannot take the place of a surrender to the assignee.

It seems, then, that Dana & Co. are not creditors who could, under ordinary circumstances, vote at the first meeting, and I agree with the decisions above cited that they cannot be reckoned at this time. I will add one other consideration peculiar to this case. It has been repeatedly held in this court and elsewhere, that a preferred creditor has no standing in a court of bankruptcy to proceed for adjudication against his debtor for the very act to which the creditor has been a party. He is estopped on every principle of equity. It was once said by a late very learned and able judge, that where the preference consisted in merely suffering a judgment to be obtained in advance of other creditors, and a seizure on execution under such judgment, the creditor thus preferred might and ought at once to proceed in bankruptcy against the debtor. But the doctrine that there can be any such preference being now exploded, the dictum must go with it. There never has been a decision, and I apprehend will not soon be, that a conscious party to a fraud, though it be only a technical one, can take advantage of that fraud as foundation for a suit against the other party. I add, therefore, to the reasons already given why the debt of Dana & Co. should not be counted, that they ought not to join, and have no right to join, in this petition. In this case the ultimate purpose of the whole proceeding is to recover this preference; and though it turns out to be much less in amount than was supposed, yet the principle is the same. It

cannot be that the assent of the very creditor indirectly proceeded against is necessary.

A brief has been submitted to me upon another point which was ruled at the trial, and, as I supposed, settled at that time. The petitioners are one-fourth in number of the creditors whose debts exceed $250, and indeed of all the creditors, and they represent one-third in amount of all the provable debts, excluding Dana & Co., but they do not represent one-third in amount of the debts exceeding $250, if they alone are to be regarded. In other words, though they hold more than one-third of all the presently provable debts exhibited by the debtor in his list, they do not hold one-third of those that are above $250. And the defendant insists that where there are such creditors, they alone are to be regarded, unless upon notice and request they have refused or neglected to join. He cites the latter part of section 12 of the act of 1874, which says that, in computing the number of creditors who shall join, those whose debts do not exceed $250 shall not be reckoned. 18 Stat. 181.

Judge Blatchford has decided that the word "number" in this clause is to be construed "number and amount." In re Hymes [Case No. 6,986]. Judge Brown has held that "number" means "number." In re Hadley [Id. 5,894]. My impression is that the latter decision is to be preferred. It seems to me that congress intended to say to petitioning creditors: If you obtain one-third of all the debts, it shall be enough if you have one-fourth in number of the larger creditors. But if there are no such creditors, or if they do not petition, you may make up the number from the smaller creditors. This was to provide, I apprehend, for those cases, not very rare, where there is a great number of small debts, and to give the creditors the election of obtaining one-fourth in number of the chief creditors, or one-fourth of all, whichever they could, provided always one-third in amount of all the debts was represented in the petition. If this view is sound, the clause in question does not apply to the amount of debts to be represented, and this petition is sufficient.

I do not consider this point essential to the determination of this case, because I can see, by inspection of the petition and of the debtor's list, that the requisite number of the creditors holding debts above the specified amount have failed to sign the petition, which brings the case within one of the exceptions of the statute. It is argued that there should be allegation and proof that such creditors have been asked to sign and have refused, but I think the statute means that a failure to sign may arise from any cause, such as illness or absence. Any other construction would be dangerous and quite unnecessary, because a failure to sign is plainly shown by not signing. It was not intended that the larger creditors should be consulted at all events, but that the petitioning creditors should represent the requisite number and amount of all the creditors, or, if more convenient in the particular case, at least of the larger creditors, however reckoned. But a case is always made out when the due proportion of all the creditors has joined; and the failure of the larger creditors to join is no defence. This petition is admitted to be good if those creditors had refused to join; and how they are any worse off by neglecting than by refusing, I am unable to see. If they are favorable to the petition they sign it, or if they are opposed to it their signature is dispensed with, and the same result follows. The law was not intended to require a demand, when the acquiescence or the refusal could affect no rights in any way.

It is not without some significance that the rule of the supreme court, having the force of law, and governing the case of copartners petitioning to put themselves and other members of the firm into bankruptcy, says: If one or more members refuse to join, not fail to join. The difference in meaning is obvious, though the cases are not otherwise parallel. A partner ought always to have notice and an opportunity to assent to or to dispute his own bankruptcy; but a creditor whose action either way will bring about the same result has no such interest.

Adjudication ordered.

CURRIER (BRADLEY v.). See Case No. 1,777.

CURRIER (CATLIN v.). See Case No. 2,518.

CURRIER (FISHER v.). See Case No. 4,818.

CURRIER (PERKINS v.). See Case No. 10,985.

Case No. 3,493.

CURRIER v. WEST-SIDE ELEVATED PATENT RY. CO.

[6 Blatchf. 487.] [1]

Circuit Court, S. D. New York. June Term, 1869.

ELEVATED RAILROAD—INJUNCTION — OWNERSHIP OF STREET—CONSTRUCTION OF STATUTES.

1. C. owned premises at the northeast corner of Fulton and Greenwich streets, in the city of New York, bounded, by deed to him, on the west, by the easterly side of Greenwich street, and, on the south, by the northerly line of Fulton street, but had no deed of any portion of the soil of Greenwich street. A corporation erected, in Greenwich street, in front of said premises, but outside of the lines thereof, one or more posts on which to lay an elevated railway. The corporation of the city of New York had theretofore exercised acts of ownership over the soil of Greenwich street, in front of said premises. *Held*, on a motion by C., on bill filed, for an injunction to restrain the construction of such railway, that C. had failed to make out that any property of his had been taken by the corporation.

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

2. *Held*, also, that, as the legislature of New York had authorized the construction of the railway, in the manner in which it was being constructed, this court could not interfere, by injunction, with such construction, on the ground that it was a nuisance.

3. The acts of the legislature of New York of the 22d of April, 1867 (Sess. Laws 1867, c. 489), and the 3d of June, 1868 (Sess. Laws 1868, c. 855), are not void, as containing a delegation of legislative authority.

4. Even if the railway were being constructed without authority of law, C., not owning in fee any of the land in Greenwich street, could not, in the absence of proof of special damage, maintain a suit to enjoin the construction of the railway.

[Cited in Lorie v. North Chicago City Ry. Co., 32 Fed. 271.]

In equity. This was an application for a provisional injunction, to restrain the defendants from further prosecuting the construction of an elevated railway in the city of New York, in and through the length of Greenwich street, northerly, to the Ninth avenue, and thence, northerly, through the Ninth avenue, to the Harlem river; and from interfering, in any manner, with the "enjoyment" of the plaintiff [John A. Currier] "in his possession" of "two lots on Greenwich street," and of the premises in front of said lots, to the middle line of said street, and from, in any manner, injuring or destroying the value of the said premises.

The defendants became incorporated, under the name of the West Side and Yonkers Patent Railway Company, as a corporation for constructing, maintaining, and operating a railway for public use, in the conveyance of persons and property, by means of a propelling rope or cable attached to stationary power, under the provisions of an act of the legislature of the state of New York, passed April 20th, 1866, providing for the creation of such corporations. On the 22d of April, 1867, an act was passed by the said legislature (Sess. Laws 1867, c. 489), authorizing the said corporation to commence and proceed with the construction of an elevated railway in the counties of New York and Westchester, in the manner and upon the route therein specified. The act provided, that the propelling power for operating the railway should be cables attached to stationary engines; that there should be one track on one side of the street, on which the cars were to be moved in one direction, and another track on the other side of the street, on which the cars were to be moved in a contrary direction; that the track should be supported by iron columns, the size of which, at the surface of the pavement, and the length of the intervals between which, and the height of which track above the surface of the pavement, were prescribed; that the corporation might commence the construction of such railway at the southerly extremity of Greenwich street, near Battery place, and extend the same, northerly, along Greenwich street, for the distance of half a mile in length; that a stationary engine should be placed at about the centre of such half mile, to operate two lengths of propelling cable, extending about one-fourth of a mile northerly, and one-fourth of a mile southerly, with a loaded car; that such experimental line should be in readiness within one year from the passage of the act, (legal delays excepted,) and then three commissioners, two of whom should be appointed by the governor of the state, and one by the Croton aqueduct board of the city of New York, should proceed to inspect the railway, and its structures, and operating machinery; that, if the said commissioners should approve of the structures, plan, and operation of the railway, and should find that the same could be operated with safety and despatch, they should certify to such facts, by a duplicate certificate, of which one copy should be sent to the governor, who, upon approving it, should cause it to be filed in the office of the secretary of state, and one copy should be transmitted to the mayor of the city of New York; that, thereupon, the corporation should be authorized to extend the lines of said railway, northerly, along both sides of Greenwich street, to Ninth avenue, and along both sides of Ninth avenue, or streets west of Ninth avenue, to the Harlem river; and that, in case the commissioners should not approve of the railway, and its plan of construction and operation, they should sign a certificate of the facts, with an order for the removal of the railway, and it should be removed. The act used the following language: "The use of such railway, in the streets aforesaid, is hereby declared a public use, and consistent with the uses for which the mayor, aldermen and commonalty hold the same." The last section of the act was as follows: "This act shall take effect immediately." On the 3d of June, 1868, an act was passed by the said legislature (Sess. Laws 1868, c. 855), in relation to the corporation, and its railway, which provided, that the time for constructing the experimental section should be extended six months; that the corporation might adopt such form of application of the propelling cable, or such other motor, as the commissioners should approve; and that the corporation might, in a certain specified manner, change its corporate name or title. The last section of this act was as follows: "This act shall take effect immediately."

The bill, after setting forth the acts aforesaid, averred that the corporation duly changed its name to that by which it was sued; that it commenced the construction of a railway, with the intention of continuing the construction of the same from Battery place and the southern extremity of Greenwich street, northerly, through Greenwich street, to the Ninth avenue, and thence, northerly, through the Ninth avenue, to the Harlem river, and was then engaged in so constructing the same, and had constructed about half a mile in length; that such construction had been approved in writing by the commission-

ers appointed under the act of 1867, and their certificate of approval had been duly filed; that it was the intention of the defendants to endeavor to avail themselves of all the privileges purporting to be conferred by the acts, and, for that purpose, to take possession of so much of the streets and avenues through which it was proposed to run the railway, and of the private property of the owners of the premises fronting upon said streets and avenues, as might be necessary to enable the defendants to construct the railway; and that the plaintiff was the owner of two lots on Greenwich street, of twenty-five feet in width, and situated in front of the said experimental line. The bill then contained this averment: "And your orator further avers, that he is the owner of the said lots in fee, in his own right, and that, as he is informed and believes, he is also the owner of the premises in front of the said lots, to the middle line of the said street, and that the said street never became the property of the city of New York, and that the city of New York has only an easement or right of way therein; that, upon said premises, there is a brick building erected, four stories high; that the defendants claim the right to construct their railway along the premises of the plaintiff, in the manner described in the acts; that, if the said railway is so constructed, great and irreparable injury will occur to and be sustained by the plaintiff, for which he cannot have an adequate compensation at law; and that the placing of an elevated railway, in compliance with the description contained in said acts, in front of said premises, will embarrass access to the front portion thereof, will darken the windows thereof, and obstruct the view therefrom, will impede and prevent the free circulation of air therein, and will, by reason of the noise of the proposed cars, seriously injure the said building, as a habitation; that the acts referred to, and the rights claimed by the defendants as properly to be exercised thereunder, are in violation of article 5 of the amendments to the constitution of the United States, which provides, that private property shall not be taken for public use, without just compensation, and of section 7 of article 1 of the constitution of the state of New York, which provides, that, when private property shall be taken for any public use, the compensation to be made therefor, when such compensation is not made by the state, shall be ascertained by a jury, or by not less than three commissioners, appointed by a court of record, as shall be prescribed by law, and that the authority purporting by said acts to be conferred upon the commissioners mentioned therein is in violation of section 1 of article 3 of said last named constitution, which provides that the legislative power of the state shall be vested in a senate and assembly; and that the erection of the railway in the manner now proposed, will be, and the same, so far as erected, now is, a nuisance." The bill prayed that the defendants might be decreed to have no legal right to construct their elevated railway in the manner proposed, along the route proposed, and that they might be enjoined, as above mentioned, and that the said proposed road, and the same, so far as then constructed, might be decreed to be a nuisance, and that the defendants might be decreed to remove the same.

Edwin W. Stoughton, Clarence A. Seward, and George Stevenson, for plaintiff.

William M. Evarts and Edward C. Delavan, for defendants.

BLATCHFORD, District Judge. The plaintiff has not furnished any description of either one of the lots referred to in the bill, claimed to be owned by him, but the defendants show that the plaintiff has a deed conveying to him the premises known as No. 201 Greenwich street, being at the northeast corner of Fulton and Greenwich streets, and being bounded, in the deed, on the west by the easterly side of Greenwich street, and on the south by the northerly line of Fulton street. The plaintiff shows no other deed to himself of any premises, and no deed of any portion of the soil of Greenwich street, and the defendants show acts of ownership heretofore exercised by the corporation of the city of New York over the soil of Greenwich street, in front of the premises covered by the said deed. On this state of facts, it must be held, that the plaintiff has failed to make out that any property of his has been taken by the defendants. They have not entered or trespassed in any way upon the premises covered by the deed to the plaintiff. All that they have done in Greenwich street, in front of said premises, has been done outside of the lines of said premises. Whatever the presumption might be as to the ownership of the fee of the street, if the plaintiff's premises were bounded on the west on or by Greenwich street, instead of being bounded, as they are, by the deed, on the west, by the easterly side of Greenwich street, such presumption is rebutted by the language of the deed; and, even if such presumption, in case of a boundary on or by the street, would be that the fee of the soil of the street was owned by the plaintiff to the centre of the street, that presumption would be rebutted by the acts of ownership shown to have been exercised by the corporation of the city over such soil.

The only other question is, the one of a nuisance. If the legislature has authorized the construction of this railway in the manner in which it is being constructed, this court cannot interfere, by injunction, with such construction, on the ground that it is a nuisance. It is not contended that the actual mode of construction differs from the authorized mode of construction, if any construction is authorized by any valid law. The question, raised by the bill, as to tak-

ing private property for public use, being out of the case, the only other constitutional question raised is, whether the acts in question are void, as containing a delegation of legislative authority to the commissioners mentioned therein. It is claimed that, inasmuch as, by the acts, the defendants have no authority conferred upon them to continue in existence the experimental half mile, or to extend the road, unless the commissioners shall approve, the acts confer upon the commissioners legislative power. On this point, the authority of the case of Barto v. Himrod, 4 Seld. [8 N. Y.] 483, decided in 1853, is invoked. In that case, it was decided, that an act of the legislature in regard to free schools, which declared that the electors of the state should determine by ballot, at an annual election, whether such act should or should not become a law, was unconstitutional and void, as being a delegation of legislative power. In the opinion of Chief Justice Ruggles, it is stated, that the act did not, on its face, purport to be a law, as it came from the hands of the legislature, for any other purpose than to submit to the people the question whether its provisions in relation to free schools should or should not become a law, and that, by one section of the act, it was provided that the act should become a law only in case it should have a majority of the votes of the people in its favor. The difference between the statute in that case and the acts now under consideration is manifest. In each of the latter, there is an express provision that it shall take effect immediately. Its existence and validity, as a legislative enactment, are not made dependent, in any manner, upon any future event, or upon any action or nonaction, or approval or disapproval, by the commissioners. The continuance of the experimental half mile of railway, after it shall be constructed, and the extension of the road further, are, indeed, made dependent upon the approval of the commissioners. But the enactment of such a provision is no delegation of legislative power. Hundreds of statutes are passed by the legislature, conferring contingent rights on individuals and corporations, dependent upon the doing of certain acts, or the making of certain certificates. In all general laws for the creation of corporations, the individuals who associate to form the corporation are required to file, in a certain place, a certificate, in a certain form, and, unless that is done, there can be no corporation; and yet, it was never contended, that the making of the creation of the corporation to depend upon the happening of such a future event, although lying wholly in the will of individuals, was a delegation of legislative power.

In Corning v. Greene, 23 Barb. 33, decided in 1856, a statute provided that the corporation of the city of Albany should file their consent thereto, within a certain time after the passing of the same, or the bill should be void, and it was urged, that, as the statute was passed on condition that it should not be a law unless the corporation consented, it was not a constitutional exercise of legislative power. But it was held, that, as the statute emanated from the legislative will alone, and had an existence from that single source, it became a mere question of expediency when and how it should cease to exist; that, upon that question, the legislature might properly exercise its judgment; and that, as it had exercised and given expression to it in the statute, the statute was not for that reason invalid, and the case was not within the principle of Barto v. Himrod [supra].

In Grant v. Courter, 24 Barb. 232, it was held, that a statute authorizing a town to borrow money, provided the consent of a certain proportion of the tax-payers was first obtained, was a statute in which the legislature imposed a condition or restraint on the exercise of the power conferred, and that the imposing of such condition was as much the unaided emanation of the will of the legislature as the conferring of the power itself. The court say: "An act granting power, to be exercised upon such conditions as the legislature impose, is no delegation of legislative authority, nor is it invalid."

In Bank of Rome v. Rome, 18 N. Y. 38, decided in 1858, it was held by the court of appeals of New York, that a law which, by its terms, was to take effect immediately, but which conferred upon the authorities of a village certain powers which were not to be exercised until the act had been approved by a vote of the inhabitants, was constitutional, and was not a delegation of legislative power, within the case of Barto v. Himrod.

Under the settled law of the state of New York, the acts in question are, therefore, not repugnant to the constitution of the state, as containing a delegation of legislative power. The acts being valid, what is being done in accordance with their provisions cannot be regarded as a nuisance, to be interfered with by injunction.

It does not appear that any damage which the plaintiff is likely to sustain from the construction of this road will be different, in kind or degree, from that which will be sustained by every other lot-owner on the streets through which the railway will pass. Under such circumstances, the case of Osborne v. Brooklyn City R. Co. [Case No. 10,597], decided by Mr. Justice Nelson, and Judge Benedict, in the circuit court of United States for the eastern district of New York, in December, 1866, is an authority, binding on this court, for the principle, that, as the plaintiff is not shown to be the owner in fee of any land in Greenwich street over which the railway will pass, he could not maintain this suit, in the absence of proof of special damage, even if it appeared that the defendants had no right to construct the railway in Greenwich street, and were erecting, or about to erect, a public nuisance. The court say, in

that case: "They do not propose to enter upon any land of the plaintiff's, and the damage occasioned by the road to the plaintiff will not be different, in kind or degree, from that sustained by every other lot-owner upon the avenue. It is damage resulting from the depreciation of the value of lots abutting on the street, by reason of a railroad running through it, in front of, but not over, the plaintiff's land. Now, it is well settled, that damage sustained alike by all the individuals of a large class, furnishes no foundation for an action on the part of a single individual of the class. Lansing v. Smith, 8 Cow. 146; Davis v. Mayor, 14 N. Y. 506. It was incumbent, therefore, on the plaintiff, to show some special damage sustained, or likely to be sustained, by him, differing in kind from that sustained by the neighborhood, to entitle him to ask the interference of the court in his behalf. No such damage is pretended to exist, and its absence is fatal to the plaintiff, on this motion." The application for an injunction is denied.

CURRITUCK, The (McCOY v.). See Case No. 8,730.

CURRO, The FRANCESCA. See Case No. 5,029.

CURRY (HENRY v.). See Case No. 6,381.

Case No. 3,494.

CURRY et al. v. The H. J. MAY.[1]

District Court, S. D. Florida.[2]

SALVAGE—COMPENSATION.

[1. Where salvors have used their best efforts and appliances, the fact that their labor is increased by reason of inability to come alongside of the wreck because of the size of their vessels, is no reason for refusing compensation for such increased labor.]

[2. The failure of salvors to save property liable to rapid deterioration, rather than that not exposed to immediate destruction, is severely censurable, especially where a greater amount of property could have been saved without incurring extra risk; yet, if the failure to save more property was not caused by willful neglect, but was at most an error of judgment, compensation should not be withheld, but should be reduced proportionately.]

[3. Where, after a salvage service has been abandoned, sugar was saved from the vessel's lower hold with great labor, necessitating the handling of 20 hogsheads to get one of sugar, 55 per cent. of the net proceeds is reasonable compensation.]

[In admiralty. Libels by John Curry and others, by Thomas Blake and others, and by Richard Warfield against the schooner H. J. May for salvage services.]

These cases having been joined, will be considered as one; as well as all petitions herein. The circumstances are nearly similar to those of the William M. Jones, in which an opinion has just been rendered. [Case unreported.] It was satisfactorily shown that the vessel had bilged at the time the libellants boarded her; and they proceeded at once to the saving of cargo. The service was promptly and skillfully rendered, and the labor much increased on account of the necessity of being compelled to transfer the property saved from their smaller vessels to their larger ones. The respondent claims that this increase of labor was caused by the libellants of larger vessels being unable to come alongside of the wreck, and should not, therefore, enhance the salvage. When salvors use all of the means within their power to save property, it is but just to consider the actual amount of labor performed, and they are in no wise to blame for not being possessed of appliances, or vessels, which would have diminished the amount of labor actually required to perform the service. It is further contended that the salvors, unmindful of their duty, before they had saved all the cargo that might have been saved from the lower hold, where it was rapidly deteriorating, abandoned that work and proceeded to the saving of cargo between decks, and the materials; and I am not fully satisfied but what this is justly urged. Whenever it is within the power of salvors it is always their duty to save property when liable to rapid deterioration rather than that which is not exposed to immediate destruction; and, any party wilfully neglecting to save property which is in greater danger for the purpose of saving that which is not in immediate peril, will be liable to severe censure. In this case there have been several reasons urged why the saving of the cargo from the lower hold was abandoned and the work of saving rigging undertaken; but, I am not fully satisfied but what a greater amount of property might have been saved without its incurring any extra risk by a continuation of labor in the lower hold. Yet, if so, I am satisfied that it was in no way a wilful neglect of the salvors, but, at the worst, an error of judgment. If, by that course, they have not saved as much property as otherwise they might, their salvage will be reduced in that proportion, as they will receive but a per centage of the actual amount saved; so that I do not consider the case demands any reduction of the salvage to be actually given.

Referring again to the case of the Jones; while the property saved herein was more liable to rapid deterioration, it does not appear that any of it was saved by diving, although much was taken from under water. In view of the facts and circumstances of the case, I consider that 28 per cent. of the property saved from between decks, and 45 per cent. of that saved from the lower hold, and proceeds of materials, will be a fair salvage compensation.

In the petition of Richard Warfield, master of the Grover King, who, after the salvage

[1] [Published by permission from the MSS. of Hon. James W. Locke, District Judge.]

[2] [Date not given.]

service had been abandoned by the libellants, saved from the lower hold three hogsheads of sugar and five barrels of syrup (it appearing that said sugar was saved with great labor, they being compelled to handle some twenty hogsheads in order to get one of sugar) it is ordered that they have 55 per cent. of the net proceeds. And is referred to John T. Barker, Esq., as commissioner.

CURRY v. The JOHN NEILSON. See Case No. 2,337.

Case No. 3,495.

CURRY et al. v. The LOCH GOIL.[1]

District Court, S. D. Florida. Jan., 1877.

SALVAGE—PILOTAGE—COMPENSATION.

[1. Salvors are not entitled to compensation for unsuccessful effort.]

[2. The fact that the salvors, in bad weather, did all in their power, though to no purpose, may be considered in determining the amount of compensation to be awarded for actual services thereafter rendered to the vessel.]

[3. Services rendered a vessel which had worked off a shoal, and was in imminent danger of again stranding, by piloting her for about 10 miles through a narrow and intricate channel, unmarked by reliable beacons, to open water, and in pumping during the passage, are in the nature of salvage services, and should be compensated as such. The nature of the service only affects the amount of compensation, which should be less than for strictly salvage service.]

[4. The value of the ship and cargo being between $125,000 and $175,000, an award of $2,500 is proper under the circumstances.]

[In admiralty. Libel by John Curry and others against the British bark Loch Goil and cargo for salvage service.]

This vessel, laden with about 3,800 bales of cotton, during bad weather and in a fog, ran onto Brilliant shoal, in the vicinity of the Tortugas. The libellants found her on the shoal with but from twelve to fourteen feet of water around her, (she drawing before going ashore seventeen,) with a strong wind and heavy sea, and thumping heavily. They attempted to get one of their vessels alongside to take out an anchor, but, after carrying away a portion of her rigging and breaking in her rail, found it was impossible, and gave up the attempt. Finally the wind so shifted that the vessel beat herself over the shoal into deep water, where an anchor was let go in time to prevent her going upon another shoal directly in her course. The next morning she was piloted out through the shoals, by narrow and intricate channels, and brought to Key West. The ship was leaking badly, and the libellants assisted in pumping during the entire service. When the libellants first boarded the vessel she was in a position of great danger, weather bad, and she badly aground; but their efforts to relieve her were fruitless, and their aid unavailing, until she had beaten herself over the reef.

It is not what salvors offer or attempt to do that entitles them to compensation, but what they succeed in doing to the benefit of the property. The efforts of the libellants in this case to carry out an anchor, no matter how earnest, honest or energetic, being unsuccessful, entitled them of themselves to no reward; yet all the circumstances of the case may be taken into consideration, and their willingness to go out in bad weather, and do all within their power, may have some weight in determining an amount of compensation for actual services rendered. After the vessel was afloat she was still in much danger on account of surrounding shoals, and in all probability, had it not been for the presence of the wreckers, and their intimate knowledge of the locality, she would have been driven again aground before being brought to anchor, or in attempting to navigate the channels leading into open waters, which were narrow and intricate, with frequent shoals, which rendered the locality particularly dangerous to one unacquainted with it. This difficult navigation extended about ten miles, and it appears, was unmarked by reliable beacons, there being but two buoys, and they both out of position. The vessel was still in danger, although afloat, and the assistance rendered, although it may have consisted entirely of piloting, authorizes a claim for compensation, which, whether termed "salvage" or not, may be determined by the same rules and decided upon the same principles. It makes a service rendered property in certain circumstances, of either slight or imminent peril, none the less entitled to compensation in the nature of salvage because rendered by piloting alone; such fact only goes to influence the amount to be given, which, for many reasons, is much less than where other service is rendered. The danger is more distant, uncertain, and indefinite, the possibilities and probabilities of the master's being able to extricate his vessel without assistance is much greater, while the peril to the person or property of the salvors, and their labor in performing the service, are, in all such instances, very much lessened.

This question of salvage by pilotage service is not a new one in this court, numerous cases having been determined of like character, and it is but necessary to refer to these to find a course marked out which I consider we can safely follow. We can consider the efforts of the libellants rendered previous to the ship's coming off the bottom only so far as it shows their readiness to do all in their power to assist property in distress. The actual service for which they are to be compensated is the bringing the vessel to anchor so as to avoid the shoal to which she was drifting, the piloting, and the pumping. Numerous cases of salvage services rendered by piloting are cited in sections 196, 197, and 198 of Marvin on Wreck and Sal-

[1] [Published by permission from the MSS. of Hon. James W. Locke, District Judge.]

vage, which it is unnecessary to quote. In the opinion of Judge Marvin, given in The Calcutta [Case No. 2,298], 1854, he cites several cases decided in this court, of this character, namely: The Herman [Id. 6,406], 1840, in which $800, The Augusta [Id. 646], 1839, in which $900, and The Mount Washington [Id. 9,887], in which $1,500, were given, and, after citing such cases, lays down what may be considered a rule for determining amounts to be given in such cases. He says: "The cases cited show that pilot services rendered by the wreckers under extraordinary circumstances have heretofore been rewarded in this court with a considerable degree of liberality. It is both just and politic that they should be so rewarded. In determining the amount of such compensation it is proper, as in a salvage cause, to take into consideration all the circumstances of the case, the situation of the vessel, the difficulties of the channel, and the value of the property, and to increase or diminish the amount accordingly. If the circumstances under which the pilot services were rendered should be very extraordinary, and the value of the property great, the court may, in my judgment, decree a compensation equal to what would probably be the share of the pilot vessel in connection with other vessels in the salvage in case the ship were lost, i. e. to give to the pilot vessel and crew what would be a fair salvage for them alone, and what vessels and crews of her size and numbers ordinarily draw in saving equal amounts of property." In that case, on a value of $60,000, there was a compensation of $1,500 given. I do not consider the circumstances in this case so materially differing from that as to require a departure from the general rule there laid down. The value of the property is large, and the amount to be awarded will be on such a small proportion thereto that it is unnecessary to obtain an accurate valuation. It will be near enough, for practical purposes, to assume it to be worth anywhere from one hundred and twenty-five to one hundred and seventy-five thousand dollars. This value will permit what I consider a very liberal compensation, without being a burdensome charge. I think $2,500 a liberal reward to the libellants, but which is fully justified by the circumstances. The decree will follow accordingly.

Vide The Angeline [Case No. 385], 1854.

Case No. 3,496.

CURRY v. LOVELL.

[1 Cranch, C. C. 80.][1]

Circuit Court, District of Columbia. March Term, 1802.

EXECUTION—SUBSEQUENT JUDGMENT.

It is no bar to execution upon a supersedeas in Washington county, that the plaintiff has recovered another judgment in Alexandria county upon the same cause of action, if it be not satisfied.

Rule to show cause why this execution should not be quashed. Curry recovered judgment against Lovell before B. More, a justice of the peace for Washington county, on the 26th of August, 1801. Lovell obtained a supersedeas under the act of assembly of Maryland, until the 26th of February, 1802, and in the mean time removed to Alexandria county. When the supersedeas had expired, the plaintiff obtained a new warrant from a justice of the peace in Alexandria county, and recovered judgment and took out execution there which was not satisfied, Lovell having removed back to this county. The plaintiff then took out the present execution on the supersedeas here. Rule discharged.

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

Case No. 3,496a.

CURRY et al. v. McCAULEY et al.

District Court, W. D. Pennsylvania. Oct. Term, 1879.

[See 11 Fed. 365.]

CURRY (MUSSER v.). See Case No. 9,973.

Case No. 3,497.

CURRY v. ROULSTONE et al.

Brunner, Col. Cas. 121;[1] 2 Overt. 110.]

Circuit Court, D. Tennessee. June, 1809.

BILL OF LADING—EFFECT OF ASSIGNMENT OF.

The assignment of a bill of lading passes the property in the goods, and the consignor thereby loses the right of stoppage in transitu, and advances subsequently made by him on the transmission of the goods are not a lien on them.

In equity. The facts were that on the 6th of April, 1804, Alexander Roulstone, one of the defendants, shipped at New Orleans in the barge called Deborah, Lindsey Shannon master, a quantity of goods for account and risk of Col. Charles Lynch, of Shelby county, Kentucky, another of the defendants; to be delivered to the said Lynch or his assigns, he or they paying freight at the port of Louisville on the Ohio. On the same day, and of the above tenor, the master of the boat signed triplicate bills of lading, one of which was transmitted by Roulstone to Lynch, who assigned the same to Jorden, Banks, and Owens for a bona fide and valuable consideration, who procured the cargo to be insured in Lexington, Kentucky, on the 25th of May, 1804. The defendant, Roulstone, after having shipped the goods at Orleans, came on immediately to Nashville, and on the 2d of June, 1804, after stating himself to be the owner of the boat and cargo, em-

[1] [Reported by Albert Brunner, Esq., and here reprinted by permission.]

ployed the complainant as his factor to descend Cumberland river to the mouth, and there receive the goods of Shannon, the master, bring them up to Nashville at the factor's expense, and sell them, receiving therefor a certain commission. The complainant upon the credit of the goods, in addition to the expense of bringing them to Nashville, advanced Roulstone $175. The goods were received at the mouth of the river from Shannon, brought up to Nashville, and stored away for the purpose of selling under the agreement which was by deed. The expenses of transporting and money advanced amounted to $718.43. Immediately after the goods were brought to Nashville by the complainant, they were claimed by Jorden, Banks, and Owens. The complainant refused to deliver them until he should be paid the amount of his advances, and Roulstone's order should be obtained. An attachment was taken out, returnable to the court of the United States, and the plaintiff summoned as garnishee to declare what property he had of Jorden, Banks, and Owens. This was discontinued, and a writ of replevin sued out of the same court; this writ commanded the marshal to replevy the goods and deliver them to Jorden, Banks, and Owens. (It is much to be doubted whether replevin would lie in this state in such a case.) The bill states that the goods were taken out of the complainant's possession by the marshal against his will, and delivered to the agent of Jorden, Banks, and Owens, who is now making sale of them; questions the legality of the proceedings by replevin; complains that he was deprived of his lien by the goods having been taken out of his hands by the marshal; prays relief generally, and particularly that Jorden, Banks, and Owens may be enjoined from selling any more of the goods until final hearing.

White & Overton, of counsel for the plaintiff, argued that the plaintiff was entitled to relief to the amount of his advances, for which he had a lien, and as he did not voluntarily part with the goods, he should not lose the benefit of it. It was admitted that the plaintiff never inquired for a bill of lading, not having been customary in trade at Nashville to ask or require one; and the course of business at particular places will be noticed by the court. Strange, Rep.; 2 Johns. 327. That possession by Roulstone was evidence of property. Bull. N. P. 47; 1 Morg. Essays, 401, 402; 1 Bac. Abr. 604, 605; 1 Atk. 245. It was insisted that, let the goods belong to whom they might, the plaintiff had a lien, having acted bona fide and according to the course of trade at the place, and for this were cited: Snee v. Prescot, 1 Atk. 245; 2 Burrows, 931–943; 3 Bos. & P. 490; 3 East, 590; 3 Term R. 122, 123; 3 Bos. & P. 420; 1 Esp. 240; 6 East, 43; Lex Mercatoria Americana, 392, 398; Bull. N. P. 130; Cow. 251. See, also, 2 Johns. 541; 3 Johns. 341. Supposing, however, that it were necessary for the plaintiff to show that Roulstone had a legal right to dispose of the goods, it was contended that the goods having been shipped by him at Orleans, he had a right to stop them in transitu, the bill of lading not being negotiable as a bill of exchange; that the shipper was not bound to show on what ground he stopped the goods. 3 East, 398; Id. 363; 1 Term R. 745; Id. 66; 1 H. Bl. 366, 369, 506; 4 East, 217; 1 Bos. & P. 564; 5 East, 178; 2 Bos. & P. 46; 1 Mer. Am. 164; 3 Term R. 761; 1 H. Bl. 606; 2 Term R. 70. Vide, 3 Caines, 182; 5 Mass. 487; Camp. 282.

Mr. Whiteside, on the part of Jorden, Banks, and Owens, the assignees of the bill of lading, contended that Roulstone, after the goods were shipped, had no property in or power over them whatever, and that the plaintiff could not acquire any lien on the goods delivered by such a person, no more than if they had been stolen. Dub. see general doctrine of stoppage in transitu. The property of the goods followed the bill of lading, and was in Jorden, Banks, and Owens by assignment. Contra, Camp. 108, 309; 2 Hayw. (N. C.) 227 [Ogden v. Witherspoon, Case No. 10,461]. The plaintiff was in fault in not asking for a bill of lading before he received the goods. Whether the action of replevin were proper or not, was not the inquiry. The question simply was, whether the plaintiff could obtain a lien on the goods under the circumstances disclosed; he certainly could not, and therefore his bill must be dismissed.

The arguments used by the plaintiff's counsel were answered at great length, and the following authorities relied on: 1 Ld. Raym. 271; 1 Term R. 205; 4 Burrows, 2046; 2 Term R. 63.

In reply it was said that the cases in 4 Burrows, 2046, and 1 Term R. 205, do not show clearly the point decided, and the doctrine otherwise advocated was overruled and explained by 4 Burrows, 2680; 1 Term R. 659; 2 Term R. 63; 1 H. Bl. 359; 1 Bos. & P. 7.

The cause having been twice argued, once before M'Nairy, J., before the establishment of the present circuit court, and at June term, 1807, before Todd and M'Nairy, JJ., the opinion of the court was now delivered by

TODD, Circuit Justice, after stating the case, observed that there were two kinds of bills of lading (it is probable the distinction here alluded to by the judge lies between a bill of lading for, on account, and at the risk of the consignee; and on account of and at the risk of the consignor), and that the bill of lading before the court seemed to be different from the one referred to in Mason v. Lickbarrow, 1 H. Bl. 357. In the principal case, the property of the goods was transferred to Lynch, and from him to Jorden, Banks, and Owens. The defendant Roulstone had

no right to dispose of them as he did. There was no ground of relief against Lynch, or Jorden, Banks, and Owens; and as to Roulstone we cannot decree against him; having been no party to the suit at law, and never having been a resident or citizen of the district, there is a want of jurisdiction. The bill must be dismissed as to all the defendants. (The doctrine respecting mercantile lien may be seen and examined by recurrence to the authorities referred to at the bar and in the margin.)

CURTENIUS (COLUMBUS INSURANCE CO. v.). See Case No. 3,045.

CURTENIUS (MORGAN v.). See Case No. 9,-799.

CURTICE v. STORRS. See Case No. 1,291.

Case No. 3,498.

CURTIS v. BOWRIE.

[2 McLean, 374.][1]

Circuit Court, D. Indiana. May Term, 1841.

ACTION AGAINST REPRESENTATIVES OF DECEASED JOINT OBLIGOR—SUFFICIENCY OF DECLARATION.

1. By statute in Indiana the representatives of a deceased joint obligor may be sued, as on a joint and several obligation.

2. A declaration which alleges a promise by the deceased to pay, and, also a promise by his administrators, though informal, is not bad on general demurrer.

3. It is apparent, from the whole declaration, that the defendants are charged in their representative character, and not in their own right. And this is substantially good.

[This action was brought by Lewis Curtis against the administrators of John B. Bowrie, deceased, upon a joint and several note executed by the decedent.]

Mr. Cooper, for plaintiff.

HOLMAN, District Judge. The declaration in this case states that John B. Bowrie, in his lifetime, together with John Peltin, made their promissory note to Booran & Co., whereby they promised to pay the said Booran & Co. the sum of eleven hundred and sixty one dollars and eighty six cents, and, also, the current rate of exchange, &c., and that the note was indorsed by Booran & Co. to the plaintiff, that before the payment of the note Bowrie departed this life, and that the defendants were duly appointed administrators of his estate, whereby they became liable to pay said note to the plaintiff, and that, being so liable, they promised to pay, &c. To this declaration the defendants have demurred generally.

The first cause of demurrer alleged, is, that the note is made jointly by Peltin and Bowrie, and that neither Bowrie nor his administrators could be sued on it without joining Peltin in the action. That this objection would be fatal to the action at common law is unquestionable. A suit could not be maintained against one of two joint obligors. The suit must be against both. It is, however, otherwise where the note is joint and several; either is liable to the action as if the note was made by him alone. And the legislature of this state, in the Revised Code of 1838, page 358, have enacted "that the representatives of one jointly bound with another for the payment of a debt, &c., and dying in the lifetime of the latter, may be charged by virtue of such obligation in the same manner as such representatives might have been charged if such obligors had been bound severally as well as jointly." There can be no doubt but that the legislature, by these provisions, have placed joint obligations on the same footing with obligations that are joint and several, in actions like the present, and that this objection is untenable.

It is, also, urged that the declaration is insufficient, because it alleges a promise to pay by Bowrie in his lifetime, and, also, a promise by his administrators after his decease, leaving it doubtful, whether the plaintiff intends to charge the defendants in their own right, or in their representative character. The promissory note is the foundation of the action. The declaration alleges the promise of the decedent, and an obligation resting on him, by virtue of his making said note. The promise alleged to be made by the defendants after they became the administrators of the decedent's estate, is mere form, and can not charge them in their individual character. They are only charged in the declaration in their representative character, and if judgment goes against them it must be according to the tenor of the whole declaration against the estate of their intestate, as there is nothing in the declaration that would render them liable in their own right. We think the declaration is sufficient, and that the demurrer can not be sustained.

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

Case No. 3,499.

CURTIS et al. v. BRANCH et al.

4 Ban. & A. 189;[1] 15 O. G. 919.]

Circuit Court, E. D. Missouri. March Term, 1879.

PATENTS—"CIRCULAR SAWS"—VALIDITY.

The reissued letters patent No. 8,076, granted to James K. Lockwood, February 5th, 1878, for improvement in circular saws (the original patent having been dated Nov. 12, 1867, and numbered 70,728), being for an invention different from the original patent, *held*, void.

J. H. Blair, for complainants.

S. S. Boyd, for defendants.

TREAT, District Judge. This is a suit for an alleged infringement of the Lockwood

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

patent, No. 8,076, granted February 5th, 1878, which patent is for—1. A circular saw constructed with a series of cuts, slots or openings in its inner or central portion to prevent the warping or bucking of the saw when any part of it is expanded by heat. 2. A circular saw constructed with cuts, slots or openings terminating in holes or enlargements for the same purpose. 3. A circular saw constructed with cuts, slots or openings, and with elongated bolt or dowel holes near the eye for the same purpose. 4. A circular saw constructed with slots or openings terminating in enlargements or circular openings, and with enlarged bolt or dowel holes near the eye for the same purpose.

It is apparent from the claim and specification in the original patent, that the main thought of the inventor was the use of slots extending from the eye into the plate of the circular saw, short of the periphery, whereby the beneficial result claimed by him would be accomplished. The combination of the various devices therefor, named in the patent, is apparent. There were other patents and devices prior to his letters patent, whereby such slots or openings extend from the periphery toward the centre, and from the periphery entirely into the centre. The special claim in the original patent was that such slots or openings, with dowels, etc., should be connected with openings from the eye into the interior of the saw. Of course that patent could not cover any slots in the circular saw, irrespective of their position, because slots in other ways had been previously patented and used. The defendants' slots are not from the periphery inward, nor from the eye outward, but leaving between the periphery and the line of the slot, and between the eye and the line of the slot, solid surfaces, as shown in letters patent No. 191,198, granted to E. W. Tilton, May 22, 1877, under which the defendants are working.

The original claim was for: "A circular saw constructed with more or less slots D, upon radial lines from the eye toward the periphery and terminating in holes C, in combination with the oblong holes or slots E, for the purposes substantially as set forth." The purposes set forth were to allow for expansion and contraction in the use of the saw. Devices by others had special reference to the expansion and contraction of the saw, near the periphery, in shallow cutting, etc.; but the inventor, in this instance, seemed to design a mode of providing for like expansion and contraction in deep cutting, by slotting from the eye into the body of the saw. Hence, if the second claim is to be construed as covering all slots terminating in holes or enlargements, irrespective of the position, or direction, of said slots, it is an illegal expansion of the original patent, and, therefore, void. As to the third claim, the same comments and conclusion apply, with this difference; that the defendants do not use the elongated bolt, or dowel holes near the eye, for the purpose of allowing for expansion and contraction. The same remarks are applicable to the fourth claim.

The reissued patent is, as to the second, third, and fourth claims, void, because not one of those claims was covered by the original patent, unless it is specifically limited to less than is therein expressed. Thus the second claim in the reissue is for a circular saw constructed with slots terminating in round holes, irrespective of the position of the slots, while the original was for radial slots from the centre, etc. That claim expands the original to cover any slots, whether radial from the centre or not, if terminating in round holes, so that all previous patents for slots from the periphery, or entirely through the saw, would, if terminating in such holes, be an infringement. In other words, the claim must be for terminating all slots in a round hole—a claim for what was not included or suggested in the original patent, as a part of the patentee's invention. The third claim, dropping the idea of the termination of slots in round holes, covers the construction of slots combined with the elongated dowel holes near the eye. As already stated, the defendants do not use such holes. That claim, however, is expanded to cover any slots combined with such holes, no matter what the position of the slots. The fourth claim is for any combination of a slot terminating in such round holes, in combination with which, the enlarged dowel holes near the eye, are used. Here is an abandonment of the radial slots from the eye, so as to expand the claim to slots from the periphery, or intermediate between the periphery and eye-hole; but, however that may be, the defendants, not using such dowel holes, do not infringe that combination.

This reissue falls within the condemnation, repeatedly pronounced, of late, by the United States courts against efforts to expand original patents to cover different inventions from those originally made or suggested, in order to secure the benefit of subsequent inventions. The first patent was for a combination, clearly stated. Prior inventions had been patented for slots in circular saws, starting and terminating at designated parts of the surface. It was, therefore, for the peculiar arrangement of old devices that Lockwood had his patent. There was nothing new in a slot, in an elongated dowel hole, or in a round hole at the end of a slot; but there was something new in combining all three of those devices with the slot starting radially, not from the periphery, but from the eye. But his reissue seeks to cover every slot which terminates in a round hole; every circular saw with a slot, whether terminating in a round hole or not, which uses an elongated dowel hole, and also all such saws with slots terminating in round holes, in combination with elongated dowel holes. A simple statement of the differences between

the original and reissued patents is sufficient to show the illegal expansion. The first claim of the reissue involves another question. It is, broadly, for a circular saw constructed with a series of slots, etc., in its interior or central portion. The original was for such slots radially from the eye, and, in that respect, it was anticipated by Kern. If the design of the reissue was to expand the original so as to cover all slots not starting from the periphery, or from the eye, but which might be made "in the interior or central portion" of the saw, then that claim was for a very different invention from the original. The reissue is, for the reasons suggested, held void. Bill dismissed with costs.

CURTIS (BROWN v.). See Case No. 2,000.

Case No. 3,500.

CURTIS v. BUTLER COUNTY.

[6 Pittsb. Leg. J. 443; 1 Pittsb. Rep. 516.]

Circuit Court, D. Pennsylvania. May Term, 1859.

ACTION ON COUNTY RAILWAY AID BONDS — BURDEN OF PROOF — RECITALS — BONA FIDE PURCHASERS.

[1. When negotiable county railway aid bonds and coupons sued on are proved to have been fraudulently issued, the plaintiff is then bound to show that he is a bona fide holder for a valuable consideration of some amount.]

[2. Purchasers of negotiable county railway aid bonds, which recite the act under which they were issued, are presumed to have notice of a provision therein forbidding the obligee to put them in circulation for less than their par value, and are therefore bound to inquire whether this provision was violated.]

[3. But, if such bonds were first put out by the obligee at their par value, the fact that they were again received by such obligee at less than par will not affect the right of a subsequent bona fide purchaser to recover upon them.]

[4. Where county railroad aid bonds are sold by the railroad company at less than par, in violation of the statute authorizing their issuance, which statute is recited in the bonds, a subsequent bona fide purchaser can recover from the county only the amount which the railroad company received for them.]

[This was an action by Jacob E. Curtis against the county of Butler upon certain bonds and coupons issued by the county to aid in building a railroad.]

The county of Butler, through its commissioners, pursuant to an act of the legislature, and on a recommendation of the grand jury of the county, subscribed $250,000 to the stock of the North Western Railroad Company, a concern of little or no value, paying for the stock in the county bonds. The action is brought to recover interest now due and unpaid upon forty-nine of these coupon bonds. Twenty-one of these interest coupons are for the sum of thirty dollars each, and twenty-eight are for the sum of fifteen dollars each. The defence set up was that the bonds were issued in violation of law, having been sold under par; that Butler county never received the benefit of a dollar from the railroad company; that in pursuance of the contract the company was bound to pay the interest upon the bonds issued by the county, until the road was finished; that the company, in the interim, was liable for the interest, and all must have known that the bonds could not legally have been sold below par. They would prove that the contractors had agreed to construct said railroad, and to take in payment the bonds issued to the company; that the estimates of the contractors were increased thirty-six per cent. over cash prices, realizing but sixty-four per cent. on the bonds. To all this it was objected by counsel for plaintiff that the bond of the county was a consummation of the contract with the company; that it did not appear upon the face of the bonds that they shall not be sold at less than par, and hence, holders have a right to take them as they appear; that the holder had nothing to do with any outside agreement between the company and the county, as to the payment of interest, and that, if the company failed to keep its contracts with the county, the county should look to the company for redress. These points were overruled by the court, and the fact of the liability of the company for interest until the road was finished was established by a written contract to that effect between the county and the company, notice of the existence of which contract had been given the plaintiff. The fact, also, of increasing the estimates, so as to cover the difference between the market price and the par of the bonds, was also proven. The defence contended that the commissioners had exceeded their authority, and their acts were therefore void. Also, that the bonds were not transferable, inasmuch as the law required that they should be made payable to the company, and not to "bearer." It mattered not that the word appeared on the face of the bond; if it was there in violation of the act, and of the conditions upon which the subscription was made, it could not make the bonds negotiable.

Hopewell Hepburn and Geo. Shiras, Jr., for plaintiff.

John Graham and John N. Purviance, for the defence.

GRIER, Circuit Justice (charging jury). Plaintiff claims as holder of 49 coupons for payment of interest on certain bonds issued by the county of Butler. No. 1 of these bonds has been given in evidence as a sample of the bonds. This is a species of bonds which has come into use of late years, where cities and other corporations issue bonds in form of the public securities issued by states. For convenience, and to give them greater value in the market, they have assumed the form of securities negotiable by delivery, that may pass from hand to hand like bank

notes; the coupons attached, constitute, by the contract of the obligor and custom of trade, the evidence to be in the hands of the bearer that he is holder of the bond and entitled to receive the instalment of interest. As their name imports, they are to be cut off from the bond, and the possession of them by the obligor is the evidence that the interest has been paid. Their negotiability by delivery arises from the contract of the bond, payable to the bearer, who, having severed the coupon from the bond, must have been in possession of the bond as bearer or holder. The value of the securities depends upon the peculiar faculty of negotiating or transferring them and their coupons, as the evidence of a right to receive the interest. Assuming that you believe the evidence that these bonds have been executed as they purport to be, and the several coupons in evidence were attached to the bonds to which they purport to belong,—that they were delivered to the railroad company in payment of a subscription to the stock of the company.

The first great question which has been raised by defendants is whether, under the evidence, not disputed, as to the action of the grand jury and the railroad company, the commissioners, or any two of them, had authority to issue these bonds binding the people of Butler county to pay the money according to the covenants therein contained.

This case differs in many respects from the case of McCoy v. Washington Co. [Case No. 8,731], decided in this court at last term.

1. There the question as to making subscription and issuing bonds was submitted to a vote of the people who were to be taxed to pay them.

2. The commissioners of the county were authorized, in direct terms, to borrow money, and to execute bonds with interest payable semi-annually, and transferrable in any manner they chose to direct, and to make provisions for the payment of principal and interest, and the railroad company was authorized to guarantee the payment of both principal and interest.

Now, it may be admitted (since the decision of your own supreme court) that the legislature may, without any such submission to the vote of the people, or even to the discretion of a grand jury, authorize the commissioners of a county to issue bonds binding the people and property of a county to pay money raised to buy stock, and become partners in a railroad corporation. Such an unusual and extraordinary power to mortgage the property of others without their individual consent should be most clearly and distinctly set forth in the statute which is supposed to authorize it. It ought not to be left to inference from vague and dubious phraseology. If it were a city corporation, having a legislature of its own, (a sort of imperium in imperio—or state within a state,) a general power to borrow money for certain purposes might be sufficient, leaving it to their own legislature, immediately representing the citizens, to devise the form of security to be given. But here we have not direct authority either to borrow money, to issue bonds of any sort, or to provide for the payment of principal or interest. It is true, such an authority might be guessed at or inferred as having been intended by the words "to make payment on such terms and in such a manner as may be agreed upon by said company and the proper county."

The grand jury are introduced only to fix the amount and approve the agreement to subscribe. It is true, the corporate powers of the county are by law exercised by the commissioners. Act 1844; Bugully, Dig. p. 172. But suppose there had been a direct power to the three commissioners of a county, to issue bonds, a question might arise, whether bonds signed by two would be binding. It is true, a majority of the commissioners may execute the ordinary duties of the corporation, but whether such an extraordinary and summary power to bind others would be so construed might admit of some doubt. It is true, the last proviso of this section, that some sort of bonds of the county are to be given in payment of subscription, assumes that fact, but it confers no direct authority on the commissioners to execute any sort of bonds. But assuming that the power is intended to be given to the railroad company, and the commissioners to devise any sort of bond show an agreement, that the county was to be bound to pay the interest on these bonds? Perhaps the giving by the one, and receiving by the other, may be considered the best evidence of this fact. If this act contained direct and express authority to issue bonds, I would say the commissioners might issue them in the best form to give them value in the money market, which is the form adopted.

Without saying that an authority to issue bonds may not be made out by inference or construction, I feel a doubt as to my right to do so, and as the case can be reviewed in the supreme court [24 How. (65 U. S.) 435], by a certificate of a division of opinion, my brother and myself have agreed to differ, and certify this case to the supreme court on this point, as upwards of $60,000 depend on the question. But the case may be given to the jury on the other points, so as to save another trial, by reserving the question as to the power of the commissioners and the validity of the bond. The jury will therefore consider the case as if the court had instructed them that the persons signing these bonds had full authority of law to sign and deliver them in the manner and form as has been done, and to find a verdict under the following instructions, and if, in accordance with said instruction, they find for the plaintiff, let them state the amount found subject to the opinion of the court on the point reserved.

The court instruct you that, assuming the commissioners to have authority to issue these bonds, and by the covenant bind the county, and did issue them therein, the plaintiff, if a bona fide holder thereof, may recover upon these coupons as declared upon.

2. They are made negotiable by the contract of the parties and the holders of the coupons, which, from usage and the agreement of the parties, are to be considered to have a prima facie right to demand the interest and recover in this suit, unless they have been fraudulently issued.

3. If proved to have been fraudulently issued, the plaintiff, under the notice in the case, would be bound to satisfy you that he is a bona fide holder for a valuable consideration of some amount. The holders of these bonds and coupons may be considered as having notice of all the provisos and conditions of the act of assembly recited in their bond, and are presumed to know that the obligees, the railroad companies, had no authority to put them in circulation, or sell them at less than their par value, and were therefore bound to inquire if such was the fact. If the bonds were first paid out for work done at par value, and thus put in circulation as a sort of currency, the fact that they were afterwards received or passed to the company at their market value, or for less then par value, will not affect this case. If you find that the bonds were not fraudulently issued, you need not inquire farther as to the consideration paid by the plaintiff. For, if paid out to the workmen on the road, as sworn to by Mr. Painter, it is immaterial to this case what the plaintiff paid for them, if anything. If you find the bonds were issued and paid in good faith, according to the conditions of the act, you will calculate the amount, with interest, and find a verdict for that sum, subject to the opinion of the court as to the validity of the bonds. If the jury should find that the bonds were originally sold for 64 per cent., plaintiff would have a right to recover that much at least.

The jury then retired, and in three hours after they came into court for instructions. They wished to know if they were correct in understanding the court to say that they could not find for the defendants unless they believed that the bonds had been obtained by fraud on the part of the plaintiff. Judge GRIER replied that he had so charged, and illustrated his meaning at considerable length. The jury retired again, and in a few minutes returned the following verdict: "The jury find for plaintiff six hundred and seventy-two dollars, subject to the opinion of the court as to the legal authority of the commissioners to bind the people of the county of Butler by the securities declared on. But, in case the court shall decide that the commissioners had not such an authority vested in them by law, then the court will enter a verdict for defendants." One of the jurors stated to the court that he was unanimously instructed by his fellow jurors to say that, if they could have done so without conflicting with the charge of the court, there were many facts which would have induced them to find for the defendants. From the verdict, it will be seen that the plaintiff has only recovered in the amount of sixty-four per cent., being the price at which the bonds were sold. The amount claimed by plaintiff was $1,050.

Case No. 3,501.

CURTIS v. CENTRAL RAILWAY.

[6 McLean, 401.][1]

Circuit Court, D. Indiana. May Term, 1855.

PLEADING — DEPOSITIONS — ADOPTION OF STATE PRACTICE — CARRIERS OF PASSENGERS — NEGLIGENCE.

1. A special plea which amounts to the general issue is demurrable.

2. A plea which states facts in bar to the plaintiff's demand, is not good, if the facts so stated do not constitute a bar.

3. The law and practice of the state having been adopted in regard to the taking of depositions, a subsequent modification of the law, which was followed for a long time, will be considered as adopted by usage.

4. But the law of the state can make no change in the act of congress, as to the circumstances under which depositions may be taken. The person whose deposition is taken, under the act of congress, must reside more than a hundred miles from the place of holding the court.

[Cited in Warren v. Younger, 18 Fed. 861.]

5. A conductor of a train of cars is engaged in an important business, and is bound to use reasonable care for the safety of passengers. And at cross roads, or where the tracks lie very near each other, a more than ordinary degree of care is requisite.

6. Any carelessness in loading a freight train of cars, or in not attending to the adjustment of the load of lumber, by which an injury is done to a passenger in another train, will make the owners of the freight train responsible.

Morrison, Ray & Morrison, for plaintiff.
Newman & Test, for defendant.

INSTRUCTIONS OF THE COURT TO THE JURY. This case is brought to recover damages against the defendant, for an injury done to the plaintiff [E. M. Curtis], through the carelessness of the agents of the defendant, by which the plaintiff was injured while traveling in the cars of another line of railroad. The declaration alleges that the plaintiff was a passenger on the train of cars running eastward, towards the state line of Indiana and Ohio, and the defendant's train running westward, on a track parallel to that on which the plaintiff was a passenger, and within five feet six inches of the track on which the eastern cars were running; the western cars being freighted

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

with cross ties and other materials of lumber, which were so negligently loaded by the servants of the defendant, that in passing the eastern train, the projecting end of a cross tie or piece of timber, being loaded as aforesaid, struck the left arm of the plaintiff below the elbow, as the arm rested on the sill of the window of the car in which the plaintiff was a passenger, and with great violence and force thereby cut, lacerated, bruised and wounded the said left arm, &c. The defendant pleaded in bar to the action, that the injury was received through the carelessness of the plaintiff, by resting her elbow and arm on the sill of the car window, by which she exposed her arm to danger and injury, &c. Several other special pleas were filed, to which the plaintiff demurred. These pleas were disposed of on the ground that they amounted to the general issue, or did not state a complete answer to the declaration, admitting the facts stated to be true. In some of the pleas there was an averment of carelessness by the plaintiff, but no denial of the careless loading of the lumber so as to project over the side of the car, as alleged in the declaration, by reason of which the injury was done. The demurrer filed authorized the defendant to test the sufficiency of the declaration, and it was alleged to be defective in not showing any connection between the cars on which the plaintiff was a passenger and those which were owned by the defendant; but this objection was overruled by the court. The fact of the tracks of those two roads being near each other, imposed the greater diligence on the agents of both companies.

Exceptions were taken to several depositions, as not having been duly taken. By a rule of court, depositions were admitted to be taken under the state law, and in pursuance of the state practice. The first exception alleged, that notice of taking depositions was served on the treasurer of the railroad company, and not on the president. It was proved that this notice was served on the treasurer in the absence of the president. This is a sufficient service of the notice under the revised acts of 1852. Volume 2, p. 35. The state law has been somewhat changed in regard to taking depositions, since the above rule of court was adopted, but it seems that the state law as altered was followed by the uniform practice in this court, and this was held by the court as a usage in practice which would be sustained. It was objected to depositions taken before the mayor of Columbus, Ohio, who did not certify that the parties were or were not present. The mayor certified that the defendant was not present, and this, we think, is sufficient. To the deposition of Churchman and wife, it was objected that they reside in Indiana, and it nowhere appears that they live more than one hundred miles from the place of holding the court. This is a fatal objection. In adopting the state practice the court did not dispense with the requirement of the act of congress, which authorizes depositions to be taken where the witness lives more than one hundred miles from the place where the case is to be tried. The adoption of the state law only referred to the form and mode of taking depositions. The injury was proved, substantially as alleged in the declaration. A short distance after leaving Richmond, the two tracks were laid five feet six inches only apart, and this was continued for a considerable distance. When the passenger cars came to this part of the road, the freight cars had stopped on the eastern part of it, and moved slowly forwards as they were approached by the passenger cars. A stick of timber, called a tie, for the road, was proved to have projected some six inches or more over the other loading of the freight cars, and this timber struck the passenger cars two or three times, broke off a part of the moulding of the car window where the plaintiff was sitting, and severely injured her left arm. Under the injury, she at first fainted, but when she came to, she thought herself fortunate in not being more injured. Every possible attention was paid to her by the conductor and others. There were differences among the witnesses as to the position of the arm of the plaintiff. Some of them stated that her arm protruded two and a half inches over the side of the car; others who were near to her said her arm did not extend beyond the side of the car.

The court called the attention of the jury to the facts proved, and instructed them, if the injury was caused by the negligence of the defendant's agents, the plaintiff was entitled to recover. It was not enough that the freight cars should be shown to have been carefully loaded, but as the ties were thrown crosswise the open cars, it was the duty of the conductor of the freight cars to see that the timbers had not slipped from their places, so as to endanger the lives and limbs of the passengers on the train which they were to meet. That if they believe the arm of the plaintiff rested on the window sill where she sat, yet if her arm was not so extended as to endanger it in passing the tracks near to each other, under ordinary circumstances, the alleged carelessness is no excuse for the defendant. The conductor of a car performs a most responsible duty. The propelling force which he controls, with the train moved by it, increases in a wonderful degree the facilities of commercial intercourse and exchanges; but by its mighty power it crushes to death all living beings which it encounters. Hence the care, the vigilance, and the skill of the conductor must be in continual exercise to avoid collisions. In passing over a cross road, or over tracks near each other, his vigilance should be in proportion to the danger he encounters. That the tie which scraped the passenger car, and tore off some of its moulding at the window must have projected several feet beyond the side of the freight cars, is clear, from the fact that it struck the car

in which the plaintiff was sitting. In almost every car passengers were warned not to stand on the platforms between the cars, and this is done for the benefit of the passengers. Still the conductor of the cars is bound to exercise reasonable diligence. He is bound not to endanger his own passengers, or the passengers in other cars, by any carelessness or want of diligence on his part.

In the case before the jury, carelessness is shown, by the fact that the timber carried by the freight train struck, with force, the passenger car. This degree of carelessness is sufficient to charge the defendant. Had the freight train been properly laden, no one will pretend that the position of the plaintiff would have subjected her to injury. The circumstances of her admitting that she was in fault, after being told that her arm was on the window, will have but little weight with the jury. She was not in a position to judge of the facts, and therefore her admissions should be cautiously received. If the jury find from the evidence that the plaintiff was injured through the carelessness of the defendant's agents, either in loading the cars or in not keeping the load properly adjusted, she is entitled to recover what may be considered a reasonable compensation for the suffering she endured, the expenses for medical treatment, and otherwise, while she remained disabled. These are called compensatory damages. There is nothing in the case which would seem to authorize vindictive damages. No proof is given from which an intention to injure any one by the defendant's agents, can be presumed.

The jury found a verdict for $1,500.

CURTIS (CHESTER v.). See Case No. 2,661.

CURTIS (COOLIDGE v.). See Case No. 3,184.

CURTIS (FARWELL v.). See Case No. 4,690.

Case No. 3,502.

CURTIS v. FESTE.

[29 Hunt, Mer. Mag. 455.]

District Court, D. Louisiana. 1853.

IMPRISONMENT FOR DEBT—FEDERAL JURISDICTION.

[Imprisonment for debt on process from federal courts having been abolished (Act 1841; 5 Stat. 410) in states which have abolished it by law, the federal courts in such states have no jurisdiction of a suit for the enforcement of a state statute, highly penal in its nature, in regard to fraudulent debtors.]

[Action by Curtis and others against Victor Feste to recover a debt. On motion to discharge the debtor from imprisonment for want of jurisdiction.]

This case came up on Wednesday, May 18th, 1853, and motion was made to discharge defendant from arrest, who was taken by process issued from this court, in accordance with the tenth and thirteenth sections of an act of the Louisiana legislature, passed in March, 1840. [Laws La. pp. 133, 134.]

In 1837, congress abolished imprisonment for debt, under process from the courts of the United States, in those states where it had been abolished by law, and provided that "when by the laws of a state, imprisonment for debt shall be allowed under certain conditions and restrictions, the same conditions and restrictions shall be applicable to the process issuing out of the courts of the United States; and the same proceedings shall be had therein as are adopted in the courts of such state." 5 Stat. 321. In 1841, an act supplementary was passed by which it was enacted that the act of 1837 should be construed so as to abolish imprisonment for debt in all cases whatever, on process issuing from the courts of the United States, when, by the law of the state in which the said court shall be held, imprisonment for debt has been or shall hereafter be abolished.

The laws of Louisiana provide fully for the abolition of imprisonment for debt, and the process by which the arrest of a debtor is made has been also abolished. The consequence is that, under the act of congress, imprisonment for debt in all the cases under process from this court was formally terminated. The legislature of Louisiana has given to creditors a remedy highly primitive in its character, as respects their debtors in certain cases of fraud. The statute cannot be enforced in favor of creditors in the courts of the United States. The supreme court of the United States, in the case of Gwin v. Breedlove, 2 How. [43 U. S.] 29, which involved the application of a penal statute of Mississippi to a marshal, for a false return of an execution, says: "This being an offense against the state law, the courts of the state alone could furnish its commission, the courts of the United States having no power to execute the penal laws of the individual states."

The statute under consideration is in a very high degree penal. It is made the duty of the court, in all cases described in it except one, upon conviction of the debtor, to sentence him to three years imprisonment, and in the other case to sentence him to the same term of imprisonment with a condition that he should be discharged on payment of the debt. This court has no jurisdiction over a case like this, and the defendant must be discharged from arrest.

Case No. 3,503.

CURTIS v. HOME INS. CO.

[1 Biss. 485.][1]

Circuit Court, N. D. Illinois. June, 1865.

INSURANCE — YEAR CLAUSE IN POLICY — HOW WAIVED—REQUIRING ADDITIONAL PROOF.

1. Where a policy of insurance contained a clause that the loss shall be paid within sixty days after it has been ascertained and proved, and another that if the loss is not paid, suit is to be brought within one year after the loss, and claim was made within a reasonable time, and further proofs required and the company held out the promise or intimation that it would pay the loss, in consequence of which the plaintiff was prevented from bringing suit within the year, *held*, the company cannot be permitted to avail itself of these conditions of the policy.

[Cited in Thompson v. Phenix Ins. Co., 136 U. S. 299, 10 Sup. Ct. 1023.]

2. The conduct of the company and the negotiations must be such that the insured, as a reasonable person, is convinced that the company will pay the loss, otherwise he is bound to bring the suit within the time limited.

3. As long as the company ask for further proof, and he in good faith is attempting to furnish it, they by their own conduct induce him to believe that it is unnecessary to commence a suit. But as soon as he makes up his mind not to furnish any more proof he has no right to rely longer on the action of the company.

This was an action by Orlando Curtis [against the Home Insurance Company of New Haven, Conn.] on a policy of insurance for two thousand dollars, dated April 8th, 1861, on what were called the "Keeler Saw Mills," in Marathon county, Wisconsin. The policy was originally for a year, and was renewed for a second year in April, 1862. The property was destroyed by fire on the 14th day of October, 1862. The plaintiff's interest in the property insured was as purchaser at sheriff's sale under a judgment recovered by him against Keeler, the then owner of the property. There was a previous mortgage on the property to Sharpstein, which had been foreclosed, and the defendant claimed that the equity of redemption was gone before the loss under the policy. The plaintiff, however, denied any notice of the foreclosure proceedings, and claimed that the foreclosure was irregular and invalid. The facts further appear in the charge.

E. S. Smith, for plaintiff.

Robert Hervey and N. C. Perkins, for defendant.

DRUMMOND, District Judge, charged the jury as follows:

The main questions in the case are: First, whether the plaintiff had that kind of interest in the property which authorized him to insure it. There has been considerable evidence introduced upon that subject. I think for the present the court will say to you,—leaving it, as I have already intimated, to be considered hereafter if necessary,—that the plaintiff had a sufficient insurable interest in the subject matter of the policy.

If there was a mortgage on the property, given by Keeler, against whom the plaintiff obtained the judgment on which the execution issued, and under which he acquired his right to the property, and that mortgage was foreclosed and the right of the plaintiff to the equity of redemption gone before the property was destroyed, then he ought not to recover anything for the loss. But considering the manner in which that question is left by the proofs, for example the possibility that he might have had the right to come in and have the decree of foreclosure opened, on the ground that he was not actually served with notice; that Sharpstein, who was plaintiff in the proceeding of foreclosure, (as there is some evidence tending to show,) acted as his attorney and trustee for his benefit, I shall leave that matter to you under the instruction that the plaintiff may have had such an insurable interest in the property as to warrant him in making the application and in taking the policy. Of course where a party deals with an insurance company, it must be in entire good faith. If there was any misrepresentation made as to the interest, if for example he was interrogated by the agent of the company as to the nature and character of his interest and he misstated it, it would have avoided the policy. But it is in proof that he did actually state that the interest he had was under a judgment and execution, which turns out in point of fact to be true. He did not state, I believe, that there was a prior mortgage on the property, and there is no evidence to show that he was interrogated on that point before the issuing of the policy. If there were any intentional misrepresentation made at the time the insurance was effected, as to the value of the property, as that it was worth $2,000, when the fact was otherwise, that would also avoid the policy. A mere mistake made by the plaintiff unintentionally, not in bad faith as to its value, I think would not avoid the policy. He might suppose the property was actually worth more than it was. The misrepresentation must have been an intentional misstatement as to its value, and it is for you to say whether there was or not anything of that character.

Secondly. Another question made by the defendant is, that by the terms of the policy, it is provided that in case of loss not paid, suit to be available is to be brought within one year after the loss. There is, however, also a provision in the policy that the loss shall be paid within sixty days after the loss shall have been ascertained and proved. I have no doubt this provision in the policy is legal. It is such as the parties could annex to the terms of their contract; so that it was incumbent on the plaintiff, within the time limited by the policy, if he sought to recover in a court of justice an indemnity

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

for his loss, to bring the suit within twelve months; but it would be unfair, if the plaintiff were prevented from bringing his suit within that time, by the action of the company, that the latter should be permitted to avail itself of this condition annexed to the policy, so that the court would instruct you upon that point in substantially the language employed by the supreme court of this state; if a claim were made for indemnity against the loss within a reasonable time, and negotiations took place between the parties by which further proofs were required and given within a reasonable time, and the promise or intimation held out that the loss would be paid by the company, and in consequence of this the plaintiff was prevented from bringing the suit within the time, then the defendant could not be permitted to avail itself of the condition annexed to the policy. But it is absolutely necessary that the party should show that by the action of the insurance company itself, he has been prevented from bringing suit within the time prescribed; in other words, he, as a reasonable person, must be convinced that it was unnecessary for him to bring suit because the company was acting as if it would pay for the loss. If the conduct of the company is such, and the negotiations or communications between the parties are of such a character as to convince a reasonable person that the company will not pay for the loss, then it is the duty of the party who has sustained the loss to bring the action within the time limited.

In this case it is in evidence that various negotiations took place between the parties. The proof of the loss was furnished within a very short time. It was, during the winter of 1862-3, and up to the summer of 1863, declared to be unsatisfactory. Mr. Pattee, who is a party in interest, and who has testified before you, states that he went to New Haven for the purpose of closing this matter up, and it was said at that time, as it had been previously, that the proofs were unsatisfactory. Now if the plaintiff could see that they were simply waiting for some further proof, and that as soon as this was furnished the loss would be paid, and he was using due diligence, in good faith, to furnish the proofs, it might truly be said that the company, by its own conduct, induced him to suppose that the loss would be paid without any litigation, and therefore that it was unnecessary to commence a suit. As is said in one of the letters introduced before us, "It will be unnecessary for the plaintiff to resort to a court of law, provided the proof shall be furnished in accordance with the conditions of the policy." But the very moment, upon proof being demanded, the plaintiff, Curtis, made up his mind that he would not furnish any more proof, then he has no right to rely upon the action of the company, because there is an end of negotiations.

I cannot commend the manner of Mr. Pattee sticking for what he considered his rights in relation to the abstract of title. It was not acting precisely, I think, as he ought to have acted. He undoubtedly presumed be was acting strictly according to his rights; at the same time, the law always requires in these cases complete good faith, and a disclosure of all the facts. It would have been much more in accordance with the relations of the parties for them both to have maintained their temper, and both to have made a fair and full explanation in regard to the evidence. But while saying this, I am also obliged to say that I do not know that it was incumbent on the plaintiff, by the terms of the 9th section of this policy, to furnish the title papers. The language is, "What was the interest of the plaintiff in the property insured?" This he was required to disclose to the company, when called upon, but I doubt whether he was bound to produce all his title papers. He had already stated to the agent of the company what his interest was, and it seems, in point of fact, that it was ascertained subsequently that there was a mortgage, and that proceedings had taken place under the same.

The remaining question is, if you shall find that the plaintiff is entitled to recover, the amount which you shall fina in your verdict. The rule upon that subject is indemnity to the amount of the loss. The policy was upon the Keeler saw mills, and for $2,000, if that was their value. The question is, what loss did the plaintiff sustain in consequence of the fire? Of course it could not exceed $2,000 by the terms of the policy, but the plaintiff cannot recover for a greater loss than he actually sustained, and that cannot be beyond the actual cash value of the property destroyed at the time.

NOTE [from original report]. As to duty of the insured in disclosing character of his interest, consult Illinois Mut. Fire Ins. Co. v. Marseilles Manuf'g Co., 1 Gilman, 236; Commercial Ins. Co. v. Spankneble, 52 Ill. 53. If the agent is informed of the facts connected with such interest, and does not require a statement, the company is bound, even though the interest varies from the conditions of the policy. Atlantic Ins. Co. v. Wright, 22 Ill. 462; Keith v. Globe Ins. Co., 52 Ill. 518. The court of appeals of New York rule that if the officers of an insurance company state that payment will be made, and fix a day at which the time for bringing suit will have expired, the company is estopped from availing themselves of the limitation. Ames v. New York Union Ins. Co., 14 N. Y. 253. Consult, also, Ide v. Phoenix Ins. Co. [Case No. 7,001], and cases there referred to.

CURTIS (HOYT v.). See Case No. 6,808.

CURTIS v. The JOHN WURTS. See Case No. 7,434.

CURTIS (PICQUET v.). See Case No. 11,-131.

CURTIS (PRATT v.). See Case No. 11,375.

Case No. 3,504.

CURTIS et al. v. QUANTITY OF WEARING APPAREL.

[39 Hunt, Mer. Mag. (1858) 75.]

District Court, S. D. New York.

SALVAGE—DERELICT—COMPENSATION.

[One-half the value of certain boxes of wearing apparel, picked up in a heavy sea at some risk, awarded to the salvors.]

Before BETTS, District Judge.

This was a libel for salvage on a quantity of wearing apparel picked up derelict at sea in boxes by the libelants, Peter Curtis and others, the master and crew of the schooner J. T. Williams, in September, 1857. No one appeared for the goods, and they were sold for $250. The schooner and cargo were worth about $12,000. The salvage was made in a heavy sea, and under considerable risk and exertions on the part of the libelants and the schooner.

HELD BY THE COURT, that no circumstances are proved which call for an allowance of salvage exceeding the ordinary one in such cases of derelict. Decree, therefore, for the libelants for one-half the gross proceeds, and that the costs and charges be paid out of the other half; and that the salvage awarded be divided into nine parts, two shares each to the owner and master of the schooner, one and a half to each of the mates, and the other two shares to be divided equally between the cook and the four seamen.

CURTIS (RICHARDSON v.). See Case No. 11,781.

CURTIS (SIZE v.). See Case No. 12,920.

Case No. 3,505.

CURTIS v. SMITH.

[6 Blatchf. 537;[1] 1 Chi. Leg. News, 417.]

Circuit Court, D. Connecticut. Aug. Term, 1869.

TRUSTS—DIVISIBILITY—ADMINISTRATION—CONTINGENT ESTATE—LIABILITY OF ADMINISTRATOR OF DECEASED TRUSTEE—APPOINTMENT OF GUARDIAN—SUIT IN FOREIGN JURISDICTION.

1. An unexecuted trust, created by a will, for the use and benefit of H., and, in the event of his death, during his minority, for the use and absolute enjoyment of the heirs of N., is a unit, and cannot be separated into distinct trusts, nor can its administration properly be divided.

2. The trustee of such a trust must take the trust property encumbered with the whole trust.

3. It being one of the terms of such trust, that such portion of the estate as may be necessary shall be expended in the education and support of H., a court of equity will not permit H. to be deprived of a proper allowance for maintenance and education, in order to enhance the contingent estate for the benefit of the heirs of N.; nor will it permit the property to be wasted on H., without regard to the contingent rights of the heirs of N.

4. The administrator of a deceased trustee of such trust is not liable, in this court, to be sued in a suit at law, by the successor of such deceased trustee, to recover the trust fund, but can be called to account for such fund only in a suit in equity.

5. A person who is not appointed trustee under such will, but is only empowered to carry into effect its trust, so far as relates to H., has no right to the custody of the trust fund.

6. In an action at law, this court is governed by the laws in force in Connecticut, when those laws relate to the substantial rights of the parties, and not to mere matters of practice.

7. It is the law of Connecticut, that a guardian must be constituted such by an appointment made in Connecticut, before he can bring an action in a court in Connecticut, to recover property claimed by him as guardian.

8. The statute of Connecticut, passed in 1854 (Gen. St. Conn. 1866, 316, 317), does not confer on a foreign guardian the right to sue in Connecticut, either at law or in equity.

[See Allen v. Philadelphia Sav. Fund Soc., Case No. 234.]

9. Semble, that, where the legal title of a trustee is created by the owner of property, the right of the trustee to enforce it will be recognized every where; but, where such title is derived solely from some act of the law, the effect of that act is confined to the territorial jurisdiction over which the law extends.

10. Whenever a trustee of the latter description seeks to exercise his powers in another state than that under whose laws he was appointed, he must first have his appointment repeated by the local tribunal having jurisdiction over the appointment of trustees.

11. A trustee of the former description, where the trust is created by a will, must, whether he be appointed trustee by the will or otherwise, prove the will in the local jurisdiction where the trust fund is in the hands of a person from whom he seeks to recover it, before he can maintain a suit against such person therefor.

This was an action at law [by Joseph Curtis, trustee, against Haskell G. Smith, administrator, etc., of Cicero Collins, deceased] for an account, tried before the court, without a jury.

Daniel B. Beach, for plaintiff.

Origen S. Seymour, for defendant.

SHIPMAN, District Judge. On the 8th of June, 1860, Alida M. Benson, of Chicago, Illinois, died, leaving a last will and testament, which, among other things not necessary to mention here, contained the following clauses: "My pianoforte and silver I give and bequeath to my nephew, Homer Collins, son of Nelson Collins, and I direct that the care and custody thereof during the minority of said Homer, be given to his father. All the rest and residue of my property, consisting of bonds, promissory notes, and debts due and owing to me, and all securities by way of mortgage or otherwise, given for the payment thereof, I hereby give and bequeath, subject to the payment of my just debts, and the charges and legacies hereinbefore named, to my brother, Nelson Collins, in trust, never-

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

theless, for the following uses and purposes, that is to say: That my said brother shall collect the same, and invest the proceeds arising from such collections, for the sole use and benefit of my said nephew, Homer Collins, for and during his minority, and, when he shall attain the age of twenty-one years, then that he give said proceeds, with all the increase thereof, to the said Homer absolutely; but, in case the said Homer shall die during his minority, leaving any brother or sister him surviving, then, and in that case, the said proceeds, with all their increase, over and above what shall have been expended for and on account of said Homer, to be held after his decease for the use and benefit of the remaining child or children of the said Nelson, for and during their minority, and to be divided between them, share and share alike, as they shall respectively attain the age of twenty-one years; but, in the event of the decease of the said Homer during his said minority, leaving no brother or sister him surviving, or, in the event of the decease of the remaining child or children of the said Nelson during their minority, then, upon the decease of the said Homer, in the one case, and the decease of the remaining child or children, in the other case, said proceeds then remaining, with all their increase, to go to such person as said Nelson shall in writing appoint, to be held by such person for the sole use, benefit and enjoyment of said Nelson for and during his life, and to be used, managed, controlled and disposed of in such way or manner as he, the said Nelson, shall direct, and, in the event that any portion thereof shall remain at the time of his decease, the portion then remaining to go to such person or persons, use or uses, as he, the said Nelson, shall, in and by his last will and testament, appoint, and, in default of such appointment, then to the heirs of said Nelson." The testatrix appointed Seth Wadhams to be her executor. The will was duly probated in the county court for the county of Cook, Illinois, and the estate of the deceased was there settled. Nelson Collins, to whom the above bequest was made in trust, died, at sea, on the 18th of January, 1861, his wife, the mother of Homer, having died previously. The domicil of Homer Collins, the cestui que trust named in the will, has always been and now is in the state of New York. On the 23d of April, 1861, Cicero Collins, then of the city of New York, was, by the supreme court of that state, appointed "trustee, in place of Nelson Collins, deceased, and directed and fully empowered to execute the trust in and by said will directed in favor of said Homer Collins." Homer Collins was then, and is still, an infant, under the age of twenty-one years. Cicero Collins accepted the appointment of trustee, and, on the 22d of May, 1861, duly filed his bond for the faithful performance of the trust. On the 5th of October, 1861, he received from Wadhams, the executor of the will, the property bequeathed in the clauses of the will above cited, and gave his receipt therefor. He subsequently converted the same into money, amounting to several thousand dollars, and held the avails thereof in his hands at the time of his death, which took place at Litchfield, Connecticut, which place was then his domicil, in 1866. The court of probate for the district of Litchfield, having jurisdiction of the settlement of the estate of Cicero Collins, appointed Haskell G. Smith, the defendant, administrator thereon, which trust he accepted, and gave bonds for its performance. Nelson Collins left no children other than Homer, the one named in the will, and left no will. On the 24th of February, 1868, the supreme court of the state of New York, at a special term held at Rochester, the domicil of Homer Collins, appointed the plaintiff "trustee under the will of the said Alida M. Benson, to execute and carry into effect the same, so far as it relates to the infant Homer Collins." The trustee accepted the appointment, and gave bonds. He has now instituted the present suit against the defendant, as administrator of Cicero Collins, the former trustee. It is an action at law, for an account, and the declaration alleges, that Cicero Collins, in his lifetime, as bailiff and receiver of the minor Homer Collins, received from Wadhams, the executor of Alida M. Benson, eight thousand dollars, and from other sources two thousand dollars. It is conceded, that whatever property or funds Cicero Collins received, came, in some form, from the estate of Alida M. Benson, and under her will, as above cited.

The defendant has pleaded the general issue, and also set up several specific grounds of defence: (1) That the supreme court of New York had no jurisdiction to appoint the plaintiff trustee, as set forth in the declaration; (2) that, whatever appointment the plaintiff in fact received from the supreme court of New York, that appointment conferred upon him no power to act within the limits of the state of Connecticut, or bring this suit in this court; (3) that, whatever may have been the relations existing between Cicero Collins and the minor, the former was never trustee of the estate of the latter, nor bailiff or receiver of any part of his estate, or liable to be sued in an action of account; (4) that the defendant, as administrator of Cicero Collins, deceased, is not liable to be sued in an action of account by the minor, or any one in his behalf. These four points are set up by notice, under the general issue, according to the modern practice of the state courts in Connecticut, and, as no objections have been raised to this form of presenting the questions in this court, all such objections are deemed to have been waived by the plaintiff, and the court, for the purposes of this case, takes the questions as if more formally pleaded.

The will, after the bequest of the pianoforte and silver to Homer Collins, already cit-

ed, makes certain other devises and bequests, which need not be noticed in this case. Then follows the residuary clause, above cited, giving to Nelson Collins the property in question, in trust for the uses set forth. Both Nelson Collins and his wife, the parents of Homer Collins, being dead, leaving no issue except Homer, the scope of the trust created by the will is narrowed. In case of Homer's death before attaining his majority, a contingency provided for in the will, he can leave no brother or sister. Nelson being dead, the contingency upon which he was to appoint a trustee to hold the property for his use and benefit, can never occur. He left no will making any appointment touching the trust property. Whether he had the power to make such an appointment by will, previous to the death of Homer, need not be determined. All the provisions of the trust have, therefore, fallen, except those which relate to the interests of Homer Collins and of the heirs of Nelson Collins. The trust, then, created by the will, as it now stands, is, first, for the benefit of Homer, and, second, in the event of his death, before his majority, for the benefit of the heirs of Nelson Collins. It is quite possible that the heirs of Nelson Collins, and those of Homer, may be identical; but it is not necessary to decide this question. If they be identical, that fact has no importance in relation to this property, for, upon the death of Homer, during his minority, the property must go, under the will, "to the heirs of said Nelson." The fact, if it be so, that the heirs of Nelson and Homer are identical, would make no difference. If they take by the happening of the contingency upon which their right is suspended, they take as a description of persons under the will, and not by descent from either Nelson or Homer. This is, therefore, an unexecuted trust, for the use and benefit of Homer Collins, and, in the event of his death, during his minority, for the use and absolute enjoyment of the "heirs of Nelson Collins." Such a trust is a unit, and cannot be separated into distinct and several trusts, nor can its administration properly be divided. The trustee, when properly appointed, must take the property encumbered with the whole trust, and be held accountable to the heirs of Nelson Collins, as well as to the primary cestui que trust, Homer. The trust continues till the latter arrives at the age of twenty-one years, if he shall live so long, when it must terminate by the payment of the estate over to him. If he should die during his minority, then the trust must terminate at his death, by the payment of the same over to the heirs of Nelson.

From the language of the will creating the trust, it is evident that the testatrix intended that such portion of the income (and perhaps such portion of the principal) as might be necessary, should be expended in the education and support of Homer. For an equitable administration of the trust in this particular, the trustee would be accountable both to the minor and to the heirs of Nelson, and his expenditures therein would be under the control of the proper tribunal, on the application of either of these parties. A court of chancery would not permit Homer to be deprived of a proper allowance for maintenance and education, by the niggardly parsimony of a trustee, in order to enhance the contingent estate for the possible benefit of the heirs of Nelson. On the other hand, it would not permit the property to be improperly lavished on the primary cestui que trust, without regard to the contingent rights of those heirs.

This being, then, an indivisible, open and unexecuted trust, the question arises, whether the administrator of the deceased trustee is liable to a suit at law for the trust fund. The question can be easily answered. The authorities are uniform and decisive on the point. In Barings v. Willing [Case No. 985], Mr. Justice Washington remarks: "Courts of equity have always claimed and exercised exclusive jurisdiction in cases of trusts, and over the conduct of those appointed to execute them. This has never been disputed ground. No other tribunal can so properly direct the manner of executing them, or inquire into and correct abuses, where there has been, or is likely to be, mismanagement by the trustees. No other court can so conveniently provide against those unforeseen casualties which may defeat the will of the party who created the trust. It would be a reproach upon the administration of justice, if a court of equity did not possess these powers, since it must be admitted, on all hands, that they cannot be exercised by the courts of common law." See, also, 2 Swift, Dig. 117; 2 Story, Eq. Jur. § 1058; Adams, Eq. pp. 26, 27. This is the general doctrine and has been uniformly adhered to. As is remarked by Nelson, C. J., in Dias v. Brunell, 24 Wend. 9, 13: "It cannot be necessary for courts of law, at this day, to repudiate any such jurisdiction; they never possessed it, and are sufficiently burthened with their own legitimate duties, if no other considerations influenced them, not to desire a most inconvenient enlargement, by usurping the peculiar province of another forum. 5 Ves. 581; Willis, Trusts, 7, 8, note k, and 16; Lewellin, Trusts, 20; 2 Hall, 130."

Had the present suit been brought against Cicero Collins during his lifetime, he could, beyond all doubt, have effectually interposed this objection to the jurisdiction of this court, as a court of law. He was liable to be called to account only in a court of equity. Now, I apprehend that the administrator of the deceased trustee stands, in this particular, in the same position as his intestate stood. He took the estate, not as administrator, but as trustee for the time being. Tiff. & B. Trusts, 325, 326. The fund does not belong to the estate of the deceased, and is not assets in the hands of his administrator. It is not to be applied for the benefit of the creditors or

distributees of Cicero Collins' estate, but is to be held, protected and disposed of in accordance with the directions in the will. Dias v. Brunell, 24 Wend. 9, 13.

It must be remarked, that there is no claim or evidence of any express promise by Cicero Collins, or by his administrator, to pay over any portion of this trust fund, and, if there had been, it may well be doubted, whether a court of law would be justified in holding such a promise a sufficient foundation for an action at law. Such a proceeding against a trustee is only allowable where he has some distinct, separate and ascertained balance in his hands, to which some particular party is entitled, and which the trustee has expressly promised to pay. In such a case, a suit at law will lie against the trustee individually. Dias v. Brunell, 24 Wend. 9, 13.

But there is another very serious difficulty in this case—one which exemplifies the mischief and impracticability of attempting to deal with such a trust as this in a court of law. As I have already shown, this is an indivisible trust, created by will, and, though now narrowed in its scope, by the death of an intermediate party, it is a trust to be held and executed for the benefit of Homer Collins, in such a manner as to protect the contingent rights of the heirs of Nelson Collins. Now, the plaintiff in this case was not appointed to execute this trust. His appointment purports to authorize him only to "execute and carry into effect the same, so far as it relates to the infant Homer Collins." Surely, it requires neither argument nor authority to prove, that the trust created by this will cannot be parcelled out in this way, and the whole fund be vested, by a judgment at law, in a person who at most is authorized to act only in behalf of one branch of the trust and of one of the parties thereto. Even a court of equity would not be justified in directing this fund to be delivered to a trustee clothed only with these limited powers, and subject only to such limited responsibilities.

It follows, from these views, that this trust fund cannot be recovered in this action at law. (1) The defendant, as representing the deceased trustee, is liable to account only in equity. The administration of the fund by the deceased should pass under the review of a court of equity, where his account can be properly settled and stated, so that, if there has been any diminution of the fund through his mal-administration, it can be clearly ascertained, and the trust estate be put in the way of being reimbursed out of the sureties of the deceased trustee, or out of the assets in the hands of his administrator. (2) The action at law must fail, because the appointment of the plaintiff is not that of trustee under the will, empowered to execute the trust therein created, but only to carry into effect the same, so far as it relates to the infant, Homer Collins. Such an appointment alone confers no right to the custody of this trust fund.

It has not escaped my attention that the pianoforte and silver, given by the will, are no part of the trust property. If they have been sold, the avails form no part of the trust funds. They were specifically given by the will to Homer. His father was merely to have the care and custody of the articles during the minority of his son. The latter took them by an indefeasible title, and, at his death, they go to his heirs, and are in no way embraced in this trust into which the residuary estate was thrown. As the father, to whose care and custody they were committed by the will, during the minority of the legatee, is dead, their custody now belongs to his guardian. But the plaintiff does not sue in this case, at least in form, as his guardian. If, however, his appointment by the supreme court of New York could be construed as clothing him with the rights, powers and character of guardian, he could not be permitted to maintain this action, even for the avails of this pianoforte and silver, for the obvious reason that he has not taken out letters of guardianship in this state.

In actions at law, this court is governed by the laws in force in this state, when those laws relate to the substantial rights of the parties, and not to mere matters of practice. Now, it is the settled law of this state, as well as of all, or nearly all, other states and countries, that foreign guardians cannot maintain suits beyond the territory in which they were appointed. Mr. Justice Story, in his Conflict of Laws (section 504a), remarks, after having stated the rule in regard to immovable property: "The same rule is applied, by the common law, to movable property, and has been fully recognized both in England and in America. No foreign guardian can, virtute officii, exercise any rights, or powers, or functions over the movable property of his ward, which is situated in a different state or country from that in which he has obtained his letter of guardianship. But he must obtain new letters of guardianship from the local tribunals authorized to grant the same, before he can exercise any rights, powers, or functions over the same. Few decisions upon the point are to be found in the English or American authorities, probably because the principle has always been taken to be unquestionable, founded upon the close analogy of the case of foreign executors and administrators." In a learned note to Andrews v. Herriot, 4 Cow. 529, the reporter says: "But persons coming en autre droit, under the appointment of foreign laws, cannot be parties. To entitle them to be received as such, they must have their appointments repeated under our laws." The precise point was directly decided by Chancellor Kent, in Morrell v. Dickey, 1 Johns. Ch. 153. He held, in that case, that a mother duly appointed by the orphans' court in Philadelphia was not entitled to receive a

legacy due to her infant son, from an administrator in New York. The chancellor remarked: "It is only in her character of guardian duly appointed here, upon requisite security, that she can entitle herself to receive the legacy of her son." As intimated by Mr. Justice Story, this doctrine has undoubtedly been regarded as resting upon the same principle as that which holds foreign executors and administrators under a disability to sue until they have received authority from the local tribunals authorized to grant the same. This was evidently the view of Chancellor Kent, in Morrell v. Dickey, and of Judge Cowen, in his note to Andrews v. Herriot; for, the cases they cite in support of the position they take, are all, or nearly all, those which relate to the rights and powers of foreign executors and administrators. The doctrine, so far as it relates to executors and administrators, has repeatedly received the sanction of the supreme court of errors of Connecticut, and once, at least, of the circuit court of the United States for this district. Hobart v. Connecticut Turnpike Co., 15 Conn. 147; Riley v. Riley, 3 Day, 74; Champlin v. Tilley, Id. 303.

This rule of law, touching the disability of foreign guardians, executors, &c., which has prevailed in Connecticut in common with other states, has never been abrogated. It has, however, been slightly modified by statute, but not to the extent of conferring the right to sue, either at law or in equity. By an act passed in 1854 (Gen. St. Conn. 1866, pp. 316, 317), it was provided as follows:

"Sec. 87. Whenever any executor, administrator, guardian or trustee, shall hold in his hands the personal estate belonging to any heir, legatee, or ward, under the age of twenty-one years, who is an inhabitant of another of the United States, and residing therein, such personal estate may be transferred and delivered to the legal guardian or trustee of such minor, appointed under the authority of the state where such minor resides, and having, by the laws of the state where appointed, power and authority to control the property of his ward.

"Sec. 88. Whenever such guardian or trustee shall be desirous to receive such property, he may file his application in the probate court where the will was proved, administration granted, or the appointment of the guardian or trustee in this state was made, stating the facts by reason of which he claims said property, and asking said court to direct that said property shall be delivered to him; and, upon his depositing in said court a copy of the record of his appointment under the authority of the state in which his appointment was made, certified conformably to the acts of congress relating to the certification of judicial proceedings between the states, and furnishing satisfactory evidence that such guardians and trustees have power, by the laws of the state where he was appointed, to control the estate of their wards, such court of probate may, in its discretion, direct such estate to be transferred to such guardian or trustee.

"Sec. 89. The executor, administrator, guardian, or trustee, shall transfer the personal estate of such heir, legatee or ward, to said guardian or trustee, according to the directions of said court, and take his receipt for the same, and shall make return of his doings under oath, which, with said receipt, shall be recorded in the records of said court, and said executor, administrator, guardian, or trustee, shall thereupon be discharged from all future liability for the property so transferred.

"Sec. 90. The courts of probate may direct guardians of minors residing in another state to pay over all, or a part, of the annual income of such minor's property, to be applied to the nurture or education of such minor, in the state where he or she resides."

These sections of the Connecticut statutes are of comparatively recent enactment, and were obviously made in view of the disability of foreign executors, administrators, trustees, and guardians to maintain suits in this state without first having their appointments repeated here. They were intended to partially obviate the difficulty arising from this disability, by permitting a resort to the discretionary power conferred upon the courts of probate in behalf of foreign minors entitled to property. No doubt, the primary object of the statute was to deal with those cases where legatees, distributees and wards under age, derive their right to property from estates of persons deceased here, in the place of their domicil, and where administration of their estates must be had. But the language of the act is broad enough to include property in the hands of a guardian or trustee and belonging to foreign minors, from whatever source derived. But the whole power in the premises is confided to the discretion of the courts of probate, to be exercised, if at all, in conformity with the provisions of the act. Beyond this, the disability to maintain legal proceedings to recover the property still remains. Therefore, the plaintiff cannot, even if he is to be deemed clothed with the rights and powers of guardian of Homer Collins, recover in this action the avails of the piano and silver.

I have already shown, that the trust fund, the fruit of the residuary clause in the will, cannot be recovered in this action. Nor can it be recovered in equity by the plaintiff, unless he shall first be appointed, by the proper tribunal, trustee under the will, and be clothed with the power and responsibility of administering the whole trust. This trust cannot be split up and confided to different hands, nor can the whole fund be committed to a trustee who is empowered to act only for one of the cestui que trusts, leaving the rights of others in abeyance, and to an uncertain fate. It follows, from these views, that judgment in this suit must be rendered

for the defendant. If this were an ordinary case, I should not feel called upon to extend this discussion further; but there are several very interesting questions which naturally arise out of the facts, upon which I shall venture to make some suggestions.

It is alleged in the pleadings, and was insisted on in the argument, that the trustee in this case, appointed by the court in New York, whatever might be the powers conferred upon him by such appointment in his own state, cannot, virtute officii, maintain a suit beyond the jurisdiction of that state. No direct authority on this point was cited at bar, and, after a somewhat extensive and diligent search, I have been unable to find any case in which such a question is discussed in relation to foreign trustees. But I apprehend, that, where the legal title of the trustee is created by the owner of the property, it would be respected, and the right of the trustee to enforce it be recognized everywhere. It would not be deemed material that the legal title was encumbered with a trust. The jus disponendi would be acknowledged and effect given to it, though, of course, any requirement of the local law as to formalities must be observed. Thus, if the title of the trustee is created by will, the will must be proved in the state where the suit is brought, according to the local law, to give effect to any title under it. So, if the legal title be by deed, the deed must be proved according to the local law. In this regard, the legal title of a trustee does not differ from any other legal title, and he can everywhere enforce that title by legal proceedings, the same as any other owner. But, if the title is not derived from the jus disponendi of the owner, but solely from some act of the law, the effect of that act is confined to the territorial jurisdiction over which the law extends. This is the principle which has governed the cases of executors, administrators, and guardians, and I see no reason why it should not prevail in regard to trustees appointed by local law. As the trustee, in such a case, derives his title, not from the jus disponendi of the owner, but from the law of the state under which he is appointed, this title, as well as the right to enforce it by legal remedies, must cease to operate when he enters a foreign jurisdiction. Whenever he seeks to exercise his powers in another state than that under whose laws he was appointed, he must first have his appointment repeated by the local tribunal having jurisdiction over the appointment of trustees.

Now, as already intimated, had the present plaintiff been named in the will as trustee, he would have received the title to this estate from the jus disponendi of the owner, and this title would have enabled him to sue in this state, on compliance with the formalities required by its laws. These formalities are, the probate of the will in this state, and a bond for the due performance of the duty imposed by the will, so far as the property in this state is concerned. But the plaintiff received his appointment from the supreme court of New York. Still, the character of the title he took, (assuming now that the latter court had jurisdiction, and that the appointment was that of a full trustee,) and the character of the trust with which it is encumbered, depend wholly on the will by which the trust was created. No court, either of law or equity, could properly proceed a step in aid of the trustee, until the will had been produced and probated here. Judge Redfield, in his treatise on the Law of Wills (volume 1, p. 401), remarks: "In those American states where the probate of wills is conclusive, both of real and personal estate, the courts of equity will not assume jurisdiction to compel the performance of a trust arising under a will proved in another state, but of which there has been no probate, or its equivalent, by filing a copy of the original probate in the state where the trust is claimed to be enforced, and into which state the funds belonging to the estate have been removed by the personal representatives. Such probate and administration is entirely local, and the personal representative appointed in one state, or his authority, cannot be recognized in any other state." This doctrine is supported by the cases of Campbell v. Sheldon, 13 Pick. 8, and Campbell v. Wallace, 10 Gray, 162, and, although reference is made in them to the statute of Massachusetts. the general principle is not dependent upon those statutes.

It would seem, then, that a trustee under this will, whether named in the will, or appointed by the tribunal to which jurisdiction belongs, must, before he can maintain a suit in this state, prove the will in that probate district where the fund is in the hands of the defendant. Undoubtedly, the judge of the probate court would be authorized to accept, as proof of the due execution and validity of the will, an exemplified copy of the same, with the foreign probate thereof in Illinois, the domicil of the testator. Indeed, the production of the will, with the proceedings and decree of the foreign court admitting the same to probate, would seem to exclude all other proof, and to require that auxiliary probate here should follow as of course. Enohin v. Wylie, 10 H. L. Cas. 1.

It is hardly necessary to add, that the statutes of Connecticut authorize the probate of foreign wills in this state. This will has not been probated in Connecticut, nor is there any proof before this court that it has ever been probated in New York. An exemplified copy of the probate in Illinois is produced, but this would not aid this court, as it has no probate jurisdiction, and no means whatever to give effect to the will in this state. That must be done by the probate tribunals of the state. I do not overlook the fact, that this fund has been brought into this state since the settlement of the estate; but that is not material. The fund is here, and it is encumbered with a

trust. The fund and the trust are derived from the will, and the trustee must claim under that instrument, in addition to the authority conferred upon him by his appointment by the supreme court of New York. He must, therefore, probate the will in this state, before he can enforce the title under this trust here. He must also be appointed in proper form, and by the proper tribunals, both in New York and in this state. The proper form undoubtedly is an appointment as trustee under the will, to execute the entire trust, with a bond holding him responsible for the interest of all persons who have any rights, contingent or otherwise, under the will.

Which is the proper tribunal to make the primary appointment of the trustee, is not so clear. The trust was created by a will executed at the domicil of the testatrix, in Illinois, where her death took place, her will was probated, and her estate settled. But neither the fund, nor the primary cestui que trust, nor any other party interested in the same, resides in that state. The primary cestui que trust, Homer Collins, has his domicil in New York. But there is no fund there, nor, so far as it appears in the proof, has this will ever been probated there. Of course, that omission could be easily supplied, if need be, before other proceedings are instituted. The will being proved and made effective in New York, where the primary cestui que trust resides with his grandparents, his natural guardians and protectors, it would seem to pertain to that jurisdiction to appoint the trustee, and supervise the administration of the trust. Certainly, the trust could be more intelligently and economically administered by a trustee residing in the vicinity of the ward. It was undoubtedly the expectation of the testatrix that the fund would be held in New York, as the trustee whom she appointed resided there, as well as the cestui que trust. The fund, which is now temporarily in the hands of the defendant, should be returned to the domicil of Homer Collins. The only object I have had in view, in touching upon this point, has been to suggest the question as to which jurisdiction should primarily appoint the trustee. As I have already stated, inasmuch as the trustee is to obtain the fund from one jurisdiction, and hold and execute the trust in another, he must receive an appointment from both. It may, after all, not be important which court first appoints him. The only material point is, that he should be first appointed and qualified in New York, before any court sitting in Connecticut could properly direct the fund to be passed over to him. If it should be contended that Illinois, the domicil of the testatrix by whose will this trust was created, is the proper jurisdiction to appoint a successor, it may be replied, that both the beneficiaries and the fund are situated elsewhere. There is nothing but the will, and its original probate in that state, upon which its jurisdiction can act; and, as the fund was received by the deceased trustee under an appointment by the court in New York, and was brought into that state by him, and from there into this state, perhaps his administrator would be estopped from denying the authority of that court to appoint his successor. At all events, after a proper appointment there, the plaintiff can prove the will here, have his appointment repeated here, and then apply to the court of probate, under the statute of Connecticut already cited, or apply directly to this court.

It is no more than just to the defendant to say, that he admits that his intestate received the property in question from Wadhams, the executor of the will, as trustee, and brought into this state the avails, which are now in the defendant's hands; and that, as administrator, he is ready and anxious to pay over whatever has come into his hands, after the account of his intestate, as trustee, shall have been properly adjusted. His only solicitude is to pay to the person properly authorized to receive, and in accordance with the law.

CURTIS (UNITED STATES v.). See Cases Nos. 14,904 and 14,905.

CURTIS (WIGHT v.). See Case No. 17,628.

CURTIS (WOODWORTH v.). See Cases Nos. 18,012 and 18,013.

CURTIS (WRIGHT v.). See Case No. 18,-075.

CURTIS (YATES v.). See Case No. 18,127.

Case No. 3,506.

CURTISS v. GEORGETOWN & A. TURNPIKE CO.

[2 Cranch, C. C. 81.][1]

Circuit Court, District of Columbia. Nov. Term, 1813.

GENERAL ISSUE IN ACTION OF DEBT—EVIDENCE OF FRAUD OR IRREGULARITY.

In an action of debt founded upon an injunction taken under the charter of the Georgetown & Alexandria Turnpike Company, of the 3d of March, 1809, the defendant, upon the plea of nil debet, may give evidence of fraud, or partiality, or irregularity on the part of the jurors who took the inquest. But the jurors themselves cannot be examined as witnesses of each other's conduct. It is necessary that all the jurors sworn should agree to the inquest.

Debt for $3,000, the damages assessed by an inquisition taken under the act of congress of the 3d of March, 1809 (2 Stat. 539), incorporating "The President, Directors, and Company of the Georgetown and Alexandria Turnpike Road." This inquisition had been quashed by the circuit court, but their decision was reversed by the supreme court of the United States, because the circuit court had no jurisdiction of that matter.

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

6 Cranch [10 U. S.] 233. At the last term the defendants demurred to the declaration in the present case, because it contained no profert of the inquisition, nor prout patet per recordum.

But THE COURT overruled the demurrer, and adjudged nil debet to be a good plea; under which plea the defendants now offered evidence of partiality, fraud, and misconduct on the part of jurors upon the inquest.

To this E. J. Lee and Mr. Swann, for the plaintiff, objected that these are facts of which the plaintiff cannot be supposed to be conusant, or to be prepared to controvert. The plea of nil debet does not deny the validity of the inquisition.

THE COURT, however, (THRUSTON, Circuit Judge, absent) permitted the evidence to be given.

The defendants then offered Mr. Threlkeld, one of the inquest, as a witness to prove the improper conduct of the other jurors. But THE COURT refused, on the ground of the general policy of refusing to hear the mutual recriminations of jurors.

Mr. Key, for the defendant, then objected that the inquisition should have been assented to by all the jurors who were sworn. Whereas, although it was signed by all who were sworn (16), it was agreed to by 12 only.

E. J. Lee, contra. The act cannot mean that the whole 24 should agree. It says there shall be not less than 12; from which it is to be inferred that if twelve agree, it is sufficient. The supreme court said that if the inquisition had been found by 11 jurors it would have been void; implying that if 12 had agreed it would have been good.

THE COURT stopped Mr. Key from reply, and instructed the jury that the inquisition was not sufficient in law to support the plaintiff's action; it appearing on the face of the inquisition, and by parol testimony, that all the jurors sworn did not agree thereto, although all signed it.

The plaintiff took a bill of exceptions, but did not prosecute a writ of error.

CURTISS v. STORRS. See Case No. 1,291.

CURTIUS (WILSON v.). See Case No. 17,800.

Case No. 3,507.

CURTS et al. v. CISNA et al.

[7 Biss. 260;[1] 8 Chi. Leg. News, 402.]

Circuit Court, W. D. Wisconsin. Aug., 1876.

AGENT CANNOT ACQUIRE ADVERSE TITLE — BONA FIDE PURCHASER — MUST HAVE OBTAINED THE LEGAL ESTATE.

1. An agent to pay taxes on the lands of his principal, cannot acquire a valid tax deed on the same when they have been sold for taxes.

2. Where an agent had acquired a tax deed on the lands of his principal, and had contracted to sell the same to a third party, who had no notice of the fraud, but his agent, in making the purchase, had such knowledge, and such purchaser had received a contract only for a deed, and had paid two-thirds of the purchase-money, *held*, that the fact that the agent of such purchaser had had knowledge of such fraud, was not sufficient to affect his principal, unless the facts and circumstances were such as to show that he had the same in mind at the time of the transaction of the purchase; but that the right of such purchaser to call for a conveyance from the fraudulent grantee in the tax deed, was an equitable right merely, and that the right of the original owner being the oldest equity, must prevail.

3. A purchaser under a contract for a deed, though he may have paid all of the purchase-money is not protected as a bona fide purchaser; nor, if he has not obtained a conveyance of the legal estate, can he insist on the re-payment of what he has paid on the contract as a condition of surrendering his claim. He must rely on the responsibility of his vendor.

[See Baker v. Whiting, Case No. 787.]

4. A purchaser without notice will not be protected against the superior equity of an adverse claim, and where a party had purchased what in reality was only a tax title, he must be held as having assumed the burden of maintaining that such tax title had extinguished the patent title, and which, as to him, was an adverse one.

In equity.

Gregory & Pinney, for complainants.

Tyler & Dickinson, R. J. McBride, and B. F. French, for defendants.

Before DAVIS, Circuit Justice, and HOPKINS, District Judge.

HOPKINS, District Judge. The bill [by John F. Curts and others] in this case charges that one Horatio Curts was in 1865 the owner of the land in controversy, being 320 acres of heavily timbered land in Clark county, in this state, and that he employed the defendant [Stephen] Cisna as his agent to pay the taxes thereon, as well as upon other lands owned by him in that vicinity, as he was a non-resident, and furnished him the funds necessary for that purpose; that the general taxes due in the winter of 1865, were paid by defendant for him, but a special war bounty tax was levied in February, 1865, of about $13, of which he had no notice, and for which the land was sold in May, 1865, without his knowledge; that the defendant Cisna continued to pay his taxes up to the time of his death in 1868; that on his death his property descended to John Curts, his father, who thereafter continued to employ Cisna to pay the taxes for him, as he had before done for Horatio, his son, and that he furnished the necessary funds to pay all taxes, and to redeem from tax sales as might be necessary, up to the time of his death in March, 1874; that the defendant Cisna paid the taxes up to the time of his death, either directly or by redemption, and never notified him of the tax deed mentioned in the complaint, or of the existence of the tax for which it was given; that in 1869 Cisna, discovering that the land had been sold for the special tax in 1865, and that the certificates

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

were outstanding, purchased them, and on the 15th of June, 1869, took a deed thereon to himself, which he immediately had recorded; that after the deed to him he paid the taxes thereon with Mr. Curts' money the same as before, and sent receipts to him; that on the death of John Curts the claimants in this case succeeded to his interest and title as his heirs-at-law; that the defendant Cisna, on May 29, 1874, contracted to sell the lands for $1,500 to the defendant Gage, through the agency of one B. F. French, an attorney residing in Clark county, who acted as Gage's agent. The bill then charges that the land was worth $8,000, and that Mr. Gage or Mr. French, his attorney, had notice of the facts and circumstances under which defendant Cisna obtained the tax deed, and that only a part of the consideration agreed upon had been paid, and no deed had been executed or delivered by Cisna to Gage of the premises. The bill prayed that the defendants might be required to release all claim under the tax deed and that it might be decreed void against them.

The defendants file a joint and several answer, in which they admit the land to be worth $8,000, as charged in the bill, and that Cisna's title was a tax title, as stated in the bill. They deny that he was the agent of either Horatio or John Curts to pay their taxes on the land as alleged, and they allege that John Curts had notice of the tax deed, and deny that either Gage or French, his agent, in making the purchase had any knowledge or notice of Cisna's relations with the Curtses, or that he was their agent or owed them any duty whatever. It does not state when they or either of them first had notice of the plaintiff's claim, nor whether it was before or after the second payment of $500 in 1875, nor does it claim that a deed has been executed to Gage, or that he has any other right than is derived under the contract set out in the bill.

Upon these issues testimony has been taken, from which it appears most conclusively that Cisna was the agent of both Horatio and John Curts for the payment of their taxes on this land as charged in the bill. The defendant's letters to them, and the tax receipts sent them by him, place that question beyond all doubt, and convict him of a most deliberate and outrageous fraud in the transaction of obtaining the deed, and also of falsehood in his testimony in denying the agency. It is seldom that parties are enabled to establish the rascality of an adversary so incontrovertibly as the plaintiffs in this case have that of the defendant Cisna.

It appears that on the day he took this deed, he paid all the general taxes due or unpaid on the land, out of Mr. Curts' money, and sent to him the receipts and his account, including a charge of $5 for his services, and also $5 paid B. F. French for services, and wrote him as follows: "I went to Clark county and paid the taxes; your land is all clear now, except some that lies back from the river, there is a tax deed on, which was given in 1864," and again on the 16th of June, 1869, the day after he had taken and recorded this deed, he wrote him again about paying the taxes in Clark county, in which he said "the land is all clear now" with the exception of the old tax deed of 1864, and that he would see if that could not be released for the costs.

In view of these letters and receipts it seems preposterous that he should claim the land under that deed, or attempt to deny his agency. It must have required some courage coupled with a great degree of moral depravity on his part to deliberately write a falsehood of that character to his employer, who had trusted his interests in his hands. It looks like a carefully contrived scheme to defraud his employer of this valuable property. He paid the general taxes and sent receipts therefor, and took the deed for the special tax, which was unknown to his principal, and therefore would not likely be discovered, as there would be no occasion for examination in regard to such a tax. He doubtless thought if he could conceal the existence and record of the deed for three years, the principal's right to impeach it would be barred, as the statute of this state limits the right of an original owner to three years to bring an action to defend or set aside a recorded tax deed.

But this is not all of his fraudulent conduct. He continued to pay the subsequent taxes out of Mr. Curts' funds, and to send him the receipts. This became a necessity to avoid inquiry on the part of Mr. Curts, and the consequent investigation, which would necessarily expose him before his scheme had existed three years. It is true, he swears that he told Mr. Curts of the existence of this deed in 1870, but his testimony on that point, Mr. Curts being dead, was incompetent. But if not incompetent, it is incredible. A careful examination of the letters written by him to Mr. Curts after that time (and they are numerous) shows that no mention was made of any such deed, although reference is made to tax deeds on other portions of his land. From this silence we are constrained to discredit his testimony upon that point, as well as upon the question of his agency. It is also true that a Mr. Bowman swears that he told Mr. Curts of this deed in 1870, and so does Mr. B. F. French testify that he spoke to him about it once. But from the whole evidence and conduct, the transactions of the parties, Curts and Cisna, subsequent to that time, we think these witnesses must be mistaken; that their conversation must have related to some other tax deed, or have been understood by Mr. Curts as relating to some other tax deed.

The position occupied by Mr. French in reference to this matter is not wholly free from suspicion. The evidence may not be sufficient to charge him as a confederate of

Cisna, but there are circumstances that require close scrutiny into his conduct, motives and testimony. He swears he had the tax certificates and sold them to Cisna, knowing they were on Curts' land, on condition that Cisna should take a deed and not let Curts have them, and yet charges $5 for services rendered to Mr. Curts on the day of the deed, that Cisna paid, and neither he nor Cisna is able to state what those services were, and very soon after Mr. Curts' death, we find him negotiating for this title with Cisna, and all in the name of Mr. Gage, the other defendant. It is also shown that Cisna paid him $50 out of the first payment for his services in buying the land from him, which, in short, was paying him for buying this land of him for a client of his—a transaction almost as questionable as that of Cisna in taking the tax deed. He probably knew all about it, but as there is no proof that he acquired such knowledge during the time he was acting as agent for Gage, Mr. Gage's rights would not be affected by his former knowledge, unless we presumed that he had the facts of the case in his mind at the time, which his evidence negatives. But it is not necessary to pursue the examination of Cisna's rights any further. He did not acquire any rights under the deed, and is not entitled to any benefit or advantage therefrom, and whatever he has received he should pay back, either to his co-defendant, from whom he received it, or to the complainants, the victims of his contemptible fraud.

This brings us to the consideration of the rights of the defendant Gage. In the answer, the rights of a bona fide purchaser are claimed for him. The facts to constitute him such are imperfectly stated in the answer, but as the parties have gone to a hearing, we will examine the question upon its merits, not regarding any technical imperfections in the pleadings. The defendant Gage is not within the authorities a bona fide purchaser, for to constitute such the purchase must be completed by a deed, and the consideration be fully paid, before notice of complainant's rights. Hill, Trustees, marg. p. 514 et seq.; Boone v. Chiles, 10 Pet. [35 U. S.] 177, 242. See Lead. Cas. Eq. p. 93 et seq. See, also, Hunter v. Simrall, 5 Litt. [Ky.] 62; Blight's Heirs v. Banks, 6 T. B. Mon. 192; Halstead v. Bank of Kentucky, 4 J. J. Marsh. 555; Moore v. Clay, 7 Ala. 742.

In this case the consideration was not fully paid, nor was there a deed to Mr. Gage. The title, while in the vendor, Cisna, is considered as held for the benefit of the prior equity in preference to those of later origin, so that the defendant Gage is not entitled to the land. The only question remaining is whether he is entitled to have the amount he had paid toward the purchase, to wit, the $1,000, refunded before the surrender of his claim. This involves the consideration of a good many questions, and first, not being a bona fide purchaser, not having the legal title, can his interest be considered as other than an equitable right, and if so, does he not fall within the rule that when both parties' rights are equitable, the older prevails? The equitable right of these complainants to this land as against the defendant Cisna, under whom the defendant Gage claims, is clear and unquestionable. His title, the tax title was obtained without any act or deed on their part, and was obtained by fraud and without consideration to them, so their equity is perfect and the older.

The defendant Gage has a contract for the land upon which he has paid $1,000, before the commencement of this suit. Now, is his interest anything but an equitable one? If not, it must yield to the complainant's. In Peabody v. Fenton, 3 Barb. Ch. 451, 465, it is held that if a bona fide purchaser has not obtained the legal title by a valid conveyance, he cannot protect himself against the prior equity of the original owner, although he has a contract for the purchase and has actually paid for the land; and cites, in support of that doctrine, Wigg v. Wigg, 1 Atk. 384; Tourville v. Naish, 3 P. Wms. 307; 2 Sugd. Vend. (9th Ed.) 274. In Boone v. Chiles, supra, the court examine the subject to ascertain who are entitled to the rights of a bona fide purchaser, and arrive at the conclusion that such rights exist only "when a prior equity can be barred or avoided only by the union of the legal title with an equity arising from the payment of the purchase price without notice and a clear conscience."

If this is a correct statement of the rule, the rights of a bona fide purchaser do not attach upon paying the purchase price and taking a contract for a deed, but only on a union of a legal title with the payment, and that until such union the right of the purchaser is equitable, and a prior equity must prevail. This view is supported by the weight of American and English authorities, and is fatal to defendant's claim of protection as to the $1,000 paid before surrendering his rights under his contract. He must look to his contract and seek redress of the party with whom he contracted.

But there are some other questions presented in this case that deserve some notice from their importance. The fact is admitted by the pleadings that the defendants contracted to buy this property for less than one-fifth of its real value. Is he entitled, in view of that fact, to be treated as a bona fide purchaser without notice? Under such circumstances, should not a court presume that he had notice of the defective and imperfect character of the plaintiff's title, particularly in the absence of any explanation on the subject? The purchaser of a promissory note at such a discount, would not, by the law merchant, be regarded as a bona fide holder for value to cut off the equities of the maker, and should a court of equity look with more favor upon a transaction apparently so unjust and unconscionable? It would seem to

be not consistent with the quality of equity to do so without some satisfactory explanation of such gross inadequacy, especially where the party claiming under such contract is seeking to defeat a prior equity of unquestionable character, as that of the plaintiff's in this case is.

This case differs in another important respect from the reported cases when the rights of the bona fide purchasers are discussed. In the most of them the plaintiff had voluntarily parted with the title, had made a sale and delivered a deed and was seeking to avoid it on the ground of fraud on the part of his grantee in obtaining it. In that class of cases courts of equity very properly lean toward the protection of a party who had bought, relying on the record and apparent title. But in this case, the plaintiffs and intestate have not conveyed; they had not clothed Cisna with any apparent title. The record shows them to be the original owners, and that Cisna's claim was adverse—only a tax title, which probably accounts for the inadequate price paid. The record disclosed also that Cisna had obtained this property, worth $8,000, for about $13.

This places the parties in a different attitude before the court. It is the case of the purchaser of an adverse title seeking the protection of a bona fide purchaser as against the real owners and claimants. No case has been found where the purchaser of an adverse title has been allowed to demand of the real owner what he may have paid for the adverse title as a condition of surrendering his worthless claim. In Moore v. Dodd, 1 A. K. Marsh. 103, it is held that a purchaser without notice will not be protected against a superior equity, deduced under an adverse claim. Mr. Gage knew his vendor's title was a tax title only, and should be held as having assumed the burden of maintaining that it had extinguished the title of the plaintiff, which was the record title, and adverse as to him.

Courts of equity should pause before going to this extent. A party who obtains "acres for cents," as tax title owners are charged with doing, hardly occupies a position which authorizes him to introduce to courts of equity, parties claiming under him as innocent purchasers as against the parties owning the original title. Grantees cannot be transformed so readily into subjects of favor in those courts. The taint of the original transaction will adhere to them until they show, at least, that they had paid full value, which might warrant a court in presuming that they had purchased in the belief that they were getting a good and perfect title. But when, as in this case, the purchaser pays only one-fifth of the real value, he cannot be entitled to claim the protection, or the favorable consideration due to a bona fide purchaser, but should rather be looked upon as a speculator in questionable titles.

In view of all the testimony in this case, we have come to the conclusion that the defendant Gage must be considered as not occupying the position of a bona fide purchaser, and therefore his claim is no better than that of Cisna, and that he, as well as Cisna, must surrender and release all claim or title to the land in controversy, and pay the costs of this case to be taxed. The complainants, upon paying into court the amount paid by Cisna for special tax certificates and interest thereon, will be entitled to a decree requiring the defendants to release and relinquish all right and title to said land, and perpetually enjoining them from setting up or claiming any right derived under or through the tax deed mentioned in the bill of complaint.

Case No. 3,508.

CUSHING et al. v. LAIRD.

[4 Ben. 70; 3 Am. Law T. Rep. U. S. Cts. 50; 4 Am. Law Rev. 615.][1]

District Court, S. D. New York. Feb. Term, 1870.

ADMIRALTY PRACTICE — FOREIGN ATTACHMENT—NON-RESIDENT—MARSHAL'S RETURN — JURISDICTION—MISTRANSLATION OF CLERKE'S PRAXIS.

1. Where a process was issued, containing a clause of foreign attachment, and containing on its face a notice of what the process demanded, and for what cause, and of the time and place when the garnishees must appear and answer, and the marshal made this return on the process: "Personally served on F. & T.," *held*, that service of the process on the garnishees was service of the notice required to be served on them, and was a sufficient attachment of any credits and effects of the respondent in their hands.

2. That the marshal should have returned, that the respondent was not found, and had no goods and chattels within the district, and that, thereupon, his credits and effects had been attached in the hands of the garnishees.

3. That the return could be amended to conform to the facts.

4. The marshal has the power, under the 28th and 32d sections of the act of September 24, 1789 (1 Stat. 88), to amend, after he goes out of office, his return to any process which was in his hands when he went out of office.

5. An attachment of the property of a respondent who is not an inhabitant of the United States, and is not found in this district, is allowable under the second admiralty rule of the supreme court.

[Approved in Atkins v. Fibre Disintegrating Co., Case No. 602. Cited in same case, 18 Wall. (85 U. S.) 306; International Grain Ceiling Co. v. Dill, Case No. 7,053.]

6. A question of jurisdiction should not be disposed of on motion, but on hearing. In Clerke, Praxis, Adm. by Hall, the 28th and 32d titles are mistranslated. Wilson v. Pierce [Case No. 17,826, and Blair v. Bemis [Id. 1,484], criticized.

[Cited in Lands v. Two Hundred and Twenty-Seven Tons of Coal, 4 Fed. 479; Romaine v. Union Ins. Co., 28 Fed. 636.]

This was a cause of spoliation and damage, civil and maritime. The libellants [John N. Cushing and others] claimed to recover from the respondent [John Laird], as damages,

[1] [Reported by Robert D. Benedict, Esq., and here reprinted by permission. 4 Am. Law Rev. 615, contains only a partial report.]

$89,044, for the destruction of their ship, the Sonora, by the Alabama. The libel was refiled twice in an amended form. The original and the two amended libels prayed for a warrant of arrest against the respondent, "and, if he cannot be found, that his goods and chattels, and, if none be found, that his credits and effects in the hands of Foster and Thomson and in the hands of the assistant treasurer of the United States, in the city of New York, (known as the proceeds of the steamer Wren or otherwise) garnishees, may be attached to the amount sued for, and costs." Process in personam was issued on the original libel and also on each of the two amended libels. The process issued on the original libel commanded the marshal to cite the respondent, if found in this district, and, if he could not be found, to attach his goods and chattels to the amount sued for, and, if such property could not be found, to attach his credits and effects to the amount sued for, in the hands of Foster and Thomson and the assistant treasurer of the United States, his garnishees. The return by the marshal to that process was in these words: "Respondent not found—attached his credits and effects in the hands of H. H. Van Dyck, assistant treasurer of the United States, and Messrs. Foster and Thomson." The process issued on the first amended libel had the same mandatory words as the process issued on the original libel, and the return to it by the marshal was in substantially the same words as the return to the process issued on the original libel. The process issued on the second amended libel had the same mandatory words as the two processes previously issued, and, in addition, a command to the marshal to cite the garnishees, if found in his district, to appear before the court, at the time and place named in the process for the return thereof, to make return concerning the property of the respondent in their possession then or at the time of the issuing of the process, and to answer such interrogatories as might be propounded to them on the part of the libellants. The return by the marshal to this third process was in these words: "Personally served on Foster and Thomson and Mr. Van Dyck, assistant treasurer." The returns to the first two processes stated that the credits and effects of the respondent were attached in the hands of Foster and Thomson. The return to the third process did not so state specifically, but only stated that the process was personally served on Foster and Thomson. Foster and Thomson now moved the court to discharge "the attachment" against them "as garnishees named in the process of attachment."

C. Cushing and J. L. Ward, for libellants.

T. C. T. Buckley, for garnishees.

BLATCHFORD, District Judge. The attachment of credits and effects in the hands of a garnishee may be made, without actual levy on or arrest thereof, by the service on the garnishee of a notice apprising him of what the process demands, and for what cause, and warning him of the time and place when he must appear before the court and respond concerning the existence of such credits and effects and their status. Ben. Adm. § 430; Conk. Adm. 481. In this case, the third process contains such a notice on the face of it. The service of the process on Foster and Thomson was, therefore, a service of such notice, and such service constituted a sufficient attachment of any credits and effects in their hands belonging to the respondent. The return of personal service on Foster and Thomson, on the third process, implies that the service on them was made in the manner in which it ought to have been made, namely, by the exhibition of the process to them, and the delivery of a copy of it to them. But the marshal had no authority by the process, which follows, in its terms, the prayer of the amended libel on which it was issued, and the provisions of the 2d rule of admiralty practice, prescribed by the supreme court, to attach the goods and chattels of the respondent unless he failed to find the respondent within his district, so as to cite him to appear, nor had he any authority to attach the credits and effects of the respondent in the hands of the garnishees named in the process, unless he failed to so find the respondent and also failed to find sufficient goods and chattels of the respondent to be attached. Conk. Adm. 480. Assuming that the marshal did not, on the third process, find the respondent or find any goods or chattels of his to be attached, the return to such process should have been, that the defendant was not found and had no goods or chattels within the district, and that the marshal had, therefore, attached his credits and effects in the hands of the garnishees named, by taking possession of such credits and effects, or by showing to the garnishees the original process, and delivering a copy thereof to them personally, or by leaving a copy thereof at the residence or usual place of business of the garnishees, with some person of suitable age, they being absent. Id. 483; rule 30 of this court; rule 37 in admiralty, prescribed by the supreme court. So, also, the returns to the first two processes should have been, that the respondent was not found, and had no goods and chattels within the district, and that, therefore, his credits and effects were attached in the hands of the garnishees. It is not shown, in point of fact, by the garnishees, that the respondent was found or that he had any goods and chattels within the district which could have been attached; and, if the facts existed, which, in the case of each process, made the attachment of credits and effects proper, the returns can all of them be amended to conform to the facts, and to show proper cases for the attachment of credits and effects.

An objection is taken to the first two processes, because they do not on their faces

contain a citation to the garnishees. I do not think that is necessary. The attachment of the credits and effects in the hands of the garnishees may be made, as before stated, by actual levy on or arrest thereof, or by notice. The notice need not be in the process. But the return should show how the attachment was made. Inasmuch as, in the first two processes, there is no citation to the garnishees, the returns to those processes should show that the notice before specified was given to the garnishees. It results, that the returns to all of the processes fail to show that the attachments of the credits and effects were lawfully made. The processes are in proper form. The motion on the part of the garnishees is understood to be a motion to discharge all of the attachments made under all of the processes. As the difficulty may be in the returns on the processes, and not in the substantive facts, and as the notice of motion does not state the grounds for the motion, an opportunity will be allowed to amend the returns. If they shall not be amended within a time to be named in the order to be entered hereon, the attachments of credits and effects made under the processes will be discharged.

In accordance with the foregoing decision the returns were amended as follows: To the process returnable September 22d, 1868, the libellants filed, on the 11th of December, 1869, an amended return, in the words and figures following: "Pursuant to an order made and entered in this cause, on Saturday, the 27th day of November, A. D. 1869, I hereby make the following amended return to the within process, viz.: Respondent not found within this district; no goods or chattels belonging to respondent found within this district. I have, therefore, attached the credits and effects of the respondent in the hands of Foster & Thomson, his garnishees, on the 16th day of September, 1868, by exhibiting to J. P. Girard Foster, one of said garnishees, the original process, and leaving with him, at the office of said garnishees, at No. 69 Wall street, in the city of New York, a copy thereof; and I have also attached the credits and effects of the respondent in the hands of H. H. Van Dyck, assistant treasurer of the United States, in the city of New York, by exhibiting to him the original process, and leaving with him a copy thereof, at his office, in the U. S. treasury building, in said city of New York. Dec. 10, 1869. R. Murray, late U. S. Marshal, S. D. N. Y." To the process returnable November 3d, 1886, the libellants filed, on the 11th of December, 1869, an amended return, in all respects like the foregoing amended return to the process returnable September 22d, 1868, except that, instead of the words "the 16th day of September, 1868," the words "the 29th day of September, 1868," were used. To the process returnable June 15th, 1869, the libellants filed, on the 7th of December, 1869, an amended return, in all respects like the foregoing amended return to the process returnable September 22d, 1868, except that, instead of the words "the 16th day of September, 1868," the words "the 18th day of May, A. D. 1869," were used; and, instead of the words "Dec. 10, 1869," the words "Dec. 7, 1869," are used; and instead of the words "R. Murray, late U. S. Marshal, S. D. N. Y.," the words "Francis C. Barlow, late U. S. Marshal, S. D. N. Y.," were used. The returns having been thus amended, the garnishees renewed their motion to discharge the attachments as against them.

BLATCHFORD, District Judge. It is objected to these amended returns, or new returns, that they appear, on their faces, to have been made by Mr. Murray and Mr. Barlow respectively after they had respectively ceased to hold the office of marshal; that the power of the marshals to make return to the processes expired when they ceased to hold the office of marshal; that the processes appear to have been executed and returned before the amended returns were made; and that the amended returns are invalid, for want of power to make them in the persons who purport to have made them. It was assumed, and not controverted, on the hearing of the motion, that Mr. Murray and Mr. Barlow had respectively returned the processes, by the several original returns, before they ceased respectively to hold the office of marshal.

The 28th section of the act of September 24, 1789 (1 Stat. 88), provides, that "every marshal, or his deputy, when removed from office, or when the term for which the marshal is appointed shall expire, shall have power, notwithstanding, to execute all such precepts as shall be in their hands respectively at the time of such removal or expiration of office." It is contended that this section does not apply to this case, for the reason that these processes were not in the hands of the outgoing marshals, when they respectively went out of office. A process in the hands of a marshal, when he goes out of office, and under which he has prior to that time made a levy or an attachment, but to which he has not prior to that time made any return, is clearly process in his hands, within the section, when he goes out of office. By the section, he has no power given to him in respect to such process, after he goes out of office, except to execute it. Yet, it cannot be doubted, that it is the intention of the section, that he shall, notwithstanding he is out of office, make return to the process under which he has, prior to going out of office, made a levy or an attachment. Therefore, the word "execute" in the section must be held to include the making return to the process executed. If this were not so, the provision would be without any meaning or effect; for, it would be useless for the execution of the process to take place,

unless a return of such execution could lawfully be made by the person executing the process. Now, until a true return, conforming to the facts, is made, there cannot be said to be, in judgment of law, any return. The return is a unit, and until, by amendment, if necessary, it is made to state the facts, it cannot be considered as fully made. Until then, the process must, under the 28th section, be regarded as still in the hands of the outgoing marshal. Having once come to his hands, it is not out of his hands, until he has made to it such a return as ought to be made to it.

Moreover, the amendments made to the processes are within the provisions of the 32d section of the same act, which provides, that no return in a civil cause in any court of the United States shall be abated, arrested, quashed, or reversed, for any defect or want of form, but the court shall proceed and give judgment according as the right of the cause and matter in law shall appear unto it, without regarding any imperfections, defects, or want of form in such return, except those only, in cases of demurrer, which the party demurring shall specially set down and express, together with his demurrer, as the cause thereof, and that the court shall and may, from time to time, amend all and every such imperfections, defects, and wants of form, other than those only which the party demurring shall express as aforesaid, and may at any time permit either of the parties to amend any defect in the process or pleadings, upon such conditions as the court shall, in its discretion, and by its rules, prescribe. The defects in the original returns were such defects as this section was intended to cover.

It is also objected, that the amended returns are not more full and specific returns as to the original executions of the processes, but are returns showing new and independent executions of the processes, made subsequently to the several return days of such processes. The criticism is, that the returns are dated severally two of them on the 7th, and one of them on the 10th day of December, 1869; that in them the late officers, severally, say that they have attached the credits and effects of the respondent in the hands of Foster and Thomson, his garnishees, (in one case), on the 16th day of September, 1868, (in another), on the 29th day of September, 1868, and, (in the third), on the 18th day of May, 1869, by exhibiting, &c.; that the late officers do not severally say, in the amended returns, that they made the attachments on those three several days, or that they severally exhibited the original processes to and left them with Mr. Foster on those three several days; that they only say that they have severally attached such of the credits and effects of the respondent as were in the hands of Foster and Thomson on those three several days; that, inasmuch as the amended returns fail to show, affirmatively, that the several attachments were made prior to the several return days of the processes, it cannot be inferred that they were so made; and that, therefore, the amended returns bear, on their faces, affirmations of distinct new executions of the three several processes, subsequent to such several return days. I think, on a fair construction of the several amended returns, they import that the several attachments were made on the three several days specified and, therefore, prior to the several return days. But, as it is not shown by the garnishees that the facts are otherwise, the libellants may, if they desire, in order to prevent all question, have leave to procure amendments of the several returns, stating specifically that the attachments were severally made on the days specified, and that the processes were severally exhibited to and left with Mr. Foster on those days.

This brings up for decision the main questions argued on the motion. The respondent is a subject and resident of the kingdom of Great Britain, and was not in the United States at the time of the commencement of the proceedings in this action, and has not been within the limits of the United States since that time, and has not appeared in said proceedings. All of the pleadings on the part of the libellants describe the respondent as being "of Birkenhead in the kingdom of England, ship builder," and the action as a cause of "spoliation and damage, civil and maritime." The substance of the libel is, that the ship Sonora, owned by the libellants, was, on the 26th of December, 1863, while on the high seas, in the straits of Malacca, piratically burned and entirely destroyed by the master of an armed vessel called the Alabama, then owned by the respondent. It is contended, for the garnishees, that this court has no jurisdiction of this action because it has acquired no jurisdiction of the person of the respondent, and that the inhibition of the 11th section of the act of September 24, 1789 (1 Stat. 78), applies to this case. That section provides, that no civil suit shall be brought before a circuit court of the United States, or a district court of the United States, against an inhabitant of the United States, by any original process, in any other district than that whereof he is an inhabitant, or in which he shall be found at the time of serving the writ. It is sufficient to say, that, as it is not shown that the respondent ever has been an inhabitant of the United States, the provision cited from the said 11th section does not apply to this case, even though it should be conceded that this suit is such a civil suit as is intended by the provision.

The processes in this case were such as are authorized by the 2d rule in admiralty, prescribed by the supreme court, in March, 1845. That rule provides as follows: "In suits in personam, the mesne process may be by a simple warrant of arrest of the person of

the defendant, in the nature of a capias, or, by a warrant of arrest of the person of the defendant, with a clause therein, that, if he cannot be found, to attach his goods and chattels to the amount sued for, or, if such property cannot be found, to attach his credits and effects to the amount sued for, in the hands of the garnishees named therein; or, by a simple monition, in the nature of a summons, to appear and answer to the suit, as the libellant shall, in his libel or information, pray for or elect." The provisions of this rule are to the effect, that, in any suit in personam, whenever, for any reason, the defendant cannot be found, his goods and chattels, to the amount sued for, may be attached, and, in default of any such, his credits and effects, to the amount sued for, in the hands of garnishees, may be attached. The rule provides for an attachment of goods and chattels, and of credits and effects, only in cases where the defendant cannot be found. It was promulgated by the supreme court, under what that court regarded as being authority to that effect conferred upon it by the 6th section of the act of August 23, 1842 (5 Stat. 518). The supreme court manifestly regarded it as settled law, that, in a civil cause of admiralty and maritime jurisdiction, in personam, a district court of the United States can acquire jurisdiction of the cause, by serving an attachment on the goods and chattels, or the credits and effects, of the defendant within its jurisdiction, where the defendant cannot be found personally within such jurisdiction. This view as to the admiralty jurisdiction was thus promulgated in March, 1845, notwithstanding the decision in the case of Toland v. Sprague, 12 Pet. [37 U. S.] 300, in 1838, to the effect, that, in a civil suit, not in admiralty, brought originally in a circuit court of the United States, by a plaintiff against a defendant, an attachment of property, to compel the appearance of the defendant, can be made only where the defendant is an inhabitant of, or found within, the United States, and is thus amenable to the process of such court in personam, and not where he is an alien or a citizen resident abroad, at the commencement of the suit, and has no inhabitancy in the United States.

The exercise of jurisdiction in admiralty, through the service of such process as is provided for by the 2d rule, was held by the supreme court to be a rightful exercise thereof, under the constitution and laws of the United States, as early as the year 1825, in the case of Manro v. Almeida, 10 Wheat. [23 U. S.] 473. The court held, that the use of the process of attachment in the admiralty had the highest sanction, as well in principle as convenience; that such process had the clearest sanction in the practice of the civil law; that it was unquestionably legal in the courts of admiralty of the United States, prior to the passage of the process act of May 8, 1792 (1 Stat. 275); that there is nothing in that act to preclude its use; and that it is agreeable to the principles, rules and usages which belong to courts of admiralty, within the language of the 2d section of that act. The court cites in support of this view Clerke, Praxis Adm., by Hall (titles 28 and 32),—a book which it pronounces to be a work of "respectable authority and remote origin." The entire title 28, in Clerke, is as follows (Baltimore Ed., 1809): "Title 28. Of the warrant to be impetrated in rem, where the debtor absconds or is absent from the realm. All that was written in the preceding titles is to be understood as applicable to cases in which the defendant is actually arrested to respond in a civil cause. But if he has concealed himself, or has absconded from the kingdom, so that he cannot be arrested, if he have any goods, merchandise, ship or vessel upon the sea, or within the ebb and flow of the sea, and within the jurisdiction of the lord high admiral, a warrant is to be impetrated to this effect, viz.: 'to attach such goods or such ship of D., the defendant, in whose hands soever they may be, and to cite the said D. specially as the owner, and all others who claim any right or title to them, to be and appear on a certain day, to answer unto P. in a civil and maritime cause.'" This passage is held by the court to be authority for issuing the process of attachment in a case where the defendant has concealed himself, or absconded from the kingdom, which was the case then before the court, it being stated in the libel that the defendant had absconded from the United States, and fled beyond the jurisdiction of the court. The court also holds, that, by title 32 of Clerke, it is consistent with the practice of the admiralty, in cases where there is no property which the officer can attach by manucaption, to proceed to attach goods or credits in the hands of third persons, by means of the simple service of a notice. The entire title 32 in Clerke (same edition) is as follows: "Title 32. The manner of attaching goods or debts in the hands of others, to which the officer cannot have access. Sometimes the person who, by loan or other maritime contract, is indebted to another, cannot be approached so as to be arrested, nor has he any property, which the officer can attach. Yet, you may be informed of persons, in whose hands there are goods which belong to your debtor, or who may be indebted to him. In such a case you may obtain a warrant similar to that which is mentioned in title 28, 'of other manner of proceeding,' &c. And the officer may go to the person in whose possession the goods are deposited, or who is indebted to your debtor, or which are liable or responsible to your debtor, and attach such goods or credits in his hands. He is to cite that person and all others to appear as before prescribed in title 28. It is to be noted that in this warrant the words, 'the goods, debts, or sums of money belonging to a certain R., and be-

ing in the hands of the aforesaid person,' are to be included. These words are omitted in the case or warrant which was before mentioned."

It was contended, on this motion, by the counsel for the garnishees, that title 28 of Clerke, and the decision in Manro v. Almeida [supra], go no further than to hold that the process of attachment is proper in a civil cause in personam in admiralty, where the defendant has concealed himself, or has absconded, and not in a case like the present, where he is merely absent and cannot be properly said to have concealed himself, or to have absconded. It is to be noted, however, that title 32 speaks of any inability to approach the defendant so as to arrest him; and the translator, Mr. Hall, in a note to title 28, says: "This proceeding is in the nature of the process of foreign attachments under the custom of London, which has been introduced into most, if not all, of the states, with great advantage and success. Its object is to compel the appearance of an absent or absconding debtor, and, in case he does appear, to satisfy the debt out of his effects and credits." So, also, the caption of title 28 announces, that that title relates to the warrant to be impetrated where the debtor absconds or is absent from the realm. Where the caption of the title thus draws a distinction between absconding and absence, in a manner to show that both are to be treated of in the title—absence following upon absconding, and absence without absconding—and it is found that the text of the title does not speak of absence without absconding, but only speaks of concealment or absconding, it would be natural to suppose that some part of either the caption or the text has not been correctly translated. The Baltimore edition of 1809, which is a translation in English, is the one referred to in Manro v. Almeida. Francis Clerke was registrar of the court of arches during the reign of Queen Elizabeth. His work, "Praxis Supremae Curiae Admiralitatis" was first printed in 1679. It was in Latin. A fifth edition, in Latin, was published in 1791. This was a very correct edition, and is the one from which the translation by Mr. Hall, which is the Baltimore edition of 1809, was made. I have recurred to this fifth edition in Latin, and find some manifest errors in the translation by Mr. Hall of title 28. The caption of title 28 is as follows: "Alius modus procedendi in causa civili, si reus aere alieno gravatus se absentaverit, quo minus actio contra eum possit institui; et primo de warranto in hoc casu impetrando." This caption Mr. Hall translates as follows: "Of the warrant to be impetrated in rem, where the debtor absconds or is absent from the realm." The true translation is this: "Another method of proceeding in a civil cause, if the defendant debtor shall have absented himself, so that an action cannot be instituted against him; and first of the warrant to be obtained in this case." The Latin words in the caption are, "se absentaverit." These are translated by Mr. Hall, "absconds or is absent from the realm." The proper translation is, "shall have absented himself." The words do not properly involve the idea of absconding, in the sense of having been within the jurisdiction and having departed from it furtively, or malo animo. To absent one's self, is no more than to be absent, or to keep one's self absent, or away, or out of the jurisdiction, without any reference to ever having been within the jurisdiction. So, also, in title 28, the Latin sentence is: "Sed si reus ita latitaverit vel abfuerit extra regnum, quo minus possit arrestari; tunc si," &c. This is translated by Mr. Hall thus: "But if he has concealed himself or has absconded from the kingdom, so that he cannot be arrested, if" &c. The true translation is this: "But, if the defendant shall have concealed himself, or shall have been absent out of the realm, so that he cannot be arrested; then, if" &c. The words, "abfuerit extra regnum," Mr. Hall translates, "has absconded from the kingdom." The proper translation is, "shall have been absent out of the realm." "Abesse extra regnum," means merely, to be absent from or out of the realm; that is, not to be present within the realm. That Mr. Hall himself, notwithstanding the apparent meaning of the language of his translation of the text of title 28, understood that the proceeding provided for in that title applied to absence as well as to absconding, is shown by his statement, before cited, in his note to that title, that the object of the proceeding is, to compel the appearance of an absent or absconding debtor. He must, therefore, have understood the word "abfuerit" as including absence in any way, as well as absence by absconding. In title 32, the Latin words are: "non potest conveniri, ut eum possis arrestare." These words Mr. Hall translates, "cannot be approached, so as to be arrested." It would be more literally accurate to say, "cannot be reached, (or found), so that you may arrest him." In either case, the language of title 32 is such as to show that the proceeding provided for is to be used whenever the defendant cannot be reached or found, whether he is absent by absconding, or absent without absconding.

No sound difference in principle can be maintained between the propriety of resorting to the species of attachment referred to, in a case where the defendant is absent from the jurisdiction by absconding, and in other cases of absence. There is equally, in all cases, the want of proper personal service of process on the defendant, and the absence of the defendant from the jurisdiction, and the presence of attachable property within the jurisdiction.

The practice of issuing a foreign attachment against the property of a respondent in the hands of third persons, in order to compel the appearance of the respondent in a

suit in personam, and to apply such property to the satisfaction of the decree in the suit, has been, it is understood, the practice recognized and used as appropriate in civil suits in admiralty, in the admiralty courts in the southern district of New York and in Massachusetts—two of the principal admiralty tribunals of original jurisdiction in the United States—for a series of years. In Reed v. Hussey [Case No. 11,646], decided in 1836, the practice is referred to as settled on the authority of Clerke, and of the case of Manro v. Almeida. It is also recognized in Shorey v. Runnell [Case No. 12,807], decided in 1858. The whole subject was reviewed by Judge Benedict, in 1867, in the district court for the eastern district of New York, in the case of Atkins v. Fibre Disintegrating Co. [Id. 600], and the lawfulness and propriety of the practice, especially under the provisions of the 2d rule in admiralty prescribed by the supreme court, was upheld in an exhaustive and conclusive opinion.

The power to issue the process of foreign attachment in a civil suit in the admiralty against a citizen of the United States, not an inhabitant of the district where the process was issued, and not found therein at the time of serving the process, but a citizen of a state other than the state embracing such district, and domiciled in the state of which he was so a citizen, was denied by the district court for the district of California, in 1852, in the case of Wilson v. Pierce [Id. 17,826], on the ground that the suit was a suit against an inhabitant of the United States, commenced by original process, and, as such, within the prohibition of the 11th section of the act of 1789. Strictly, that case does not cover the present one, as the respondent here is not an inhabitant of the United States. The court, in that case, holds, that the process of foreign attachment is in accordance with the principles, rules and usages of courts of admiralty; that the decision in Manro v. Almeida was limited, however, to the point, that the process of foreign attachment could issue against the credits and effects of an absconding debtor who had fled beyond the jurisdiction; that the case of a similar process against an inhabitant of the United States, and a resident of another district, was not before the supreme court in that case, and is within the prohibition of the said 11th section; and that the 2d rule in admiralty, if it conflicts with the 11th section, must yield to it.

In the case of Blair v. Bemis [Case No. 1,484], in 1863, in the district court for Connecticut, in a civil suit in admiralty against inhabitants of the district of Massachusetts, none of whom were found in the district of Connecticut at the time of serving the writ, the same views were held as in Wilson v. Pierce [supra].

These two cases are opposed to the general current of authority, and to the understanding and practice of the profession. Mr. Justice Story, who was a member of the court when Manro v. Almeida was decided, says, in Clarke v. New Jersey Steam Nav. Co. [Case No. 2,859], decided in 1841, that, ever since the case of Manro v. Almeida, it has not been doubted, that the process of attachment well lies, in an admiralty suit, against the property of private persons, whose property is found within the district, although their persons may not be found therein, as well to enforce their appearance to the suit, as to apply it in satisfaction of the decree rendered in the suit, and that the very point decided in that case was, that the jurisdiction of courts of admiralty might be executed not only against persons found within the district, but also by attachment against their property found within the district, although the persons are not there. Professor Parsons, in his work on Maritime Law (volume 2, bk. 4, Ed. 1859, p. 685, c. 3, § 2), says that, in Manro v. Almeida, the question was considered as to the power of the court to grant an attachment of goods when the defendant was out of the jurisdiction, and the power was asserted by the court. He refers to the decision in Wilson v. Pierce [supra], and says that he does not consider it to be correct, and has no doubt that a person who resides out of a certain district may be sued in admiralty in that district, if he has property there which can be there attached; that a suit in admiralty is not a civil suit, within the meaning of that term in the 11th section of the act of 1789; and that, until the decision in Wilson v. Pierce, it was never doubted that the rule established in Manro v. Almeida, in respect to a person who had absconded, applied to every case where the defendant was out of the jurisdiction. These views are reiterated by Professor Parsons, in his work on Shipping and Admiralty (volume 2, bk. 3, Ed. 1869, p. 390, c. 3, § 2), and the case of Atkins v. Fibre Disintegrating Co. [supra] is cited by him as sustaining those views.

I have no doubt of the jurisdiction of this court in this case, acquired in the manner referred to. If I regarded it as doubtful, I should not be willing, in view of the weight of authority in favor of it, to set aside the attachments on motion. So grave a question as that of jurisdiction ought not to be disposed of on a motion, but ought to be presented by pleading or at the trial, and in a formal manner. Dennistoun v. Draper [Case No. 3,804]; Cartwright v. The Othello [Id. 2,483]. When it is so presented, the benefit of a review in regard to it can certainly be secured, while the right of the libellants to such review might be doubtful if the attachments were to be discharged on motion.

The motion is denied.

[NOTE. The case was heard and decided on the merits at the April term, 1873. See Case No. 3,509.]

Case No. 3,509.

CUSHING et al. v. LAIRD.

[6 Ben. 408; 7 Am. Law Rev. 762.][1]

District Court, S. D. New York. April Term, 1873.[2]

FOREIGN ATTACHMENT—GARNISHEES — EFFECT OF A DECREE IN A PRIZE CASE—NOTICE TO MASTER —PARTY—ESTOPPEL — PRACTICE — ANSWERS TO INTERROGATORIES—EVIDENCE.

1. A libel in prize was filed, in June, 1865, against the steamer Wren, in the district of Florida. The master, S., appeared and filed a claim, as bailee for the owner, alleging that L., a British subject, was the owner, as appeared by the register of the steamer. The district court condemned the vessel as enemies' property, and a writ of venditioni exponas was issued, and the vessel was sold, and the proceeds were deposited with the assistant treasurer of the United States, in New York, subject to the order of the court. An appeal was taken from that decree to the supreme court of the United States, which reversed the decree, and directed restitution of the vessel to the claimant. F. and T., attorneys, in New York, directed and had charge of this appeal, and paid the expenses of it, and obtained the mandate of the supreme court. They then obtained a power of attorney from L. and S., authorizing them to collect the proceeds of the Wren, and receive the restitution decreed. After the decree in the supreme court, but before the mandate was filed, C. and others, the present libellants, by their proctor, W., filed a libel, in the district court of Florida, against L., and issued a foreign attachment against the proceeds of the Wren, as his property. F. and T. thereafter employed an attorney in Florida, who filed the mandate and a copy of the power of attorney from L. and S. to them, and entered a final decree in the prize case, directing the payment of the money to L., claimant. The same attorney also entered a special appearance for L., as respondent, in the suit brought by C. and others, and moved to dissolve the attachment. In the mean time, negotiations took place between W., the attorney for C. and others, at New York, and F. and T., looking to a removal of that second litigation to New York, and it was agreed that W. should make no objection to the removal of the fund to New York, and that F. and T. should receive it under their power from L. and S., and hold it long enough to enable W. to take such legal steps as he might be advised Accordingly, instructions to that effect were sent to Florida, the attachment there was dissolved on the entry of an absolute appearance for L., and the funds were paid to F. and T., in New York. Thereupon this suit was commenced by W., for C. and others, against L., and a foreign attachment was issued against these funds in the hands of F. and T., as the property of L., and the funds were duly attached. F. and T. thereupon appeared, on the return of the attachment. Interrogatories to them were filed, to which they filed answers, denying that they had any funds of L. in their hands, and setting up, that, before the commencement of the prize suit, the Wren had been sold by L. to one P.; that they had acted, in all that they had done, as attorneys for P., and had never been retained by L., and that the proceeds in question were the property of P., and not of L. This issue being brought to trial, the libellants offered in evidence the complete record in the prize case, and the record in the other suit in the Florida court, and proof of the agreement between W. and F. and T. F. and T. then offered in evidence their own answers to the libellants' interrogatories, and a bill of sale of the Wren from L. to P., dated and recorded before the commencement of the prize suit, and proof of their retainer by P., and not by L. P. was a member of the firm of Frazer, Trenholm & Co., agents of the Confederate States, at Liverpool. *Held*, that the answers of F. and T. to the interrogatories addressed to them by the libellants were not evidence in their favor.

[Cited in Havermeyers & E. Refining Co. v. Compania Transatlantica Espanola, 43 Fed. 91.]

2. That the final judgment in the prize case was a judgment that the Wren was the property of L.

3. That neither P. nor F. and T., who had procured that judgment to be rendered, could be heard now to allege the contrary of the fact there adjudged.

4. That F. and T. were estopped by what had taken place between them and W., from saying, in this suit, that the proceeds of the Wren were not the property of L.

5. Notice of a prize suit against a vessel, given to her master, is notice to her real owner, and he is a party to such prize suit.

6. The claimant of a vessel, seized as prize of war, is allowed to give the papers of the vessel in evidence, and is, therefore, bound to see that they are true papers.

The question in this case was, whether the libellants [John N. Cushing and others], under the attachments issued herein, and levied on certain moneys in the hands of Foster and Thomson, as garnishees, were entitled to regard such moneys, for the purposes of such attachments, as having been, when such attachments were levied, the moneys of the respondent, John Laird, the younger. The libel was filed to recover damages for an alleged maritime tort. After the issuing of the process, several motions were made respecting the attachments and the returns to them, which are reported in 4 Ben. 70 [Cushing v. Laird, Case No. 3,508]. Foster and Thomson, the garnishees, having appeared and filed an answer denying the possession of any funds belonging to Laird, the respondent in the action, interrogatories to them were filed by the libellants, and their answers to those interrogatories were also filed. On the trial of the issue between them and the libellants, the former offered in evidence their answers to the interrogatories. These were excluded by the court, which held that the answers of garnishees to interrogatories proposed to them by the libellants were not evidence in favor of the garnishees. The facts of the case sufficiently appear from the arguments of counsel and the opinion of the court.

E. H. Owen, on behalf of the garnishees, presented to the court the following points:

I. The libellants must establish, by competent testimony, that the proceeds in question were the property of the respondent at the time the attachment was served on the garnishees. The burden of proof is upon them to do this.

1. There is no oral testimony upon the sub-

[1] [Reported by Robert D. Benedict, Esq., and here reprinted by permission. 7 Am. Law Rev. 762, contains only a partial report.]

[2] [Reversed in Case No. 3,510.]

ject showing or tending to show that fact. All that the libellants rely upon to establish it is, that the master of the steamer, in and by his claim in the prize suit, stated that, as he was informed and believed, the steamer belonged to the respondent. But that in itself is not sufficient. The libellants have no greater rights to the proceeds than the respondent. If, under the testimony in this case, he could not recover the same from Prioleau, then they cannot. Drake, Attachm. § 458.

2. It is manifest that, upon the evidence herein, the respondent could not recover these proceeds from Prioleau. Having sold and conveyed the steamer to Prioleau, in good faith, and by a valid and legal bill of sale, and having received a full and valuable consideration therefor, which he still retains, it would be unconscionable and unjust in him to claim these proceeds, and such a claim would not be allowed, or even tolerated, by this court.

3. But, to evade such an apparent and gross wrong, the libellants invoke the record in the prize suit, as a technical estoppel. It is claimed by them, that it was adjudicated in that suit, that the steamer belonged to the respondent, and therefore Prioleau is estopped to deny it in this action. This the garnishees deny. The libellants have no more right in law or equity to insist upon such estoppel, than the respondent would have if he were prosecuting to recover these proceeds; and to allow him to use it, as against Prioleau, would be in the highest degree unjust. An estoppel should not be employed to shut out and exclude the truth, nor where its use will work a wrong or cause injustice. Its whole force and effect are to preclude parties, and those in privity with them, from unsettling a matter which they have in solemn form admitted and adopted, or which has been actually adjudicated. And it cannot be seriously contended, that the prize suit settled, or was intended to settle, the ownership of the steamer as between Prioleau and the respondent. Its whole object and purpose was to determine the status of the vessel, that is, whether she was owned by enemies of the government, or had violated the blockade, and so was a lawful prize of war.

II. But, the decree or sentence offered by way of estoppel is not admissible for the purpose of establishing the respondent's title to the proceeds, nor does it estop Prioleau from setting up his title thereto.

1. It is res inter alios acta. The suit wherein it was pronounced was between other and different parties, the issue was different, and the suit was brought for a different purpose, and therefore inadmissible. Aspden v. Nixon, 4 How. [45 U. S.] 467, 499.

2. Even as a sentence of a prize court having exclusive jurisdiction of the matter in controversy, it is inadmissible, because it does not purport to adjudicate the question of the actual ownership of the steamer. In determining what was adjudicated in that suit, this court should not look at the testimony contained in the printed record, nor at the briefs and points of counsel, nor even at the decision of the supreme court, all of which were offered and received under objection, and should now be excluded. But it must look at and examine simply the sentence. The law upon this subject is well settled. Fisher v. Ogle, 1 Camp. 418; Dalgleish v. Hodgson, 7 Bing. 495; Bradstreet v. Neptune Ins. Co. [Case No. 1,793]; Calvert v. Bovill, 7 Term R. 523; Christie v. Secretan, 8 Term R. 192; Ocean Ins. Co. v. Francis, 2 Wend. 64, 68, 69; Bigelow, Estop. pp. 164, 185.

3. Upon examining the sentence of the district court, it appears that that court did not adjudge that the steamer, when captured, was owned by the respondent, nor that Prioleau was not her owner. The libel did not allege that she was owned by the respondent. It simply alleged that she had been captured and brought into Key West, and that she was "lawful prize of war, and subject to condemnation and forfeiture as such." To this, Stiles, as master and bailee of the vessel, in his own name, filed a claim, denying that she was prize of war, and claiming her "for the owner thereof." This was all he had a right or could properly do, since he could not know, and did not pretend to know, to whom she belonged. It was the only proper pleading in the suit. He, however, added that the respondent was owner, as appeared by her register, and as he believed, which was wholly unnecessary, and should be regarded as surplusage. The issue should have been, and was, in fact, simply, prize or no prize. Anything stated in the claim beyond that was "irregular and improper." The Cheshire [Case No. 2,655]; The John Gilpin [Id. 7,343].

This being the true issue, what did that court decide? The sentence, after erroneously reciting that the master had interposed a claim "for and on account of John Laird, the younger," and that it appeared to the court that the steamer, her tackle, etc., were, at the time of capture, the property of enemies of the United States, proceeds as follows: "It is now ordered, adjudged and decreed, that the steamer Wren, her tackle, apparel, furniture, and cargo be condemned and forfeited to the United States, as lawful prize of war." There is nothing in this sentence which adjudicates that the steamer was the property of the respondent, which was indispensable to make it an estoppel in this suit and as against Prioleau.

In the case of Fisher v. Ogle, cited above, and which is a leading case, it appeared that the ship Juno had been captured by a French privateer, carried into Martinique, and there condemned in the vice admiralty court. The vessel had been insured, being represented to be American. In an action on the policy, the defendant, to falsify the representation

of neutrality, gave in evidence the sentence of condemnation, which, after stating that, from the papers on board, it resulted that the property belonged to English merchants, who, to mask their property, borrowed the American flag, etc., etc., went on to declare the ship as good and lawful prize, and to confiscate her and her cargo to the profit of the captors, but without stating any specific grounds for the condemnation. Lord Ellenborough held that the sentence did not say that the ship was not American, and that it was not evidence of what it does not specifically affirm; that, looking at the adjudicative part of the sentence, nothing was stated as to the ship or her cargo not being American; and the record was excluded. This case was referred to, and fully approved by Mr. Justice Story, in the case of Bradstreet v. Neptune Ins. Co., also cited above, who, speaking of such a sentence, says: "The facts and grounds ought to appear ex directo, in order to estop the parties in interest from denying or questioning them. I agree with Lord Ellenborough in Fisher v. Ogle, that courts of justice are not bound to fish out a meaning when sentences of this sort are produced before them. Whatever points the sentence professes, ex delicto, to decide, they are bound to respect and admit to be conclusive. But, if the sentence be ambiguous or indeterminate, as to the facts on which it proceeds, or as to the direct grounds of condemnation, the sentence ought not to be held conclusive." The case of Dalgleish v. Hodgson, above cited, is to the same general effect. That case determines also that the sentence commences with the adjudicating clause.

In the present case, it commences with the words, "It is now ordered," &c. That this is so appears also by the mandate, wherein the recital of the decree commences with these words. The district court did not, therefore, adjudge that the steamer was not the property of Prioleau, nor that she was the property of the respondent, and does not, therefore, estop Prioleau from setting up his title to the proceeds.

4. Nor did the supreme court adjudge that the steamer was not the property of Prioleau, or that she was the property of the respondent. The mandate, after reciting the decree of the district court (commencing with the words, "It is now ordered"), and that the cause had been heard, proceeds as follows: "It is now here ordered, adjudged and decreed by this court, that the decree of the said district court in this cause be, and the same is hereby, reversed; and it is further ordered, that the cause be, and the same is hereby, remanded to the said district court, with directions to restore the vessel and cargo to the claimant, without costs." This is all that is said, and there is not in this any adjudication that the vessel belonged to the respondent, or that she did not belong to Prioleau. Now there is an evident fallacy in the libellants' argument, "that upon such a libel and such a claim the sentence of the court established conclusively against all the world," that the steamer was owned by the respondent, so as to preclude inquiry upon that subject in this court. Allen v. U. S. [Case No. 240]. The master had claimed the vessel "for the owner thereof," and the supreme court decreed restitution to the claimant, but that did not affirm the property to be in him, nor in any person in particular. The district court had not given, as a reason for condemning the vessel, that she was owned by any one in particular. It merely stated, which was not true, that a claim had been filed by the master "for and on account of John Laird, the younger, a British subject." But it did not adjudge that he was or was not the owner of the vessel. Nor was it necessary to do so in order to pronounce such sentence of condemnation. She was condemned as being enemies' property, and such condemnation was reversed on appeal. This case, therefore, comes clearly within those above cited, and, under the rulings therein, the record should be excluded as immaterial and incompetent to prove the respondent's ownership of the property in the hands of the garnishees, or to estop Prioleau from asserting his title to the proceeds. Allen v. U. S. [supra]; Millengar v. Hartupee, 6 Wall. [73 U. S.] 258.

III. The garnishees, in obtaining the proceeds, have not done anything which does, or can, in any manner estop Prioleau from alleging his ownership thereto, nor which estops them from setting up such ownership against the libellants' claim. Representations to the libellants in regard to the ownership of the proceeds will not estop Prioleau from asserting his rights thereto. Drake, Attachm. § 629, and note a; Lewis v. Prenatt, 24 Ind. 98. But, in fact, no such representations were made either by the garnishees or by Prioleau. Merely obtaining and using the power of attorney from the respondent and Stiles did not acknowledge that the respondent had any right to or interest in the proceeds, or estop the garnishees or Prioleau from disputing his ownership. The power was executed by Stiles, the claimant, as well as the respondent. It was joint and several, and this court cannot find, from the evidence, that the garnishees used the respondent's power in obtaining the proceeds. His power, as appears by the testimony, was obtained out of caution, for the convenience of the garnishees, to meet such obstacles, if any, as might arise from his name having been improperly inserted in the claim as the owner of the steamer. But he could not avail himself of this to recover the proceeds from Prioleau. He certainly could not do so, even if there had been a collusion between them to mask the real ownership of the vessel, and to have her pass as belonging to him as a citizen of a neutral government. Having obtained the proceeds, the respondent could not, if he would, recover the same from

Prioleau. De Metton v. De Mello, 12 East, 234; Drake, Attachm. § 458.

IV. Nor did the order of the district court, entered on filing the mandate, directing the proceeds to be paid to "John Laird, claimant," establish, as against Prioleau, the fact that he was owner of the vessel, or that he was the claimant. There was no adjudication on that question at that time; nor had there been any previously. The mandate directed that the proceeds be paid to the claimant, not to the respondent, and the district court had no right to assume the determination of that question. Stiles was, in fact, the claimant. He claimed, as master and bailee for the owner, whoever he might be, and the mandate directed payment to be made to him as such claimant. Dockray, whose name appears to have been inserted in the order as proctor for "John Laird, claimant herein," and who moved the court for a final decree, upon filing the mandate, had no authority so to appear for, or so to use the name of, the respondent. His name was so used without the knowledge of Prioleau or of the garnishees. The fact that Dockray had so used it was not known to the garnishees until after they had received the proceeds, and so they did not acquiesce therein or ratify the same, by receiving the proceeds. Bell v. Cunningham, 3 Pet. [28 U. S.] 289; Hays v. Stone, 7 Hill, 128; Brass v. Worth, 40 Barb. 648, 654. Moreover, the libellants cannot avail themselves of the acts of Dockray, to establish, by way of estoppel in pais, the title of the respondent to the proceeds. They have not suffered any injury by his acts or representations, nor by any acts or representations of the garnishees. They have not parted with anything or lost any rights, and they are therefore "strangers," and not entitled to the benefit of the alleged estoppel. Com. Dig. Estoppel, C; Heane v. Rogers, 9 Barn. & C. 577; Dezell v. Odell, 3 Hill, 225.

V. It was stated, in the presence of the court, that Prioleau was a member of the firm of Frazer, Trenholm & Co., who were enemies of the government, and that, if the supreme court had known this, it would have condemned the vessel as enemies' property. This, however, is mere conjecture. There is no evidence upon which such inference can be founded, and it is unjust towards Prioleau, who, for aught that appears in this case, was a neutral citizen, as well as the respondent. Nor is there any evidence that such firm was an enemy of the government. The libellants cannot import into this case evidence taken in other prize cases to establish this or any other fact. Nor can this court take judicial notice of what may have been proved in other cases between other and different parties. Seymour v. Marvin, 11 Barb. 85, 86. Whether Prioleau was or was not an enemy of the government, or what the court would have directed if his true status in regard to the steamer had been known, is wholly immaterial in deciding this case.

VI. The libellants' claim to the proceeds should, therefore, be dismissed, and the suit also dismissed for want of jurisdiction.

T. C. T. Buckley, also counsel for the garnishees, presented the following argument:

Pursuant to the rules and practice of this court, Foster & Thomson, when cited as garnishees, filed their answer under oath, in which they say, that it is not true "that at the time of the service of the several processes in this action, or at any time since, any goods, chattels, choses in action, property, credits or effects were in their hands, or under their control, belonging to the above respondent."

It is conceded by the counsel for the libellants that the burden of establishing the possession of such funds rests upon them. But, on the facts disclosed by the uncontradicted evidence on both sides, it is established that such proceeds belong to Charles Kuhn Prioleau, and not to the respondent Laird. The steamer Wren was built by John Laird, Jr., at Birkenhead, in the year 1864. Her construction was completed in the month of December in that year, and the said Laird, being then her owner, registered her at Liverpool, her home port, on the 24th of said month, and received from the customhouse authorities a register, which accompanied the vessel. She then started upon a voyage and never got back to Liverpool. On the 3d day of January, 1865, Mr. Laird sold the said steamer, then on her voyage, to Charles K. Prioleau, who on that day paid him therefor the sum of £15,450 sterling, as appears by the bill of sale, read in evidence and marked "Exhibit No. 1," the execution and delivery of which was admitted on the trial. The transfer was duly registered in accordance with the laws of England, at the customhouse at Liverpool, as fully appears by Exhibit No. 2, which is in evidence in the cause.

On the 13th of June, 1865, while on a voyage from Havana to Liverpool, her crew mutinied, took possession of the steamer, and ran her into Key West, where she was libelled by the United States authorities as lawful prize of war, the government of the United States claiming the mutinous seizure as the equivalent of a lawful capture. At that time she was commanded by one Edward C. Stiles, who, in the discharge of his duties as master, put in a claim on behalf of the registered owner, Laird, Stiles having no information of the facts above recited, with reference to the change of title, and having been placed in charge of the vessel as master only upon her departure from Havana, two days before her capture.

The vessel was condemned on the ground (as appears by the prize record) that, at the time of capture, she belonged to enemies of the United States, the view of the government being, that she was the public property of the Confederate government. Subsequent to this condemnation, Charles K.

Prioleau, through his agent, Mr. Sellar, retained Messrs. Foster & Thomson. They, in the discharge of their duty, as Prioleau's counsel, caused the prize record to be removed to the United States supreme court by appeal, and employed counsel, with a view to obtaining a reversal of the decree, in which they succeeded. It appears, by the opinion of the supreme court (see [The Wren] 6 Wall. [73 U. S.] 583, 586), that the decree below was reversed on the ground that the proof was insufficient to show that, at the time of the capture, the Wren (as was claimed by the United States) was the property of the Confederate government. Nothing was decided, or in that case was necessary to be decided, for the purposes either of affirmance or reversal, except the question of the property of the Confederate States; and any ownership of Laird is only referred to by the judge who delivered the opinion, as being a presumption inferable from the contents of the certificate of registry found on board the vessel. The mandate of the supreme court reversed the judgment appealed from, and directed restitution to the claimant, Stiles, who, by virtue of his position, was necessarily, in judgment of law, trustee for the actual owner of the vessel, whoever he might be, and who in this case, in fact, was Charles K. Prioleau. An attempt was made by the United States officials at Key West, to interfere with the execution of the judgment of the supreme court, but, as it has no relevancy to the issue before the court, it need not be considered.

On the 2d day of July, 1868, for the purpose of collecting the proceeds on behalf of their client, Mr. Prioleau, Mr. Thomson caused to be prepared a power of attorney from Stiles, the claimant, in which, evidently for greater caution, is inserted as well the name of the registered owner, Laird, and the same was sent by him to Mr. F. A. Dockray, whom he retained to collect and remit the proceeds referred to in the power. At that time, the libellants had filed a libel in the district court, in Florida, against Mr. Laird, for the same cause of action as that embraced in the present suit, and were seeking, under process of foreign attachment, to arrest the proceeds of the Wren in the registry of the court there, and the validity of such attachment was contested. Some negotiation ensued between Mr. Thomson and the resident counsel of the libellants, Mr. Ward, which resulted in a letter from Mr. Thomson to Mr. Ward, written by mutual arrangement, and containing a suggestion that Foster & Thomson should draw the funds (meaning the proceeds of the Wren in the registry) under their authority from the claimants, Laird and Stiles, and keep the proceeds in their hands sufficiently long to enable Mr. Ward to serve upon them any process that he might be advised.

Mr. Thomson testified, that when, in this letter, he used the expression "claimants, Laird and Stiles," he referred to them as being the parties named in the record of the supreme court, and not as actual claimants of the fund. It further appeared, from his evidence, that he never knew or had any communication or correspondence, written or verbal, with the respondent, Laird, but acted throughout, in the whole proceeding, as the representative of Mr. Prioleau, through his agent, Mr. David P. Sellar, and that the power of attorney referred to in his letter to Mr. Ward was received by him from Mr. Prioleau through Mr. Sellar. Under the arrangement referred to in the letter, as explained by Mr. Thomson in his testimony, the money was received, no stipulation, or understanding, or agreement being claimed to exist outside of the promise of the letter, which was fully acted up to by Messrs. Foster & Thomson, viz., to keep the proceeds long enough to enable Mr. Ward to attach them here if he could. The obvious advantage resulting to Mr. Ward, and sought for by him, was that, in Florida, the funds were in custody of the law, and here they were not. Mr. Thomson testifies, that there was no stipulation made and entered into between him and Mr. Ward, in reference to any appearance being given either in Florida or here for Laird, and the appearance which, on the face of the Florida record, seems to have been given by Mr. Dockray, was utterly without authority, and unknown to Foster & Thomson until the receipt of his letter of apology, which did not come to hand until after they had drawn the large check.

First Point. Under this process of garnishment the libellants have no greater rights against Foster & Thomson than Laird himself could have. If Laird could not sue them for the proceeds of the Wren and recover, they cannot be held under the attachment.

1. It is settled law, that it must be affirmatively established that the garnishees have property. No presumption can be indulged in. Ben. Adm. (2d Ed.) §§ 427, 459; Drake, Attachm. §§ 458, 461.

2. Even a direct representation made by the garnishee to the creditor, as to funds, if any had been made, would not estop the garnishee, when cited under an attachment, from showing the true state of the case. Drake, Attachm. § 629a.

Second Point. As between Laird and Prioleau, Laird could not either have or enforce any claim to the proceeds of the Wren, which he had sold, and for which he had been fully paid.

1. Payment to Prioleau would have been a perfect defence at law to Foster & Thomson, if sued by Laird.

2. As trustee, holding the legal title, Laird would have been compellable, in equity, to furnish Prioleau with the means of collecting the fund in question.

3. His intervention was, therefore, nothing more than that of a nominal party signing

formally a receipt for a fund in which he had no personal interest, and which he was bound to see came into the hands of the representative of his vendee.

Third Point. The libellants' attempted appropriation of Mr. Prioleau's property cannot be maintained. The proceedings in prize, shown by the record, do not estop Prioleau, the true owner of the fund, from showing his ownership, in a collateral controversy between persons who are neither parties or privies to such proceedings in prize. As against Mr. Prioleau there cannot exist any estoppel in pais.

1. No case has ever held that, in a contest between strangers to a record in prize, the real owner of the property, in a collateral controversy, is estopped from showing facts, in reference to his title, which were not before the prize court. The vice of the libellants' argument is, that it overlooks the distinction between the case where title is claimed directly under the decree and the case now before the court. His counsel rely on loose expressions found in text-books and opinions, without examining the facts of the particular cases cited. To illustrate and enforce the above proposition, reference is especially made to the case of Maley v. Shattuck, 3 Cranch [7 U. S.] 458, 487, where Marshall, C. J., held, that the sentence of a prize court was not conclusive on a question of title arising in a subsequent proceeding. It is also laid down, in Phillips on Evidence, that the decision of a prize court is an estoppel only as to the point put in issue and directly determined. 1 Phil. Ev. p. 334, and note 627.

2. The well settled rule is, that, to work an estoppel by a record, the parties and subject-matter must be the same. See Clemens v. Clemens, 37 N. Y. 74.

3. The supreme court itself, in a case similarly situated, did not hold a special proceeding an estoppel. Millinger v. Hartuple, 6 Wall. [73 U. S.] 258.

4. It cannot, for one moment, be disputed, if Laird, himself, had collected the money, and had paid it over to an agent of Mr. Prioleau's, he, Prioleau, being the beneficiary and equitable owner of the money so paid over, that, in the agent's hands, the property in that money could not be changed back again to Laird by any determination as to Laird's title to the fund before it was paid over. This is precisely this case; the proceeds of the Wren, when received by Foster & Thomson, the agents of Prioleau, were, in fact, in the possession of Prioleau himself, and this money cannot be taken, under this process, out of the hands of Foster & Thomson, unless it could be taken out of Prioleau's pocket, in an action by Laird.

5. There is no estoppel in the case; both parties stood on equal ground; no representation was made by the garnishees, of any matter of fact.

6. The motives which led either side to consent to the withdrawal of the fund from Florida are not material. By tacit arrangement the motives of the parties were left mutually undisclosed, and it is not for the court to speculate as to what they were.

Something was said, in the argument, that, if Mr. Prioleau's claim to this money had been presented to the court at Washington, or in Florida, the result of the original controversy would have been different. There is nothing, in the judgment of the court on appeal, or in the facts of the case, which warrants such a presumption, but it is difficult to see how that can inure to the benefit of these attaching creditors, who are absolute strangers, in law and in fact, to the proceedings in the prize court.

Fifth Point. The garnishees should be discharged, with costs.

R. D. Benedict and J. Langdon Ward, for the libellants, presented the following argument:

First Point. The question before this court is, whether John Laird, the younger, was the owner of the proceeds of the Wren when they came into the hands of these garnishees. The libellants, for proof that he was such owner, rely mainly upon the record evidence of the judgment of the prize court. In considering this evidence, two questions arise, namely: (1) What did the court decide? (2) What is the effect of that decision?

Second Point. The supreme court decided that the Wren was the property of John Laird, Jr.

(a) The Wren was libelled simply as prize. The master claimed her, as bailee of said Laird, a British subject, as owner, and for and on account of said Laird, and the court decided that the Wren was the property of enemies of the United States. The question before the supreme court, on the appeal, therefore, was only this, "whether the vessel was owned by said Laird, a British subject, or by enemies of the United States?" This was the point argued by counsel, and was the very point decided by the court. See [The Wren] 6 Wall. [73 U. S.] 586. The court say: "The certificate shows that the claimant is the builder and owner. * * * The claimant not only built the vessel, but put his master in command. * * * These acts, in connection with the registry, afford strong evidence that the title of the vessel was in the claimant." Whom did the supreme court mean by "the claimant?" They meant John Laird, Jr. Not Stiles, for he did not build the vessel or put any master in charge of her. Not Prioleau, for he did not appear. The garnishees, who now claim to have represented him, were careful to keep any such idea from the mind of the supreme court. They stood by, and their principal stood by, in their persons, and heard the supreme court say: "The title to this vessel is in the claimant." They knew that the supreme court meant, by "the claim-

ant," John John Laird, Jr., and, when the mandate of that court directed the vessel to be restored "to the claimant," they knew that that mandate meant to restore it to John Laird, Jr., and to him alone. And thereupon they procured the decree of the district court in Florida, which decreed that the money should be restored to John Laird, Jr. The sole foundation of this decrée was, that the supreme court had found, as a fact, that, when the Wren was seized, she was the property of John Laird, Jr., and of no one else.

(b) The supreme court not only actually did decide this question, but were compelled to decide it. As the counsel for the garnishees aptly puts it, "the whole object and purpose of the prize suit was to determine the status of the vessel." She was libelled as prize. All the world were cited to appear and interpose their claims to her. Laird alone appeared, and claimed her as his. Every one else, by their silence, gave up to him such claim on her as they had. The district condemned her as enemy's property. This decree necessarily negatived Laird's claim of ownership, and from it Laird appealed. The supreme court, in order to determine that the vessel was not enemy's property, had to determine that she was the property of somebody else, and to determine also who that somebody else was, or they could not have told whether she was enemy's property or neutral property.

(c) The garnishees' brief argues that "Stiles was in fact the claimant." This seems to be a most remarkable misrepresentation of the case, or misunderstanding of the law of prize.

1. It is stated that "Stiles claimed, as master and bailee, for the owner, whoever he might be." Not so. He claimed as "bailee of, and for and on account of, John Laird, Jr.," whom he described as owner. The garnishees' counsel do not agree on this point, for Mr. Buckley's brief says, that Stiles "put in a claim in behalf of the registered owner, Laird."

2. It is also stated, that the words of the claim, "as bailee of John Laird, Jr., the owner thereof," are "surplusage," and are "irregular and improper," and the cases of The Cheshire [Case No. 2,655], and the John Gilpin [Id. 7,343], are cited in support of this statement. Those cases, however, merely hold, that it is "irregular and improper" to add to a claim charges of misconduct against the captors, or defences extraneous to the prize issue. But the allegation of ownership is essential. In the very case of The John Gilpin [supra], it is said, "the claim should be one of property merely." Stiles could make no claim of property as master only. Being master, he must claim for the owner. And, so far from its being the case that "he could not know, and did not pretend to know, to whom she belonged," he was bound to know that fact and to state it truly. The master, at least, must be cognizant of the true nature of the transaction.

3. Claims by masters of vessels in this form are frequent in prize cases, but, when they are so interposed, it is not the agent but the principal, not the master but the owner, who is the claimant. We cite the following cases in this court: The Crenshaw [Case No. 3,-384]. Claim filed by Irwin & Co., "in their own behalf and that of Scott & Clarke. * * * The claimants, Clarke & Scott, intentionally violated the blockade." The General Green [Id. 5,313]. Atwell, the master, interposed a claim alleging that the vessel belonged to Mr. Oppenheim. "The only question," says the court, "is whether the vessel, being owned by the claimant, Oppenheim," &c. The Cheshire [supra]. Craig, the master, filed a claim, averring that Jos. Battersby was the owner of the vessel, and Jos. and Wm. Battersby were owners of the cargo. But the court speaks of "the present claimants, J. & W. Battersby." The Sally Magee [Case No. 12,260]. Here, also, a claim was interposed by the master, but the court says, "the claimants can secure no exemption," etc.

4. The law on this point is clearly enunciated by Mr. Justice Story, in his article on "'Prize," 10 Ency. Am. p. 364, § 15, subd. 3. He says: "No claim is permitted to be put in unless by the master or correspondent or agent of the owner, or by the consul of the nation. A mere stranger having no interest is not permitted to claim. It has been already stated that a claimant in a prize court must be the general owner of the property."

5. The decision of the supreme court in the case of The Wren shows that that court did not consider the allegation of Stiles, that he was bailee of Laird, as surplusage, for that speaks only of Laird as the claimant, never of Stiles as such. And, if there were any doubts on the subject, these garnishees have made it certain by the final decree which they procured to be entered, directing the proceeds to be restored to "John Laird, Jr., the claimant." Since "a claimant must be the general owner of the property," this decree has the same force as if it read, "restored to John Laird, Jr., the general owner of the property."

6. The counsel of the garnishees (citing Fischer v. Ogle), has argued, that this court can only look at the sentence, and not at the recitals of the decree. It seems somewhat extraordinary, after reading Lord Ellenborough's remarks in that case of Fischer v. Ogle, about "the piratical way in which the French sentences proceed," that this court should be referred to such a case as a rule by which it is to construe the decisions of our own supreme court and of a sister court of equal authority with itself, and that, too, in favor of a foreigner as against our own citizens. Other cases show that the recitals are often referred to to throw light upon the sentence. Pollard v. Bell, 8 Term R. 434; Bird v. Appleton, Id. 562; Kindersley v. Chase,

cited in 2 Park, Ins. pp. 743, 747, 748. But, even if this court is limited to looking at the sentence alone, it makes no difference. The mandate directs that the vessel be restored "to the claimant," and the final decree declares that the proceeds are to be restored to John Laird, Jr., the claimant; and the claimant, as we have seen, must be the owner.

Third Point. That decision is conclusive of the fact decided, and cannot be contradicted or questioned.

(a) The judgment of a prize court, being the judgment of a court of exclusive jurisdiction, proceeding in rem. is binding on the whole world, and is conclusive both of the right established and of the fact decided. In Croudson v. Leonard, 4 Cranch [8 U. S.] 437, Mr. Justice Washington says: "It is a well-established rule, in England, that the judgment, sentence or decree of a court of exclusive jurisdiction, directly upon the point, may be given in evidence as conclusive between the same parties, upon the same matter coming incidentally in question in another court for a different purpose. It is not only conclusive of the right which it establishes, but of the fact which it directly decides. This rule, when applied to the sentences of courts of admiralty, whether foreign or domestic, produces the doctrine I am now considering, upon the ground that all the world are parties in an admiralty cause. The proceedings are in rem, but any person having an interest in the property may interpose a claim," &c.

In Penhallow v. Doane, 3 Dall. [3 U. S.] 86, Patterson, J., says: "The sentence of a court of admiralty or of appeal, in questions of prize, binds all the world as to everything contained in it, because all the world are parties to it. The sentence, as far as it goes, is conclusive to all persons." And Iredell, J., in the same case, in deciding that the erection of courts of admiralty was a function delegated to congress exclusively, says (page 91): "A prize court is, in effect, a court of all the nations in the world, because all persons in every part of the world are concluded by its sentences, in cases coming clearly within its jurisdiction. Even in the case of citizen and citizen I do not think it a proper subject for mere municipal regulation, because, as was observed at the bar, a citizen may make a colorable claim which the court may not be able to detect, and yet a foreigner be fatally injured by it. In case of a bona fide claim, it may appear to be good by the proofs offered to the court, but another person, living at a distance, may have a superior claim which he has no opportunity to exhibit." Palpably, no foreigner could be fatally injured by the presentation of a colorable claim in a case of prize, unless a sentence, awarding the res to the colorable claimant, concluded the real owner.

In Bradstreet v. Neptune Ins. Co. [Case No. 1,793], Story, J., says: "That the sentence of a foreign court of admiralty and prize, in rem, is in general conclusive, not only in respect to the parties in interest, but also for collateral purposes, and in collateral suits, not only as to the direct matter of title and property in judgment, but also as to the facts on which the sentence professes to proceed, although formerly subject to much doubt and controversy, is now a point fully established in courts of England and the courts of the United States."

In Bolton v. Gladstone, 5 East, 155, Lord Ellenborough, C. J., says: "Since the judgment of the house of lords in Lothian v. Henderson, it may now be assumed, as the settled doctrine of English law, that the sentences of foreign courts, of competent jurisdiction to decide all questions of prize, are to be received here as conclusive evidence in actions on policies of assurance, upon every subject immediately and properly within the jurisdiction of such foreign courts, and upon which they have professed to decide judicially." Barzillay v. Lewis (MSS.), reported in 1 Marsh. Ins. (2d Am. Ed.) p. 398, was an action against the insurers. The ship, originally a French vessel, was captured and condemned at Liverpool, where the name Three Graces was given her. She was then bought by a Liverpool merchant for a house in Amsterdam, her name translated into Dutch, a Dutch pass was sent her from Amsterdam, she was insured warranted Dutch property, sailed for Amsterdam, and was captured by the French and condemned as The Three Graces, of Liverpool. The insurers put the condemnation in evidence, as proof of a breach of the warranty, and it was held conclusive. Lord Mansfield said: "The warranty meant that the ship was Dutch to the purpose of being protected, and the sentence of the court of appeal in France is conclusive. The question, then, is, what the sentence means. The ship is condemned as not being Dutch. The warranty was that she was Dutch, which was false. * * * If the sentence had gone on a ground collateral to the property, the plaintiff would have been permitted to go into evidence to show the truth of the warranty."

In the case at bar, the sentence of acquittal went on the ground that the Wren was the property of John Laird, Jr., and was, therefore, not enemy property, as which she had been condemned below, and is conclusive on that point. Had the sentence gone on ground collateral to the property, the garnishees might possibly have been admitted to show want of title in the claimant. Could there be any doubt as to the grounds on which the sentence of acquittal was pronounced by the supreme court, after reading the opinion of that court, and the decree of the Florida court entered on the mandate, the certified copies of the briefs of counsel, offered by the libellants, are clearly admissible to resolve the doubt. Calvert v. Bovill, 7 Term R. 523.

In this case, where this question was

raised, Mr. Justice Lawrence said: "The cases alluded to in the argument seem to have established this, that, if it can be collected from the sentence itself, on what ground the foreign court decided, that would be conclusive in any action brought in this country. But, if it were ambiguous, or did not show on the face of it on what ground they proceeded, then the court here might receive evidence to show what were the grounds of the decision abroad."

To the same point are Hudson v. Guestier, 4 Cranch [8 U. S.] 293; Stoughton v. Taylor [Case No. 13,502].

(b) The only case cited in behalf of the garnishees, as opposed to the above authority, is the case of Maley v. Shattuck, 3 Cranch [7 U. S.] 458. An examination of that case will show that it is no authority against us. The decree of the prize court in that case will be found on page 465, and only adjudged that the vessel and her cargo "were good and lawful prize." When that decree came before the supreme court, that court only held that, as the vessel might have been a good and lawful prize, although she were the property of the neutral claimant, the decree that she was good prize was not a decree that she was not his property. Page 488.

It is a very long step from that decision to the decision which the garnishees seek to procure from this court, viz., that the decree of a prize court restoring a vessel to a neutral claimant, is not a decision that she was his property. Such a decree of restoration must be a decree that she is the property of the claimant, because, as the supreme court say in the case of The Siren, 7 Wall. [74 U. S.] 154: "When they (the United States) proceed in rem, they open to consideration all claims and equities in regard to the property libelled." The decision of the court must, therefore, determine all claims and equities.

(c) The decree of the prize court is, of course, effective to pass the title to a vessel which is sold under it. But its effect is by no means limited to that case. Where the question of prize or no prize depends upon the question of enemy's property, the decree of the prize court determines the question of the title to the vessel at the time of the seizure. That is a fact on which the "direct matter of title and property in judgment," as Judge Story says, is based.

A little consideration will show good reason for this rule. Why does a prize court examine the papers of a vessel to determine the question of prize or no prize? Because the law requires: (1) That "a claimant must be the general owner of the property." (2) That every vessel shall tell the truth about herself; that her papers shall be true; and that her master shall be informed of the true character of the transaction (letter of Sir Wm. Scott and Dr. Nichol, given in Upt. Mar. Warf. & Pr. 268), and, of course, that, when examined as a witness, he shall state that character truly. Falsehood, either in papers or testimony, is fatal to the vessel. As Dr. Lushington has said: "The court of prize never goes on a mere formal instrument. Over and over Lord Stowell has said: 'It is not the documents themselves which the court goes upon.' They must be true. They must be bona fide." The Ocean Bride, 2 Spinks, 20.

Acting upon this principle, the prize court looks to the papers of the vessel and the evidence of those on board of her, and from them it determines the fact on which the "matter of title and property" depends. And it must be borne in mind, also, that all the world are parties to a prize proceeding, and for this reason any one may intervene who is the real owner of any part of the vessel, and may defend his interest as suits him best. In The Mary, 6 Cranch [10 U. S.] 144, Marshall, C. J., said: "The whole world, it is said, are parties in an admiralty cause, and, therefore, the whole world is bound by the decision. The reason on which this dictum stands will determine its extent. Every person may make himself a party and appeal from the sentence; but notice of the controversy is necessary in order to become a party, and it is a principle of natural justice of universal obligation, that before the rights of an individual be bound by a judicial sentence, he shall have notice, either actual or implied, of the proceedings against him. When these proceedings are against the person, notice is served personally or by publication; when they are in rem, notice is served upon the thing itself. This is necessarily notice to all those who have any interest in the thing, and it is reasonable because it is necessary, and because it is the part of common prudence for all those who have any interest in it to guard that interest by persons who are in a situation to protect it. Every person, therefore, who could assert any title to the Mary, has constructive notice of her seizure, and may fairly be considered as a party to the libel."

The prize court, therefore, virtually says to all the world, in all cases where the question of enemy property is concerned: "We propose to try the question of the title to this vessel, and to try it on these papers on board of her, which are required to tell the truth. If you have anything to say why we should not so determine it, come forward and say it, otherwise hold your peace hereafter." Thus saying, its determination is conclusive, on the facts involved, against all the world —and so it ought to be. For any one who would afterwards maintain that the facts were not in accordance with the decision, must maintain that the papers of the vessel and the evidence of the master, on which the decree of the court was founded, did not conform to the truth. And this no one, who was in any way interested in the matter, will be allowed to maintain.

(d) Look for a moment at the circumstances of this case. Read the remarks of the supreme court about the "matters for well-grounded suspicion" in the "facts and circumstances surrounding the history of this vessel." Can any reasonable man doubt that, if this fact, by which it is now sought to overthrow that decision of the supreme court, had been thus made to appear, it would have turned the scales of justice, which obviously hung in doubtful balance?

If the fact of this bill of sale, from Laird to Prioleau, had appeared, either on the registry or on the evidence of the master, is there any doubt as to its effect upon these "well-grounded suspicions?" The status of Mr. Prioleau, as was argued before the court, "was established by the judicial records of Great Britain and the diplomatic history of the late contest." Counsel might have added, "and by the judicial records of our own courts." If they had proceeded to read from the opinion of Mr. Justice Clifford, in the case of U. S. v. The Lilla [Case No. 15,600]: "Direct testimony is exhibited in the record which requires explanation. The deponent Gleason testifies that Frazer, Trenholm & Co., of Liverpool and Charleston, owned the vessel and her cargo when she was taken, and that the two houses have the same name in each of those places," Mr. Justice Clifford would probably have said to counsel, as Lord Stowell said, "I do not forget the information which I have received from other cases." 2 Spinks, 10, note.

Can there be a moment's doubt that this fact was studiously concealed from the knowledge of the court? And can this court now hold that a party who, by concealing a fact from the knowledge of the court, has procured the decree which he desired, will now be permitted to set up that fact against the decree? If Mr. Prioleau was before the court, would the court hear him saying, "The papers of my vessel did not tell the truth. The master of my vessel either falsified or else did not know the truth of the transaction. I pray you now to allow me to prove that falsity." That would be to overthrow the settled policy and principles of prize law. It would be to offer a premium for concealment and falsification.

(e) The conclusiveness of the judgments of courts of exclusive jurisdiction proceeding in rem, both as to the right declared and the grounds on which the sentence professes to proceed, has been affirmed in many cases other than those of prize.

In Street v. Augusta Ins. [& Banking] Co., 12 Rich. Law, 13, which was an action on a policy of insurance to recover for damages suffered by a collision, the defendants pleaded the negligence of the plaintiffs as a defence, and offered the sentence of an admiralty court condemning the plaintiffs' vessel in damages by reason of such negligence, on a libel by the owners of the other vessel. Held conclusive.

In Magoun v. New England Marine Ins. Co. [Case No. 8,961], which was an action to recover the value of a vessel which rotted pending a litigation to condemn her for smuggling, resulting in her acquittal, the defendants offered to prove probable cause of seizure, which the decree of acquittal negatived, and also that the master swore falsely, etc. Story, J., said: "The most that can be said is, that the master concealed the facts, &c., and that thereby both courts were misled in their decrees. But concealment of facts would be a new head of the law upon which to avoid a sentence of condemnation or acquittal in rem. * * * It appears to me that, independently of fraud (a point which will be presently considered), the sentence is conclusive."

In The Apollon, 9 Wheat. [22 U. S.] 362, Story, J., says: "A decree of acquittal on a proceeding in rem, without certificate of probable cause of seizure, is conclusive evidence, in every inquiry before every other tribunal, that there was no such cause."

In Rose v. Himely [Case No. 12,046], Johnson, J., says: "The jurisdiction of the court of admiralty is of a peculiar nature, acting wholly in rem, and not affecting the rights of any persons whomsoever, except so far as they exist in the thing which is the subject of the libel. Its decrees are laid down to be conclusive against all the world, a doctrine which, as to the right of property in the subject libelled, is strictly and universally correct, whenever the court is erected within the jurisdictional limits of the power which constitutes it, when the subject is of admiralty jurisdiction, and the court professes to sit and judge according to the law of nations and the style of the admiralty." And in the same case [4 Cranch, 8 U. S.] Marshall, C. J., says (page 276): "If the court of St. Domingo had jurisdiction of the case, its sentence is conclusive."

Whitney v. Walsh, 1 Cush. 29, was a case where suit was brought to recover back the purchase money paid for cigars, which, after the sale, were condemned as smuggled. The defendant objected to the record of condemnation because he was not a party to the proceeding. But the court held that it was not only admissible but conclusive. Wilde, J., says: "It is a well established principle that the sentence or decree of a court of admiralty and maritime jurisdiction in rem is binding on all the world as to the points in issue and judgment thereon."

Gelston v. Hoyt, 3 Wheat. [16 U. S.] 246, was a case where, after acquittal of property seized for violation of revenue laws, without certificate of probable cause, suit was brought against the marshal for damages for the seizure, and, when he offered evidence of probable cause, the decree was held conclusive against him. Story, J., said: "The reasonableness of this doctrine results from the very nature of proceedings in rem. All persons having an interest in the sub-

ject-matter, whether as seizing officers, or informers, or claimants, are parties or may be parties to such suits so far as their interest extends. The decree of the court acts upon the thing in controversy, and settles the title to the property itself, the right of seizure and the question of forfeiture. If its decrees were not binding upon all the world upon the points which it professes to decide, the consequences would be most mischievous to the public. In case of condemnation, no good title to the property could be conveyed, and no justification of the seizure could be asserted under its protection. In case of acquittal, a new seizure might be made by any other person, toties quoties, for the same offence, and the claimant be loaded with ruinous costs and expenses." In Story, Confl. Laws, § 592, it is said: "In cases of this sort (that is, in rem) it is wholly immaterial whether the judgment be of acquittal or condemnation. In both cases it is equally conclusive."

(f) Such judgments settle the title to the res. Marshall, C. J., in Williams v. Armroyd, 7 Cranch [11 U. S.] 423-432, says: "It appears to be well settled in this country, that the sentence of a competent court, proceeding in rem, is conclusive with respect to the thing itself, and operates as an absolute change of property. By such sentence the right of the former owner is lost, and a complete title given to the person who claims under the decree." See, also, Gelston v. Hoyt, supra.

1. The truth of this proposition in cases of sentences of forfeiture or condemnation need be sustained by no quotation of authority.

2. That it is equally true in cases of acquittal, is manifest, since, in such cases, ex necessitate rei, the court must decide to whom the property belongs, in order to determine to whom it shall be delivered.

In the case of The Panama [Case No. 10,703], the court say: "The court, being rightfully in possession of the funds representing the ship arrested, must necessarily, as incident to that possession, have power to decide who is entitled to withdraw them from the registry."

In The Mary Ann [Id. 1,195], the court says: "The process acts on the thing itself, and places it in the custody of the court. When thus in its possession, the court is bound to preserve it for all who have an interest in it, and not to deliver it but to those who prove a title." To the same effect is Andrews v. Wall, 3 How. [44 U. S.] 568-573.

3. In close analogy to this case is that of the grant of probate or administration.

Ennis v. Smith, 14 How. [55 U. S.] 400. This was an action to recover for the descendants of the sisters of Kosciusko, as his next of kin, funds in the United States, belonging to him and as to which he died intestate. The court below dismissed the bill on the ground (among others) that the plaintiffs had not proved themselves the next of kin of the deceased. The only proofs offered in that behalf were decrees of the government of nobility at Grodno, and of the court of Kobryn in Lithuania. The competency of the jurisdiction of these tribunals in matters decided upon by these decrees was proven. The supreme court reversed the judgment of the court below, and in their opinion, referring to this decree, say: "It is not a judgment inter partes, but a foreign judgment in rem, and is evidence of the facts adjudicated, against all the world."

In Noell v. Wells, 1 Lev. 235, 236, it was held, that "a grant of probate or administration is in the nature of a decree in rem, and actually invests the executor or administrator with the character which it declares belongs to him. Accordingly, such grant of probate or administration is conclusive against all the world." It may, indeed, be shown that the grant was revoked, for that is the further act of the same court, or that it was forged, for that shows it not to be the act of the court at all, or that it was granted by a court having no jurisdiction, for then it is a nonentity. But it cannot be shown that the testator was mad, or that the will was forged, for those facts might have been alleged in the ecclesiastical court in opposition to the grant of probate.

So, in this case, the garnishees may show that the decree of the Florida court has been reversed, or that the record of that decree is forged, or that that court had no jurisdiction. But they cannot show that Laird was not the owner of the Wren, for that fact might, and, if true, should, have been alleged in the prize court, in opposition to the final decree.

Fourth Point. The judgment of the prize court is so conclusive upon the question of the title to this vessel, that if, after that decree of restoration, Laird had taken the vessel, or her proceeds, into his possession, Prioleau could not have recovered them from him. If Prioleau and Laird were the parties before this court, the decree of the court must be for Laird. De Metton v. De Mello, 12 East, 234. This case and the case at bar are singularly alike. This was an action for money had and received to recover the proceeds of a cargo shipped by the plaintiffs at Lisbon for Nantes, captured, libelled as prize, claimed by the defendant, and restored to him. It appeared that the defendant was was a clerk for the plaintiffs, and lent his name to neutralize the property. Ellenborough, C. J., at the circuit, nonsuited the plaintiffs, on the ground that it did not lie in their mouths to gainsay that the property of the cargo was in the defendant, after he had, with their privity and consent, put in a claim, as owner, before the court of admiralty, which had been induced, on that statement of facts, to award restitution of the cargo to the defendant, as neutral prop-

erty belonging to himself. A rule nisi for a new trial was refused by the king's bench, with the following opinion:

"Ellenborough, C. J.: I think that the plaintiffs are estopped by their own act in setting up and establishing, in the court of admiralty, the claim of De Mello to this property, from now turning around and insisting upon it as their own. If they could have shown that De Mello had acted tortiously, as against them, in setting up a false defence and claim to the cargo as his property in that court, that might have served them; but, on the contrary, it appeared that he had acted all through with their privity and consent. De Mello may have behaved like a rogue to the plaintiffs, but both plaintiffs and defendant have behaved wrongfully, as against this country, in colluding to make French property appear to be Portuguese, in the court of admiralty, upon the question of prize as against the captors. The plaintiffs should go back to the admiralty, and have the matter set right there, that the opinion of the court may be taken upon a true statement of facts."

On the authority of this case, therefore, Prioleau could never be heard to say that this vessel was not Laird's property. No case has been suggested by the counsel for the garnishees which points to any different rule. We add the following authorities in support of it: One making an assertion of acts in court is estopped thereafter to deny it. The Mary [Case No. 9,185]. When a man alleges a fact in a court of justice for his advantage, he shall not be allowed to contradict it afterwards. It is against good morals to permit such double dealing in the administration of justice. Wills v. Kane, 2 Grant, Cas. 63. One who has intervened in a suit on a bottomry bond, as mortgagee, is estopped from claiming the surplus as owner. The Panama [Case No. 10,703]. But the counsel for the garnishees argue, that they received this money as the agents of Prioleau, and that the case is to be treated as though the money was now in the possession of Prioleau himself. We think that they should not, in fairness, have put forth such a claim, and that it will not be listened to by the court under the circumstances of this case.

The garnishees were acting for Mr. Laird. They knew that Mr. Ward represented this claim against Mr. Laird, and had attached this fund as his property. They inform him of their power of attorney from Laird, and they propose to him that they will receive the money "under our authority from the claimants, Laird and Stiles," and hold it here till he should have the opportunity to serve his attachment; and, this proposition being accepted by Mr. Ward, and his attachment having been thereupon vacated by him, they now turn around and say, "We received the money, not under our power from Laird and Stiles, but as agents for Mr. Prioleau." Such a change of position is neither equitable nor legal. If Mr. Thomson had stated to Mr. Ward that he was acting for Mr. Prioleau, he would not have obtained the consent to discharge the attachment. He held his peace when he should have spoken. He should be compelled now to hold his peace when he would speak. "The rule of law is clear, that when one, by his words or conduct, wilfully causes another to believe in the existence of a certain state of things, and induces him to act on that behalf, so as to alter his own previous position, the former is concluded from averring against the latter a different state of things, as existing at the same time." Pickard v. Sears, 6 Adol. & E. 469.

Such is this case. Mr. Thomson's words and conduct certainly caused Mr. Ward to believe that Thomson's position was that of attorney in fact for Laird, and that the position of the fund, as to the right to attach it as the property of Laird, would not be affected by its being received by Mr. Thomson. Acting on this belief and assurance, Mr. Ward vacated the attachment. Mr. Thomson is then concluded from averring a different state of things existing at the time, and alleging that, in receiving the money, he was agent for any one except Laird.

Fifth Point. The above propositions being true, it follows that the evidence offered by the garnishees must be excluded. No evidence can be received against the decree of the prize court, unless it be evidence of a title acquired subsequent to the seizure.

(a) But there is no evidence of any such subsequently acquired title. The only evidence offered to prove title in Prioleau is the bill of sale of January 3d, 1865, executed five months before the seizure.

(b) As to this paper, there is no evidence of its bona fides, or that it had any actual consideration. Suspicion is cast on it from the fact that it was not recorded at the customhouse at the port of registry, until May 1, 1865, four months after its pretended execution, and that it was never made to appear in the prize proceedings.

(c) The execution of the power of attorney by Laird is entirely inconsistent with the validity of the bill of sale.

(d) That power of attorney and the acts of the parties are consistent with one of three theories, namely: (1) That the bill of sale was never a reality; (2) a retransfer of the vessel to Laird; or (3) on the present theory of the garnishees, an attempted fraud on the prize court. On neither theory can it be regarded by this court.

Sixth Point. On the state of facts here shown, the libellants insist that this court must decide this case as if this court were the district court of Florida. The object and intention of Mr. Ward and Mr. Thomson, in their negotiation, was simply to transfer the litigation to this court, without in any way affecting their rights. If Mr. Thomson had any other intention, he can-

not now be allowed to bring it forward. Now, the district court of Florida would never have allowed the party who procured its decree of ownership in Laird, to allege before it that that decree was procured by concealment, and was, in fact, an imposition on the court. This court will be no more ready to allow it.

Seventh Point. The procurement by Prioleau of the decree of ownership in Laird, was practically an assignment to Laird of his interest in the vessel, if he had any. He procured a decree to be pronounced, which, per se, placed the title to the vessel where it declared it to be. He is in the same position as if he had made, executed, and delivered a bill of sale of the vessel to the claimant. This is now claimed to have been a mere cover for the purpose of defrauding the captors and the United States, and this court is asked to help the success of the artifice. But a court of admiralty, which is a court of equity, will not listen to such a claim from these garnishees, who were the active agents in carrying out the transaction. Their position is analogous to that of one who, having made a conveyance of his property to cover it against his own creditors, should apply to the court to set the assignment aside, in order to protect it from the creditors of his grantee. (a) No court would listen to such a suit. Jackson v. Dutton, 3 Har. [Del.] 98. (b) The assignment would be held good. Randal v. Phillips [Case No. 11,555].

Eighth Point. The garnishees are bound by the appearance of Dockray in Florida. They should have immediately repudiated his action, and returned the funds. They did no such thing, and are bound by that appearance and its effect. The Sally Magee, 3 Wall. [70 U. S.] 457; Benedict v. Smith, 10 Paige, 130. How, then, can they say that this fund is not the property of Laird, when, under the compulsion of its being attached as Laird's property, they have given the appearance for him, which it was the very purpose of the attachment of the fund to compel?

Ninth Point. The sum of the whole matter is this: These garnishees, acting, as they say, as agents for Mr. Prioleau, procured from the prize court a decision that a certain state of facts existed. They now seek to avoid the effect of the decree, which was based upon that state of facts, by setting up that the state of facts did not exist. They cannot be heard to make that allegation. Their action was an admission, of the most solemn character, that Mr. Laird was the owner of the Wren. It was an admission, "On the faith of which a court of justice has been led to adopt a particular course of proceeding," and such admissions are "conclusive." 1 Greenl. Ev. (12th Ed.) p. 234, § 204. It is contrary to public policy that they should be allowed to avoid the effect of that adjudication of the prize court, and thus secure for themselves, or for the principal whom they claim to have been assisting, the fruits of a fraud, which, as they seek to show, was practiced upon that court, not only with the knowledge, but by the active interference of them all. "Allegans suam turpitudinem non est audiendus."

BLATCHFORD, District Judge. On the 16th of June, 1865, the United States filed a libel, in admiralty, in the district court of the United States for the southern district of Florida, against the steamer Wren and her cargo, alleging, in the libel, that certain persons, citizens of the United States, on the 12th of June, 1865, captured the Wren and her cargo, on the high seas, as prize of war; that the captured property had been brought into Key West, in said district; and that it was lawful prize of war, and subject to condemnation and forfeiture as such. It prayed a condemnation of the property. An attachment was issued against the Wren and her cargo, and was returned duly executed. A monition, in the usual form, was also issued, returnable June 27th, and was returned duly executed.

On the 26th of June, 1865, a claim and answer signed "Edward C. Stiles, master British steamer Wren," and duly verified, was filed in the cause. It says: "And now comes Edward C. Stiles and says, that he is the master of the said steamer Wren, and, as such, is the lawful bailee of said steamer, her tackle, apparel and furniture, and claims the same for the owner thereof; and he further says, that John Laird, a lawful British subject, residing in England, is the true and bona fide owner of said steamer, and that no other person is the owner thereof, as appears by the register of said steamer, now in possession of the court, and as he is informed and believes." The answer also denied, that the steamer was prize of war, and averred that she had no cargo, and prayed restitution.

On the 15th of August, 1865, a decree was made in the cause, in these words: "A claim having been interposed for this vessel and cargo by Edward C. Stiles, master of said vessel, for and on account of John Laird, the younger, a British subject, and this cause having been heard on the libel and proofs and testimony taken in preparatorio, and pleadings of the claimant, and all due proceedings having been had, and the court being fully advised in the premises, and it appearing to the court that the said steamer Wren, her tackle, apparel, furniture and cargo, were, at the time of capture, the property of enemies of the United States, it is now ordered, adjudged and decreed, that the said steamer Wren, her tackle, apparel, furniture and cargo, be condemned and forfeited to the United States, as lawful prize of war." The decree also ordered a sale of the property.[3]

[3] [See Case No. 16,768.]

From the testimony in the prize cause, it appears that the main question in issue was, whether the Wren belonged to Laird, a subject of Great Britain, residing in Liverpool, and was bona fide neutral property, or whether she was really the property of the government of the Confederate States, or of the firm of Frazer, Trenholm & Co., acting for and representing such government. A certificate of registry was found on board of the Wren, at the time of her seizure, dated at Liverpool, December 24th, 1864, signed by a registrar, which specified December 24th, 1864, as the date of registry, and stated that the Wren was British built, and was built by Laird Bros., at Birkenhead, in 1864, that her port of registry was Liverpool, that John Laird, the younger, of Birkenhead, shipbuilder, was the owner of the whole of her, and that William Raisbeck was her master. The Wren, when seized, was on a voyage from Havana to Halifax and Liverpool. She was seized by persons forming part of her crew. She had previously been engaged in running the blockade, into Galveston, Texas, from Havana, and, a short time before she began the voyage on which she was seized, she had entered the port of Galveston, discharged a cargo, taken one of cotton on board, and carried it safely to Havana. From the decree of the prize court an appeal was taken, on behalf of the claimant, to the supreme court of the United States. On the 16th of October, 1865, a writ of sale was issued, under which the vessel was sold. The proceeds of sale, amounting to $37,108 50, were deposited with the assistant treasurer of the United States, at New York.

The appeal was heard by the supreme court, and it reversed the decree of the court below. The case is reported in 6 Wall. [73 U. S.] 582. In the decision of the supreme court, as reported, the question is stated to be, whether the vessel was the property of the enemies of the United States. It is also stated therein, that the certificate of registry shows that "the claimant" (Laird) is "the builder of the vessel and owner;" that "the proofs show, with reasonable certainty, that his" (Laird's) "registered master brought the vessel to Havana, and was there engaged in command of her within three months after she was launched and fully equipped for the voyage, and which was within three months of the time when she was seized, as prize, by her crew." The decision proceeds: "It is quite apparent, therefore, upon the proofs, that the claimant" (Laird) "not only built the vessel, but put his master in command, in this, her first voyage, and the presumption would seem very strong, if not irresistible (nothing else in the case), that he continued the owner for the short period of six months which elapsed after she was built, and before the seizure took place. In addition to this, she was in the command of a master" (Stiles) "claiming to represent Laird as owner. These acts, in connection with the registry, afford strong evidence that the title of the vessel was in the claimant." The decision, then, after holding, that most of the proofs relied on to disprove such evidence were "inadmissible and incompetent as testimony in a court of justice" because they did "not rise to the character or dignity of testimony in any court that respects the law of evidence," goes on to say: "We agree, that, in the facts and circumstances surrounding and attending the history and operations of this vessel, and of the individuals connected with her, there are matters for well-grounded suspicion and conjecture, as it respects the purpose and intent with which the vessel was originally built and sent to Havana; and, as she entered immediately on furnishing supplies to the enemy and receiving cargoes of cotton in return, it is not unreasonable or unnatural to suspect, that the so-called Confederate States, or their agents, had some connection, if not interest in her. But this alone is not evidence on which to found a judgment, in the administration of justice. The facts, that the master, Stiles, who was put in command of her for the voyage home, from Havana to Liverpool, was an officer in the enemies' naval service, and had belonged to the United States navy, and Helms, who was in some way, not explained, connected with her voyages in running the blockade, and who was the agent of the enemy at Havana, might well be entitled to consideration and weight on the question, if there had been any legal proof in the case laying a foundation for such a conclusion. So, also, would the evidence that Stiles destroyed, at the time of the capture, a letter from Helms, agent of the ship, as he calls him, to himself, and an order for the payment to him of £40, on the delivery of the ship at Liverpool. But, in the view we have taken of the case, there is no foundation of legal proof of the ownership of the vessel in the Confederate States, on which these circumstances can rest, or be attached, as auxiliary considerations, to influence the judgment of a court."

From the language of the decision of the supreme court, it is apparent, that, from the fact that Laird built the vessel, and that she was registered in his name as builder and owner, and that the master named in the certificate of registry brought her from Liverpool to Havana, and was in command of her at a time less than three months after her registry, and less than three months before her seizure, the court presumed, because there was no competent evidence to the contrary, that Laird continued to be the owner of the vessel at her seizure, especially as Stiles claimed to represent Laird as owner. On this the court concluded that, as Laird was a British subject, and was not shown to be the representative or agent of the Confederate government, the vessel was not enemies' property at the time of her seizure. It is also apparent, that the court thought, that,

on the facts and circumstances disclosed by the proofs, there was good ground for suspicion that the Confederate government, or its agents, had some connection with, or interest in, the vessel, but that there was no legal proof of the existence of such connection or interest, so as to uphold the decree condemning the vessel as enemies' property.

The master, Stiles. in his deposition, in the prize case, in answer to the interrogatories in prize, states, that the vessel "belonged to one Laird, Junior, as he inferred from the register, and was informed;" that "he believes that one Laird, Junior, was owner of the vessel at the time she was seized;" that "he only knows that from the register," and that "the deponent was engaged to take the vessel to Liverpool and deliver her there to Frazer, Trenholm & Co." The master, also, in that deposition, speaks of Helms as "the agent of the vessel" "at Havana;" and the supreme court, in its decision, speaks of Helms as "the agent of the enemy, at Havana."

It appears, by the evidence in the present case, that Foster and Thomson, after the decree of condemnation was made, were retained by one Charles K. Prioleau, who has for many years been a member of the firm of Frazer, Trenholm & Co., to attend, on behalf of Prioleau, to the prosecution of the appeal to the supreme court. Foster and Thomson do not know Laird, and never saw him, and never had any communication or correspondence with him, written or verbal. On that retainer, Foster and Thomson caused the transcript of the record on the appeal from the district court in Florida, to be sent to the supreme court, and made the necessary deposit of money with the clerk of the latter court, and employed counsel to argue, and who did argue, the appeal in the supreme court, and they have paid such counsel for his services.

The brief of such counsel, filed in the supreme court, on the appeal, asserts it to be shown by the record, that the Wren was never sold or transferred, and was owned by Laird, the younger, at the time of her seizure; that she was owned in England, by an Englishman, and had never been owned by any one else; that she was at all times the property of a British neutral; and that, therefore, she was never the property of enemies of the United States. It was not disclosed to the supreme court by Foster and Thomson, or by Prioleau, that, prior to the seizure of the vessel, Laird had parted with all his interest in the vessel, or had sold and conveyed her to Prioleau, or that Prioleau had any interest in her at the time of her seizure.

The case was decided by the supreme court on the 23d of March, 1868. The mandate of that court designates the suit as one between the United States, libellants, and "the steamer Wren and cargo, and E. C. Stiles, claimant, respondents." It recites the decree of the district court in the suit, and then orders that such decree be reversed, and that the cause be remanded to such district court, "with directions to restore the vessel and cargo to the claimant, but without costs," and then commands such district court that such further proceedings be had in the cause in conformity to the opinion and decree of the supreme court, as ought to be had.

Foster and Thomson received such mandate, and then drew a power of attorney to be executed by Laird and Stiles, and caused it to be sent to Prioleau, with instructions that he should procure it to be executed by Laird and Stiles, and should cause it to be returned to Foster and Thomson. It was so executed. It bears date July 2d, 1868, and was returned, executed, to Foster and Thomson. By its terms, Laird and Stiles appoint Foster and Thomson their attorneys, "to receive and collect from the United States government, or any branch or officer thereof, or any depositary thereof, any and all moneys, the avails or proceeds of the sale of the steamer Wren and her cargo, sold under decree of the district or circuit court of the United States, at Key West, in the southern district of Florida, by the marshal of the United States for the said district, the said decree having been reversed by the supreme court of the United States, on appeal, and this power having been given to our said attorneys for receiving restitution of the avails of the said steamer Wren and cargo."

On the 28th of December, 1868, the libellants in this suit filed in the district court of the United States for the southern district of Florida, a libel, in admiralty, against John Laird, the younger, for the same cause of action that is sued on in this suit, and praying the same relief. On the 5th of January, 1869, Foster and Thomson wrote to Mr. Dockray, an attorney in Florida, advising him of such suit in Florida, and employing him to obtain for them the funds in court in The Wren Case, and directing him not to enter a general appearance for Laird in the suit in Florida, but only to move specially to set aside the process and any attachment against the Wren fund. On the 6th of January, 1869, the court in Florida ordered process to issue in such suit, returnable on the 3d of May, 1869. Such process was issued on the 7th of January, 1869, and was a warrant of arrest bailable in the sum of $44,622. On the same day such warrant was returned, not served. On the 26th of January, 1869, Foster and Thomson sent to Mr. Dockray a copy of the said power of attorney from Laird and Stiles, in a letter to him which said: "We lay stress on this, as the particular object we have in the matter is to receive the money under it," the power of attorney, "and we wish to have the judge's check so drawn, that we, as attorneys, may collect it." On the 20th of February, 1869, in the suit in Florida against Laird, an attachment was issued against "the proceeds of sale of the steamer Wren, now on deposit with the assistant treasurer of the United

States, in the city of New York, and subject to the order of this court," returnable May 3d, 1869. This attachment was executed by serving a copy thereof, on the 4th of March, 1869, on the assistant treasurer of the United States at New York. On the same 20th of February, 1869, a monition, in the suit in Florida against Laird, was issued, returnable May 3d, 1869, and was afterwards returned as served by publication in a newspaper published at Key West, and by posting there. Negotiations took place between Foster and Thomson and Mr. Ward, who represented the libellants in the suit in Florida against Laird, and who also represents them in this suit, respecting a disposition of the Wren funds which should transfer them to the city of New York in such manner that process of attachment in this suit should be served on them, and, on the 24th of February, 1869, Foster and Thomson wrote to Ward, suggesting that the district judge in Florida should forward to them his check on the assistant treasurer in New York for the proceeds of the Wren, and that they should draw the funds under their authority from "the claimants, Laird and Stiles," and keep the proceeds in their hands sufficiently long to enable Mr. Ward to serve upon them such process or papers as he might be advised. This proposal appears to have been substantially agreed to by Mr. Ward, for, on the 12th of March, 1869, he wrote to Mr. Bethel, his attorney at Key West, directing him to "make no objection to the forwarding by the judge," to Foster and Thomson, "of the check for the proceeds of the Wren, in accordance with the mandate of the supreme court," and saying: "Until otherwise advised, hold the suit where it is, staying further proceedings for the present, but do not discontinue. If necessary to enable the court to forward the check, stipulate as may be proper. I enclose a copy of a letter from Messrs. Foster and Thomson to their attorney" (the letter of March 13th to Mr. Dockray, next mentioned), "for your information. Advise me by telegraph the day the check leaves Key West." On the 13th of March, 1869, Foster and Thomson wrote to Mr. Dockray, advising him that Mr. Ward had decided to make no objection to the forwarding by the judge to them, of his check for the money, and enclosing to him a copy of the letter of the 12th, from Mr. Ward to Mr. Bethel, and directing him to obtain the check payable to their order, and to forward it to them. On the 18th of March, 1869, Dockray, who was attorney of the United States for the southern district of Florida, wrote to Foster and Thomson, saying: "In the case of the steamer Wren, John Laird, owner, &c., I would have written you several weeks ago, if I was at liberty to take any action in your interest. While representing the government, and bound by the instructions of the attorney general, it has not been possible for me to serve you as indicated in yours of the 5th of January last. Before the mandate of the supreme court of the United States reached the clerk of the court at Key West, the acting United States attorney had filed a petition, in a cause of possession, against the proceeds of the sale of the Wren, the monition being returnable December 1st, 1868. The attorney general, however, directed that no default be taken, nor any other steps, without further instructions. The matter seems to be in a shape to enable you to secure the benefit of the mandate of the supreme court of the United States by proper management. It is certainly my duty to obey the terms of the decree of the supreme court, as it also is to promptly and efficiently execute any instructions I may receive from the attorney general. If you will communicate with Senator Osborn, of Florida, at Washington, immediately, you may be able to obtain definite instructions to be forwarded me from the office of the attorney general. I am precluded at present from taking any steps without further directions." On the 25th of March, 1869, Foster and Thomson wrote to Mr. Dockray, saying, that they had been informed that directions had been sent from the office of the attorney general to discontinue the suit brought in behalf of the United States against the proceeds of the Wren, and adding: "These directions, together with the withdrawal of opposition by Messrs. Cushing, will, no doubt, enable you to obtain and forward the judge's check to our order." On the 26th of March, 1869, Mr. Dockray wrote to Foster and Thomson, saying that he should move to set aside the process and attachment in the suit brought by these libellants against Laird, in Florida, for want of jurisdiction. On the 13th of April, 1869, the mandate of the supreme court, and a certified copy of the power of attorney from Laird and Stiles to Foster and Thomson, were filed in the court in Florida, the latter paper being filed by Mr. Dockray. Some delay took place in the receipt, by Mr. Dockray, of the instructions from the office of the attorney general to discontinue the proceeding in the suit referred to, but they were received by him on or before the 8th of May, 1869. On that day Mr. Ward telegraphed to Mr. Bethel, directing him to consent absolutely to forwarding to Foster and Thomson the judge's check for the proceeds of the Wren, drawn to their order, and to require no bond or stipulation. On the same day, Mr. Dockray, in the prize court, in Florida, in the prize case, as "attorney and proctor for John Laird, claimant," exhibited to the court the mandate of the supreme court, and moved for a final decree in accordance with the requirements of the mandate. On the same day, in the suit in Florida brought by these libellants against Laird, a paper was filed in the court, entitled in the suit, and signed, "John Laird, by F. A. Dockray, attorney and proctor," and reading thus: "And now comes John

Laird, the respondent in this cause, and makes his general appearance herein, and claims the proceeds in the registry of this court, as attached in this suit." The record of the court states that such appearance and claim were filed by Laird. On the same day, in the same suit, a paper was filed in the court, entitled in the suit, and signed, "John Laird, by F. A. Dockray, attorney and proctor," and reading thus: "And now comes John Laird, by his attorney and proctor, F. A. Dockray, and moves the court for an order dissolving the attachment herein." Appended to, and filed with, this paper, was a consent signed by Mr. Bethel's firm, as proctors for the libellants, consenting to such motion "absolutely and without stipulation or bond." On the 10th of May, 1869, in the same suit, an order was entered, entitled in the suit, reciting that "John Laird, respondent herein, by F. A. Dockray, his attorney and proctor," had moved for a dissolution of the attachment, and that the libellants, by their attorneys and proctors, had, in writing filed, consented thereto absolutely and without stipulation or bond, and ordering "that the attachment issued out of this court, upon the proceeds of the sale of the steamer Wren, now on deposit with the assistant treasurer of the United States at New York, be dissolved." On the same day, in the prize court, in Florida, in the prize case, a decree was entered, reciting the former decree, and the appeal to the supreme court, and the action of that court, and the filing of its mandate, and stating that the costs and expenses in the proceeding, amounting to $5,666 88, had been taxed and paid to the officers of the court entitled thereto, out of the proceeds of the sale of the steamer Wren, and then, "on motion of F. A. Dockray, attorney and proctor of John Laird, claimant," decreeing that the remainder of the proceeds of the steamer Wren, amounting to the sum of $31,441 62, on deposit with the assistant treasurer of the United States at New York, and subject to the order of the court, "be paid to the said John Laird, claimant," and, further, stating that it appeared to the court, "that Foster and Thomson, of the city of New York, are the lawfully authorized attorneys in fact of the said John Laird, claimant," and then decreeing, "that the said proceeds be paid to the said Foster and Thomson." The record of the court then proceeds: "Whereupon, checks No. 199, for $29,869 62, and No. 200, for $1,572, were drawn in favor of Foster and Thomson, of New York, attorneys for Laird and Stiles, as against the proceeds of the steamer Wren, on deposit with the assistant treasurer of the United States at New York, which checks were delivered to F. A. Dockray, Esquire, attorney for Foster and Thomson, and attorney in fact for John Laird, and his receipt therefor taken." The receipt is entitled in the prize suit, and is signed, "F. A. Dockray, attorney for Foster and Thomson, of New York, attorney in fact for John Laird, claimant," and is a receipt for the two checks as drawn by the judge on the assistant treasurer, and payable to the order of Foster and Thomson. On the 10th of May, 1869, Dockray wrote to Foster and Thomson, enclosing to them the two checks, and advising them that he would write to them the next day in full, and send to them certified copies of the proceedings had on the dissolution of the attachment. That letter and the two checks were received by Foster and Thomson on the 19th of May, 1869, and on that day the amount of the larger check of the two was paid to Foster and Thomson by the assistant treasurer. The amount of the smaller check was paid to them a few days afterwards. After the larger check had been paid, Foster and Thomson received from Dockray a letter dated May 11th, 1869, advising them that he induced Mr. Bethel's firm to consent to the motion for the dissolution of the attachment, by himself agreeing to enter a general appearance for Laird, and stating his reasons for so doing, and sending to them a certified copy of the proceedings.

The funds so in the hands of Foster and Thomson are the funds which have been attached in this suit as the funds of the respondent Laird. It is not shown that Prioleau, or his agents, ever informed the prize court in Florida, that, prior to the seizure of the Wren, Laird had parted with all his interest in the vessel, or had sold and conveyed her to Prioleau, or that Prioleau had any interest in her at the time of her seizure, or claimed any interest in her proceeds which that court was restoring; or that any such information was given by Prioleau, or his agents, to Mr. Ward, or to the libellants, prior to the receipt of the fund by Foster and Thomson.

It is now set up by Foster and Thomson, that, in all their transactions respecting this matter, from the commencement of their connection with it, they were acting on behalf of Prioleau, and not of Laird; that they so acted in procuring a reversal by the supreme court of the decree condemning the vessel, and in obtaining the money from the prize court; and that they knew throughout of Mr. Prioleau's having been, for many years, a member of the firm of Frazer, Trenholm & Co. The inadmissible and incompetent testimony referred to by the supreme court, in its decision, was a part of the depositions in preparatorio, of persons on board of the vessel, and was presented as tending to show ownership of the vessel in Frazer, Trenholm & Co., on behalf of, and as agents of, the Confederate States. It consisted, partly, of the statement of one witness, that he believed that Frazer, Trenholm & Co. were the owners of the vessel at the time she was seized, that he had heard Helms, at Havana (the same person who is spoken of by the supreme court, in its decision, as the agent, of "the enemy," at

Havana), speak of Frazer, Trenholm & Co. as the owners of the vessel, that he believed the real and true property of the vessel to be in Frazer, Trenholm & Co., and that he had heard Helms say that he was the agent of Frazer, Trenholm & Co., for the Wren, and other steamers, at Havana; and of the statement of another witness, that he believed the vessel was the property of the Confederate States, and that he so believed, from what he had heard her former master say, with whom he had sailed in her.

As evidence, in the present case, of the fact that Prioleau and not Laird, at all times at and after the seizure of the vessel, owned her, and that Foster and Thomson are at liberty to maintain that they hold for Prioleau, and not for Laird, the moneys which they received from the prize court in Florida, there is produced to the court the original of an instrument signed by the respondent Laird, as "John Laird, Jr.," and dated January 3d, 1865, whereby he, described therein as "John Laird, the younger, of Birkenhead, in the county of Chester, shipbuilder," in consideration of £15,450, paid to him "by Charles Kuhn Prioleau, of Liverpool, in the county of Lancaster, merchant," transfers "sixty-four sixty-fourth shares" in the Wren to Prioleau, and covenants that she is free from incumbrances. This bill of sale was registered in the customhouse at Liverpool, May 1st, 1865.

On the part of Prioleau, acting through Foster and Thomson, it is contended, that, under this process of garnishment, the libellants have no greater rights against Foster and Thomson than Laird himself would have against them, as respects the funds in their hands; that, if Laird could not recover the funds from them, or from Prioleau, such funds cannot be held under the attachment in this case against Laird; that, inasmuch as Laird sold the vessel to Prioleau, Laird could not recover these funds from Foster and Thomson, or from Prioleau; that the question is merely one as to who, in fact, owns the funds; that the proceedings in the prize suit do not estop Prioleau from showing, in this suit, that he really owns the funds, and owned the vessel when she was seized; that the libellants have no more right to insist on such estoppel, than Laird would have, if he were seeking to recover these funds from Prioleau; and that neither the original decree of the prize court, nor the decree of the supreme court, was a decree that Laird owned the Wren when she was seized, or that Prioleau did not then own her.

It clearly appears, by the language of the decree of condemnation made by the prize court, that it condemned the Wren, as lawful prize of war, on the ground that she was, at the time of her capture, the property of enemies of the United States. The claim, put in on behalf of Laird, had averred that Laird, "a lawful British subject, residing in England, is the true and bona fide owner of said steamer, and that no other person is the owner thereof." The decree necessarily negatived this averment of the claim, and, in declaring that the vessel was "the property of enemies of the United States," declared that she was not the property of Laird. On the appeal, the supreme court, as appears from its decision, not only decided that there was no legal proof that the vessel was owned by the Confederate States, or their agents, but also decided that there was strong evidence that the title to her was in Laird, who is called by the court "the claimant," and that he owned her. From the whole case, it is manifest, that the supreme court, on the appeal taken on behalf of Laird, in order to find that the vessel was not enemy property, was obliged to find, and did find, that the vessel was the property of Laird, the claimant of her. The decree of the supreme court reversed the decree of the district court, that is, declared, in reversal of the latter decree, that the vessel was, at the time of her capture, not the property of enemies of the United States, and remanded the case, with directions to restore the vessel to the claimant. The claimant was Laird, who claimed as owner; and Prioleau, through Foster and Thomson, as is shown, in fact procured the prize court to make a decree that the $31,441 62 be paid to "John Laird, claimant," that is, to John Laird by virtue of his claim filed in the prize court, which was a claim to the vessel as her "true and bona fide owner;" and such a decree was made.

In the prize suit, if Prioleau had, in fact, an interest in the vessel, he could have interposed a claim, and put himself in a position, on the record, to contest the prosecution in the prize court, and to be a direct party to an appeal. If, in fact, he became the owner of the vessel ten days after her registry, so that he owned her substantially during the whole of her career, he was, most clearly, a party to the suit in rem against her, and Laird was no party. Notice of the suit, by attachment and publication, if notice to the owner, was notice to Prioleau. Notice to Stiles, the master, was notice to Prioleau, the real owner. In this view, Prioleau is bound by the record of the proceedings in the prize court. Croudson v. Leonard, 4 Cranch [8 U. S.] 434, 437. The attachment of the vessel in the prize suit, was notice to her owner, and, therefore, notice to Prioleau as such owner, and he was a party to that suit, and the decision in the suit binds him, and is conclusive as against him, and cannot be re-examined in this suit. The Mary, 9 Cranch [13 U. S.] 126, 144; Bradstreet v. Neptune Ins. Co. [Case No. 1,793].

But, beyond this principle, it clearly appearing that Prioleau, through Foster and Thomson, actually prosecuted the appeal in the supreme court, and procured that court

and the prize court to declare that the averment of ownership in Laird, made in the claim and answer in the prize suit, was true, and, consequently, that his, Prioleau's, present claim of ownership had no foundation, and that he also procured the prize court to restore the money, the proceeds of the sale of the vessel, to Laird, as owner, Prioleau is estopped from denying, in this suit, that Laird was such owner. Prioleau did not disclose his ownership to the supreme court or to the prize court. His assertion now is that he owned the vessel when she was seized. If his claim now were that his interest in her accrued after her seizure, there might, perhaps, be some reason for entertaining a more favorable view of his position. But he permitted Stiles to conceal the true ownership of the vessel, and to assert a falsehood to the prize court. That falsehood was asserted nearly six months after the transfer to Prioleau, and nearly two months after the entry of the transfer at the customhouse in Liverpool. Prioleau also permitted the vessel to be sailing with a certificate of registry showing that Laird was her owner, at a time when Prioleau was her owner by bill of sale from Laird, and when such bill of sale had been entered in the customhouse where the original registry, in the name of Laird, as owner, was made. In a case of libel as prize of war, the burden of proving the neutral ownership of the vessel being upon the claimant, the papers of the vessel are allowed to be evidence on the question of such ownership, and the claimant, being thus permitted to resort to them, is bound to see that they are true papers. The British merchant shipping act of 1854 (17 & 18 Vict. c. 104) provides (section 57) that every bill of sale for the transfer of any registered ship, when duly executed, shall be produced to the registrar of the port at which the ship is registered, with a declaration made by the transferee, under section 56, and that the registrar shall thereupon enter in the register book the name of the transferee as owner of the ship comprised in the bill of sale, and shall endorse on the bill of sale the fact of such entry having been made, with the date and hour thereof. In the present case, this was done, and the name of Prioleau was entered in the register book, in the office of the registrar, in the customhouse at Liverpool, as the owner of the Wren, on the 1st of May, 1865. The act also provides (section 88) that, if, on any change of ownership in the vessel, the owner desires to have the vessel registered anew, it shall be lawful for the registrar of the port at which the ship is already registered, on the delivery up to him of the existing certificate of registry, and on compliance with such of the other requisites to registry as the registrar thinks material, to make such registry anew, and grant a certificate thereof. Prioleau, therefore, might easily, within the five months and a half which elapsed between the date of the bill of sale and the seizure of the Wren, have procured for that vessel a certificate of registry showing the ownership of her by Prioleau, and which, if on board of her at her seizure, as it ought to have been, would have made it impossible for the supreme court to decide that Laird was her owner, based, as that decision was, solely upon the certificate of registry found on board. Is it possible that a court of the United States can be seriously invoked to sustain Prioleau in committing a fraud of this character on another court of the United States, and to aid him in securing the fruits of the fraud? If Prioleau had disclosed to the supreme court, or to the prize court, the fact that the certificate of registry found on board the Wren did not state her true ownership at the time of her seizure is it not entirely clear that the decree of condemnation would not have been reversed? Prioleau must be held to be barred from the privilege of now denying what he asserted in those courts, and of now asserting what he denied in those courts. As between him and the courts of the United States and these libellants, the vessel and her proceeds belonged to Laird, whatever might be adjudged in regard to such proceeds, if either Laird or Prioleau were seeking to recover such proceeds from the possession of the other.

There is another view of this case. The agents of Prioleau did not disclose to Mr. Ward that the funds belonged to Prioleau, and did not belong to Laird. If they had disclosed to him their intention, when the funds should be released from the attachment in the Florida court, and be transferred from the custody of that court, in prize, and should reach their hands, to set up that the funds did not belong to Laird, but belonged to Prioleau, is it, on the state of proofs now disclosed, to be imagined that Mr. Ward would have consented to release the attachment? The libellants, represented by Mr. Ward, are entitled to have this court act upon the matter as the court in Florida would have acted upon it, if it had been made known to that court, before the delivery of the funds to Foster and Thomson, and before the release of the attachment, that Prioleau was the owner of the vessel when she was seized. Is it to be imagined that that court would have delivered the funds to Prioleau, or would have discharged the attachment, as one which, while issued against funds belonging to Laird, had been levied on funds belonging to Prioleau? And yet this court is asked to deliver the funds to Prioleau, and to hold them not to have been properly levied on as the funds of Laird. This case falls directly within the principle which holds a party concluded by his acts and admissions, on the faith of which a court of justice has been led to adopt a particular cause of proceeding. 1 Greenl. Ev. § 204.

In the foregoing views, I have proceeded

on the ground that, in fact, Foster and Thomson have regarded themselves as acting throughout for Prioleau, and not for Laird, and have acted throughout for Prioleau as against Laird. But it is such very action which estops them and Prioleau from now saying that the money is not Laird's money. As between them and the court in Florida, and the supreme court, and these libellants, Foster and Thomson received the money as Laird's money, and not as Prioleau's money. And, if they were to claim to hold it for Laird, as against Prioleau, it would seem, on the authority of the case of De Metton v. De Mello, 12 East, 234, that Prioleau could not recover it from them, he having colluded with Laird and Stiles to make the vessel appear to be the property of Laird, and not the property of Prioleau, a member of the firm of Frazer, Trenholm & Co., and to set up a false defence in the courts of the United States, and to deceive and impose upon such courts. I must, therefore, hold, that, for the purposes of the attachments levied in this suit, the moneys levied on thereunder in the hands of Foster and Thomson, were the moneys of the respondent.

[NOTE. Pursuant to this opinion, a decree was made requiring the garnishees to pay the money into court; and subsequently the court entered a final decree in favor of libellants, and against Laird, for a sum of money, and subjecting the fund to the payment thereof. Appeals were taken from both these decrees, and the circuit court (Waite, Circuit Justice) dismissed the first appeal, and after a hearing on the second appeal, only, held that the fund did not belong to Laird, and reversed the decree accordingly. Case No. 3,510.]

Case No. 3,510.

CUSHING et al. v. LAIRD.

[15 Blatchf. 219.][1]

Circuit Court, S. D. New York. Sept. Term, 1878.[2]

ADMIRALTY APPEALS—APPEALABLE DECREES—DECREE OF ACQUITTAL IN PRIZE SUIT — EFFECT UPON TITLE.

1. In a suit in personam, in admiralty, in the district court, money in the hands of a garnishee was attached, under process of foreign attachment, as the property of the respondent. The garnishee claimed that the fund was the property of P. On the trial of that issue, the district court made a decree that the money belonged to the respondent, and that the garnishee must pay it into court. From this decree the garnishee appealed to this court. Afterwards, the district court made a money decree against the respondent, and awarded execution on it against the money in the hands of the garnishee. The garnishee appealed to this court from that decree: *Held*, that the second decree was the only final decree, and that the first appeal was irregular, and must be dismissed, with costs.

2. The ordinary sentence of acquittal in a prize suit, even if accompanied by an order for the delivery of the property to the person appearing as claimant upon the record, does not necessarily divest others of any title they may have to the subject-matter of the capture.

3. Such claimant, when the property is restored to him, holds it in trust for the true owner of it.

4. As against such claimant, the true owner may assert his title, although he carried on the proceedings which resulted in the sentence of acquittal and in the restoration of the property to such claimant.

These were appeals by Foster and Thomson, from two decrees of the district court,—6 Ben. 408 [Cushing v. Laird, Case No. 3,509],—one requiring them to pay into court a certain fund, and the other subjecting it to the payment of the amount found due to the libellants from the respondent. This court found the following facts:

"The steamer Wren was built at Birkenhead, England, in the year 1864, by Laird Brothers, and registered at Liverpool, England, in accordance with the laws of Great Britain, December 24th, 1864, in the name of John Laird, Jr., as owner. A certificate of this registry was issued in due form, and the vessel sailed from Liverpool, having the certificate on board, as part of her ship's papers. On the 3d of January, 1865, after the vessel had left Liverpool, John Laird, Jr., executed and delivered a bill of sale, in due form of law, whereby he conveyed her, with her tackle, &c., to Charles Kuhn Prioleau, of Liverpool, a member of the firm of Frazer, Trenholm & Co., for the consideration of £15,450, and, on the first of May, 1865, this bill of sale was duly entered at the custom house in Liverpool, and the vessel registered in the name of Prioleau, as owner. On the 13th of June, 1865, while on a voyage from Havana to Liverpool, by the way of Halifax, Nova Scotia, a portion of the crew took forcible possession of the vessel, overcame her officers and ran her into Key West, where they delivered her to the naval authorities of the United States. On the 16th of the same month of June, the attorney of the United States for the southern district of Florida filed in the district court for that district a libel of information against the steamer, as prize of war, in the words and figures following, to wit: 'District Court of the United States for the Southern District of Florida, in Admiralty. The United States v. The Steamer Wren and Cargo. Prize. To the Honorable Thomas J. Boynton, Judge of the District Court of the United States for the Southern District of Florida. The libel of Homer G. Plantz, attorney of the United States for the southern district of Florida, who libels for the United States and for all parties in interest against the steamer Wren and cargo, in a cause of prize, alleges, that Charles W. Gilley and other citizens of the

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

[2] [Reversing decree of the district court in Case No. 3,509. Decree of the circuit court affirmed by supreme court in Cushing v. Laird, 107 U. S. 70, 2 Sup. Ct. 197.]

United States did, on the twelfth day of June, in the year of our Lord one thousand eight hundred and sixty-five, subdue, seize, and capture on the high seas, as a prize of war, the said steamer Wren and cargo, and that said captured property has been brought into the port and harbor of Key West, in the state of Florida, where the same now is, within the jurisdiction of this honorable court, and that the same is lawful prize of war and subject to condemnation and forfeiture as such—wherefore the said attorney prays that the usual process of attachment in prize causes may issue against said captured property; that monition may issue citing all parties having or claiming any interest or property in said captured property to appear and claim the same; that the nature, amount, and value of the said property may be determined; that due and proper proofs may be taken and heard; and that, all due and proper proceedings being had, the said captured property may, on the final hearing of this cause, by the definite sentence of this court, be condemned, forfeited, and sold, and the proceeds distributed according to law. Homer G. Plantz, U. S. Attorney, Southern District of Florida.' On the same day, the court ordered that attachment and monition be issued as prayed, returnable on Tuesday, June 27th, 1865, and, under this order, the vessel, her tackle, &c., were taken into the custody of the marshal for the district and held for condemnation, and all persons interested were cited to appear on the day named and show cause, if any they had, against such a decree. On the 26th of June, Edward C. Stiles, master of the vessel, appeared in court and filed a claim to the vessel, &c., in the words and figures following, to wit: 'United States District Court, Southern District of Florida, in Admiralty. United States vs. Steamer Wren and Cargo. Prize. And now comes Edward C. Stiles and says, that he is the master of the said steamer Wren, and, as such, is the lawful bailee of said steamer, her tackle, apparel, and furniture, and claims the same for the owner thereof. And he further says, that John Laird, a lawful British subject, residing in England, is the true and bona fide owner of said steamer, and that no other person is the owner thereof, as appears by the register of said steamer now in the possession of the court, and as he is informed and believes. And he further says, that the said steamer had no cargo, when seized. And he further says, that he denies that said steamer is a prize of war. And he further prays restitution of said steamer, her tackle, apparel, and furniture, and that this honorable court will award such damages as shall appear to have been incurred and suffered by reason of the unlawful seizure and detention of the same, and grant such other and further relief as to the court may seem meet and just. And he will ever pray, &c. Edward C. Stiles, Master British Steamer Wren. Samuel Walker, Proctor. Sworn and subscribed before me this 26th day of June, 1865. George D. Allen, Clerk. Southern District of New York, ss.: Edward C. Stiles, being duly sworn, deposes and says, that he is the master of the British steamer Wren, and is the claimant named in the above claim; that he knows the contents thereof, and that the matters and allegations therein contained are true in manner and form as therein set forth, and that his knowledge of the same was acquired by his relationship to said steamer as master thereof; that, on the 12th day of June, A. D. 1865, the said steamer left the port of Havana, Cuba, bound to Liverpool, England, via Halifax, Nova Scotia; that, while on the voyage to the said port, about 1½ o'clock a. m., June 13th, a portion of the crew of said steamer mutinied, and this claimant was put in irons by the mutineers, two of whom entered his room when he was asleep and overpowered him, one holding a pistol to his head; that, about the same time, as he is informed and believes, his first and second officers were also put in irons and the purser arrested, and that, when the mutiny occurred, Mr. Duggan, the third officer, and Mr. Wilson, the third engineer, were on duty; that this claimant and the said steamer were then brought into the port of Key West, where the said steamer was delivered over to the prize court by a Mr. Gilley, who at the same time took from the person of this claimant the ship's papers; that this claimant, his first and second officers and purser, were then taken from the said steamer and imprisoned in Fort Taylor; that this claimant was afterwards taken before the prize commissioner and required to give evidence; and that he answered under protest. Edward C. Stiles, Master Steamer Wren. Sworn and subscribed before me this 26th day of June, 1865. George D. Allen, Clerk.' On the 17th, 19th, and 20th days of June the depositions of the master of the vessel, Stiles, the purser, M'Gahan, the first mate, Long, and the third mate, Duggan, were taken in preparatorio. On the 27th of June, Stiles, by his proctor, moved the court to strike out the deposition of Duggan, as he was named as one of the captors, in the letter of the captors addressed to the admiral commanding at Key West, and filed in the cause. This being refused, the court proceeded to hear the cause 'upon the allegations and pleadings, the depositions taken in preparatorio, and the papers, letters and writings found on board the vessel.' On the 29th of June, the court, upon its own motion, directed the prize commissioner to take immediately the testimony of the master, purser and first mate of the vessel, and of any other witnesses that might be produced by the claimant from the persons on board the vessel, upon certain specific interrogatories; of Charles W. Gilley and John Howard, and any other witnesses produced by the captors,

from persons on board, upon the first two of the interrogatories to be propounded to the witnesses produced from those on board by the claimant; and of any witnesses produced either by the government or the claimant, from persons not on board, upon certain other interrogatories. Two days were allowed the parties to produce witnesses. Testimony was taken under the authority of this order, and on the 3d of July, the court resumed the hearing 'upon the allegations and pleadings, the depositions taken in preparatorio, and the papers, letters, and writings found on board * * * and depositions under orders allowing further proof.' The only certificate of registry found on board was of that granted December 24th, 1864, upon which were noted, at the British consulate, Havana, changes of masters, March 24th, 1865, and June 10th, 1865. At the foot of this certificate was a note as follows: 'Note. A certificate of the registry granted under the "merchant shipping act, 1854," is not a document of title. It does not necessarily contain notice of all changes of ownership, and in no case does it contain an official record of any mortgage affecting the ship.'

"On the 8th of July the court 'announced its opinion in this (the) case, and condemnation of vessel and cargo' [see Case No. 16,786], but, exceptions having been taken to certain rulings, the decree in form was delayed until August 15th, when it was duly entered in the words and figures following, to wit: 'District Court of the United States, Southern District of Florida, in Admiralty. The United States vs. The Steamer Wren and Cargo. Prize. A claim having been interposed for this vessel and cargo by Edward C. Stiles, master of said vessel, for and on account of John Laird, the younger, a British subject, and this cause having been heard on the libel and proofs and testimony taken in preparatorio, and pleadings of the claimant, and all due proceedings having been had, and the court being fully advised in the premises, and it appearing to the court that the said steamer Wren, her tackle, apparel, furniture and cargo were, at the time of capture, the property of enemies of the United States, it is now ordered, adjudged, and decreed, that the said steamer Wren, her tackle, apparel, furniture and cargo be condemned and forfeited to the United States, as lawful prize of war. And it is further ordered, that the clerk of this court issue a writ of venditioni exponas to the marshal of the district, for the sale of said steamer Wren, her tackle, apparel, furniture and cargo, and that the marshal make return of sale and expenses to the court, and deposit the proceeds of such sale with the assistant treasurer of the United States, subject to the order of this court, as required by law. Thomas J. Boynton, U. S. D. Judge.' From this decree an appeal by the claimant to the supreme court was in due form allowed, and the requisite security given, August 25th. Afterwards, on process duly issued, the vessel was sold, and the proceeds of the sale, amounting to $37,108.06, deposited with the assistant treasurer of the United States in the city of New York, subject to the order of the court. Subsequent to this time, Prioleau, still residing in England, retained Foster and Thomson, the garnishees in this case and attorneys and counsellors at law, doing business in the city of New York, as his counsel, to do whatever might be necessary for the protection of his interests. It does not appear that he had any actual knowledge of the proceedings for condemnation until after the decree was entered. As soon after their retainer as it could be done, Foster and Thomson procured a copy of the record in the district court, and had the appeal docketed in the supreme court, February 7th, 1866, they furnishing the necessary security for that purpose. They also employed additional counsel, who argued the case upon the record sent up from the district court. No additional testimony was taken, and no change in the pleadings made or applied for. Upon the argument in the supreme court, it was insisted by the attorney-general, on behalf of the government, that it appeared from the evidence that the steamer was the public property of rebel enemies at the time of the capture; and, in support of this position, reference was made to the testimony of witnesses who swore that Frazer, Trenholm & Co. were the owners. In opposition to this, it was contended by the counsel for the appellant, that there was 'not a particle of evidence to show that the steamer was ever enemies' property, but the evidence is (was) conclusive that she was at all times the property of a British neutral,' evidently referring to Laird. At the December term, 1867, of the supreme court (The Wren, 6 Wall. [73 U. S.] 582), the decree of the district court was reversed, and an order entered to the effect that the cause be remanded, with directions to restore the vessel and her cargo to the claimant, without costs. In the opinion filed at the time of the rendition of the judgment in the supreme court, it was said, that the only question in the case was, whether the vessel was the property of the enemies of the United States. In discussing this question, the late Justice Nelson, who delivered the opinion, says: 'It is quite apparent, therefore, upon the proofs, that the claimant not only built the vessel, but put his master in command in this, her first, voyage, and the presumption would seem to be very strong, if not irresistible, (nothing else in the case,) that he continued the owner for the short period of six months which elapsed after she was built and before the seizure took place. In addition to this, she was in the command of a master claiming to represent Laird, as owner. These acts, in connection with the registry, afford strong evidence that the title of the vessel was in

the claimant. Now, most of the proofs relied on to disprove this evidence are wholly inadmissible and incompetent as testimony in a court of justice. We cannot think that it needs any argument to show that they do not rise to the character or dignity of testimony, in any court that respects the law of evidence.' Then, after stating that it was not unnatural to suspect, from the surrounding facts and circumstances, 'that the so called Confederate States, or their agents, had some connection, if not interested in her,' he concludes: 'But, in the view we have taken of the case, there is no foundation of legal proof of the ownership of the vessel in the Confederate States, on which these circumstances can rest, or be attached, as auxiliary considerations to influence the judgment of a court. Our conclusion is, that the decree below must be reversed and the vessel restored, but without costs.'

"After the judgment of the supreme court was entered, Foster and Thomson made a draft of a power of attorney to be executed by Laird, Jr., and Stiles, and sent it forward to Prioleau. In due time they received from Prioleau a power of attorney, in all substantial respects like their draft, properly executed, a copy of which is as follows: 'Know all men by these presents, that we, John Laird, the younger, of Birkenhead, in the county of Chester, ship-builder, and Edward Copeland Stiles, of 14 Delamere street, Upper Westbourne Terrace, London, master mariner, do, by these presents, nominate, constitute and appoint J. P. Giraud Foster and James Thomson, both of New York, in the United States of America, solicitors, jointly and each of them severally, to be the true and lawful attorneys and attorney of us, and of each of us, for us and each of us, and in our and each of our names or name, or otherwise, to receive and collect from the United States government, or any branch or officer thereof, or any depository thereof, any and all moneys, the avails or proceeds of the sale of the steamer Wren and her cargo, sold under decree of the district or circuit court of the United States, at Key West, in the southern district of Florida, by the marshal of the United States for the said district, the said decree having been reversed by the supreme court of the United States on appeal, and this power having been given to our said attorneys for receiving restitution of the avails of the said steamer Wren and cargo, with full power to give any receipts or discharges for the same, and generally to make, do, and execute all such further and other acts, deeds, matters and things in the premises, as amply as we or either of us could do if personally present, and one or more attorneys or attorney under them or him from time to time to substitute and appoint, and such appointments at pleasure to revoke, and another or others again to substitute and appoint, we and each of us hereby binding ourselves and each of us to ratify and confirm whatever shall be lawfully done by our said attorneys or either of them by virtue hereof. In witness whereof we have hereunto set our hands and seals this second day of July, one thousand eight hundred and sixty-eight. John Laird, Jr. (L. S.) Edw'd C. Stiles. (L. S.) Signed, sealed and delivered by the above named John Laird, the younger, in the presence of Wm. Stone, atty. at law, Liverpool. Signed, sealed and delivered by the above Edward C. Stiles in the presence of E. L. Rowcliffe, solicitor, 1 Bedford Row, London. I, William Henry Fletcher, notary public by royal authority, admitted and sworn, practising in Liverpool, in the county of Lancaster, in England, do hereby certify and attest unto all it shall or may concern, that the signature "John Laird, Jr.," set and subscribed opposite the first seal at foot of the power of attorney hereunto annexed, is the real signature and proper handwriting of John Laird, the younger, therein named and described, who signed the same in my presence, and in presence of Wm. Stone, Esquire, attorney at law, Liverpool. Whereof an act being required, I, the said notary, have granted these presents under my notarial form and seal of office, to serve and avail as occasion shall or may require. Done and passed in Liverpool, this fourth day of July, one thousand eight hundred and sixty-eight. In testimonium veritatis, W. Henry Fletcher, Notary Public. (Notarial Seal.) I, the undersigned, consul of the United States of America, for the port of Liverpool and its dependencies, do certify and make known to whom these presents shall come, that William H. Fletcher, whose true signature and notarial seal are subscribed and affixed to the annexed certificate, is a notary public duly authorized, admitted and sworn, residing and practising in Liverpool, to whose acts as such full faith and credit are due. Given under my hand and seal of office, at Liverpool, the 8th day of July, and year of our Lord one thousand eight hundred and sixty-eight. F. H. Morse. (Consular Seal.) I, John Newton, notary public by royal authority, admitted and sworn, practising in London, do hereby certify and attest unto all whom it shall or may concern, that the signature "Edw'd C. Stiles," set and subscribed opposite the second seal at foot of the power of attorney hereunto annexed, is the real signature and proper handwriting of Edward Copeland Stiles therein named and described, who signed the same in my presence and in presence of E. L. Rowcliffe, Esquire, solicitor, No. 1 Bedford Row, London. Whereof an act being required, I, the said notary, have granted these presents under my notarial form and seal of office, to serve and avail as occasion shall or may require. Done and passed in London this second day of July, one thousand eight hundred and sixty-eight.

In testimonium veritatis, John Newton, Not'y Public. (Notarial Seal.) Consulate of the United States of America, at London. I, Freeman H. Morse, consul of the United States of America, for London and the dependencies thereof, do hereby make known and certify to all whom it may concern, that John Newton, who hath signed the annexed certificate, is a notary public, duly admitted and sworn, and practising in the city of London aforesaid, and that to all acts by him so done full faith and credit are and ought to be given, in judicature and thereout. In testimony whereof, I have hereunto set my hand and affixed the seal of the consulate of the United States at London aforesaid, this second day of July, in the year of our Lord, one thousand eight hundred and sixty-eight, and in the ninety-second year of the independence of the United States. F. H. Morse. (Consulate Seal.)' Having received this power of attorney, Foster and Thomson obtained a mandate from the supreme court, and sent it, together with a copy of their authority, to the United States attorney for the southern district of Florida, requesting him to see that the appropriate decree was entered in the cause, and a draft, to their order, upon the assistant treasurer in New York, for the money, was transmitted to them by the judge. Afterwards, January 5th, 1869, they employed F. A. Dockray, Esq., to aid them in procuring the money from the registry of the court, advising him that the mandate, and the power of attorney under which they were acting, had already been forwarded to the court. They did not, in any of their letters to the district-attorney, or to Dockray, make mention of the fact that any other person than Laird was, or pretended to be, the owner of the fund in court.

"On the 28th of December, 1868, certain of the libellants in this cause, and the owners of one-half the ship Sonora, filed their libel in the district court for the southern district of Florida, against John Laird, Jr., in personam, to recover for the same identical wrong and injury which is in this suit complained of, and prayed, among other things, 'that his (Laird's) credits and effects in the registry of this (the) court, known as the proceeds of the steamer Wren, may (might) be attached to the amount sued for and costs.' On the 6th of January, 1869, the following order was entered in that cause: 'District Court of the United States, Southern District of Florida, in Admiralty. John N. Cushing and William Cushing, Executors of Nicholas Johnson, Deceased, Mary A. Johnson, Executrix of Henry Johnson, Deceased, Keturah M. Pritchard, Administratrix of Thomas Pritchard, Jr., Deceased, and Elizabeth H. Pritchard, Executrix of William Pritchard, Deceased, vs. John Laird, the Younger. Cause of Spoliation and Damage, Civil and Maritime. A libel having been filed in said court, in the above entitled cause, praying for a warrant of arrest against the defendant, the said John Laird, the younger, and that he may be required to appear and answer on oath the aforesaid libel, and all and singular the matters aforesaid, and, if he cannot be found, that his goods and chattels, and, if none be found, that his credits and effects in the registry of this honorable court, or elsewhere within the jurisdiction of said court, known as the proceeds of the steamer Wren or otherwise, may be attached to answer said libellants, it is, therefore, ordered, that process issue as prayed for in said libel, returnable on the third day of May, A. D. 1869. Thomas J. Boynton, Judge.' On the 7th of the same month of January, an attachment, in the usual form, was issued to the marshal of that district, against the person of Laird, and, on the same day, the marshal returned that Laird was not found in his district, and, therefore, no service could be had. On the 20th of February, 1869, another attachment was issued to the same marshal, directing him to attach and take into his custody the proceeds of the sale of the steamer Wren, then on deposit with the assistant treasurer of the United States in the city of New York, and subject to the order of this court, wheresoever the same might be found in his precinct. To this writ the marshal made return, that he had executed the same, by serving a copy thereof by mail on the assistant treasurer of the United States in New York. It also appears that the copy was received by the assistant treasurer on or before March 4th, 1869. A monition was also issued in the cause, February 20th, returnable May 3d, and served by publication in the Key West Dispatch, once a week for six weeks, to wit, from February 27th to April 3d, and also by posting two copies in the city of Key West. On the 24th of February, 1869, Foster and Thomson, in New York, addressed J. Langdon Ward, Esq., the proctor for the libellants in this cause, in writing, as follows: 'In the Matter of the Wren. Office of Foster & Thomson, Attorneys & Counsellors, 69 Wall St., New York, Feb. 24, 1869. J. Langdon Ward, Esq. Dear Sir: Our suggestion is, that the district judge in Florida forward to us his cheque on the assistant treasurer for the proceeds of the Wren, and that we draw the funds under our authority from the claimants Laird and Stiles, and keep the proceeds in our hands sufficiently long to enable you to serve upon us any process or papers as you may be advised. Should this suggestion be satisfactory to you, we give you our personal assurance that the funds will be so retained by us. Yours truly, Foster & Thomson.' This proposition was accepted by Mr. Ward, and, March 12th, he instructed the counsel in Florida having the matter in charge, to make no objection to the transmission of a check to Foster and Thomson for the money, in the manner proposed. In the course of the negotiations which preceded the arrange-

ment, Mr. Ward was in no manner given to understand that there was any ownership, or claim of ownership, of the fund, other than such as appeared on the face of the record and the power of attorney filed with the mandate, and, in point of fact, he did not know, or have any reason to believe, that Foster & Thomson were acting in any other capacity than as attorneys for Laird and Stiles, representing their several interests as disclosed by the record in the supreme court. On the 8th of May, Dockray, acting under his employment by Foster & Thomson, and having no other authority, entered the general appearance of Laird to the libel filed in Florida against him, claimed the proceeds of the Wren in the registry of the court, and moved to dismiss the attachment. This being done, the proctors for the libellants, under their instructions from Mr. Ward, consented to the granting of the motion, and, May 10th, the necessary order to that effect was entered. On the same day, Dockray exhibited to the court the mandate of the supreme court, and, upon his motion, the following decree was entered in that cause: 'In the District Court of the U. S., Southern District of Florida, in Admiralty. The United States vs. The Steamer Wren. John Laird, Claimant. Prize. A final decree of condemnation and forfeiture of the steamer Wren having been pronounced in this cause, and an appeal having been taken to the supreme court of the United States, and the final decree having been reversed, and the property ordered to be restored to the claimant herein, and the mandate of the supreme court having been filed in this court, and it further appearing that the costs, charges and expenses in this proceeding, amounting to the sum of five thousand six hundred and sixty-six dollars and eighty-eight cents ($5,666.88), have been taxed and paid to the officers of the court severally entitled thereto, out of the proceeds of the sale of the steamer Wren, now, therefore, on motion of F. A. Dockray, Attorney and Proctor of John Laird, claimant, it is ordered, adjudged, and decreed, that the remainder of the proceeds of the steamer Wren, amounting to the sum of thirty-one thousand four hundred and forty-one dollars and sixty-two cents ($31,441.62), now on deposit with the assistant treasurer of the United States, at New York, and subject to the order of the court, be paid to the said John Laird, claimant; and it further appearing to this court that Foster & Thomson, of the city of New York, are the lawfully authorized attorneys in fact of the said John Laird, claimant, it is ordered, adjudged, and decreed that the said proceeds be paid to the said Foster & Thomson. Thos. J. Boynton, Judge.' Whereupon, checks No. 199, for $29,869.62, and No. 200, for $1,572, were drawn in favor of Foster & Thomson, of New York, attorneys for Laird and Stiles, as against the proceeds of steamer Wren, on deposit with the assistant treasurer of the United States, at New York, which checks were delivered to F. A. Dockray, Esquire, attorney for Foster & Thomson, and attorney in fact for John Laird, and his receipt therefor taken, in the words and figures following, to wit: 'In the District Court of the U. S., Southern District of Florida, in Admiralty. The United States v. The Wren, John Laird, Claimant. Prize. ($31,441.62.) Received of the Hon. Thomas J. Boynton, U. S. Judge Southern District of Florida, his check for the sum of fifteen hundred and seventy-two dollars; also his check for the sum of twenty-nine thousand eight hundred and sixty-nine and 62-100 dollars, drawn on the assistant treasurer of the U. S., at New York, and payable to the order of Foster & Thomson. F. A. Dockray, attorney for Foster & Thomson, attorneys in fact for John Laird, claimant.'

"The next day after the transmission of the drafts, to wit, May 11th, Mr. Dockray wrote Foster & Thomson as follows, 'Office of the U. S. Attorney, Southern District of Florida. Key West, May 11th, 1869. Messrs. Foster & Thomson, 69 Wall Street, New York. Dear Sirs: On the 29th day of April I filed a motion in the case of Cushing vs. Laird, to dismiss the libel and attachment for want of jurisdiction. Premising that Mr. Mallory intended to contest the motion to the fullest extent, I prepared to argue my motion very thoroughly, on my arrival here. When I reached here, Mr. Bethel manifested some alarm at my energy and confidence in the case, and telegraphed to Mr. Mallory at Pensacola to come here at once, when I found that he intended to oppose my motion with an elaborate argument, which (on the part of both of us) would necessarily involve the merits of the case. Pending this argument, I informed them of my instructions to obtain the proceeds, and of the acquiescence of Mr. Langdon Ward in the terms agreed upon. Mallory and Bethel, however, would not consent without stipulation, and telegraphed to Mr. Ward at the time I also telegraphed you to see him. Ward replied, to "consent absolutely, without bond or stipulation," to the payment of the proceeds to your order. M. and B. were not fully satisfied by this, of the intention of Cushing et al., and did not imagine that the parties libellant would consent to a dissolution of the attachment without security, as Mr. Ward had lately written them to keep the suit in court by all means in their power. I succeeded finally in inducing them to consent in writing to my motion for dissolution, if I would enter a general appearance for Laird, which I hazarded nothing in doing. I was willing for these reasons and on this defence, viz.: 1. That the dissolution of the attachment left the court free to decree upon the mandate of the supreme court and restore the proceeds to you as Laird's attys. in fact. 2. The attachment being dissolved and the money paid to you, the libellants have no case in

court, even if they had before. 3. The voluntary general appearance of Laird has no legal importance, because, the court having no jurisdiction, no voluntary act of either party can give it jurisdiction. 4. The libellants reside in one judicial district and bring suit in a second against a party in a third, or an alien domiciled abroad, which ousts the jurisdiction. 5. Even allowing or admitting the jurisdiction, (if so,) the most the libellants are able to do is to obtain judgment against Laird, and suggest it in an English court of competent jurisdiction. Meanwhile, the claim of Cushing et al. for the Sonora is pending as one of the Alabama claims, and is more than likely to be adjusted before any United States court could come to judgment on this case, and before any English court would finally afford process of execution. I send you enclosed a certified copy of the late proceedings in the matter. A copy of the decree and order of dissolution of attachment has been transmitted to the asst. treasr. of U. S. at New York, by the clerk of the court. The judge's checks, one for $29,869.62, and one for $1,572, total $31,441.62, cover the entire proceeds on deposit with the asst. treasurer. They are forwarded to you through John Jay Philbrick, Esq., British vice consul, through his house in New York, Messrs. C. & E. Howe, 71 Broadway. I have drawn on you through him for $1,071, at sight, covering my fee and expenses, ($71,) of which I enclose a memo., and which dft. he has cashed to me. There may be a little difficulty at the asst. treasury, owing to an error (not yet fully rectified) in its ac. with the court here. The error amounts to about $600. I suggest that you present the check for $29,869.62 before that of $1,572, delaying the latter a few days. But you will ascertain more fully of the asst. treasr. about this. I leave for Jacksonville on Thursday, 13th, where I shall be glad to hear from you. I am, yours truly, &c., F. A. Dockray, Atty.' In due course of mail, Foster and Thomson received the drafts and the foregoing letter of Mr. Dockray. The drafts were not collected until after the letter was received. The money was collected upon the drafts in due course of business, and Foster & Thomson have paid on account of the same as follows: To Mr. Dockray, for his services and expenses, $1,171; to the counsel who argued the prize cause in the supreme court, $2,000. They have also a claim against the fund, for their own professional services in the supreme court and in the proceeding in Florida, amounting to $2,500. The balance of the amount collected, over the payments made as above, is still in their hands, and is the subject-matter of the controversy upon this appeal. Foster & Thomson never had any personal communication with Laird, and never received any instructions from him in regard to their acts in the premises. They were actually employed by Prioleau and communicated with Laird only through him. All that was done in Florida, after the arrangement between Mr. Ward and Foster & Thomson, in New York, was with a view of transferring the litigation to New York, where it could be carried on by both parties more conveniently than in Florida. As soon as the drafts were sent to Foster & Thomson from Florida, Mr. Ward was duly advised and he caused the attachment to be issued, under which the present proceeding is had, and which was duly served May 18th. It does not appear from the evidence, that the Wren ever entered a British port after leaving Liverpool, in December, 1864, and previous to her capture. It does not appear from the evidence, that Laird exercised any acts of ownership over the Wren, after the execution of his bill of sale, and she was actually employed nearly or quite all the time before her seizure, in running between Havana and Galveston, breaking the blockade at Galveston. At the time of the commencement of this action, all the libellants were citizens of the state of Massachusetts, and Laird was a subject of Great Britain, residing at Birkenhead, England. On the 19th of November, 1864, the libellants, or those whom they represent, caused their memorial and protests to be filed in the office of the secretary of state of the United States, in which they asked the intervention of the United States to obtain reparation from the government of Great Britain for the same identical cause of action set forth in their libel in this suit. Their claim, as filed, was as follows: Loss of vessel, above insurance, $25,800; loss of charter, $33,244.44; insurers of vessel, $30,000. The claim thus filed was included among those presented by the agent of the United States to the tribunal of arbitration, under the provisions of the treaty between the United States and Great Britain, concluded May 8th, 1871, known as the 'Treaty of Washington.' In or about the month of November, 1874, after the establishment by congress of the court of Alabama claims, these libellants, or their legal representatives, presented to that tribunal their petition, in which they demanded judgment against the United States for $134,893.34, including value of ship ($115,869.50, less insurance, $30,000,) $85,869.50, net freight, $44,094.33 and stores, $4,929.51, and afterwards such proceedings were had upon this petition that judgment was rendered against the United States, for damages, $33,334.30; interest, $15,286.02; in all $48,620.32; which was paid in full, October 19th, 1877."

J. Langdon Ward and Robert D. Benedict, for libellants.

Aaron J. Vanderpoel, for Foster & Thomson.

Cornelius Van Santvoord, for respondent.

WAITE, Circuit Justice. These are two appeals, taken at different stages of the same

cause, to avoid the embarrassment of a mistake as to the proper decree to be appealed from. They are docketed as separate cases, but come up on the same pleadings and proofs. The only difference is, that one is taken from one decree, and the other from another. Motions to dismiss have been made in each case, and, before proceeding to consider the merits, it is necessary to decide which appeal is regular. That depends upon which of the decrees appealed from was the final decree, as to these appellants.

The appellants are garnishees in admiralty, under process of foreign attachment, in a suit in personam against a defendant not found, and who has never appeared. The libellants claim that the appellants have in their hands a fund, known as the proceeds of the steamer Wren, which they hold in trust for the defendant, Laird, and which should be subjected to the payment of the demand in the action, while the appellants say, they hold the fund for Prioleau, to whom it belongs and to whom alone they are accountable.

This issue, thus raised between these parties, was tried below before any decree was rendered against Laird, and, on the 26th of April, the court found and adjudged that the fund belonged to Laird, and amounted to $31,441.62. On the same day a further order was entered, directing the appellants to pay the fund into court, or give stipulation, with sufficient security, to abide the further order of the court in relation thereto. This stipulation they gave May 5th, and May 9th they appealed. This appeal is docketed as the first of the two cases here. Afterwards, September 19th, 1873, a decree was entered in favor of the libellants and against Laird, in the principal action, for $143,298.30, and granting execution thereon against the fund in the hands of the garnishees. From this decree the second appeal was taken, which is docketed as the second case.

The proceeding by foreign attachment is auxiliary to the principal action, and, if that action fails, nothing is gained by the attachment. The decision that the fund in the hands of the garnishees belonged to Laird was interlocutory only. It settled the title to the fund for the purposes of the suit, but did not adjudge that it be paid to the libellants. If, in the further progress of the cause, they had failed to maintain their claim against Laird, the decision would have been of no avail. The garnishees did not become finally bound to apply the fund they held to the payment of the demand sued upon, until the order to that effect was entered, September 19th. The order of April 26th left the final disposition of the fund open. The actual appropriation was not made until September 19th. The last was, therefore, the final judgment, and from that alone the appeal lies. It follows that the appeal of May 9th must be dismissed at the costs of the garnishees, appellants, and the cause retained for hearing only upon the appeal of October 3d.

Upon the merits, the principal question is as to the effect of the final decree in the prize cause, the libellants contending that it settled the title of Laird to the fund and concludes Prioleau. There can be no doubt that a judgment in rem, by a court of competent jurisdiction, binds all the world. It is, also, true, that such a judgment is conclusive as to all the essential facts upon which it rests.

Here, the cause was one of prize, and the ultimate fact to be determined was that of prize or no prize. The decision was, no prize. To that extent, confessedly, all the world is bound.

In prize causes, the captors bring the captured property into court, and ask for a sentence of condemnation, but, before this can be had, they must satisfy the court that their capture is lawful prize. Mere capture is not enough. Capture, to justify condemnation, must be lawful, and of this the court must be judicially informed. To this end, the captors are required to produce all documents and writings found on board a captured vessel, and the depositions of her master, or some of her principal officers or crew, taken in preparatorio. Upon the information thus obtained, the case is heard in the first instance, and, if the proof is such as to show that the capture could not have been lawful, there must be an acquittal, whether there be a claimant on the record or not. The right to condemnation may be resisted by a party in interest, without the interposition of a formal claim. The rule upon this subject is thus stated by the late Judge Betts, of this district: "When no proofs are expected to be offered by a claimant, beyond what are procured on the examination in preparatory, there would be no utility in his coming in with a claim in form, inasmuch as his advocate may be heard upon the captor's proof, and a condemnation as prize is never made in the first instance upon a mere default in not claiming, without at least strong presumptive evidence that it is enemy's property. The court must be informed by the proofs that it is a case of prize." Betts' Adm. 76.

A proceeding in a prize court is something more than a call upon those opposed to condemnation to come in and show cause against it. It is a suit by the captors to condemn, in which they are required, in the first instance, to make out their case by proof. That proof, at the outset, consists, as has been seen, of the documents and writings found on board and the depositions taken in preparatorio. If this leaves a doubt as to the lawfulness of the prize, further proof may be ordered. Such an order is not a matter of strict right, but always rests upon the sound discretion of the court. The reason is, that a ship's papers ought to show her true character, and her officers and crew ought to be able to give such further in-

formation as may be required in order to enable the court to act understandingly upon the question to be decided, to wit, that of prize or no prize. The burden of overcoming the effect of the proof which is thus produced in the first instance, is thrown upon the claimant. This is the meaning of the rule which throws the burden of proof upon a claimant. The preliminary proof, which the law requires the captors to bring with them, is a part of their case, and, if sufficient, must condemn, unless overcome. For this purpose, further proof may be required, but, until one opposed to condemnation presents his formal claim in the suit, he cannot be heard to ask that an order to that effect be made. The master of a captured vessel may put in the claim, but it must be for his owner, and, in practice, he is required to state, upon information and belief, who his owner is. If, upon an examination of the captor's preliminary proofs, it appears that there should be an acquittal, and no claimant has filed a claim, the court will, in some appropriate manner, ascertain and determine to whom a delivery of the property shall be made.

In this case, the captors brought the captured vessel into court and caused her to be libelled as prize of war. They also produced the documents and writings found on board, and the depositions of the master, purser, and first and third mates, taken in preparatorio. This being done, the master appeared, and, as bailee of the vessel, claimed "for the owner," stating that "Laird, a lawful British subject, residing in England, is the true and bona fide owner of said steamer, and that no other person is the owner thereof, as appears by the register of said steamer, now in the possession of the court, and as he is informed and believes." The cause was thus made ready for hearing, but, upon examination of what was on file, an order for further proof was taken. No witnesses were examined, except such as were on board the Wren at the time of the capture, and the only additional proof offered or permitted on the part of the captors related entirely to the names of the persons who took part in the seizure of the vessel, or who had knowledge of the undertaking before the commencement of its execution. The testimony being all in, the cause was again heard, July 3d, and the court, finding that the vessel "was the property of the enemies of the United States." announced its judgment of condemnation, July 8th, only twenty-six days after the vessel left Havana, twenty-four after she was brought into Key West, and twenty-two after the filing of the libel. Under such circumstances, it would seem to be clear, that the issue tried must have related only to the enemy character of the vessel, and not to its particular ownership. The legal effect of the claim put in by the master, was for the owner, believed to be Laird, whose name appeared in the certificate of registry found on board. It was, however, nowhere positively asserted that he was the real owner, and the certificate of registry to which the reference was made, and which was then in the possession of the court, bore upon its face the express declaration that it was not a document of title, and did not necessarily contain notices of all changes of ownership. It bore date December 24th, 1864, nearly six months before the capture, and there had been abundance of time for many regular and lawful changes of ownership, without an actual necessity for a new certificate, as the vessel had never returned to her home port after sailing upon her first voyage, and a new certificate could not be granted without a surrender of the old one. Merchants' Shipping Act of 1854 (17 & 18 Vict. c. 104, § 88). Prudence, undoubtedly, requires, that, when a master claims for the owner, he should state his belief as to who the owner was, but it would be dangerous to hold, in this class of cases, that a decree of acquittal, after such a statement based upon the evidence contained in the ship's papers, would cut off a title lawfully acquired after the vessel had left her port of registry, and while she was absent on a voyage.

The office of a claim is to bring the claimant into the cause, so that he may become an actor. Before a claim is filed, all a contestant's advocate can do is to present the case upon the captor's proofs, but afterwards, he may, by leave of the court, add affirmative evidence of his own. When the master presents the claim, he acts, in contemplation of law, for whom it may concern, and is required to name his supposed owner, not for the purpose of maintaining the particular owner's title against all the world, but to satisfy the court that he is acting in good faith, and that he is entitled to resist the captor's title by further proof. When, after an acquittal, the court directs that the property shall be delivered to the claimant, it is not necessarily because he has been adjudged to be the owner, but because, upon the proofs which have been submitted, he appears to be such. If, because of his apparent ownership, he gets possession of that which actually belongs to another, he does so as the representative of the true owner and must account accordingly. If, after an acquittal, a controversy arises between two conflicting claimants as to their title, and they present their respective claims to the court for adjudication, in order that it may be definitively settled who has the better right, a judgment would bind them, but not necessarily all the world. The particular litigants are concluded, because they have voluntarily submitted their rights for adjudication in the cause. As they were not compelled to come in to litigate between themselves, they would not have been bound but for their submission. So, as all the world has only been called upon to appear, if they will, and contest the sentence of condemnation, the sentence of

acquittal leaves all interested in the property free to resort to such appropriate remedies as they choose, for the settlement of their conflicting individual rights.

It seems to me clear, that, if there had been no claim in this case, and, after a sentence of acquittal, the court had ordered the vessel delivered to Laird, as the registered owner, such an order would not have transferred the title back from Prioleau to Laird. As the claim in this case was, in effect, nothing more than for him as registered owner, it is difficult to see how it adds anything to the strength of his position as against the true owner.

Prize proceedings are not at all suited to the adjudication of disputed titles to the captured property. They are essentially war measures, and necessarily summary. To a large extent, the courts, like the captors, must rely upon the evidence furnished by the vessel herself, that is to say, upon appearances. Under ordinary circumstances, a vessel ought to be able to protect herself from condemnation, if innocent, by such testimony as she can obtain from her papers and her officers and crew. The laws of all maritime nations make ample provision for documentary evidence of a vessel's true character, and the principal officers are presumed to have always at hand the means of protection against unlawful capture. Hence, proceedings in prize are always hurried forward with all convenient dispatch. This is important both to captors and owners; but especially as to owners, if they are innocent, in order that their voyage may not be unnecessarily interrupted. For this reason, all collateral questions are, as far as possible, kept out of the way, and the enquiry confined to the lawfulness of the capture. Hence it is, that in the article in the American Encyclopedia (volume 10, p. 364), so much relied upon by the counsel for the libellants, in their argument, it is said: "If he (the claimant) has but a lien, or is a mere insurer, or a mortgagee not in possession, he cannot maintain his claim, for reasons which are found in the incompetency of such a court (prize) to investigate such claims." Certainly, if it had been supposed that a decree in the cause was to settle anything else than the one question of prize or no prize, this would not have been said. If an ordinary sentence of acquittal was to have the effect of determining all conflicting claims between individual proprietors, the court ought to be competent to investigate and determine such questions. But it is practically incompetent, because the summary manner in which it necessarily acts is entirely unsuited to such enquiries. The master of a vessel is not presumed to have accurate information upon such subjects, and it is not usual for him to keep on board the evidence required in the trial of such causes. It has never been supposed, that, when a mortgagee appears as claimant, in a suit in admiralty brought to enforce a maritime lien, if he defends successfully against the lien and defeats the action, a decree dismissing the libel would settle his rights as against the mortgagor. So, too, one who, by asserting ownership, defeats a condemnation as prize, does not thereby establish his title as against a contesting owner.

I am, therefore, clearly of the opinion, that the ordinary sentence of acquittal in a prize suit, even if accompanied by an order for the delivery of the property to the person appearing as claimant upon the record, does not necessarily divest others of any title they may have to the subject-matter of the capture. It only remains to consider whether there is anything in this case to take it out of this general rule. Certainly, no issue as to Prioleau's ownership was directly presented upon the record. The case was submitted substantially upon the preliminary proofs, and the district court only decided that the property was enemies' property, and, therefore, lawful prize. The decree of the supreme court simply reversed that of the district court, and ordered restoration of the property. Upon its face, it only decided that the vessel was not enemy property. On the part of the United States, it was argued, that the register was only "a cover of the rebel title," and, on the part of the captors, that "there was not a particle of evidence to show that the steamer was ever enemies' property." The court, while conceding that it was not "unnatural or unreasonable to suspect that the so called Confederate States, or their agents, had some connection, if not interest in her," concluded, that there was "no foundation of legal proof of the ownership of the vessel in the Confederate States, on which these circumstances can rest, or be attached, as auxiliary considerations, to influence the judgment of a court." In this there is nothing to indicate a definitive decision as between Laird and Prioleau, that Laird was the owner and Prioleau not. All it amounts to is, that the captors had not succeeded in showing that Laird had parted with his title to "the enemies of the United States." What the court might have decided, if the bill of sale to Prioleau had been in evidence, is not now the question, but what it did decide upon the evidence actually presented.

When the mandate went down from the supreme court, all the district court had to do was to enter the decree which was ordered and deliver the fund in the registry to the claimant. The effect of the decision upon the appeal was, that, as Laird was the apparent owner, he should have the possession. So, too, when the district court acted upon the mandate, it did not adjudicate upon the actual title of Laird to the fund, but simply ordered that the fund be given up to him, as the person apparently entitled to take it out of court. When Foster & Thomson received the money upon the authority

of Laird, they took it to hold, as Laird would have held it, if it had been paid to him instead of them. As the apparent registered owner of the vessel, he, under the circumstances of the case, represented the real owner, and would be accountable for all that came into his hands in his representative character. If Laird had himself drawn the fund, and placed it in the hands of Foster & Thomson for safe keeping, or if he had placed it upon special deposit in a bank, or if he actually held it in his own possession separate from his other property, it could not have been subjected by these libellants to the payment of their demand against him, because he held it, not in his own right as owner, but in trust for another. So long as Foster & Thomson hold the money, it is kept separate from the other property of Laird, and preserves its trust character.

Clearly, if this were all, the fund could not be subjected in this action. Prioleau, upon the evidence submitted in this case, was the actual owner of the vessel when captured and when sold. The proceeds, therefore, which had taken the place of the vessel, in the progress of the suit, were his when paid out of the registry of the court, and the parties to whom the payment was made took them in trust for him. They have not only been kept as a distinct and separate fund, but are proceeded against in this action as such.

But it is further insisted, that, as Prioleau employed counsel and prosecuted the appeal in the supreme court, with Laird upon the record as claimant, he stands in the position of an enemy who has put forward a neutral to claim his captured property as owner, and cannot now be heard to say that the neutral was not the owner in fact. Such I do not understand to be the effect of what was done. So far as anything appears upon the evidence in this case, Laird was in truth the owner of the vessel when she was registered, and when she sailed from Liverpool. She may have been built upon the order of Prioleau, but there is nothing whatever to show that she actually belonged to him at any time previous to the execution of the bill of sale. She was, then, when she sailed, properly registered in Laird's name, and Prioleau cannot be said to have put forward Laird as owner, because she went to sea with a certificate of Laird's registry on board. More than six weeks before her capture, Prioleau had entered his bill of sale in the custom house at her port of registry, and obtained a new registry in his own name. When she was captured, she was returning for the first time to her port of registry. There was nothing in the laws of Great Britain which made it necessary to give up the old certificate of registry and take out a new one before that time. When the vessel was brought into court, and the preliminary proofs taken and filed, the master, in accordance with his duty, attempted, in the usual way, to protect the interests of her owners. Believing it to be important to secure the privilege of submitting further proof, and finding from the ship's papers that Laird was the registered owner, he made the necessary formal claim for the owner, stating his belief that the registered owner still continued to be the true owner. By so doing he raised no new issue upon the pleadings. The court had still to be satisfied that the vessel was enemies' property. A false claim, if discovered, would have been a strong circumstance in favor of the validity of the capture, but still there could not be a condemnation, unless the proof satisfied the court that not only Laird was not the owner but an enemy was.

As has been seen, a formal claim was not necessary to enable one having a substantial interest in the property, to argue against the sufficiency of the captors' proof. A master may employ counsel to appear for a registered owner and oppose the condemnation, and he will, ordinarily, be heard upon the case as made by the libellants, without making himself an actual claimant. In this case, there is nothing to show that Prioleau knew of the pendency of the proceedings until after the master had secured an appeal. He simply did, after this, what the master might have done, without entering a claim, before. He argued, that, upon the proof as it stood, there was no case for condemnation.

The question here presented does not arise between Prioleau and the United States. If all the truth had been spread upon the record, a different result might have been reached, and the captors might have secured their prize. But that is not now the question. A sentence of acquittal has been pronounced, and an order made for the restoration of the property to the owner. If Prioleau were now asking to have the delivery made to him instead of Laird, the court might with propriety refuse to interfere, and leave him to such remedies as he was entitled to after the money reached Laird's hands, on the ground that, having waited until a decision had been reached at his instigation, it did not lie in his mouth to object to such a decree as the record required. As between him and Laird, however, there is no estoppel, and, if he is not estopped as against Laird, he is not as against the libellants. They acquired no new rights by the decree, and they have given Laird no new credit upon the faith of it. Their rights depend upon Laird's actual title, and not upon what Prioleau may have done to save the property. The case of De Metton v. De Mello, 12 East, 234, so much relied upon, is far from being like this. There, a neutral lent his name to an enemy to neutralize property, and the enemy put the neutral forward as claimant, to prevent a condemnation. The whole thing was planned as a deliberate and

palpable fraud, and the court said, that, after the fraud had been successful, it would not hear the enemy to recover its fruits from his guilty confederate. As the parties had combined to commit a fraud, and had been successful, the law would leave them in the transaction just where it found them. Here, there was no fraudulent combination, no putting forward for the purposes of deception, but a simple contention that the captors had not, by their own showing, made out their case. Prioleau stands just where he would if, without a claim, the district court, upon the proof, had acquitted the vessel, and delivered her to Laird. When he interfered in the cause, he was not bound to put in more testimony. He had the right to stand upon the case as made. In this respect he did not occupy a position different from other litigants. He was at liberty to rely upon the weakness of his adversary's case as well as the strength of his own. The captors had no claim upon him for discovery, and he might keep silent if he chose. His promotion of the cause after the appeal placed him in no worse position than he would have been if the same decree had been rendered without his interference.

Neither do I think that the rights of the parties have been changed by what was done by Foster & Thomson to get possession of the fund. For all the purposes of this suit, they are to be treated as the representatives of Laird, in obtaining the money. If Laird was not the actual owner of the fund in his own right before it was paid to them, he was not after. The change of possession did not change the ownership. The title of Prioleau reaches behind that transaction, and behind any proceeding of these libellants, here or elsewhere, to reach the fund as Laird's. Laird would have taken the money out of court as trustee for Prioleau if it had been paid into his own hands, and Foster & Thomson, in their character as his agents, hold it clothed with the same obligation.

This disposes of the whole case. The money in the hands of Foster & Thomson was never the property of Laird, but always of Prioleau. Consequently, the judgment of the district court declaring it to be the property of Laird, and subjecting it to the decree against him, was wrong.

Many other important and interesting questions were presented upon the argument, which, in the view I have taken of the case, need not now be considered. I have, however, thought it proper to find all the facts upon which these questions rest, in order that, if there should be an appeal, the whole case may go up. Without passing upon the validity of the defence set up in the amended answer of the appellants, which the late lamented judge of the circuit allowed to be filed provisionally, I have considered it as part of the case, and found the facts upon its allegations.

The testimony in the prize cause, and which is found in that record, cannot be considered here to prove the facts put in issue by the pleadings in this case, but it may be referred to for the purpose of ascertaining what was actually decided there, if the record leaves that question otherwise in doubt. The same may be said of the briefs of counsel and the opinion of the court upon the appeal. According to my view of the matter, they are unimportant, but, to present the case in full to the reviewing court, I have found the facts they establish, if admissible, thus putting the question of their relevancy upon the record.

Let a decree be prepared to the effect, that the fund, known as the proceeds of the steamer Wren, in the hands of Foster & Thomson, when served with process in this action, was not the property of John Laird, Jr., the defendant in the principal suit, and that it cannot be subjected to the payment of the decree against him. All orders of the district court inconsistent with this finding are reversed and set aside. As the garnishees only have appealed, no order can be made in respect to the decree against Laird. The costs of the court upon this appeal, and of the district court, so far as they relate to the proceedings under the process of garnishment, are to be paid by the libellants.

[NOTE. From this latter decree an appeal was taken by libellants to the supreme court, and the garnishees also took an appeal from the order dismissing their appeal from the first decree of the district court. Both decrees were affirmed (107 U. S. 69, 2 Sup. Ct. 197), the court saying, through Mr. Justice Gray, that it was fully satisfied, both upon principle and authority, of the correctness of the decree upon the merits; that a decree of acquittal in a prize court "does not establish the title of any particular person, unless conflicting claims are presented to the court, and passed upon;" that, "even when conflicting claims of title are put in, the prize court will not ordinarily determine between them, unless one of the claimants is a citizen of its own country." The court further said: "The libellants, in this suit against Laird personally, and against Foster & Thomson as his garnishees, have the burden of proving that the fund in the hands of the garnishees belongs to Laird. There is nothing in the acts of Prioleau, or of the garnishees as his attorneys, which estops the garnishees to deny that fact, and to put the libellants to proof of it. He had no knowledge of the prize proceedings until after the decree of condemnation. Having a title to the vessel under the bill of sale from Laird, he prosecuted the appeal from that decree in Laird's name, and by Laird's authority. Whatever effect Prioleau's omission to disclose his own interest might have had, if discovered upon the issue in the prize cause, or might have, by way of estoppel, if the present suit were brought by the United States, he has done nothing which Laird or Laird's creditors have been misled by, or have acted upon. The title in the vessel, as between Laird and Prioleau, was in Prioleau. The garnishees, being attorneys both of Laird and Prioleau, received the proceeds in the name of Laird, but for Prioleau. There being no estoppel, either of record or in pais, the libellants fail to prove that the fund belongs to Laird, and cannot, therefore, maintain their attachment."]

Case No. 3,511.

CUSHING v. SMITH et al.

[3 Story, 556.][1]

Circuit Court, D. New Hampshire. Oct. Term, 1844.

TRUSTS FOR BENEFIT OF CREDITORS — PURCHASE BY TRUSTEE INDIVIDUALLY—LACHES AND ACQUIESCENCE OF OTHER TRUSTEES—BONA FIDE PURCHASERS—EQUITY PLEADING—BURDEN OF PROOF.

1. A made an assignment of all his property to B, C, D, and E, in trust, to pay his debts. Among the property assigned was a large debt from Messrs. F and M, on which an action was brought, and judgment recovered, and execution levied by selling an equity of redemption in the Folsom farm, mortgaged to the Granite Bank, but owned by F and M. This equity was purchased by B, one of the assignees, and subsequently sold to the defendant, Smith, Jr., the latter mortgaging the property to B, to secure his notes for the purchase money. B conveyed the mortgage and two of the notes, to the defendant Rice, for a debt due to B from Goddard, of whom Rice was administrator. The mortgage held by the Granite Bank was subsequently conveyed to the defendant, Smith, Jr., and, at the time of the filing of the bill, was foreclosed. The present bill was brought by one of the assignees, to enable the assignees to obtain a decree for the redemption of the Folsom farm, as against Smith, Jr., and as against Rice, to obtain a surrender of the mortgage and notes,—and charged that the conveyance to B was made to him as assignee, and not in his own right. It was *held*, that, as no deed from the sheriff, conveying the equity of redemption to the assignees, appeared, and its absence was not accounted for, but the only deed shown was to B, alone, who declared that he bought on his own account; and as the assignees had acquiesced in the possession and foreclosure of the mortgage by him, without objection; it must be considered as belonging personally to B,—the onus probandi being on the plaintiff to show the contrary, which he failed to do.

2. *Held*, also, that, under the circumstances of the case, Smith, Jr., was a bona fide purchaser, without notice of any equity on the part of the assignee; and that his title was completely established by the foreclosure of the mortgage, under the requirements of the statutes of New Hampshire.

3. *Held*, also, that the plaintiff could not, in the argument, take advantage of the objection, that the publication in the newspaper of an intention to foreclose, as required by the statute, was not established by any copy of the newspaper, but only by two witnesses; but that the objection should have been made at an earlier period; or the prima facie evidence of the witnesses should have been disproved.

4. Where denials to allegations in the bill are made in the answer, the onus probandi is on the plaintiff to overcome such denials by the testimony of two witnesses, or of one witness and other corroborative facts.

Bill in equity. The bill set forth, in substance, that on April 13th, 1829, Jacob Cutter assigned to Clement Storer, James Shapley, Charles W. Cutter, and Charles Cushing, (the plaintiff), all his property in trust for the payment of his debts, as stated in a schedule annexed to the assignment, and that by virtue thereof, a large amount of property and effects came into the hands of the said assignees, for which they have never accounted. That on the day of the execution of said indenture, and prior thereo, Arthur Folsom and William McCulloh, both of Jeremie, in the island of Hayti, were indebted to the said Jacob Cutter in a large amount of money, as in the said indenture is set forth, and that on the 8th day of April, A. D. 1829, the said Cutter sued out a writ against the said Folsom and McCulloh, and on the 1st Tuesday of August, A. D. 1834, recovered judgment against the said Folsom, for the sum of four thousand six hundred and fifty dollars damages, and ten dollars cost of suit; and the said Shapley, Cushing, and Cutter, on the 22d day of August, A. D. 1834, sued out a writ of execution upon the said judgment, and on the 6th day of September, A. D. 1834, delivered the said execution to Samuel Larkin, a deputy sheriff of the said county of Rockingham, to be served, and executed, and returned, according to law, and such proceedings were then and there had upon the said execution, by the said Larkin, in due course of law, that the said Larkin, on the 20th day of October, A. D. 1834, sold thereupon, and in satisfaction thereof, at public auction, to the said Shapley, Cushing, and Cutter, who purchased the same as assignees, as aforesaid, and conveyed to them, and their heirs and assigns, all the right in equity of the said Arthur Folsom, of redeeming a tract of land, situated in Newington in the said county, being the Folsom farm, so called, for the price of two thousand five hundred dollars; and the said Shapley, Cushing, and Cutter, thereby became seized of the same right in fee simple, as assignees in the trusts set forth in the same indenture. And the said Arthur Folsom, at the time of the said conveyance, owned and was seized in fee of the said land, subject only to a mortgage made to Nathaniel Gilman, dated October 1st, 1825; and the said land was worth twenty-five hundred dollars more than said mortgage debt. And on the 7th day of July, A. D. 1835, the said Charles W. Cutter sold and conveyed to one Samuel Smith, and his heirs and assigns, all his right, title and interest in the said equity of redemption, for the price and consideration of two thousand and five hundred dollars, secured to be paid by the said Smith, to the said Cutter, and the said Samuel Smith, on the sixteenth day of May, A. D. 1836, sold and conveyed his right and interest in the land aforesaid, to James Smith, junior, his heirs and assigns, for the price of two thousand and five hundred dollars, which the said James Smith, junior, secured to be paid for and on account of the said Samuel Smith, to the said Charles W. Cutter. And the said James Smith, junior, on the second day of December, A. D. 1836, made and executed to the said Charles W. Cutter, and his heirs and assigns, a deed of his right in the said lands, conditioned to be void, provided the said James Smith, junior, should, on or before April the 1st, A. D.

[1] [Reported by William W. Story, Esq.]

1838, pay to the said Cutter, $2800.00, according to the said Smith's notes, each for $833.33, dated the seventh day of July, A. D. 1835, and signed by the said James Smith, and by the firm of E. & S. Smith, and the said James Smith's draft on the said E. & S. Smith, by them accepted, for $876.27, payable in sixty days, dated April 18th, A. D. 1836, which notes and draft, or certain other notes, which formed the consideration of the said notes and draft, were made and delivered to secure the price of the right in said farm, sold and conveyed by the said Cutter, as aforesaid. And the said Charles W. Cutter, afterwards, on or about the ninth day of January, A. D. 1833, transferred to Robert Rice, as administrator of the goods and estate of John T. Goddard, deceased, of the said Portsmouth, the said mortgage, with part or all the securities mentioned in the condition thereof. And the said Rice, at the time of the said transfer, had been informed and well knew, or had reason to suspect and believe, that the said Cutter held the said right in equity of redemption of the said lands as aforesaid, not as his own absolute property and estate, but only upon the trust specified in the said indenture. And the said notes and drafts, or so many thereof as were assigned to the said Rice, were transferred to him long after the same became due and payable. And the said mortgage, made by the said Arthur Folsom to the said Nathaniel Gilman, hereinbefore set forth, and the balance remaining due upon the debt therein mentioned, and intended to be secured, were on the 22d day of April, A. D. 1835, duly and legally assigned by the said Nathaniel Gilman to Nathaniel Gilman 3d, and on the same day, to the president, directors, and company of the Granite Bank, by the said Nathaniel Gilman 3d. And the said James Smith, junior, on the thirteenth day of July, A. D. 1836, paid the said president, directors, and company of the said Granite Bank, on account of the said debt secured by the said mortgage, the sum of twenty-nine hundred and eighty-eight dollars and forty-seven cents, which was the balance which remained due thereon. And the plaintiff further shows that the said James Shapley, after the execution of the said indenture, viz: on or about the first day of January, 1830, sold the ship Neptune, in the said indenture mentioned, for a large sum of money, and received the proceeds thereof to his own use; and also, in like manner, received the earnings of the said ship, and hath never accounted for the same, though requested. And the said James Shapley died on the ninth day of July, A. D. 1837, and on the ninth day of August, A. D. 1837, J. Hamilton Shapley was appointed administrator upon his goods and estate.

The prayer of the bill was, that the said defendants may answer the premises, and that an account may be taken of all the dealings and transactions hereinbefore mentioned between the said Charles W. Cutter on his own account and behalf, and as executor of the last will and testament of the said Clement Storer,—and the said J. Hamilton Shapley, as administrator of the goods and estate of the said James Shapley, and the said plaintiff,—and between them and each of them in said capacities; and that the said defendants may be decreed to pay the plaintiff, as one of the assignees mentioned in the said indenture, what may be found due him on taking such accounts from the said Jacob Cutter. And that the said Robert Rice may be ordered to convey the said securities and mortgage conveyed to him, as aforesaid, to your said plaintiff, or to the said Shapley, the said Cutter and the said plaintiff, or to pay to the said plaintiff the amount thereof. And that the said James Smith, junior, may be decreed to release and to convey to the said plaintiff, or to the said plaintiff and the said Shapley and Cutter, as assignees as aforesaid, the equity of redemption in the premises aforesaid, being the same sold by the said Larkin as aforesaid, or to convey and release to the said Shapley and the said plaintiff, two-third parts thereof, and to hold the same subject to redemption, upon payment of the said debt, assigned to him by the said Granite Bank, and to pay to the said plaintiff, or to the said Shapley, Cutter and the said plaintiff, as assignees aforesaid, the amount due upon the notes and securities made by him to the said Charles W. Cutter, as aforesaid. Or that the said court will decree and order, that all the said property held by the said Charles W. Cutter, as one of the assignees, mentioned in the said indenture, and as executor of the said Storer, and by the said Shapley, Rice and Smith, may be conveyed and delivered to some person, who may be appointed by the said court as a receiver, to have the care, custody and management thereof, to dispose thereof, and also to receive all sums due from any of the persons aforesaid, on account of the said assignment; and under the direction of the said court, to apply the same property and sums to the indemnity and payment of your said plaintiff, for his said claims and liabilities, and to the execution of the other trusts mentioned in the said indenture. And that the plaintiff may have such further and other relief in the premises, as the nature and circumstances of this case may require, and to your honors may seem meet.

A supplemental bill was afterwards filed, setting forth, in substance, that on the 17th of September, A. D. 1839, the said James Smith, Jr., executed a deed, conveying the said Folsom farm to James Smith, Sen., for the consideration of $5,000. That on the thirteenth day of July, A. D., 1836, when the said James Smith, Jr., paid the aforesaid debt to the said Granite Bank, he procured to be made to him from the president, directors and company of the said Granite Bank, an endorsement of the said note held

by the said bank, and a deed purporting to convey the said mortgage of the said farm held by the said bank. That the said Robert Rice on the —— day of —— A. D. 1838, commenced an action, as assignee of the mortgage aforesaid, made by the said James Smith, Jr., to Charles W. Cutter, to obtain possession of the said mortgaged premises, which action was entered at the court of common pleas at Exeter, in and for the said county of Rockingham, in the state of New Hampshire, on the first Tuesday of September, A. D. 1838, and continued from term to term to the September term of the said court, A. D. 1844, when the same was tried, and the said James Smith, Jr., upon the said trial, alleged and relied, as a defence to the said action, upon the fact, that the said Charles W. Cutter, though, when he made the said conveyance of the said equity of redemption, he claimed and represented himself to be the owner thereof, had no interest therein except what he acquired by virtue of the said sale from the said Larkin, deputy sheriff, as aforesaid. And that the said James Smith, senior, claims to be the assignee and owner of the aforesaid mortgage, and mortgage debt, from Arthur Folsom to Nathaniel Gilman, and that on the 15th day of October, A. D. 1841, he gave public notice, that on the 16th day of April, A. D. 1841 he took possession of the said farm, as assignee of the said mortgage, for conditions broken, and held the same for the purpose of foreclosing the said mortgage, by publishing the said notice in a newspaper, printed in the said county as the law directs. And that the said James Smith, senior, at the time of the said pretended conveyances of the said real estate and mortgage was far advanced in years,—was not possessed of any property, or of none beyond a very small amount, and that he, in fact, never paid any valuable consideration for the said pretended conveyance of the said farm, and of the said mortgage, and that the said conveyances were merely to enable him to hold the said property, and mortgage, in trust for the said James Smith, Jr., and for his benefit; and that the said James Smith, senior, is not a purchaser thereof in good faith and for a valuable consideration, but that the said conveyances were made by the said James Smith, Jr., without consideration, and for the purpose of delaying and defeating his creditors, and others, who have just claims upon said property; and that the said pretended conveyances of the said property are, and should be held and taken to be, void, and of no effect. And that the said James Smith, Jr., though he well knew, and alleged, and admitted, that he had no title to the said equity of redemption, by virtue of his said deed from Charles W. Cutter, is now seeking and attempting in the name and through the agency of the said James Smith, senior, to foreclose the said last mentioned mortgage, and to obtain a complete and indefeasible title to the said farm, during the pendency of the said plaintiff's original bill, and before a decree can be had therein. That the said James Smith, Jr., pretends, that he has an absolute title to the said Folsom farm, by foreclosure of the said mortgage assigned to him by the said Granite Bank. Whereas your plaintiff charges the contrary thereof to be true, and that the said mortgage was discharged by the said Smith, Jr., to the said bank, or has since been paid to the said Smith, and satisfied by the rents and income of the said farm by him received. And the said Charles W. Cutter pretends that he alone was the purchaser of the said equity of redemption from Samuel Larkin, deputy sheriff; whereas your plaintiff charges the truth to be, that the same was struck off to and purchased by the said James Shapley, in the names and in behalf of the said Cushing, Cutter and James Shapley, surviving assignees of Jacob Cutter as aforesaid, at and for the price of $2500. And the said James Smith, Jr., sometimes pretends, that he had no notice of the said last mentioned purchase by the said assignees, whereas your plaintiff charges it to be true, that the return of the said sale, upon the said execution, by the said Larkin, was duly made and recorded, and that the sale aforesaid was made upon due and legal notice, and was open and notorious. That the said James Smith, Jr., sometimes pretends, that he purchased an absolute title to the said Folsom farm, from the Granite Bank, at Exeter. But your plaintiff charges, that the said Smith, Jr., only paid and discharged the said Folsom mortgage, held by the said Granite Bank, and that James Smith, Jr., gave Charles W. Cutter a mortgage of the said farm, to secure the price of the right in equity of redemption aforesaid. And sometimes the said Charles W. Cutter and the said Rice pretend, that the securities given by the said Smith, Jr., were endorsed and delivered to the said Rice, before they became due, and without notice of the consideration for which the same were given, and the said Rice pretends to hold the same as his absolute property, or as administrator, and has suits at law pending to recover the same, or to foreclose the said mortgage from James Smith, Jr., to Charles W. Cutter. Whereas, your said plaintiff charges, that the said securities were endorsed and delivered to the said Rice, after the same or a part of them became due, and that the mortgage deed, accompanying the said securities, was not assigned to the said Rice until the tenth day of November, A. D. 1837. And the said Rice, well knowing or having reason to believe, that the said securities were a part of the property held in trust by virtue of the said indenture, was therefore bound, in point of law, to hold the same subject to said trusts.

Charles W. Cutter in his answer, states, that at the time of the execution of the judgment set forth in the bill, the said Arthur

Folsom was indebted to the said Jacob Cutter in about the sum of eleven thousand dollars, and that this defendant procured the demand to be put in suit, and the said farm to be attached on the original writ, returnable at the superior court, at the September term thereof; and at the August term thereof, judgment was rendered in said action in favor of the said Jacob for the sum of $46.50 damages, and $10 costs; and on the 24th day of August, A. D. 1834, execution was sued out, and soon afterward delivered to the said Larkin, the deputy sheriff, with instructions to levy the same on the said farm, by selling the said Folsom's right to redeem the same at public auction. That he instructed the said Larkin, in case no person should appear, and offer for the said equity of redemption more than $2500, that the said Larkin might hire the purchaser thereof at that price; that he was unable to attend the said sale, but was informed by the said Larkin afterwards, that it was so sold, and that he, this defendant, was the purchaser, and that he, this defendant, paid the said Larkin his fees in the said levy and sale. But this defendant cannot state from his present recollection, that the said Larkin made a deed to him of the said premises; but he has no doubt of the fact, because he finds at the registry of deeds for the county of Rockingham, that a deed has been recorded, which he has no doubt was the deed executed by the said Larkin to this defendant.

And this defendant further saith, that he has been informed, that the return of the said officer upon the said execution sets forth, that the said right in equity was bid off to the said Cushing, Shapley, and this defendant; but this defendant avers, that he never saw the said return, and never heard, that any other person pretended to be the purchaser of the said premises but himself; and he avers, and is ready to prove, that he alone took possession of the said premises, and contracted with a person to occupy and cultivate the same, and purchased cattle and farming utensils, and made contracts of sale hereafter mentioned, and took the notes therefor, and neither the said Cushing nor the said Shapley ever interfered, or claimed a right to interfere, in the said transactions. And he further states, that on the 7th day of July, A. D. 1835, he sold the said Folsom's equity of redemption in the premises to Samuel Smith, of Bangor, in the state of Maine, and that the price, agreed to be paid by the said Samuel for the said equity of redemption, was $2500, for which sum the said Smith gave to this defendant his notes of hand, payable in six, twelve, and eighteen months from date, signed by the said Samuel and by one James Smith, Jr.; and this defendant thereupon made a deed of his interest in the said premises to the said Samuel Smith, which deed is duly recorded in the registry of deeds for the said county of Rockingham. That the said farm had been mortgaged by the said Arthur Folsom to one Nathaniel Gilman, and at the time of the said levy, the Granite Bank, at Exeter, was assignee of the said mortgage, and that the sum due on the said mortgage was about $2900, at the time of the said sale to the said Smith: that the said Samuel Smith stated to this defendant at the time, that he had purchased the said premises for the use of the said James Smith, Jr., to whom he has since conveyed the same; that sometime in the summer of 1835, the said assignee of the said mortgaged premises, took possession thereof for breach of condition, in pursuance of an agreement between the said assignee and this defendant, made before the said conveyance, and the said Smith, by advice of this defendant, took an assignment and conveyance from the said assignee, and the equity of redemption having long since expired, the said Smith has acquired a complete title to the premises. That the said James Smith, Jr., on the 2d day of December, A. D. 1836, made to this defendant a deed, conveying the said premises to him, to secure the payment of the draft in the said complainant's bill mentioned, and also of two notes of hand, each for the sum of $833.33, in the said bill mentioned, and that the said draft was given in payment for another of the same tenor, which had not been paid, and that the consideration of all of them was the sale of said equity of redemption; the said draft having been negotiated by this defendant, before it became due, to Calvin Spaulding and Edward Howe, the present holders thereof. That on the 6th day of December, A. D. 1836, being about to go to distant parts of the country, and being largely indebted to John T. Goddard, Esq., since deceased, he transferred and delivered to the said John T. Goddard, the said two notes of hand, and the mortgage deed securing the payment thereof, as collateral security; and that afterwards the said John T. Goddard deceased, and the said Robert Rice, was appointed administrator of the said estate, and afterwards, but when, he cannot from his recollection now state, at the request of the said Rice's attorney, he wrote out or executed a formal transfer of the said deed and mortgaged premises on the back of the said deed. That the said Goddard, and the said Spaulding and Howe, knew nothing of the consideration, upon which the said notes were founded, at the time the same were transferred, to the best of his knowledge and ability, but this defendant avers, that having paid out on account of his own liabilities for the said Jacob, and having compounded debts, owed by the said Jacob to the persons in the said assignment mentioned, and paid therefor a much larger sum than the amount received by him as assignee as aforesaid, he assumed the notes by him received for the sale of the said

equity of redemption, as his own property, and dealt with them accordingly. That the said E. & S. Smith and James Smith, Jr., utterly refuse to pay the amount of the draft and notes aforesaid, or any part thereof, on the ground, that no title has passed to them, or either of them, by virtue of the said sale, and that the said draft and notes are now in suit, in the names of the holders thereof.

Robert Rice, in his answer, states that John T. Goddard, late of Portsmouth, aforesaid, merchant, deceased on or about the month of July, A. D. 1837, and that this defendant, on or about the month of August, following, was duly appointed administrator of the said John T. Goddard; that soon afterwards, this defendant discovered among the papers of the said John T. Goddard, two notes, in the following words and figures, to wit:

"Portsmouth, July 7, 1835. For value received, we jointly and severally promise to pay Charles W. Cutter, or his order, eight hundred and thirty-three dollars and thirty-three cents, in eighteen months from date, with interest annually. James Smith, Jr. E. & S. Smith." Indorsed: "Charles W. Cutter."

"Portsmouth, July 7, 1835. For value received, we jointly and severally promise to pay Charles W. Cutter, or his order, eight hundred and thirty-three dollars and thirty-three cents, in twelve months, with interest. James Smith, Jr. E. & S. Smith." Indorsed: "Charles W. Cutter."

Which said notes this defendant was informed, by the said Goddard, in his life time, and some time in April, 1837, but at what time in the said April, he is now unable to state, were assigned, by the said Charles W. Cutter, together with the mortgage given by the said James Smith, Jr., to secure the same to the said Goddard. This defendant believes, that the said notes were so assigned in the year 1836, but at what time in the said year he does not know. That in the autumn of 1837, being about to institute a suit to foreclose the mortgage, given to secure the said notes, he applied to the said Charles W. Cutter, by his attorney, William H. Y. Hackett, to write out a formal transfer of the said mortgage to this defendant, in his capacity as administrator of the said Goddard, he being advised that that course was proper; the said notes having been assigned to the said Goddard, in his life time. That the said Charles W. Cutter, was largely indebted to the said John T. Goddard, at the time of his death, but whether the said notes were assigned to the said Goddard, by the said Cutter, as collateral security, or in part payment of the said debt, this defendant is not informed, but he has no doubt that the assignment was for one of the said last mentioned purposes, and not in trust. That the said notes were not assigned to him long after they became due and payable, but on the contrary, that they were assigned to the said Goddard in his life time, and, as this defendant verily believes, some time in the year 1836, but at no time were the said notes transferred to this defendant. That before the filing of the complainant's bill, as aforesaid, he had no intimation from the said Charles W. Cutter, or from any person, or from rumor, that the said Charles W. Cutter held the said right in the said equity of redemption, not as his absolute property and estate, but only upon trust, or that the same was subject to any other claim; nor did he know, nor was he informed, nor did he suspect, that the said notes were given to the said Charles W. Cutter for the said equity of redemption, or what the consideration of said notes, or either of them, was.

James Smith, Jr., in his answer states, that on or about the fifth day of July, A. D. 1835, in a conversation concerning the Folsom farm, between the said Charles W. Cutter and this defendant, the said Cutter affirmed that he owned all the right in equity which the said Arthur Folsom had of redeeming the said farm or tract of land, and proposed to sell and convey the same to this defendant, and as an inducement for this defendant to purchase the same, he stated, that there was money enough arising out of a certain contract made by one Samuel Smith and the said C. W. Cutter and this defendant, and due to this defendant, for him, (this defendant,) to purchase the said equity of redemption; and the said Charles affirming, that he had a perfect title to the same, this defendant agreed to become the purchaser thereof; and the said Charles then made a deed thereof to this defendant, but which was not fully executed; and afterwards, at Boston, on the 7th day of July, A. D. 1835, it was mutually agreed, that the said Charles should sell and convey the said equity of redemption to the said Samuel Smith, he then being present with the said Charles and this defendant, for the benefit of the said defendant, for the sum of $2500, which was accordingly done, by a deed executed on the same day, conveying all the right in equity, which the said Arthur Folsom had on the 20th day of October, A. D. 1834, of redeeming the said Folsom farm; and to pay or secure the said sum of $2500, the said Samuel made and delivered, to the said Charles, three certain promissory notes, each bearing date July 7th, 1835, each for the sum of $833.33, each signed by James Smith, Jr., this defendant, and E. & S. Smith, which the said Charles then and there received and accepted in full satisfaction. And afterwards, in pursuance of said agreement and understanding made at said city of Boston, between the parties aforesaid, the said Samuel Smith, by his deed, bearing date the sixteenth day of May, A. D. 1830, in consideration of $2500, quit-claimed unto this defendant, all his right, title and interest in and to the said Folsom farm. That Arthur

Folsom on the 1st of October, 1825, mortgaged the said Folsom farm to Nathaniel Gilman, for the sum of $7500, which said mortgage was on the 2d of April, 1832, assigned to the president, directors and company of the Granite Bank,—and afterwards, on July 13th, 1836, was assigned to this defendant in consideration of his agreement to pay over to the said bank the balance still due on the notes which were secured by the said mortgage, being the sum of $2988.97.

And this defendant understands and believes, that previous to the assignment to him, to wit, on the 28th day of September, 1835, the said president, directors and company of the said Granite Bank, the condition of the said deed of mortgage having long previous to the said 28th day of September, 1835, been broken, entered peaceably into the said mortgaged premises, and took possession of the same, for condition broken, for the purpose of foreclosing the said mortgage, and therefore gave due public notice, according to the requirement of the statute, in such case made and provided, and so continued in possession of the premises, without any hinderance or interruption, until the defendant became actually seized and possessed thereof; and this defendant, from the time last aforesaid, without any hinderance or interruption, continued in the possession thereof until the 17th day of September, A. D. 1839, during all which long space of time, neither the said Arthur Folsom, nor his assigns, nor any other person or persons, have ever paid, or offered to pay, either to the said Granite Bank, or to this defendant, the aforesaid sum of $2988.47. That on the 17th day of December, 1839, he conveyed all his right, title and interest in the Folsom farm, to James Smith, Sen., for a good and valuable consideration, and that the said Smith has thenceforward been in the actual possession thereof. That he has no knowledge whether the said Arthur Folsom was indebted to said Jacob Cutter, or in respect to the recovery of judgment and the levy of the execution mentioned, except from rumor and report, but he did understand, and was informed by the said Charles W. Cutter, that on the sale of the said equity of redemption by the said Larkin, deputy sheriff, he, the said Charles, was the sole purchaser thereof, and by that sale acquired a perfect title to the same in his own right, and not as assignee, for the purpose of holding the same upon the trusts mentioned in the said indenture. And this defendant, long since the date of the said deed of Charles to said Samuel Smith, has been informed that the said Larkin, on the 20th day of October, 1834, sold and conveyed all the right, which the said Arthur had of redeeming said premises, to James Shapley, the said Charles Cushing and said Charles W. Cutter, and it so appears by the said Larkin's return of said execution in favor of said Jacob Cutter; but whether said Larkin ever executed deeds of the premises to the said Shapley or Cushing, this defendant has no certain knowledge or information, and is yet, after diligent inquiry, unable to ascertain the truth in respect of the same. That the three promissory notes received as the consideration of the conveyance from the said Cutter to the said Samuel Smith, were payable as follows: one of said notes was payable in six months from its date, one other in twelve months from its date, and the third in eighteen months from the date; that this defendant is informed, as well by the said Charles as by the said Samuel Smith, that the said note payable in six months from its date, has been duly paid, and discharged; the said last note having been, from its date until payment, in the possession of said Samuel, and afterwards the said Charles instituted a suit, as the said Charles stated to him, on the said other two notes against this defendant alone, and a certain draft on said E. & S. Smith, given for the said last mentioned note for six months, and for security, attached the said Folsom farm, and the said suit was entered in the court of common pleas, September term, 1836, and continued, and was pending in the said court of common pleas, in and for the said county of Rockingham, on the 2nd day of December, A. D. 1836, and long afterwards; on or before the said 2nd day of December last aforesaid, the said Charles agreed, that if this defendant would secure the payment of the said two notes, and also a certain draft of this defendant on said E. & S. Smith, dated April 18, 1836, payable to the order of the said Charles at the Suffolk Bank, in Boston, for the sum of $883, which the said E. & S. Smith, on the 20th day of June, 1836, had accepted, to pay, that he, the said Cutter would discontinue the suit; and this defendant agreeing thereto, did, on or about the 2nd day of December, 1836, execute to said Charles a deed of mortgage of the said Folsom farm for the purpose aforesaid, the said deed to be void upon payment of said notes and a certain draft; but the said suit was not so discontinued until the September term of the court of common pleas, in which said court the said suit had long been pending.

And the said Robert Rice, administrator upon the goods and estate of the said John T. Goddard, on the 21st day of July, A. D. 1838, instituted a suit upon the said mortgage against this defendant, which was entered in the court of common pleas, in and for said county of Rockingham, September term, 1838, which said suit is still pending, and the said Robert claims, that the said deed of mortgage, and the said notes, were duly assigned by the said Charles to the said John T. Goddard, in his life-time, for a valuable consideration; and another suit in the name of Edward Howe and Calvin Spalding, on or about the 18th day of Sep-

tember, A. D. 1839, was commenced against this defendant, founded upon the said draft, which suit is now pending in this circuit court of the United States, and the said Charles pretends, that he sold and duly negotiated the said draft, now amounting to about the sum of $883, and interest thereon, to the said Howe and Spalding. And this defendant says, that the said Charles W. Cutter stated to him, that when he assigned the said two notes to the said Goddard, the time specified for the payment of one of them had elapsed, and this defendant has reasons to believe, that the said mortgage was not duly and legally assigned to said Rice, or said Goddard, until after the decease of said Goddard; that on or about the said 2nd day of December, 1836, or soon afterwards, the said Goddard, acting as the agent of the said Charles, and long before the pretended assignment of said mortgage and notes to him (the said Goddard,) received full knowledge of the consideration, for which the said two notes were given, and that this defendant ought not to be precluded from making a legal defence against said notes, or from making any equitable and just set-off against the said notes of the claims he had against the said Charles, by reason of the negotiation or transfer as aforesaid, or of the assignment of said mortgage; and this defendant insists and claims, that there was equitably and justly due to him from said Charles, anterior to the pretended assignment of said mortgage and notes to said Goddard, or said Rice, as administrator of said Goddard, the sum of about $1300, being about one-half the sum paid by the said Samuel Smith to the said Charles, in consequence of a certain agreement or contract, made on or about the 5th day of February, 1835, by and between the said Samuel on the one part, and the said Charles and this defendant on the other part, by which the said Samuel agreed to pay the said Charles and this defendant, one-half, or a certain portion of the profits, which the said Samuel might receive in the sale of certain lands in the state of Maine, in consequence of the aid and assistance of the said Charles and this defendant, rendered in the sale of such lands. And this defendant alleges, that the said Samuel, in pursuance of the said agreement or contract, paid into the hands of the said Cutter, the sum of about twenty-six hundred dollars, for the aid and assistance so rendered the said Samuel by the said Charles and this defendant; one-half of which said sum the said Cutter, although thereto requested, has neglected to pay to this defendant, or allow in part satisfaction or payment of said two notes. And this defendant now prays this honorable court to exercise its equitable jurisdiction for his protection and relief in the premises; and that the said notes and the said mortgage, so transferred and assigned by the said Cutter to the said Goddard, or his administrator, may be set aside or cancelled, or else that the said Cutter may be ordered to apply the said sum of about thirteen hundred dollars towards the payment thereof.

James Smith (Sen.) having died pending the proceedings, a bill of revivor was filed, and the suit revived against his heirs. The plaintiff, Charles Cushing, having afterwards become bankrupt, a bill was filed, making his assignee a party to the suit. The assignee appeared, and disclaimed all interest in the premises, admitting, that the title thereto had been sold by him, by authority of the court of bankruptcy, and that the same was now revested in the bankrupt.

Some cross-bills were filed by some of the parties, but they were afterwards dismissed. A separate answer was also made by each, and several interlocutory orders were made, and much testimony taken which it is not deemed necessary to set forth, as all the material facts sufficiently appear in the foregoing abstracts of the bill and answers, and in the opinion of the court. The following letter also appeared in the case, which was published in the New Hampshire Gazette, of October, 1840: "Sir: You are respectfully called on by the subscriber to furnish him with the following documents, namely: a certain deed from one Samuel Larkin, of Portsmouth, Esq., deputy sheriff, to Charles W. Cutter; the said deed is dated October 20th, A. D. 1834, which deed purports to convey all the right and equity, that one Arthur Folsom had at that time to redeem the Folsom farm, commonly so called. The said farm is situate in Newington, in the county of Rockingham, and the aforementioned deed is witnessed by two of the daughters of Larkin, aforesaid, and acknowledged by him before Mr. Hackett, a justice of the peace, as appears by a certified copy, from the register of deeds for the county of Rockingham. The said copy is now and has been for a long time filed in the United States court, of which you, sir, are sole clerk; which copy purporting to be a true deed, has been shown both to yourself and the said Larkin; you read and examined it with astonishment, and Mr. Larkin, after a thorough examination of the copy, denied having ever executed such a deed to Charles W. Cutter, and referred the subscriber to the execution, Jacob Cutter vs. Arthur Folsom, and the said Larkin's sworn return thereon, and also the said Larkin's deposition taken by Daniel P. Drown, Esq., on the same subject, both of which are now filed in the office of which you are clerk; which copy of execution is certified to be a true copy of record, by Mr. Hoit, clerk of the court from whence the said execution is issued; which return so made by Officer Larkin, aforesaid, and sworn to by him, conveyed all the right and title that Arthur Folsom had to the premises aforesaid, to James Shapley, Esq., late of Portsmouth, now deceased, Charles Cushing of Boston, merchant, and Charles W. Cutter, aforesaid, Esq., in consideration of the sum of $2,500, paid by

the grantees of Samuel Larkin, aforesaid, who made, executed, and delivered to them the aforesaid deed; and you are further invited to furnish the subscriber one other document now in your hands and possession, namely, a confidential letter or contract from Samuel Smith, of Bangor, merchant, addressed to Charles W. Cutter, and James Smith, Jr. A sworn copy by Samuel Smith of the said contract is now filed in the court, of which you are clerk, and his deposition, also there filed, states that the said Samuel Smith paid you, Charles W. Cutter, in accordance with that contract, about $2,600, one half of which, namely, $1,300, ought to have been applied in part payment of the notes and drafts on you and S. Smith, which I gave you for your right in the Folsom farm aforesaid, which now amount to about $2,900, and which are by you all sold and transferred to people in and out of this state, and are in suit against me in several actions now pending both in the state and United States courts; and there is also a bill of equity by Mr. C. Cushing, against the subscriber, demanding immediate possession of this very farm, for which I gave you my notes and draft aforementioned. Now, sir, the deed, if there be such an one, Samuel Larkin to C. W. Cutter, dated October 20th, A. D. 1834, and the confidential letter or contract from Samuel Smith to C. W. Cutter, and James Smith, Jr., dated February 5, A. D. 1835, now locked up by you, Mr. Cutter, are absolutely necessary to the subscriber, to enable him to make a defence against these expensive and ruinous actions so frequently referred to. And, sir, the subscriber is compelled to call on you in this public manner, partially in consequence of your refusing to appear before the several justices before whom the subscriber summoned you for the purpose of obtaining your testimony in relation to the document before referred to, and partially as a matter of prudence not again to call on Mr. Cutter, after the vile threats made use of by you to me in your office; and you are further requested to state, whether you did agree with the subscriber, provided the subscriber would give Mr. Cutter a mortgage deed of the farm aforesaid, to secure the aforesaid notes and drafts; which mortgage is dated December 2nd, 1836; that you, Mr. Cutter, then and there, at once, would discharge the said Cutter's action vs. the subscriber, founded on the notes and draft already named, which action was then pending in the court of common pleas in this state; and after you got the possession of the deed aforesaid, did you not refuse to discharge the said action? And did you not make and file an affidavit in the said court, in which you stated, that the aforesaid action was by me, the subscriber, agreed to be defaulted instead of being discharged? Be also good enough, Mr. Cutter, to inform the subscriber, whether or not you were the bona fide owner of the notes and the draft, at the time you took the mortgage deed aforesaid to secure to yourself the aforementioned notes and draft? Or have you ever sworn, before any court of justice, that you transferred the notes or draft aforesaid, before you took the mortgage deed aforesaid, to secure the aforementioned notes and draft to yourself? Or have you transferred the said mortgage deed to Robert Rice? And is not the subscriber by the said Rice, now sued on the mortgage, and the action now pending in the state court? And is not the draft now also in suit in the United States court, brought by people down in the state of Maine, secured by this very mortgage sold by you to Rice? And has not Mr. Cushing a suit pending with the subscriber, in the United States court, for the above notes? You well know, sir, that I have paid the president, directors and company, of the Granite Bank at Exeter, the sum of $3,000, for their title to the Folsom farm; and you, sir, must be well aware, that you have received $2,600, of Mr. Samuel Smith, in accordance with the confidential letter before referred to, now in your possession, and held by you with an iron hand, one half of which sum ought to have been endorsed on the notes I gave you, Charles W. Cutter, for your pretended title to the Folsom farm, for that is all you ever had; if otherwise, show it, if you are able, and not let an innocent purchaser lose both his farm and money, and saddle him with the payment of all these notes and draft, (all which are without consideration,) through your misconduct. James Smith, Jr. P. S. Will Mr. Cutter be good enough to state the reason why he refused to go to Bangor, after agreeing with the subscriber to go with him and have the business with Mr. Samuel Smith settled? And did not Samuel Smith offer you, if you and the subscriber would visit Bangor, to pay us the balance on the contract, in property to be appraised by any good men, by your giving up the contract and our joint discharge to him? Now, it is hoped by the subscriber, that Mr. Cutter will settle this business, before he again visits Georgia or the West Indies, and not dodge the courts. J. S. Jr."

The case was argued by James Bell for plaintiff; by Hackett, for defendant Robert Rice; and by Claggett and Woodbury, for Smith, Jr., and the heirs of Smith, senior.

STORY, Circuit Justice. This case is extremely complicated in its actual presentation, and has been rendered much more so by some of the irregularities and imperfections, which have occurred in its progress. The history of the principal transactions may be thus summarily stated. On the 13th of April, 1829, Jacob Cutter, by indenture, conveyed and assigned to Clement Storer, James Shapley, and Charles W. Cutter, all his property in trust for the payment of his debts, due to his creditors, stated in an accompanying schedule. At the time when the in-

denture was executed, a large debt was due from Messrs. Folsom and McCulloh of Hayti, to Jacob Cutter, and was among the assigned property. The trustees brought an action to recover the amount from the debtors, in September, 1829, and recovered judgment against Folsom for $4650, and costs; and the sheriff, on that execution, in October, 1834, levied and sold the equity of redemption of Folsom in a certain tract of land in Newington in New Hampshire (the same being then subject to a mortgage to Nathaniel Gilman, made in October, 1825; and afterwards conveyed to and held by the Granite Bank—a bank incorporated in New Hampshire), for the sum of $2500. One of the allegations in the bill is that the purchase was made and the property bought in by the assignee of Jacob Cutter, for the benefit of the creditors; and that a deed thereof was made by the sheriff to Shapley, Cushing, and Charles W. Cutter, for and on account of the creditors. In point of fact, no original deed from the sheriff can now be found; and, as we shall presently see, Charles W. Cutter insists, that the deed was made to him alone, and that he purchased the premises upon his own account. On the 7th of July, 1835, Charles W. Cutter sold and conveyed the equity of redemption so purchased to Samuel Smith (senior), in fee, and Smith, on the 16th of May, 1836, sold and conveyed the same to his son James Smith, Jr., (the defendant), in fee, for the sum of $2500. On the 2nd of December, 1836, James Smith, Jr., executed a deed of mortgage to Charles W. Cutter, to secure to him the purchase money under the original purchase, made from Cutter, for which certain notes were given by Smith, senior. On the 9th of January, 1838, Charles W. Cutter conveyed the said mortgage to Robert Rice, administrator (the defendant) with two of the notes which then were unpaid by Smith, junior, on account of a debt due by the said Charles W. Cutter to one Goddard, of whom Rice was administrator. The Granite Bank, having become the owners of the mortgage, made by Folsom to Gilman in July, 1835, afterwards, on the 13th of July, 1836, conveyed the same to James Smith, Jr., for the sum then due on the mortgage, viz. $2988.47. Smith, Jr., in his answer, asserts, that before the conveyance by the Granite Bank to him, to wit, on the 28th of September, 1835, the Granite Bank entered into forcible possession of the premises for condition broken, and held peaceable possession thereof, for the purpose of foreclosing the mortgage, until the conveyance thereof to him, Smith, who then entered and held possession thereof until the 17th of September, 1839, and that the mortgage has never been redeemed by Folsom, or any other person.

The present bill was brought by the plaintiff, who is one of the creditors of Jacob Cutter, and one of the assignees named in the deed of assignment of Jacob Cutter, to obtain an account and settlement from the other assignees of the trust property; and mainly to have the Folsom farm brought into and accounted for as a part of the assets under the assignment. The accounts as between the assignees and the plaintiff were referred to a master, who made a report satisfactory to the parties; and nothing now remains for consideration, except what relates to the Folsom farm. Now, under these circumstances, the remaining and main subject of the bill is to enable the assignees of Jacob Cutter, as against Smith, Jr., and the heirs of Smith, senior, to obtain a decree, for the redemption of the Folsom farm, under the title, which they insist that they acquired under the sheriff's sale and conveyance by him to Shapley, Cushing and Cutter for the assignees; and as against Rice, to obtain a surrender of the mortgage and notes, held by him under the conveyance by Charles W. Cutter to him. Smith, Jr., insists upon various grounds of defence, the most prominent of which are; First, that he is a bona fide purchaser of the premises, without knowledge, or notice of any equity of the assignees. Secondly, that his title to the premises has been completely established by the foreclosure of the Gilman mortgage by the acts of the Granite Bank, and his own possession under the bank, according to the requirements of the statutes of New Hampshire. Rice insists upon various grounds of defence, and among others, upon the two grounds above insisted on by Smith, Jr. If either of these grounds is maintainable, it will not be necessary to proceed farther in the examination of the other points made in the case. If they are not supported, then the court must proceed to examine the validity of the other points.

In respect to the first point, the case is not without its difficulties from the loose and inartificial manner, in which the pleadings are drawn, and the incompleteness and unsatisfactory statements in the evidence taken in the cause. This has most probably arisen from bills in equity being of rare occurrence in this district, and, therefore, the parties have not derived the full benefit of the skill and experience of the bar, in the arrangement and management of the proceedings. It appears to me, that the present defendant, James Smith, Jr. must be now treated as the sole purchaser in the case, his father being but a mere nominal party, and having, in truth, no substantial interest in the premises. I shall, therefore, drop all consideration of the supposed claim of the father, and deal solely with that of the son. The latter is beyond all question a bona fide purchaser of the mortgage held by the Granite Bank in the premises. So far his title seems unexceptionable. In respect to his purchase of the equity of redemption, under the sheriff's sale, the case stands thus. The sheriff sold the equity of redemption, and in his return on the execution dated the 20th

of October, 1834, he states that the highest bidder and purchasers were James Shapley, (since deceased,) Charles Cushing (the plaintiff,) and Charles W. Cutter (the defendant,) three of the assignees under the indenture already referred to, for the sum of 2500 dollars, and that he made a deed to them accordingly. Now, no such deed is produced in the case; there is a copy of a deed, taken from the registry of deeds of Rockingham county, where the lands lie, which was recorded therein on the 17th of November, 1834, which deed purports to be dated on the 20th of October, 1834, and to be a conveyance to Charles W. Cutter (the defendant) alone as the purchaser at the sale. No original deed to Charles W. Cutter from the sheriff is produced either by Charles W. Cutter, or by the other assignees; nor is the absence of the original deed in any manner whatsoever accounted for. I say in any manner whatsoever; for neither Charles W. Cutter, nor either of the other assignees, pretends to account for the same. The witnesses to the deed, and the magistrate, who took the acknowledgment, do not pretend to state, from their own present knowledge or remembrance, to whom the original deed was made, whether to Charles W. Cutter, or to him and Shapley, and Cushing. The sheriff asserts little more than his belief, that the facts were as stated in his return; and his testimony is otherwise as vague and inconclusive as can well be imagined; and he does not seem to have any definite recollections on the subject. He presumes, but he does not know, that he carried the original levy of the execution to be recorded. No other deed under the levy appears to have been recorded in the registry than that to Charles W. Cutter. There is also a memorandum in the case, copied from a memorandum book of the late Samuel Shapley, which is introduced as evidence in the case, which purports to have been made by him on the 20th of October, 1834, and to state, that he was present at the sale, and that the premises were bid off by him as the highest bidder for $2500; and that he directed the sheriff "to place the bid to Charles Cushing, C. W. Cutter and himself, Shapley, assignees of Jacob Cutter." But if Shapley were now living, he would not be permitted to give testimony of the facts, so stated, since he is a party in the trust; and therefore this memorandum cannot, in any possible view, be evidence. The same suggestion applies to a letter, addressed by Charles Cushing to Shapley on the same day. It is not competent evidence in the cause to support his interest. On the other hand, Charles W. Cutter utterly denies that the purchase was made on account of the assignees, or of any body but himself; but he gives no account whatsoever of the original deed of the sheriff, or what has become of it.

Now, it is under these obscure, and indeterminate, and doubtful circumstances, that the court is called upon to decide this important question, by whom, and on whose account the purchase at the sheriff's sale was made,—whether by the three assignees, or by Charles W. Cutter alone. If the return on the execution is to be trusted, the purchase was made by Shapley, Cushing, and Cutter, not as assignees, for it is no where suggested in that return, that they were the purchasers, as assignees, but simply, that they were personally the purchasers. On the other hand, the recorded deed shows, that the sale was to Charles W. Cutter alone; and the said Cutter, (as has been already suggested), insists that the purchase was upon his own sole account. In this state of the case, the onus probandi is on the plaintiff to overcome the denials of Cutter's answer by the testimony of two witnesses, or of one witness and of other decisive corroborative facts. The most, that can be said, is, that the whole transaction is involved in great mystery, as much on the part of Cutter, as of the other assignees, and that a cloud rests upon it, which it is equally difficult to disperse, or to penetrate. It may be, that as between Cutter and the other assignees, the case ought to be treated as one, in which the deed was made to him alone, for the benefit of all the assignees, as such. But that he denies, and neither the deed to him, nor the sheriff's return, states, that the sale was for or on their account, as assignees; and the deed alludes to no purchaser, but Cutter. And it is quite consistent with the other presumptions in the case (I do not say the facts), that the assignees, even if the purchase was originally made on their account, finally acquiesced in Cutter's taking it to himself. How are we otherwise to account for their total silence and acquiescence in Cutter's assuming the whole control of the property, without objection, and above all, never interfering to redeem the equity, notwithstanding the notoriety of the publication in the newspapers, that it was in the course of a foreclosure? The truth is, that there has been apparently gross laches on the part of the assignees, in relation to the whole matter; the sale of the equity; the giving of the deed by the sheriff; and the subsequent entire non-resistance of the adverse claims of the Granite Bank and Smith, Jr., (the defendant). And I do exceedingly doubt, whether, under the existing evidence, there is enough to show, that Cutter can now be treated by the other assignees, as a trustee for them, upon a bill filed by them, whatever might be the fact as to the rights of the other creditors, included in the indenture of assignment. But supposing Cutter to have been a trustee for the assignees of the equity of redemption, under the sheriff's sale, that will advance the case of the plaintiff but a little way, unless it can be shown, that Smith, Jr., at the time of his purchase from Cutter, had full knowledge,

or was put upon full inquiry, as to Cutter's being a trustee for the assignees as such. Smith, Jr., utterly denies having nad any such knowledge, until long after his purchase from Cutter; and, indeed, (as it should seem), until shortly before the suit was brought. Nor was Smith, Jr., ever put upon inquiry by any facts stated in the deed of the sheriff to Cutter. That deed treats Cutter (as has been already suggested), as the sole purchaser of the premises at the sale. It no where alludes to the other assignees. It is true, that the deed refers to the judgment and execution, on which the sale was made; and it may be said, that Smith, Jr., must be presumed to have searched, and was bound to search the records of the court, in order to ascertain the validity of the levy at his peril. Be it so. But the judgment, and execution, and return, would only have informed him, at most, that the sale was made to Shapley, Cushing, and Cutter, not as assignees, but personally; and the deed from the sheriff would have told him, that the sale was to Cutter alone, and on his own account. Under such circumstances, he could have had a full right to presume, that the return was made by a mistake, and that the deed contained the name of the true purchaser, or that Shapley and Cushing had relinquished their own claims to Cutter, and clothed him with all the full rights of a sole proprietor. In either view, Smith could not be affected with any implied notice of any trust; and in fact, as he in his answer states, Cutter asserted himself to be the sole owner, and Smith purchased under him, upon the belief, and in the confidence, that this was true. It may not be immaterial to state, that although by the statutes of New Hampshire in force at the time when the present levy was made, upon a levy and setting off of real estate unincumbered, it was required, that the execution should be recorded in the registry of deeds,—Act July 4, 1829 (St. N. H. 1830, p. 101, c. 6),—yet, upon a levy of an execution on an equity of redemption, no such registry was required,—Act July 3, 1822 (St. N. H. 1830, pp. 104, 105, c. 7.)

It may be suggested, that the defendant (Smith, Jr.,) has not paid the purchase money; but he sets up two claims, either of which, if well founded, would amount to a complete answer; that is to say, a set-off of a claim against Cutter, and a liability to pay the notes to Rice the administrator of Goddard. At all events, the latter ground seems to have a strong foundation, for Goddard took the notes and draft of Smith, Jr., from Cutter in payment of a debt, due to him from Cutter, to a larger amount, without any knowledge of the trust, or that they were not Cutter's own property; and the subsequent transfer of the mortgage to secure the notes by Cutter to Rice, is precisely what a court of equity would have decreed, as the mortgage was but an appendage to the debt due on the notes and draft. Rice, as administrator of Goddard, stands in the predicament, so far as the plaintiff is concerned, of a bona fide holder of the notes and draft, without being affected by any trust for the assignees; and, so far as I have been able to see from the evidence, Smith, Jr., has shown no valid defence against the payment thereof to Rice. In truth, the plaintiff, to sustain nis claim, must make out a clear and indispensable title, both against Smith, Jr., and against Rice, as affected with a clear trust in favor of the assignees, as such. It does not seem to me that such a trust has been sufficiently established, either as against Cutter, or as against Smith or Rice; but if against Cutter, it is certainly not against Smith or Rice. The only possible drawback from this conclusion, seems to be the exceedingly rash, and inconsiderate statements of Smith in his newspaper letter of October 27th, 1840, addressed to Cutter; a letter, by whosoever advised, as impolitic as it was improper, and which has done more to damage the case of Smith than all the other evidence put together. Absurd as it is in some of its suggestions, it does not overcome the other just inferences from the evidence in the case.

Then as to the other point, as to the foreclosure of the mortgage by the Granite Bank, and by Smith, under the title of the bank. First, it is said, that the foreclosure was opened by the payment of $2,000 by Folsom, or by Smith, on the 20th of June, 1836. Now, there is no evidence to show, that the payment was made by Folsom; and indeed it would seem clearly to have been made by Smith, as a part of his purchase money for the debt then due to the bank. But, if it were otherwise, the payment would not have opened the foreclosure, as the argument supposes; for the foreclosure was not then complete under the statute of New Hampshire, then in force, the entry to foreclose having been made on the 28th of September, 1835, and the notice of foreclosure having been first given in the newspapers on the 5th of March, 1836; so that the right of redemption was then running; and of course, like any other payment, only repelled the notion, that the right of redemption was then gone. Then, secondly, it is said, that the conveyance from the bank to Smith, conveys the lands, subject to the condition in the mortgage. This is true; but this in no respect varies the rights of Smith; but leaves the right of redemption as it stood before.

Again, it is said, that the statute foreclosure is not established, because the publication in the newspapers is not established by any copy of the newspapers; but only by the evidence of Burley and Gilman. But it seems to me, that the plaintiff has waived any objection on this head, by his omission to take the objection at an earlier period, when the depositions were taken; and, at all

events, he might have disproved the prima facie evidence on the part of these witnesses, if he had any contradictory evidence. If, however, there were any real difficulty on this point, I would now order the newspapers to be brought into court, and verified on oath, for the satisfaction of the court. But, as I understand the argument, it is not pretended, that the objection is anything more than formal, or that the newspapers would not support the statements of the witnesses. The subsequent advertisement of Smith (senior), on the 12th of October, 1841, for a foreclosure, would not vary his rights or those of Smith, Jr. (the defendant), if the former foreclosure were complete. It might have been done ex majori cautelâ, if the former foreclosure should be held, from any unsuspected cause, inoperative, or insufficient; but it was not a waiver of it.

Let us then see, whether the original foreclosure be or be not complete and conclusive, under the act of New Hampshire of the 4th of July, 1834, c. 165. That act provides, "that, hereafter, no possession of any lands, or tenements, by any mortgagee, or his assigns, shall operate to bar or foreclose the right to redeem said mortgaged premises, or against any person but the mortgagor and his heirs, unless the mortgagee, or other person so in possession, for the purpose of foreclosing the right to redeem, shall, at least, six months before such right to redeem would be foreclosed by the law now in force, give notice in some public newspaper, printed in the county where such premises are situated, or if no newspaper be printed in such county, then in some newspaper printed in Concord, in the county of Merrimack, which notice shall state at what time such possession for condition broken commenced, with the name of the mortgagor and mortgagee, and date of the mortgage, and shall give such description of the premises, as the same are generally known by, and shall be published three weeks successively." By the act of the 29th of July, 1829 (St. N. H. 1830, p. 486, tit. 105), then in force, one year was allowed for redemption, after an entry by the mortgagee for condition broken. It seems to me, that the published notice, set forth in the record, fully complies with all the requisites prescribed by this act; and no effort having been made to redeem the premises until several years afterwards, the foreclosure became complete at the expiration of the year; and Smith, Jr., as assignee of the bank, is entitled to the full benefit thereof, as the absolute owner, both of the equity and of the mortgage.

Upon the whole, my opinion is, that the bill ought to be dismissed, without prejudice. But I think, that it is not a case for costs generally, for any of the parties. The clerk's fees, and the costs of printing the record being for the benefit of all parties ultimately interested, ought to be apportioned among them; and I accordingly direct, that the plaintiff pay one-third thereof; the defendant James Smith, Jr., one-third thereof; and the defendant Charles W. Cutter, one-third thereof; to be taxed by the clerk of this court. I do not think, that any of the other defendants ought, under all the circumstances, to bear any portion of these costs. And I further decree, that, except as to the clerk's fee, and the costs of printing the record, all the parties in the case ought to bear their own costs. A decree will be entered accordingly.

CUSHING (YOUNG v.). See Case No. 18,-156.

Case No. 3,512.

In re CUSHMAN.

[7 Ben. 482.][1]

District Court, S. D. New York. Oct. Term, 1874.

DISCHARGE—OMISSION OF OUTLAWED DEBTS.

A bankrupt omitted from his schedule certain debts, and the creditors holding them had no notice of the bankruptcy proceedings. He claimed that the debts were outlawed: *Held*, that the bankrupt had not conformed to the requirements of the act [of 1867 (14 Stat. 517)]; that his discharge could not now be granted; and that the case must be referred back to the register for further proceedings.

[In the matter of John H. H. Cushman, a bankrupt.]

W. W. Hewitt, for bankrupt.

P. Condon, for creditor.

BLATCHFORD, District Judge. As it appears that the bankrupt omitted from his schedule certain debts which he asserts were outlawed, on the ground that they were outlawed, and the creditors holding such debts have had no notice of the bankruptcy proceedings, the bankrupt has not conformed to all the requirements of the act. Therefore, his discharge cannot now be granted, and the case must be referred back to the register for such further action as he may take on the application of either party to him.

Case No. 3,513.

In re CUSHMAN.

[1 MacA. Pat. Cas. 569.]

Circuit Court, District of Columbia. Jan., 1858.

ISSUANCE OF PATENTS — RULE AS TO UTILITY—IMPROVEMENTS IN LIGHTNING RODS.

[1. The rule that when an invention is useful for some purpose the degree of usefulness is not a subject for consideration is applicable only when the validity of a patent already issued is attacked in a court of law; but when the question is as to the issuance of a patent the rule is that prescribed by the statute (Act 1836, § 7),

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

namely, that "the commissioner shall deem it to be sufficiently useful and important."]

[2. Surrounding the portion of a lightning rod that is buried in the earth with plates of dissimilar materials, so as to form a galvanic battery, which will furnish electricity opposite to that in the air for the purpose of facilitating the discharge thereof, is not "useful," in the sense of the patent law, for the current of a galvanic battery is so feeble, as compared with a flash of lightning, as to be, necessarily, without practical effect.]

[3. The question of the usefulness of surrounding the buried part of a lightning rod with a galvanic battery for the purpose of facilitating the discharge of electricity from the air must, in the absence of experiments by the inventor, be determined by the application of received and approved scientific principles.]

Appeal from refusal to grant patent.

P. Hannay, for appellant.

MORSELL, Circuit Judge. The claim as set forth in the amended specification is in these words: "Having thus described my invention, what I claim as new, and desire to secure by letters-patent, is surrounding that part of the lightning-rod which is embedded in the earth with a galvanic-battery, in the manner and for the purposes set forth." The nature of the invention is stated thus: "To facilitate the discharge of the electricity from the conductor to the earth is the object of my present invention, and it consists in surrounding that part of the lightning-rod embedded in the earth with plates of dissimilar metals, arranged in such manner as to constitute an open galvanic-battery. Electro-motive power will divide the electricity on the metallic plates, and as they are uninsulated they will act as a condenser of the electricity that is opposite to that of the air. Should there be a high electrical tension of the air, by this means the electrical fluid conducted through the rod is more readily discharged by uniting with the opposite electricity as it accumulates on the surface of the plates. When the discharge flows from the earth to the air, then the rod conducts from the plates such electricity as is opposite to that of the air." On the 3d of June, 1857, the commissioner decided, refusing to grant the patent for reasons filed. The reasons alluded to appear to be contained in a report made by Examiner Baldwin, directed to the commissioner, in these words: "In the revision of the application of S. D. Cushman for a patent for alleged improvements in lightning-rods, I have the honor to report that the invention consisted in surrounding that part of the lightning-rod embedded in the earth with plates of dissimilar metals, to constitute an open galvanic-battery for the purpose of facilitating the discharge from the lightning-rod to the earth. The claim was, surrounding that part of the lightning-rod which is embedded in the earth with a galvanic-battery, in the manner and for the purposes described. Practical science has long since determined that to guard buildings against the destructive effects of lightning, it is necessary to provide a continuous line of conduction beyond the point of danger through which the electrical discharge may be transmitted, and it is well known that the building is rendered secure in proportion to the power of the conductor to transmit the electrical current. In Harris on Thunder Storms numerous examples are given to increase the security to buildings by extending the surface of the rod at its termination, and even directions are given to connect it there with conducting channels. For example, at page 97 it is said: 'It (the rod) should terminate under ground' in two or more branches passing out in any convenient direction, 'and if convenience permit, these branches should be connected with springs of water or drain or some other conducting channel.' At page 105, same book, a clear view is given of the effect of the extension of surface in the power of conduction in the rod. At page 125 a drawing shows the forked termination of the rod; and at page 127 the description of the rod on the Nelson monument mentions its termination connected with three pointed branches under the surface of the ground, while at page 134 is noticed the views of M. Le Roy in 1790, who proposed to protect the ship from the effects of lightning by terminating her conductors on the copper on her bottom. The modern experience with iron ships also shows that their large mass of conducting surface gives them almost a perfect immunity from the effects of lightning. In my opinion the application was properly rejected, for the use of plates of metal in which to terminate the rod for augmenting its security was not the invention of the applicant, and making this termination in plates of different metals could at most have but effected an infinitesimal action in the power of conduction, and even this the office cannot readily perceive any precise mode of verifying by experiment, and can therefore only receive it as a possibility; but not even then can I regard it as presenting a doubt, of which the applicant should be allowed the benefit. I am, for these reasons, of opinion that the patent should be refused."

This report and opinion was approved by the commissioner on the 1st of June, 1857. From which decision said Cushman appealed, as before said, and filed his reasons of appeal, which are: First. Because the office has failed to give references to show that the devices employed by the applicant were old or well known. Secondly. Because the office has not shown that the invention is useless. Thirdly. Because the office has failed to show that it is prejudicial to the morals of the community. Fourthly. Because the commissioner had no right to reject the case on the ground that he could not perceive any precise mode of verifying by experiment the invention; and lastly, because

wherever there is a doubt the applicant should receive the benefit of it. The commissioner's reply to these reasons consists, in the first part, of an historical account of the proceedings in the first stages of the application, then of the object of the invention and the nature of the subject generally, and of the references to Harris on Thunder Storms, substantially as stated in the commissioner's reasons for the decision. He proceeds then to say: "The only thing, then, that his claim has to rest on is the galvanic action arising from the use of copper and zinc as the metals of the plates, and this is what the claim is strictly limited to. The reason which the office gives for refusing a patent for this is simply that the intensity of the action arising from either the copper or zinc, or both, in the earth, is thousands of times too small to be sensible as compared with that of any flash of lightning. The latter has force enough to strike through hundreds of thousands of feet, or sometimes through miles of air. The former has not force enough to strike through the thousandth part of an inch. These are well-known facts, and the thing must be utterly without practical effect. The applicant has not shown the slightest reason to believe in any effect. It has been attempted to be shown by some theoretical notions, but there is no occasion to resort to theory. In a practical point of view it is well known what the galvanic action of copper and zinc does and what it does not do, as it regards such a question as the one now before us, and fanciful theories cannot have any weight against well-known practical facts. The fact above mentioned of the infinitesimal degree of the galvanic force of copper and zinc, or any other two metals, stands out in almost every good elementary treatise on electricity and galvanism, and would be readily testified to by any person well read upon the subject of electricity. Such, for instance, as Professor Henry, of this city. And the office has, therefore, not thought it necessary to make citations in regard to it from any particular authors or works on electricity. Another point in the case is the uncertainty as to the direction in which the auxiliary galvanic force, even if it were sensible in quantity, in comparison with that of the atmospheric electricity, would be wanted, since the stroke may be either from the cloud to the earth or from the earth to the cloud, according as the latter is positive or negative. Another point is the fact, well known as a practical fact, independent of all theory, that in the use of both copper and zinc these metals tend mutually to neutralize the effect which either might have by itself, though that is infinitesimal, as above stated." The original papers, with the commissioner's decision, the reasons of appeal, and the said report in writing in answer thereto, were laid before me on the day and at the place previously appointed by me, and according to due notice given for the hearing of said appeal; at which time and place an examiner appeared on behalf of the office, and the appellant by his attorney, and the said party having desired to examine said officer appearing on behalf of the said office, was permitted so to do, according to the provisions of the act of congress on said subject, and the oath duly administered by me accordingly.

Most of the questions and answers under that examination are of a general nature, without any special application in any material particular to the alleged invention. It is contended in the argument of the appellant's counsel that the fact of the novelty of the invention is thereby further established. Further, that the answer to the thirteenth interrogatory refutes the idea in the report as to the insufficiency of the battery in its operation to meet an electrical stroke which might take place from the earth to the cloud, said battery being confined in its operation to that of the latter; and further, that the answers to the fourteenth and fifteenth interrogatories show contradictory statements made by the examiner as to the matter above alluded to. For a more particular notice to the answers, I refer to the examination itself.

In the argument it is further contended that the fact of novelty being so established, the sole question is as to the utility; and that as to the position of the office—"that the degree of beneficial effect produced is so small that the office does not deem it patentable"—it is not nor cannot be sustained by any authority; but on the contrary, the practice of the office and rulings and decisions of the court are against it. To support the position, a reference is given to Curtis (section 28). It is there stated that "the doctrine in relation to utility being in this country that the subject-matter of a patent must not be injurious or mischievous to society, or frivolous or insignificant, it follows that every invention for which a patent is claimed must be to a certain extent beneficial to the community. It must be capable of use for some beneficial purpose. But when this is the case the degree of utility, whether larger or smaller, is not a subject for consideration in determining whether the invention will support a patent. But it is obvious that the capability of use for some beneficial purpose is a material element in determining whether there is a sufficiency of invention to support a patent, the force of the word 'useful,' introduced into the statement in connection with the epithet 'new,' being to determine whether the subject-matter upon the whole is capable of use for a purpose from which any advantage can be derived to the public. General rules will not decide this question in particular cases, but the circumstances of each case must be carefully examined under the light of the principles on which general rules are founded." It will be proper here to remark that the foregoing is the rule

which is laid down in cases where a patent has issued, and where it becomes necessary to sustain it when its validity is impeached in a court of law. With respect to the rule more immediately applicable to the present case, it will be found in the seventh section of the act of 1836, where one of the conditions necessary to the granting the patent is that upon the examination thereby directed "the commissioner shall deem it (the invention) to be sufficiently useful and important," &c.

The question to be decided is whether the alleged invention of an improved mode of protecting objects from the effect of lightning, by surrounding that part of the lightning-rod which is embedded in the earth with a galvanic-battery, as described in the specification, is capable for said purpose in a patentable point of view. There having been no experiment made by the applicant in this case to test his invention, the solution of the question must depend upon received and approved scientific principles. The subject appears to have undergone thorough investigation in the patent office by the commissioner and several of his learned examiners—the result of whose investigation, both upon reason and authority, appears to be as hereinbefore stated; from which it appears that in their judgment the alleged invention was in fact wholly incapable of answering practically any such purpose. This authority justly claims very high respect. Upon my own investigation, and from the best lights I have been able to obtain, I am satisfied that galvanic electricity is not intense, but, on the contrary, quite feeble; for instance, a sheet of copper and a sheet of zinc, each from eighty to one hundred and twenty square feet of surface, have been rolled up together and immersed in a large tub of acid, giving a current so feeble in intensity as to be quite insensible to the feeling. I am satisfied that the action arising from the galvanic-battery in this case would be incomparably small when compared with that of any flash of lightning, so much so as to be of no beneficial use. I think, therefore, that the commissioner was correct in refusing to grant the patent.

Case No. 3,514.

In re CUSHMAN.

[1 MacA. Pat. Cas. 577.]

Circuit Court, District of Columbia. Aug. Term, 1858.

ANTEDATING OF PATENTS—ESTOPPEL—DISTURBING PRIOR COMMISSIONER'S RULINGS.

[1. An applicant who has requested and obtained the antedating of his patent to a certain date as the time of filing his specifications, in supposed accordance with the statute (Act 1836, § 8), is estopped to claim that the action of the commissioner in so antedating was unauthorized because the date taken was merely the date of refiling after withdrawal for amendment, the original filing having been much earlier.]

[2. The decision of the commissioner that in antedating a patent to the time of filing the specifications (Act 1836, § 8) the date to be taken is the date of filing the amended specifications on which the patent was finally issued, and not the date of filing the original specifications, cannot be disturbed by a subsequent commissioner, or by the court on appeal from the ruling of the latter.]

[Appeal by William M. C. Cushman from a decision of the commissioner of patents refusing to grant an application for a reissue of patent No. 3,889.]

Marcus P. Norton, for Cushman.

DUNLOP, Chief Judge. On the 16th of January, 1845, a patent issued to the appellant, William M. C. Cushman, for improvement in rails for railroads, for fourteen years from the 16th of July, 1844. The application and specification on which the patent issued appear to be dated on the 23d and 27th of October, 1844, but the indorsements on the papers in the patent office submitted to me, and the letters of the appellant, show that specifications, &c., for the same invention had been presented to the office as early as 1843, and several times between then and the 23d of October, 1844, and withdrawn to correct and make perfect the specifications, &c. The appellant, in writing, by his letter marked "A," requested the antedate, and it was so ordered by Commissioner Ellsworth for six months previous to the issue, to wit, the 16th of July, 1844, in conformity, as was supposed, with the last clause of the eighth section of the act of the 4th of July, 1836, although the earliest specification for the same invention had been filed in the office much longer than six months before the date of the issue. On the 12th of July, 1858, the appellant applied to the present commissioner (Holt) to surrender his patent and to have the antedate corrected and the reissue to confer on him the patent privilege for fourteen years from the 16th of January, 1845, so that his privilege should not expire till the 16th of January, 1859. He made this application, in substance, on two grounds: First. That the antedate was a clerical error in the office, being never asked for by Cushman or ordered by Commissioner Ellsworth. Second. If ordered by Commissioner Ellsworth, it was erroneous and void, he having no power to carry the antedate beyond the 23d of October, 1844, or to antedate at all, except in cases of interference. Commissioner Holt refused the application for want of power to reissue for a term beyond the term limited in the original patent, or to reverse the judgment of his predecessor, Commissioner Ellsworth, and from this refusal the appellant has made his present appeal to me.

This is not the case of a clerical error or mistake in the patent office in making out a patent. As a court can correct the errors

of its clerk in the discharge of his ministerial duties, the commissioner of patents may no doubt do the same as to his clerks. In this case there is no clerical error, but if error at all, it is the error of judgment of the former commissioner as to his power and authority under the patent laws. The act of antedating did not proceed from inadvertence or accident. The whole case seems to show it was the result of the deliberate judgment of Commissioner Ellsworth in construing the acts of congress, and was asked for and assented to and accepted by the appellant. It protected Cushman, or he thought it would, against strangers from the 16th of July, 1844. (See his letter "A.") Whether Commissioner Ellsworth properly construed the eighth and thirteenth sections of the act of July, 1836, and his powers under them, is not now before me. The appellant acquiesced in and submitted to, nay, asked for, the construction given by the commissioner; and although the application and specification now on file, on which the patent issued, appear to be presented to the office on the 23d and 27th of October, 1844, the indorsements of the office and the letters of the appellant show that specifications long before, and as early as 1843, for the same invention, had been before the commissioner, and withdrawn at the appellant's request for correction and to make them perfect and complete. If the appellant asked for the antedating of his patent, and accepted it so antedated, he cannot now complain "non fit injuria volenti." The act of 4th of July, 1836 (section 5) provides for patents for inventions or discoveries "for a term not exceeding fourteen years." The patentee is not obliged to claim the whole fourteen years. He may, I presume, waive his claim to part of the term in favor of the public by antedating it, or he may take a patent for a term less than fourteen years, or he may seek protection against strangers, as in this case the appellant seems to have done for the time intermediate between the antedate and the date of issue—six months previous to the issue—if in that time he has made application, and is seeking, in good faith and with reasonable diligence, to perfect his specifications, &c. See the case of Sparkman v. Higgins [Case No. 13,208], decided in the southern district of New York, January 27, 1847.

If the appellant knowingly acquiesced in the antedating, and took the deed so antedated, he is in like condition. If he was ignorant at the time of what the commissioner did, of which there is no proof—but the reverse is proved—and has slept upon his rights for thirteen years and more, it is too late now to seek redress. No tribunal ought to encourage or countenance such gross negligence. The public may have relied upon the recorded termination of his privilege, and have contracted with reference to its termination. If Commissioner Ellsworth antedated the patent against the will of the appellant, he ought not to have received the deed so antedated. He ought to have refused the antedated patent, and have appealed from the decision of the commissioner. While that decision is unappealed from and unreversed, neither the present commissioner nor myself, on appeal, in my judgment, can disturb or gainsay it unless special power to do so is conferred by law. It is argued that this power is conferred on the present commissioner in the thirteenth section of the act of 1836; but upon a careful perusal of that section, it will be found to apply to no such case as this. That section covers only cases where the patent granted is inoperative or invalid by reason of a defective or insufficient description or specification, or by reason of the patentee claiming in his specification more than he had, or shall have a right to claim as new, in which cases, if the error has arisen from "inadvertency, accident, or mistake," and without fraud, upon the surrender of the patent the commissioner may reissue, for the same invention, but only then, for the residue of the then unexpired term, with the patentee's corrected description and specification. It has no application to this case, and gives no power to the commissioner to alter the date of a previously-granted antedated patent. And in the cases to which the power does apply, of pure accident and mistake and inadvertence, without fraud, he can only exercise the power of reissue during the continuance of the term stipulated in the original patent. No power like that asked to be exerted by the present commissioner to change the date of a patent deliberately agreed on by the former commissioner and the appellant, can be found in the fifth and eighth sections of the act of the 3d of March, 1837 [5 Stat. 193], or in any of the provisions of the patent laws to which I have been referred or which I can find on a careful reading of them. Upon the whole, therefore, I think Commissioner Holt was correct in refusing, for want of power, to correct the error in the antedate of the patent, if there was any, which I by no means admit or decide, and that his judgment in the case must be affirmed.

I return all the papers, together with this my opinion and certificate affirming Commissioner Holt's judgment.

CUSHMAN, The JEANNIE. See Cases Nos. 7,249 and 7,250.

Case No. 3,515.

CUSHMAN v. RYAN.

[1 Story, 91.][1]

Circuit Court, D. Massachusetts. May, 1840.

ADMIRALTY APPEALS—DISTURBING DAMAGES—AUTHORITY OF MASTER TO PUNISH SEAMAN — ASSAULT—PLEADING—ANSWER AS PROOF.

1. In cases of appeal, in admiralty proceedings, where damages are discretionary, the bur-

[1] [Reported by William W. Story, Esq.]

den of proof is on the appellant to show some clear mistake or error in the court below, either in awarding excessive damages, or in promulgating an incorrect rule of law, or to offer new and materially important testimony, which must go to the proof of the new allegations without contradicting the former evidence.

[Cited in Hutson v. Jordan, Case No. 6,959; Fuller v. Colby, Id. 5,149; The Busy, Id. 2,232; Lockwood v. The Grace Girdler, Id. 8,450; U. S. v. The Juniata, 93 U. S. 339; Lubker v. The A. H. Quinby, Case No. 8,-586; The Albany, 48 Fed. 565. Quoted in The Lord Derby, 17 Fed. 268.]

[See Bearse v. 340 Pigs of Copper, Case No. 1,193.]

2. Quere, whether a court of equity will enforce an assignment by a seaman of his expectant earnings.

3. No words of provocation will justify an assault, although they may constitute a ground for the reduction of damages.

[Distinguished in Fuller v. Colby, Case No. 5,149. Cited in Kiff v. Youmans, 86 N. Y. 330.]

4. Punishment inflicted by a master upon a seaman must be moderate in degree, both proportioned to the nature of the offence, and the exigency of the occasion, and administered in a proper manner.

[Cited in Fuller v. Colby, Case No. 5,149.]

5. The answer of the respondent upon oath in reply to interrogatories does not, in the admiralty, constitute positive evidence in his own favor. Its true effect is, either to furnish evidence for the other party, or, in a case doubtful in point of proof, to turn the scale in favor of the respondent.

[Cited in The Mary Paulina, Case No. 9,224; Jewett v. Cunard, Id. 7,310; The Australia, Id. 667; Havermeyers & Elder Sugar Refining Co. v. Compania Transatlantica Espanola, 43 Fed. 91.]

Suit in the admiralty in a cause of damage. The libel in substance stated as follows: That in July, 1839, the libellant, Michael Ryan, shipped on board the ship Arab, of which the respondent, Benjamin Cushman, was master, being then on a whaling voyage. That during the continuance of that voyage, and while the ship was off the island of St. Mary's, the captain came up and inquired of the libellant, how the cook obtained liquor and got drunk, and charged this libellant with giving liquor to the cook, which the libellant denied; whereupon, and without cause, the said Benjamin Cushman, with his fist, struck the libellant a violent blow over the eye, and cut a large and deep gash over the left eye of the libellant, and again immediately with his fist struck the libellant another violent blow upon the right side of the libellant's ear, so that the blood ran from it, and he was knocked down helpless upon the deck; and the said Cushman continued to kick and beat the libellant with a rope, after he was so knocked down. That afterwards, on the high seas, and on board the said ship Arab, on the 9th day of February last past, the said Cushman made another violent assault upon the libellant, and caused him to be seized up in the main rigging, and while so seized up, the said Cushman ordered the trowsers of the libellant to be stripped down, and his naked person exposed, and with a weapon called a "cat," inflicted fifteen severe blows upon the naked body of the libellant, so as to wound him severely; and, after causing the libellant to be cut down, the said Cushman continued to beat the libellant with said cat, and cut him across the legs and arms so that the flesh and limbs of the libellant were bruised and lacerated, and thereupon immediately, while the libellant was suffering great bodily pain and distress from the severe flagellation he had received, the said Cushman ordered the libellant to go to the mast-head, where he was kept during the space of nearly four hours, in the cold and rain, until he was so benumbed with cold, that he could with difficulty keep himself from falling. That the said libellant by means of the said assault, suffered severe pain in his head, and to this day his hearing is injured by the said blow, and that he has suffered damage to the amount of one thousand dollars.

The answer admitted the hiring of the libellant, and his shipping on board the Arab; and goes on, in substance, to state, that the crew shipped under a contract not to use ardent spirits on the said voyage, and with notice that spirits would not be furnished by the owners, or allowed to the crew, except for medical purposes, for which last purposes a small quantity of spirit was put on board. That the vessel sailed from Desolation island to Delago bay, and that on the voyage, and while she was lying at Delago bay, the said Ryan neglected his duty as steward, and was frequently in liquor himself, and embezzled the ship's stores by giving liquor and wines to others of the ship's crew, contrary to his duty and the express orders of the respondent and his officers. That on or about the 28th of August last, the said ship still lying at Delago bay, the respondent being on shore, a signal was made to him, from the said ship to come on board; that on repairing on board, he was told by Charles F. Cushman, one of the officers, that the said Ryan was in liquor, had been giving liquor to others of the crew, and had been doing damage and making disturbance in the ship. That the respondent called the said Ryan to him, and while charging the said Ryan with some of his conduct, was insolently answered by the said Ryan, and finally told by him, that he (the respondent) lied; whereupon the said respondent knocked the said Ryan down instantly with his fist, and that while the said Ryan was down, this respondent further corrected him, kicking him and striking him with a piece of launch warp, a quarter of an inch in thickness, two or three times; but denies that any permanent injury was done, or that the punishment was malicious or unduly severe; and especially denies, that the respondent struck the libellant on the ear, or on his head after he fell, and avers, that he struck him but once in the face. That

after this last mentioned occurrence, the said Ryan was repeatedly in liquor, and embezzled the spirits of the said ship, and removed for that purpose a lock on the scuttle of the run to protect the spirits, and that the respondent told the libellant, that unless he desisted he would flog him. But the libellant disregarded the warning, and on the 4th day of February last, on the passage home, the libellant having been in liquor, and having been insolent to the first officer of the ship, the respondent ordered him on deck and had him seized up, and flogged him with a cat made of eight strands, of a line of the size of a log line, after distinctly stating the reason for the punishment. And after the flogging, this respondent ordered the libellant to go to the foretop for two hours, after previously ordering him to go below and change his clothes, and denies, that the punishment was more than the exigencies of the case required. The answer goes on to state, that this suit is set on foot by a person to whom the said Ryan is indebted, and for the purpose of extorting money from this respondent.

The cause was tried before the district judge, who decreed to the libellant one hundred and fifty dollars and costs. From that decree the present appeal was taken, and argued at this term, by

George T. Curtis, for appellant.

T. G. Coffin, of New Bedford, for appellee.

STORY, Circuit Justice. This is the case of an appeal from the district court, in a cause technically called a cause of damage. The libel charges two assaults and batteries as having been committed on the high seas, and within the admiralty jurisdiction of the district court, by the respondent, Cushman, master of the whaling ship Arab, upon the libellant, Ryan, the steward of the ship; and the particulars are set forth articulately in the libel; the answer does not deny the assaults and batteries charged in the libel; but it does deny many of the circumstances of aggravation, and insists, that the same were inflicted upon the libellant for drunkenness and other gross misconduct, by way of correction and punishment, and in enforcement of the proper discipline of the ship. The learned judge of the district court, at the hearing, pronounced a decree in favor of the libellant, for one hundred and fifty dollars damages, and costs; and from that decree an appeal has been taken to this court. In cases of this nature where the damages are necessarily uncertain, and are incapable of being ascertained by any precise rule, and therefore, unavoidably rest, in a great measure, in the exercise of a sound discretion by the court, upon all the circumstances in evidence at the hearing, it is with extreme reluctance, that the appellate court entertains any appeal; and it expects the appellant to show, beyond any reasonable doubt, that there has been some clear mistake or error of the court below, either in promulgating an incorrect rule of law, or in awarding excessive damages; or that new evidence is now offered, which materially changes the original aspect of the case. If new evidence is offered which might fairly have been introduced in the court below, by the exercise of reasonable diligence, it is treated as being of far less value, than it would have been under other circumstances, especially if it goes to the very gist of the matters put in controversy by the libel and answer, since it may be justly imputed to the laches of the party, and is open to the suspicion of being framed to meet the new exigencies of the case. Indeed it may well be doubted, whether the introduction of such new evidence, going in contradiction to the proofs of the points in issue by the libel and answer in the court below, ought, according to the true principles, which regulate the practice in courts of admiralty in instance causes, ever to have been admitted. It is true that courts of admiralty, upon appeals in instance causes, may permit new allegations to be filed, and new evidence to be admitted; but the proofs are strictly confined to the support of the new allegations, and are not allowed to contradict the original testimony upon points in contestation in the court below. The rule is, that, under certain restrictions, the appellant may be permitted "non allegata allegare, et non probata probare." But then it is a part of the rule, that it shall not contradict the former evidence, ("modo non obstet publicatio testium") or that it shall solely go to the proof of the new allegations ("novis articulis ex veteribus pendentibus, et ex illis orientibus, et ad causam pertinentibus"). So the rule is laid down on many occasions; and Doctor Brown has affirmed its general adoption by courts of admiralty.[2]

But, as to the other point, where the damages or amount must necessarily rest in the sound discretion of the court, as it does in salvage causes and causes of damage, the constant policy in the courts of the United States, in the exercise of their appellate jurisdiction, and especially of the supreme court, has been, to discourage appeals upon slight or trivial grounds, and never to reverse the original decree, unless there is a plain mistake of law, or a gross excess in the amount of damage awarded. Indeed, under other circumstances, there would be no safety to any parties; and new motives to litigation would be perpetually presented, to stimulate the parties to take the chances of an appeal, in the hope that, in a mere exercise of discretion, the different courts might not arrive exactly at the same amount either of

[2] See 1 Brown, Civ. Law, 500; 2 Brown, Civ. Law, 436, 437.

salvage or of damage, although the decree in each case was founded upon the same principles. In the few cases of appeals of this sort, which have come before me, I have constantly been governed by this consideration; and I have never asked myself the question, whether originally I should have awarded exactly the same sum; but only, whether I could discern a clear and unequivocal mistake or error in the court below, either of law or of fact.

It is under this view of my duty, sitting as an appellate tribunal, that I have examined the allegations and proofs in the present case. Before, however, I proceed to the direct consideration of these matters, I wish to say a word upon another subject, which has been distinctly alluded to at the argument, as the probable ground of many controversies between the officers and crews of whale ships. It is said to be a general practice and long sanctioned, to allow the common seamen in these voyages to assign to persons, who are commonly, by an expressive phrase, called outfitters of seamen, the whole or a great part of the expected earnings of the voyage; so that the common seamen rarely have any substantial interest in the prosecution of the voyage, and are thus often tempted to acts of insubordination, misconduct, and even desertion; and that the owners of the ships often accept orders drawn upon them in pursuance of these assignments, and thus give to them their full approbation and sanction. If this suggestion be true, it is a fact, the existence of which is deeply to be lamented; and it requires the immediate interposition of the national legislature to check or prohibit such mischievous contracts, as ruinous equally to the interests of the seamen and the owners, and subversive of the soundest public policy. It would be difficult, indeed, to persuade a court of admiralty or a court of equity to enforce any such assignments, as they import almost upon their face a gross advantage taken of the weakness, or ignorance, or imprudence of this most valuable but thoughtless class of men; and I must confess my utter surprise, that the respectable merchants engaged in the whale fisheries, should lend the slightest countenance to such contracts. They are at war with the true interests of the owners, as well as of the crew in the voyage, and must sooner or later involve them in a common ruin.

But to return to the merits of the present controversy. The libel alleges two distinct assaults and batteries; one on the high seas, at Delago bay, on the coast of Africa, near St. Mary's, under Elephant island, in July, 1839; the other, on the high seas, on the homeward voyage, near the equator, on the 9th of February, 1840. The libel in substance charges, in respect to the first assault and battery, that the respondent struck the libellant a violent blow over the left eye, and cut a deep gash over that eye, and again immediately with his fist struck the right side of the libellant's ear, so that the blood ran therefrom, and the libellant was knocked helpless on the deck; and that the respondent continued to kick and beat the libellant with a rope after he was so knocked down upon the deck.

The answer, by way of defence, in substance states, that while the ship was lying at Delago bay, the respondent being on shore, a signal was made from the ship, for him to come on board; that on repairing on board, he was told by Charles Cushman, one of the officers, that the libellant was in liquor, had been giving liquors to others of the crew, and had been doing damage, and making disturbance in the ship; that he called the libellant to him, and, while charging him with some of his conduct, was insolently answered by him, and finally told by him, that he (the respondent) lied; whereupon the respondent knocked him down with his fist, and while he was down the respondent further corrected him, kicking him in the fleshy part of his person behind, and striking him on the same place with a piece of launch rope, a quarter of an inch thick, two or three times. But the respondent denies, that any serious, permanent, or severe injury was done by such chastisement to the libellant, and avers, that it was done after his gross and provoking insolence, and for his previous misconduct, and without malice. And the respondent denies that he struck the libellant upon his ear, or that he struck him any more than one blow on his face, or that he struck him on his head after he fell. Now, upon this statement, it is clear, that in point of law, no justification is made out, even if the facts relied on in the answer are admitted to be true. It is well settled that no words of provocation whatsoever will justify the offended party in inflicting a blow upon the offender, although certainly they may constitute an excuse, which will mitigate the damages, even down to the point of reducing them to mere nominal damages, if the language of provocation be very gross and reprehensible, and calculated from the circumstances to draw forth strong resentment. And, as to chastisement by a master, by way of correction of seamen for drunkenness, or other misconduct, the law requires it to be moderate in degree, and proportioned to the nature of the offence, and the exigency of the occasion. If there be any excess in the mode of punishment, or any passionate violence, the law will not tolerate it, either as a justification, or as an excuse. And I must say, that although knocking a seaman down, under the impulse of sudden passion, from provocation by language of gross insolence and insubordination, or defiance, may, in consideration of human infirmity, be somewhat excusable on the part of the master, so as not ordinarily to be visited by severe damages; yet if it is followed up by other passionate acts, such as kicking, and beating,

and whipping the party when fallen, it betrays more of the spirit of revenge, than the just indignation of a wounded mind. But, if the punishment is meant to be applied to enforce a proper discipline on board the ship, or as a chastisement for past misconduct, or for present drunkenness, knocking a man down, or kicking him in the manner here stated, is not such a punishment as the law allows, much less such as it justifies. It is not in the proper mode, or at the proper time, or in the proper degree, to promote good discipline or good conduct.

But was there, in fact, any such provocation in language as the answer asserts; for I think it may be admitted, that the libellant was then, or might be presumed to be, somewhat affected with liquor, although not positively intoxicated, so as not to know what he was about. And certainly this was no venial offence. No witness, except Charles F. Cushman, who is a cousin of the master, speaks to the point. He says, that, "he, (the captain) asked him (the libellant) if the cook had been in the cabin. He said, 'No.' Then the captain said, he broke the slates. He said, he did not. The captain said, he did; and he told the captain, that he lied. Then Captain Cushman stepped up to him and struck him; and, about the time he struck him, the steward fell down." This is not very ingenuous. The witness would leave us to infer, not that the captain knocked the steward down, but that he fell down, so as to leave a doubt on the point. The answer admits, distinctly, that the captain knocked the steward down. The witnesses for the respondent give a very different account of the matter. Gordon states, that when "the captain came on board, Charles (meaning the witness Cushman) told the captain, that Ryan (the libellant) had been afoul of his rum. The captain then jumped on board, and called up Ryan, who was then steward, out of the cabin, and asked him what he had been doing with his liquor. Ryan said, he had not taken any of his liquor at all. The captain told him not to lie to him; that he had taken his liquor and given the cook some. He repeated the words over two or three times, not to lie to him; and said he knew a damned sight better; he had taken his rum. Ryan told him he had not; that the rum he had drunk did not belong to the captain, but was some he had got on shore. The captain then knocked him down, with his fist, and struck him two or three times after he was down, with his fist, on the side of his head, and then kicked him." But he adds, "I saw him kick him but once." And, in answer to interrogatories, he states further, that "Ryan's eye was bruised pretty bad; the skin was cut on the under lid of his eye and the blood came from that." Hood, another witness, says, that "the captain then jumped aboard and called Ryan. Ryan came to him, and the captain struck him with his fist, somewhere on his face or head. Ryan fell on the deck. I heard Ryan say, 'What is this for, Captain Cushman;' the captain said, 'I will let you know what it is for?'" The witness saw nothing further, and went below and left Ryan lying on the deck. The testimony of the other witnesses on this point is far more loose and indistinct.

Now, taking this testimony together, it strikes me, that it is far from being satisfactory to establish the fact, that the libellant did, on this occasion, tell the captain that he lied. To say the least of it, the statement of Gordon contains quite as probable an account of the actual occurrences; and the onus probandi is on the respondent to make out his defence. But it is said, that the answer, being on oath, and responsive to the allegations in the libel, is evidence in favor of the respondent, and, therefore, ought, in a case of doubt, to be decisive in his favor. Now, in point of fact, the libel is also sworn to; and, therefore, there is only oath against oath, so far as there is any contradiction between them. But, in fact, the defence on this point is not responsive to any allegation in the libel; but it is new matter set up by way of defence to excuse the assault and battery. It is, therefore, strictly matter of fact, to be made out in proof by the respondent. And this leads me to remark, that the rule, adopted by courts of equity, that an answer under oath, when it is responsive to matters charged in the bill, is positive evidence in favor of the respondent, and will prevail, unless overcome by the satisfactory evidence of two witnesses, or of one witness and other corroborative circumstances, has never been adopted in courts of admiralty. The rule of the civil law seems to have been, that the testimony of a single witness was not sufficient to establish any material facts in controversy in a suit. "Sanximus (says the Code) ut unius testimonium nemo judicum in quacunque causa facile patiatur admitti. Et nunc manifeste sanximus, ut unius omnio testis responsio non audiatur, etiamsi, proeclaroe curioe honore proefulgeat."[3] But this rule does not necessarily import, that the answer of the respondent, upon the interrogatories propounded to him, shall be positive evidence in his favor. The case is very different from what it would be, where the respondent is sworn upon, what is called, the decisory oath. Pothier accordingly informs us, that the answers of the respondent to the common interrogatories and articles in libels, are evidence against him, but not in his favor; and that, in this respect, they greatly differ from the decisory oath.[4] My learned friend, the district judge of Maine, has examined this subject with his usual accuracy and full-

[3] Code, lib. 4, tit. 20, c. 9, § 1; Pothier, Pand. lib. 22, S. N. 19; 2 Story, Eq. Jur. § 5130.

[4] Pothier, Traité des Obligations, n. 920; Id., Traité de Procédure civile, pt. 1, c. 3, art. 5, § 5.

ness of learning in the case of Hutson v. Jordan [Case No. 6,959], and I entirely concur in his opinion, that the answer of the respondent in reply to interrogatories does not in the admiralty constitute positive evidence in his favor. Its true effect is, to furnish evidence for the other party, or, in a case hanging in equilibrio in point of proof, to turn the scale in favor of the respondent.

I have dwelt somewhat more at large upon the considerations, as well of law as of fact, applicable to the first charge in the present libel, than it might seem to require, because I was desirous of disposing of some points, which have not hitherto undergone a direct and positive adjudication in this court, although they have silently insinuated themselves into the common practice in this class of appeals.

The second charge in the libel is that, which constitutes the substantial grievance, upon which the present suit is brought. It states, in substance, that on the high seas, on the 9th of February last past, the respondent made another and violent assault upon the libellant, and caused him to be seized up in the main rigging, and, while so seized up, the respondent caused the trowsers of the libellant to be stripped down, and his naked person exposed, and with a weapon called a "cat" inflicted fifteen severe blows upon the naked body of the libellant, so as to wound him severely, and after causing him to be cut down, he continued to beat the libellant with the said cat, and cut him across the legs and arms, so that the flesh and limbs of the libellant were bruised and lacerated, and while the libellant was suffering great bodily pain and distress from the severe flagellation he had received, the respondent ordered him to go to the mast-head, and kept the libellant there nearly four hours, until he was so benumbed with the cold, that he could with difficulty keep himself from falling.

The answer of the respondent to this allegation, in substance, states, that, after the first assault and beating, the libellant was repeatedly in liquor, and embezzled the spirits of the said ship and took off a lock for that purpose, which the respondent placed upon the scuttle of the run for the purpose of protecting the spirits; and that the respondent then informed the libellant, that if he did not desist from taking the said liquors, he certainly would flog him. That the libellant disregarded the warning, and on the 4th of February last past, the libellant having been in liquor, and having been insolent to the first officer of the ship, the respondent ordered him on deck, had him seized up, and flogged him with a cat made of eight strands, of a line of the size of a log line, after distinctly stating to the libellant the reason of the said punishment, and referring it, as well to his present, as to his former misconduct. And after the said flogging, the respondent ordered the libellant to go into the foretop for two hours, having previously ordered him to go below and change his clothes. And the respondent denies, that any serious, or permanent, or severe injury was done to the libellant, or that it exceeded the proper bounds of his lawful authority. Now in this answer it is somewhat remarkable, that the respondent does not state the number of blows struck by him with the cat, nor the place where they were struck; and he takes no notice of the allegation as to the blows struck after the libellant was cut down, and attempts no justification of them. In point of fact, the libel, as to the number of lashes, and the beating after the libellant was cut down, is fully maintained, at least in its substantial circumstances, by the concurrent testimony of all the witnesses; and some of them state the beating in a very aggravated form. It seems, indeed, that such was the severity of the lashes with the cat, which was on the naked parts below the back of the libellant, that an involuntary dejection (as I am reluctantly obliged to state) took place, and the subsequent beating was, because the respondent ordered the libellant to get a shovel to remove the offensive materials, and he did not find the shovel as quick as it was thought that he might. The sending the libellant to the foretop for two hours is admitted; and it is in proof, that he stood exposed during all that time in a drizzling rain, in a warm climate. Now, the court is asked to say, admitting that the charges of drunkenness and embezzlement of the spirits on board, which were designed merely as ship's stores, to be used in cases of sickness, are proved, (as I confess, that I think they are to some extent) whether the punishment was justified in point of law by the occasion, or whether it was excessive, and improper in its nature and degree. I admit, that the master is clothed with authority to correct and punish any seamen, who disobey the lawful orders and discipline of the ship, or who are guilty of other gross misconduct. But the correction must be reasonable in itself, and moderate in degree, and administered in a proper mode. If the master inflicts punishment in a violent, or brutal, or malignant manner, to gratify his passions, or in wanton abuse of his power, he is responsible therefor, and can not shelter himself from damages by general allegations of misconduct or insolence in the offender. The law clothes the master with summary authority in this respect, to enforce due discipline on board of the ship. But it should not be forgotten that the power is arbitrary and discretionary in its exercise; but it is deemed to be analogous to the power of a parent to inflict chastisement upon a disobedient child, or perhaps more nearly to that of a master over his apprentice.

Now, I must say, looking to all the circumstances of the present case, that I think the punishment was not only excessive in kind and degree, and disproportionate to the offence,

but it was persisted in with a rash resentment, and gross harshness, which admit of no apology. But I do not stop here. It strikes me that there was gross indecency and impropriety in the character of the punishment, and in the mode of inflicting it. I know of no right or authority in the master, thus indecently to expose the person of the seaman, and thus to degrade, as well as to punish him. To strip a seaman naked, and whip him severely with a cat, an instrument producing exceedingly sharp and agonizing pain, is a punishment, which if justifiable at all, is so only under extreme circumstances; and certainly is not justifiable for ordinary violations of the ship's discipline. Drunkenness and embezzlement of the ship's spirits by the steward are certainly grave offences, and deserve some punishment; and probably no court or jury would incline to weigh the punishment inflicted in such cases in very nice scales. But when a punishment is pursued with extreme severity, as, in this case, that with the cat was, and when the party, smarting under his sufferings, received other blows and lashes after he was cut down; and when, after this, he was ordered aloft for two hours in a drizzling rain, in the midst of his bruises, and pains and sufferings, and instead of those bruises and pains and sufferings being assuaged, they were to be thus aggravated, I, for one, must say, that there is in such conduct more of vindictive passion, if not of deliberate malice, than of any sense of justice, or desire to support proper order and discipline in the ship. But, when I add to this the utterly inexcusable indecency of stripping the libellant's trowsers down, and inflicting the lashes with the cat upon his naked person, it seems to me, that the court is called upon to reprove such excessive misconduct in strong terms. Has the master ever repented of his misconduct, or shown contrition, or expressed regret, since that period? Not at all; for when the process in the present suit was served upon him, his language was of a directly opposite nature. He regretted that he had not punished the libellant more. Then, is there any thing in the new evidence, that justly goes in mitigation of the offence, or to establish, that the wrong has been exaggerated? I hardly see how that can be maintained; for the answer admits the truth of the main allegations. But it is said, that the libellant has admitted, since the suit was brought, that he was not punished more than he deserved; and that the suit is now carried on substantially for the benefit of another person, who instigated the suit, and at whose expense it is carried on, and who is to receive the damages awarded by the court for his own use. It is to these two points, that the new evidence on behalf of the respondent is mainly addressed.

As to the supposed confessions of the libellant, made after the libel was filed, that he deserved the punishment, I must confess, that they come clouded with suspicion, and under all the circumstances, considering the quarter from which they come, and the time, and the nature of the testimony, and the relationship of the parties, I am not disposed to attach much importance to them. They are either not fully stated, or the precise bearing of the conversations was not understood by the libellant. In short, the admitted facts show, that the punishment was not deserved, but was excessive. It adds not a little to the scruples, that one might be supposed to entertain on such a subject, that the respondent did not offer this evidence at the original hearing, although he (but not his counsel) according to all probabilities, then knew the facts.

As to the other point, certainly the court will not suffer itself to be speculated upon by mere adventurers and intruders into a cause; nor award large damages, where the libellant seeks no redress, but is content to engage in a traffic, which savors of maintenance, and is every way reprehended in the law. But this last evidence can at most go only in mitigation of damages; and it cannot, as is frankly admitted, operate as a bar to the suit. But it appears to me that the point is not made out as a matter of fact. The evidence, so far as it goes, distinctly repels it; and the very party, who is alleged to be the maintainer, positively denies it; and the averments introduced contain nothing but what supports his testimony. The libellant was asked to settle the suit; but he declined it, as it clearly appears, because he had confided the management of it to an agent, without whose consent and approbation, he was advised by disinterested persons, that he ought not to act. I do not know, that there was anything reprehensible in this, if the agent was a sincere and faithful friend, acting, not for himself, but for the libellant. According, then, to my view of the case, there is nothing further for the consideration of this court. I cannot say, that the damages given by the district judge are excessive or unjustifiable. Knowing his habitual moderation, great experience, and just comprehension of all the difficulties and irritations of the nautical service, I should say, that there was the strongest reason to believe, that the damages were not excessive or unjustifiable. I can have no doubt, that the indecency as well as the excess of the punishment, had great weight in his mind. The question is not, whether I should have given exactly the same sum in damages; for in such cases there is large room for the exercise of discretion, as well as for difference of judgment. But that any clear error has been committed, I confess, that I am unable to perceive; and therefore I affirm the decree with costs.

CUSHMAN (UNITED STATES v.). See Cases Nos. 14,906–14,908.

Case No. 3,516.

CUSHMAN v. WADDELL.

[Baldw. 57.][1]

Circuit Court, D. New Jersey. April Term, 1830.

ASSAULT AND BATTERY—EVIDENCE IN MITIGATION—PROVOCATION.

1. In an action of assault and battery to which the general issue is pleaded, the defendant may give in evidence his state of mind, caused by an excitement or provocation so recent or immediate, as not to allow the blood to cool.

2. The legal effect of such evidence is not to excuse the defendant from paying compensatory damages, but will excuse him from paying such as are exemplary.

3. If the alleged provocation is a previous assault and battery by the plaintiff of the son of the defendant, evidence of the transaction is not admissible; but the defendant may give in evidence the appearance of the son, and the account he gave to the defendant at the time he first saw him, so as to enable the jury to decide on the cause and extent of the provocation.

This was an action of assault and battery, plea not guilty, issue, &c. The plaintiff was a schoolmaster in Trenton, under whose care the defendant had placed one of his sons, who had been severely punished by the plaintiff for some offences. He was seen by his father immediately afterwards, when the appearance of the boy indicated the infliction of serious injury. The father went to the boarding house of the plaintiff, attacked and beat him severely, accompanied with very intemperate and vindictive language, and other circumstances of aggravation. The defendant offered, in mitigation of damages, to prove the correction of the son by the plaintiff to have been a cruel, wanton, and undeserved one, and to give all the circumstances attending it in evidence.

Mr. Southard and Mr. Scott, for plaintiff, objected to the admission of this evidence, on the ground that an action of assault and battery was now pending against the plaintiff for the same act, and that on the general issue, the defendant could give nothing in evidence except what occurred at the time of the assault and battery, or some immediate or recent provocation, before the blood had time to cool. Lee v. Woolsey, 19 Johns. 319; 1 Saund. Pl. & Ev. 106, 127; Bull. N. P. 17; Avery v. Ray, 1 Mass. 12, 14. The plaintiff will be taken by surprise by evidence of any thing not happening at the time, or so immediately preceding it as to make the provocation a part of the res gestae, and the court will not collaterally examine into the merits of the suit for the correction of the son.

Mr. Halsey and Mr. Wood, for defendant, contended, that: Inasmuch as the matter now offered in evidence was in mitigation of damages only, and could not be pleaded in justification to the action, it was admissible to show the state of mind of the defendant (3 Starkie, 1460; 2 Bos. & P. 2245, note; 12 Mod. 232), the absence of malice (1 Penn. 169, S. P.), or a high degree of excitement on seeing the situation of his son, after he had been punished, as in 1 Hale, P. C. 453; 12 Co. Litt. 87; Royley's Case, Cro. Jac. 296. The provocation is part of the res gestae; and on a mere question of damages, it is proper for the jury to know its nature and extent, so as to enable them to decide whether the assault and battery was the result of passion, and excited feelings, under recent provocation, or deliberate and maliciously intended injury.

BY THE COURT. We cannot go into evidence of the circumstances attending the correction of the defendant's son by the plaintiff, as it would be neither a justification, nor mitigation of damages in this action, however aggravated the case may have been on the part of the plaintiff. We therefore reject the evidence offered, so far as it respects the nature of the infliction on the boy: but we think evidence admissible to show the situation of the son, after the transaction; the account he gave of it on his father's first seeing him; and the conduct and declarations of the latter, from that time to the attack on the plaintiff; otherwise the jury cannot decide whether the defendant acted under the influence of the sudden excitement produced by the situation and story of his son, or a disposition to inflict a wanton injury or disgrace upon the plaintiff.

The evidence was admitted. The only question for the jury was the amount of damages. THE COURT laid down the following as the rule of law by which they ought to be guided:

That whether the defendant acted wantonly and maliciously, or under the excitement of the occasion, the plaintiff was entitled to such damages as would compensate him for any injury he may have sustained in his person, or his occupation, and all expenses incurred in consequence of the injury. That no provocation, however great or immediate, could excuse the defendant from making full compensation for all the plaintiff had suffered by the unlawful attack on his person; nor could any provocation, so remote in point of time from the infliction of the injury to his son as to allow the excitement to subside and leave the defendant to act coolly and deliberately, be any mitigation of damages. But if the jury were satisfied that he acted in the heat of passion caused by the appearance and account of his son, without any previous malice towards the plaintiff, or any deliberate design to injure him in person or the estimation of the public, it was a circumstance which ought to operate powerfully to reduce the damages to such as would be compensatory. If death had ensued from the blows inflicted by the defend-

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

ant, his offence would have been murder or manslaughter, according to the degree of excitement or deliberation with which it was committed. The same rule is applicable to actions for personal injuries, whenever a plaintiff claims damages beyond those which afford him remuneration for all injuries he has sustained.

The jury found a verdict for $1,500. A motion was made for a new trial, on account of excessive damages, but before any decision of the court, the case was compromised.

Case No. 3,517.

CUSHWA v. FORREST.

[4 Cranch, C. C. 37.][1]

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

SALE—ACTION FOR PRICE—DEFENSE OF FRAUD—OFFER TO RETURN.

In an action by the vendor for the price of a blind horse sold to the defendant by the plaintiff, if the defendant prove fraud in the sale he need not show that he offered to return the horse; for fraud vacates the contract, and the plaintiff cannot recover upon it; aliter where the action is brought by the vendee to recover back the purchase-money paid for the horse.

Assumpsit for the price of a blind horse sold by the plaintiff to the defendant.

Mr. Key, for defendant, prayed the court to instruct the jury "that if they should believe from the evidence that the horse sold to the defendant was affected before or at the time of the sale with a latent disease in his eyes, materially impairing the value of the horse, of which he afterwards went blind, and which ordinary skill and attention could not discover, and that the same was known to the plaintiff, then it was the duty of the plaintiff to disclose such defect, and if he sold him without doing so, but purposely concealed the same, and the defendant bought him without knowing such defect, then the sale was fraudulent, and the plaintiff is not entitled to recover in this cause."

Mr. Jones, contra, cited 2 Selw. N. P. 584, 586; Hunt v. Silk, 5 East, 452, that the parties must be put in statu quo; Starkie, Ev. pt. 4, p. 586; Wynn v. Thornton, 12 Wheat. [25 U. S.] 193; Lewis v. Cosgrave, 2 Taunt. 2.

THE COURT (THRUSTON, Circuit Judge, contra) gave the instruction prayed by Mr. Key, and observed that there was this difference between the case of an action by the vendee to recover back the purchase money on the ground of fraud and that of a vendee resisting, on the same ground, an action by the vendor to recover the purchase-money: that in the former case the vendee must show that he offered to return the thing sold; but, when the vendee is defendant, he is not bound to show such an offer to return, but it is sufficient for him to show the sale to be fraudulent; for fraud avoids every contract; and this distinction reconciles the fraud upon the subject.

It was admitted, by the plaintiff's counsel, that the burden of proof was on the defendant.

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

CUSTER (CRESSLER v.). See Case No. 3,388.

CUSTIS (GEORGETOWN TURNPIKE-ROAD CO. v.). See Case No. 5,348.

CUSTIS (SHEDDEN v.). See Case No. 12,736.

CUSTIS (UNITED STATES v.). See Case No. 14,909.

CUTLER (HINMAN v.). See Case No. 6,524.

CUTLER (REA v.). See Case No. 11,599.

CUTLER (UNITED STATES v.). See Case No. 14,910.

CUTTER (ASHCROFT v.). See Case No. 578.

Case No. 3,518.

CUTTER v. DINGEE.

[8 Ben. 469;[1] 14 N. B. R. 294.]

District Court, S. D. New York. June Term, 1876.

INJUNCTION AND RECEIVER—USURY—FORECLOSURE—BAR BY DECREE.

A suit was brought in a state court, by D., to foreclose a mortgage made by I., in which suit a decree of foreclosure was made after the filing of a petition in bankruptcy against I., but before the service of an injunction upon D. After the adjudication in bankruptcy, D. enforced the decree in foreclosure by a sale, at which he bought the property, and the assignee in bankruptcy, having been appointed, filed a bill in equity to set aside the foreclosure sale, and the mortgage itself, as being usurious, and applied for an injunction and a receiver: *Held*, that the bill could not be sustained, because the decree of the state court was a bar to the right of the plaintiff to raise in this suit the question of usury in regard to the mortgage, and that the application must be denied.

This was a motion for an injunction and a receiver on behalf of the plaintiff [John C. Cutter], who, as assignee of Mary Irving and Benjamin H. Irving, filed a bill in equity against the defendant [Peter M. Dingee], by which he sought to set aside the purchase of certain real estate by the defendant, referred to in Re Irving [Case No. 7,073], in foreclosure proceedings instituted by him in a state court, and to set aside the mortgage on which such foreclosure proceedings were founded and the bond to secure which it was given, on the ground of usury. The motion was heard on the bill and answer, and on affidavits.

F. Fellowes, for plaintiff.

D. A. Hawkins, for defendant.

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

BLATCHFORD, District Judge. The case made by the bill and affidavits on the part of the plaintiff, so far as usury is alleged, is fully met by the answer and the opposing affidavits. The usury, as alleged, could, if established, affect only the house and lot which were conveyed and the property which was mortgaged. If the machinery in the factory was covered by the mortgages, the foregoing observations apply to it. If it was not covered by the mortgages, then it is not involved in this suit. The bill prays for no relief as to such machinery, otherwise than as it was part of the mortgaged property.

As to the mortgaged property, the views announced in my decision, made herewith, in the contempt proceedings founded on the foreclosure of the mortgages (In re Irving [supra]), lead to the conclusion that the plaintiff can have no relief in this suit founded on any alleged invalidity in the foreclosure proceedings, or in the sale of the mortgaged property thereunder, on the idea that the sale was invalid because the decree of foreclosure and the sale were made after the bankruptcy proceedings were commenced, or because the assignee in bankruptcy was not made a party to such proceedings.

The bill, therefore, could not, in any event, be sustained as to the mortgaged property, for the reason that, as to it, the decree of the state court is a bar to any right of the plaintiff to raise the question of usury in regard to the mortgages, in this suit, even though the evidence for final hearing should sustain the allegations of usury in respect to the house and lot conveyed to the defendant.

The motion for an injunction and a receiver is denied.

CUTTER (NELSON v.). See Case No. 10,104.

CUTTER (REED v.). See Case No. 11,645.

CUTTER (UNITED STATES v.). See Case No. 14,911.

CUTTER (WHITTEMORE v.). See Cases Nos. 17,600 and 17,601.

CUTTING (CARTER v.). See Case No. 2,476.

Case No. 3,519.

CUTTING et al. v. GILBERT et al.

[5 Blatchf. 259;[1] 2 Int. Rev. Rec. 94.]

Circuit Court, S. D. New York. Sept. Term, 1865.

INTERNAL REVENUE—RESTRAINING COLLECTION—PARTIES—JURISDICTION—REMEDY AT LAW.

1. A bill of peace, founded on the idea that all persons charged with a tax under the 99th section of the internal revenue act of June 30, 1864 (13 Stat. 273), have such a unity of interest in contesting the tax, that they may join as plaintiffs in a bill to restrain the assessment and collection of such tax, and that a determinate number of such persons may appear in the name of themselves and for the rest, will not lie.

[Approved in Georgia v. Atkins, Case No. 5,350.]

2. To authorize such a joinder of plaintiffs, their interest must be not only one in the question, but one in common in the subject matter of the suit.

3. By virtue of the 2d section of the act of March 2, 1833 (4 Stat. 632), and the 50th section of the act of June 30, 1864 (13 Stat. 241), the proper court of the United States has power to prevent, by injunction, the imposition of an illegal tax under the latter act.

[Approved in Georgia v. Atkins, Case No. 5,350.]

4. Where the remedy at law is adequate, an injunction is always refused. It will be granted to prevent a multiplicity of suits and vexatious litigation, where the right has been established at law; and, where the right is plain, and the remedy at law is not adequate, it will oftentimes be granted without even a trial at law.

[Cited in Schulenberg-Boeckeler Lumber Co. v. Town of Hayward, 20 Fed. 425.]

5. A tax payer, under the internal revenue laws, has a remedy, by an action at law, against an assessor, who makes an assessment on property or business not liable to the tax, where the property or business is disturbed by pretence of the authority.

[Approved in Georgia v. Atkins, Case No. 5,350. Cited in U. S. v. Schlesinger, 14 Fed. 684.]

6. Where a great number of persons are affected by a tax, and the remedy by separate suits in equity will involve onerous and vexatious litigation, the court will not interfere by injunction in any suit.

This was a bill in equity, filed by some six firms of the city of New York [Robert L. Cutting and others], licensed and doing business as bankers and brokers, under the internal revenue act of June 30, 1864 (13 Stat. 223), as amended by the act of March 3, 1865 (13 Stat. 469), against Sylvester P. Gilbert, assessor, and Sheridan Shook, collector, of the thirty-second collection district in said city, as well for themselves as all others in the same interest, and who should come in and be made parties thereto, and contribute to the expenses of the proceedings. The bill, after setting forth the facts which raised the question whether or not brokers, and bankers doing business as brokers, who had bought and sold stocks, bonds and other securities mentioned in section 99 of the act of 1864, on their own account and for themselves, and not for others or on commission, were properly chargeable with the tax prescribed in that section, prayed that it might be adjudged that they were not, and that the defendants might be enjoined from assessing or collecting the tax.

William F. Allen, for plaintiffs.

Samuel G. Courtney, Dist. Atty., for defendants.

NELSON, Circuit Justice. The act of June 30, 1864, provides for the production by the tax-payer of a list of property chargeable with a tax, and confers power upon the assessor to alter and amend the same; and sec-

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

tion 20 declares that the said assessors, &c., shall, immediately after the expiration of the time for hearing appeals, &c., make out lists containing the sums payable according to law upon every object of duty or taxation for each collection district, which lists shall contain the name of each person residing within the said district, &c., and that the assessor shall furnish to the collectors of the several collection districts, within ten days, &c., a certified copy of such lists, for their collection. The 28th section provides for the collection of the tax by the collector. The bill is filed to stay the assessment and collection, by those officers, of the tax claimed to be due, under the 99th section, for stocks, bonds, &c., sold by the plaintiffs for themselves, and on their own account.

If the question before me, on this application, turned solely upon my opinion as to the liability of the plaintiffs to this tax, I should feel bound to grant it at once; for, although I appreciate the difficulties and perplexities encountered in endeavoring to give construction to the various provisions of the act of 1864, and of the amendments of 1865, and in reconciling and harmonizing the same, yet, after the best consideration I have been able to give to the subject, I have come to the conclusion that the plaintiffs are not liable to the tax. But other considerations must be taken into view on this motion.

This is a bill of peace, to quiet the rights of parties, and to put an end to further litigation. The bill is founded on the idea that all persons in business as brokers, or who are bankers doing business as brokers, charged with the tax in question, have such a unity or joinder of interest in contesting it, that all may join in the bill for that purpose; and that as the parties are so numerous as to make it inconvenient to join all of them, a determinate number may appear in the name of themselves and for the rest. I have not been able to concur in this view. The interest that will allow parties to join in a bill of complaint, or that will enable the court to dispense with the presence of all the parties, when numerous, except a determinate number, is not only an interest in the question, but one in common in the subject matter of the suit; such as the case of disputes between the lord of a manor and his tenants; or between the tenants of one manor and those of another; or where several tenants of a manor claim the profits of a fair; or in a suit to settle a general fine to be paid by all the copyhold tenants of a manor, in order to prevent a multiplicity of suits. In all these and the like instances given in the books, there is a community of interest growing out of the nature and condition of the right in dispute; for, although there may not be any privity between the numerous parties, there is a common title out of which the question arises, and which lies at the foundation of the proceedings. There are analogous cases, also, where such a bill may be filed—such as, where a person has an exclusive right of property or franchise which is controverted by numerous persons, as in the case of the corporation of York claiming an exclusive right of fishing in the river Ouse for nine miles, and which right was contested by different lords of manors, and persons resident on the banks of the river, as the litigation would have been endless, if the corporation had to bring actions at law. The same principle is found in the case of London v. Perkins, 3 Brown, Parl. Cas. 602, to establish a duty or tax against certain dealers in the city; and also in a suit on behalf of a charity for a rent-charge against the ter-tenants of the land.

In the case before me, the only matter in common among the plaintiffs, or between them and the defendants, is an interest in the question involved, which alone cannot lay a foundation for the joinder of parties. There is scarcely a suit at law, or in equity, which settles a principle or applies a principle to a given state of facts, or in which a general statute is interpreted, that does not involve a question in which other parties are interested, as for instance, the doctrine of trusts, and the statutes of descents, of frauds, of wills, and the like; yet no lawyer would contend that such an interest would justify a joinder of parties as plaintiffs, in a case arising under the law of trusts, or under any of the statutes mentioned. The same may be said of questions arising under the revenue laws, such as the tariff and the excise laws, which are the subject of litigation in the courts almost daily. Large classes of persons, other than the parties to the suit, are interested in the questions involved and determined. To allow them to be made parties to the suit would confound the established order of judicial proceedings, and lead to endless perplexity and confusion.

I am satisfied, therefore, that this bill cannot be sustained, on account of the joinder of improper parties as plaintiffs. But, as this error may be corrected, and as there are other cases before me in which it does not exist, I shall proceed to express my views upon them. They are cases in which the bill is filed by the party or firm against whom the tax is threatened.

I do not doubt the jurisdiction or power of the courts to interfere, and prevent the threatened imposition of the tax, if it is illegal. The second section of the act of March 2, 1833 (4 Stat. 632), known as the "Force Act," confers jurisdiction in express terms, and has been applied to the act of 1864, by its fiftieth section. And jurisdiction had previously, and has since, been upheld and exercised upon general principles of equity jurisprudence. Osborn v. Bank of U. S., 9 Wheat. [22 U. S.] 738; State Bank v. Knoop, 16 How. [57 U. S.] 369; Dodge v. Woolsey, 18 How. [59 U. S.] 331; Jefferson Branch Bank v. Skelly, 1 Black [66 U. S.] 436.

The granting of the writ of injunction, generally speaking, rests in the exercise of the sound discretion of the court. Where the remedy at law is adequate, it is always refused. It will be granted to prevent a multiplicity of suits and vexatious litigation, where the right has been established at law; and, where the right is plain, and the remedy at law is not adequate, it will oftentimes be granted without even a trial at law.

Although it was denied, on the argument, by the learned counsel, that the tax-payer, under the internal revenue laws, had a remedy at law, I am satisfied, on examination, that this is a mistake. The position may be true, as respects the collector, but I regard the liability of the assessor as settled, in a case of illegal assessment, by which I mean an assessment on property or business not liable to the tax. This is a naked trespass, where the property or business is disturbed by pretence of the authority. Even a court of special and limited jurisdiction is liable, in cases where its powers are carried beyond its jurisdiction. I agree, however, that the remedy at law in this case is not adequate, and that, for this reason, in ordinary cases, the party would be entitled to relief in equity. The main reason why this remedy at law is not adequate is the multiplicity of suits. The want of responsibility of the officers, I do not regard as material or controlling, for the reasons stated hereafter.

I have said that, in ordinary cases, a writ of injunction will be granted, to prevent a multiplicity of suits at law. The embarrassment in the present case is from the great number of persons affected by the tax. The remedy in equity would involve a litigation almost, if not quite, as onerous and vexatious as suits at law. Each tax-payer would be obliged to file a bill, in order to obtain relief. As to the litigation and multiplicity of suits, therefore, the difference in the proceedings in the one tribunal or in the other will scarcely justify the interposition of a court of equity in favor of the party complaining, especially where the inconvenience to the government in the collection of its public revenue is much more serious in the latter tribunal. I agree that, if the joinder of parties in this case could be maintained, this difficulty of a multiplicity of suits in equity would be very much diminished; but, for the reasons already stated, I am entirely satisfied that it is without precedent or principle.

It has been strongly urged, that the amounts of money involved in this controversy are very large, far beyond the ability or means of these officers to respond in actions at law. But, whether these officers are of sufficient responsibility or not, it must be remembered that the litigation is substantially between the tax-payer and the government [where the tax is collected under its express instructions as in the present case] [2]; and it would be unjust to the latter to doubt, that, if the tax should be ultimately found to be illegal, the government will at once refund with interest, the money thus illegally collected. Indeed, the 44th section of the act has pledged the government to this effect, in advance.

Upon the whole, without pursuing the examination of the case further, my conclusion is, that, under the peculiar facts and circumstances attending this case, and for the reasons above stated, the injunction should be withheld, and the parties be left to their remedy at law. [Motion for injunction denied.] [2]

[NOTE. The right of the government to collect this tax of the complainants was upheld by the supreme court in U. S. v. Cutting, 3 Wall. (70 U. S.) 441.]

Case No. 3,520.

CUTTING et al. v. MYERS.

[4 Wash. C. C. 220; [1] 1 Robb, Pat. Cas. 159.]

Circuit Court, D. Pennsylvania. April Term, 1818.

ACTIONS FOR INFRINGEMENT OF PATENTS—DECLARATION—NECESSARY AVERMENTS—DEMURRER.

1. The declaration in a patent cause need not state that the stages preliminary to the issuing of a patent were observed. What is required to be stated in such a declaration.

[Explained in Van Hook v. Wood, Case No. 16,854.]

2. The declaration must set forth the attestation of the president of the United States, and that the patent was delivered; and the want of a statement of either is a cause for general demurrer.

[Cited in Dobson v. Campbell, Case No. 3,945; Nathan Manuf'g Co. v. Craig, 47 Fed. 524.]

3. It is no cause of demurrer to such a declaration that neither the patent, nor the declaration states in what the improvement consists. If the defendant wants the specification inserted on the record, he must crave oyer of it.

4. In what manner and form the breach in actions on patents must be laid.

WASHINGTON, Circuit Justice. This is an action for the infringement or a patent right. The declaration contains four counts, to two of which, viz. the second and fourth, the defendant has filed special demurrers. The decision upon either of the counts will decide the fate of the other. The second count states, that by certain letters patent, made out in due form of law, under the seal and in the name of the United States, dated, &c. which said letters patent the plaintiffs bring into court, whose date, &c. there was granted to the said Robert Fulton, his heirs, &c. for the term of fourteen years from the said date, the full and exclusive right and liberty of making, constructing, using, and vending to others to be used, a new and use-

[2] [From 2 Int. Rev. Rec. 94.]

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

ful improvements in steamboats; he, the said Robert, being a citizen of the United States, and the true and original inventor of the said improvement, &c. The demurrer states for cause, that it is not stated, nor alleged, nor does it appear by the said count, in what the said new and useful improvement in steamboats consisted, and that the said count is altogether vague, &c.

The objections made by the defendant's counsel to this count, are 1. That it does not sufficiently state that all the steps which the inventor is required by the act of congress to take to entitle him to a patent were observed; that is to say, that a petition was presented to the secretary of state; that the attorney general's certificate as to the form of the patent was obtained; that the patent was signed by the president; or that the conditions prescribed in the third section of the law were complied with. In support of this objection it is contended, that the declaration ought to show a title in the plaintiff, and that every thing which is of the essence of the action, was performed by the patentee. That a performance of all the acts required by the first and third sections of the law, are of the essence of the plaintiff's title, and therefore ought to have been precisely averred. The validity of this argument will be best tested by an attention to the first and third sections of the act of congress of the 21st of February, 1793 [1 Stat. 318]. These sections describe, 1. Who is entitled to the exclusive property in any new and useful art, machine, manufacture, or composition of matter. 2. They prescribe what shall be the essential parts of the instrument granting such property. And lastly, what the petitioner must do before he can receive a patent. As to the first, to entitle any person to this exclusive right, he must be the inventor of the thing in which he claims an exclusive property, and must allege himself to be such. As to the second, the letters patent must be made out in the name, and under the seal of the United States, and bear teste by the president of the United States, reciting the allegations and suggestions of the petition, giving a short description of the invention, and granting to the petitioner, for a certain term, the full and exclusive right and liberty of making, constructing, using, and vending to others to be used, the said invention. Lastly, to entitle the inventor to receive this patent, he is required to present a petition to the secretary of state, signifying his desire to obtain an exclusive property in his invention, and praying that a patent may be granted therefor. He is also required to swear or affirm that he is the true inventor or discoverer of the art, machine, or improvement, for which he solicits a patent, and further, to make a full disclosure of his invention in the manner prescribed in the third section of the act.

The principle contended for by the defendant's counsel, that the declaration must show a title in the plaintiff, is incontrovertible. But on what does the title of the plaintiff to the exclusive property of an invention rest? The answer is, on a grant of such exclusive property by the United States; and if the declaration avers that such grant, in the form prescribed by law, was issued, it shows the very title on which the action is founded, and on which, prima facie, the plaintiff is entitled to recover. It is not necessary for him to aver that those preliminary steps were taken, without which a valid grant could not issue, because the court will presume in favour of the grant, that every thing was rightly and solemnly done which the law required, in order to authorise the issuing of the grant. If the prerequisites to the issuing of the grant were not observed, then the allegation in the declaration, that the patent granted to R. F. the full and exclusive right and liberty of making, &c. his improvement, is not true. As well might it be contended, that in pleading a grant of land, it is necessary to aver the entry, survey, and all the other steps required by law to be taken before a valid grant can issue. They are prima facie implied in the allegation that the grant was duly made in the manner prescribed by law. But the court is of opinion, that within these principles there are two objections to these counts which are fatal, and which the defendant is entitled to the benefit of, upon a general demurrer. The first is, that they contain no allegation that a patent did issue to R. F.; or secondly, that it was tested by the president. As to the first, the allegation is, that a patent was made out in due form of law under the seal, and in the name of the United States, by which there was granted to the said R. F. &c. But the law proceeds to declare that the patent so made out shall be delivered to the petitioner, and that no person can receive it until he has taken the oath, and made the disclosure prescribed in the third section of the act. Now there is no allegation in these counts that the patent was more than made out, or that it was ever delivered to R. F., and consequently, there is nothing averred from which the court can imply that those conditions were performed, without which R. F. was incapable of receiving a patent. The principle laid down and relied upon by the plaintiff's counsel, that necessary circumstances implied by law from what is expressed need not be expressed, does by no means impugn this argument; because nothing is expressed to authorise a presumption that the requisite conditions were complied with. It has been contended that delivery is implied in the allegation that the patent was made out, containing a grant of the exclusive right; and the case of Churchill v. Gardner, 7 Term R. 596, is relied upon. But that was a case at common law, and the implication that the bill of exchange was delivered, arising out of the allegation that it was made, was perfectly natural and reasonable. But it is believed to be a clear principle of law,

that if a statute requires certain acts to be performed before a statutory instrument can be delivered or take effect, the plaintiff must aver in his declaration, either the performance of those acts, or the fact of delivery from which such performance may be implied.

2. The plaintiff's title resting upon a patent from the United States, the form of which is prescribed by the act of congress, it certainly should be shown, by the declaration, that the patent in question was such as the law requires. Now the attestation of the president is rendered as necessary to the form and validity of this patent, as the affixing of the seal of the United States to it; and the signature of the president can no more be implied from the allegation that the patent was made out containing a grant of the privilege, than the seal could be implied from the allegation that a patent was made out containing the grant. The certificate of the attorney general forms no part of the patent, and may reasonably be implied from the allegations contained in the counts.

The second objection made to the counts under consideration is, that the improvement for which the patent is alleged to have been granted is too loosely described in the patent itself, as set forth, to entitle the plaintiff to a judgment. It is contended that it ought to have stated in what particulars the improvement consists. An objection similar to the present, in all respects, was made to the declaration in the case of Gray v. James [Case No. 5,719], and after the most mature consideration by the court it was overruled. With that opinion the court finds no reason to be dissatisfied. The declaration in that case stated, that Jacob Perkins, having invented a new and useful improvement in the manner of manufacturing nails, &c. which had not been known or used before his application, &c. (and so averring a compliance with all the requisitions of the act of congress previous to obtaining a patent, and an assignment of his right to Guppy and Armstrong), letters patent were duly made out in the name of the United States, bearing teste by the president of the United States, reciting, &c. and giving a short description of the said invention, and granting to the said G. and A. &c. the full and exclusive right and liberty of making, &c. the said improvement, &c. The objection made to this declaration was, that the "et caetera" in the description of the discovery rendered the patent too vague, and ought to have been cured by stating in the declaration the material parts of the specification, so as to leave no doubt as to the particular discovery for which the patent was granted. The court laid down the general rule, that a declaration ought to show a title in the plaintiff, and that with convenient certainty; and should also state those matters that are of the essence of the action, without which the plaintiff shows no right in point of law to ask for a judgment: but that in that case, the plaintiff's right was founded on a patent which was accurately stated in the declaration, the et caetera forming a part of the former, which was designated in the declaration by the terms which itself uses. That though the specification was referred to in the patent as a part thereof, it was still merely descriptive of the invention—a matter of evidence to be used at the trial, and might have been spread upon the record by oyer if it was important for the defendant to see it. The court was therefore of opinion, that the patent was described with sufficient certainty, even upon a demurrer. In this case, and upon these pleadings, the court must presume that the description of the thing granted is as broad as the patent itself, and in all respects corresponds with it; and upon the principle decided in the above case, we are of opinion that the plaintiffs were not bound to go farther, and to set out the specification, either verbatim, or substantially.

3. The last objection to this declaration is, that the breaches are laid too generally. The breach in substance is, that the defendants, without the leave or license, &c. did use the said improvement so invented by the said R. F. contrary to the form of the acts of congress, &c. and against the privileges so granted, &c. The answers given by the plaintiff's counsel to this objection are entirely satisfactory to the court. 1. The objection is to the form of the declaration, and no such cause is assigned by the demurrer. 2. The breach assigned is as broad as the right set forth in the declaration, and granted by the patent; and this the court considers to be not only sufficient, but that it is the most correct manner of pleading in this case. But for the reasons mentioned under the first head, the demurrer must be sustained.

[This patent was granted to R. Fulton February 11, 1809.]

Case No. 3,521.

CUTTING v. SEABURY et al.

[1 Spr. 522; 23 Law Rep. 533.][1]

District Court, D. Massachusetts. Oct. Term, 1860.

ADMIRALTY JURISDICTION—ACTION FOR WRONGFUL DEATH.

1. Where a minor left his father's service and went to a port where he was a stranger, and there shipped as of full age, for a whaling voyage, during which he perished: *Held*, that the father could not maintain an action for the loss of the services and society of the son arising from his death, unless the person who shipped him knew that he was a minor.

[Cited in The G. H. Starbuck, Case No. 5,378; The Epsilon, Id. 4,506; Baird v. Daly, 57 N. Y. 248; The Sea Gull, Case No. 12,578; Holmes v. Oregon & C. Ry. Co., 5 Fed. 80; The Garland, Id. 926; The Hattie

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

Low, 14 Fed. 880; The Manhasset, 18 Fed. 925; The Columbia, 27 Fed. 720.]

2. It cannot be considered as settled law, that no action can be maintained for damages occurring from the death of a human being.

[Cited in American Steamboat Co. v. Chace, 16 Wall. (83 U. S.) 532; The Towanda, Case No. 14,109; The Charles Morgan, Id. 2,618; Hollyday v. The David Reeves, Id. 6,625; The Garland, 5 Fed. 926; Re Long Island N. S. P. & F. Transp. Co., Id. 608; The E. B. Ward, 17 Fed. 458; The Max Morris, 28 Fed. 884; The Harrisburg, 119 U. S. 206, 7 Sup. Ct. 144.]

[See note at end of case.]

R. C. Pitman, for libellant.

Wm. W. Crapo, for respondents.

SPRAGUE, District Judge. In September, 1850, the minor son of the libellant left his father's employment in Palmer, Massachusetts, went to New Bedford, and there representing himself as of full age, was shipped by the defendants for a whaling voyage. The vessel sailed soon afterwards, and when last heard from was in the Arctic ocean, in the autumn of 1853, and is believed to have there perished, with all on board. In the spring of 1855, the libellant went to New Bedford and made a settlement with the respondents, the extent of which is in controversy. On the 6th of July, 1860, this suit was commenced, after a few days' previous demand. When a minor is knowingly withdrawn from the service, society and control of his father, the latter may have an action, not only for the value of his services, but damages for the loss of his society, and of the opportunity of directing his education and training. The libellant admits that he has received compensation for the services of his son while on board of the vessel, and he prosecutes this suit to recover damages for the loss; that is, the death of his son; which damages are alleged in the libel to consist in being deprived of the "services, comfort and society" of his child, from the time of his death until his minority would have expired.

Upon this several questions arise:—1st. Can a suit for damages ever be maintained for the death of a child? 2d. If ever, can it be upon the facts of this case? 3d. Was this claim embraced in the settlement made in 1855? 4th. Is it a stale claim, and to be rejected for that reason?

Upon the first question, whether a suit can ever be maintained by a parent for the death of a child by the wrongful act of another, the authorities are not agreed. In Carey v. Berkshire R. Co., 1 Cush. 475, the supreme court of Massachusetts decided against the action, and rested their decision upon the absence of any English authority in favor of such a claim, and upon the opinion of Lord Ellenborough, in Baker v. Bolton, 1 Camp. 493, where he declared that "in a civil court, the death of a human being cannot be complained of as an injury."

By act of 9 & 10 Vict. c. 93, an action is given for the benefit of those who may sustain damage by the death of a person, caused by the wrongful act of another. This shows that parliament were of opinion that there ought to be a remedy in such case, and that none previously existed. The Massachusetts statute of 1840, c. 80 [1 Laws (N. S.) 224], is quite different from the English. It imposes in certain cases, a fine to be recovered by indictment, for the benefit of the representatives of the deceased. In Ford v. Monroe, 20 Wend. 210, damages were recovered by the father of a minor, who had been killed by the negligence of the defendant's servant. But the objection, that no action for the death of a person would lie, was not raised, nor does it appear by the report, that any such question was even adverted to. In James v. Christy, 18 Mo. 162, where a minor was killed on board of a steamboat by a defect in the machinery, a suit for the loss of his services by the administrator of the father, was maintained against the owner of the boat.

The weight of authority in the common law courts seems to be against the action, but natural equity and the general principles of law are in favor of it. It is not controverted that, if a father be wilfully and wrongfully deprived of the services, society and control of his minor son, he may maintain an action against the wrong doer, if the son survive. Why, then, if the same wrong be done by superadding the infliction of the death of the child, should his right of action be lost? By the civil law, and by the laws of France and Scotland, such an action can be maintained. This is admitted in 1 Cush. 480. The common law to some extent, that is, as to deaths occasioned by a felony, was formerly, at least, different. How is this difference to be accounted for? Upon what reasons did it rest? I think it may be legitimately traced to the feudal system and its forfeitures.

The doctrine, that, where death is occasioned by a felonious act, the private wrong is merged in the felony, is often laid down by writers, and has been judicially decided. It is recognized, as if still in force, by Judge Story, in Plummer v. Webb [Case No. 11,233]. But the reason for it has not accompanied its annunciation. It must be found in the law by which all the property of the felon, real and personal, was forfeited to the crown. This left nothing to satisfy the claims of private justice. It would have been idle to maintain an action which could afford no redress.

By the feudal system, all estates were deemed to be held by grant from the king, as paramount lord, upon numerous conditions; the most familiar of which were service and fealty. Felony was a violation of a condition of tenure, and a forfeiture was thereby incurred. The paramount right of the crown took all the property of the felon, and thus absorbed all means of redress, and left the injured vassal, or subject, remediless.

The forfeitures have been abrogated. The

competition between the prerogative of the sovereign and private right, by which the latter was overborne, no longer exists. Why then should not the latter now prevail? The only answer which has been given is, that there is no principle of the common law, by which a person injured by the death of another, can have remedy by suit. To this I am loth to assent. The common law recognizes, and is pervaded by, the great principles of natural justice, one of which is, that for every wrong there should be a remedy. The operation of these principles is often obstructed by the political organization of the state, and this was especially so while the civil polity was feudal. So far as that system has been abolished, the restraint upon private rights, which its existence required, should no longer remain, but the beneficent principles of the common law should spring into free and full action.

When a main portion of an old feudal castle is swept away by the hand of modern improvement, its props and appendages should follow, especially, if the change has rendered them a mere nuisance and deformity. We should regard the unwritten law, as animated by all pervading principles of individual justice,—ready by their own energy to expand into new applications, when artificial restraints or obstructions by public policy are removed. It may thus be made, in a great measure, to meet the wants of a progressive civilization.

The doctrine laid down by Lord Ellenborough, in Baker v. Bolton, 1 Camp. 493, is not limited to cases of felony, but embraces all deaths. How is such extension to be accounted for? It may have arisen from that passion for generalization which has so frequently led judges to lay down broad propositions, extending a rule of law far beyond the foundation on which it rested; or, it may be that, by the ancient common law, no action could be maintained by a father for the infringement of parental rights by the act of another, unless it was accompanied with that intent or wilfulness which, if death ensued, would make the offence manslaughter at least; that is, felony. In such state of the law, if the act had not the ingredient of an intent which might make it felony, then no action could be maintained, even if death did not ensue, and if it had that element, and death ensued, then there was a felony and consequent forfeiture.

As the law is now understood, a father may maintain an action for the violation of his parental rights, if the son survive the injury, although the wrong would not have been a felony, if he had died. Surely there is now no reason why an action for the same act should not be maintained, when to the injury is added the calamity of the death of the son. The question is not one of local law, but of general jurisprudence, and I cannot consider it as settled, that no action can be maintained for the death of a human being. But I am not under the necessity of deciding that question, because there is another objection which is fatal to this suit. It does not appear that the respondent knew that the son was a minor when he was shipped. He was a stranger to the respondent, and offered himself for the service, and was shipped as a person of full age. This libel is for a tort. It is not to recover the value of services received by the respondent, but for the death of the son in a voyage for which he had been wrongfully engaged and sent. Knowledge of the minority seems to be essential to the maintenance of such an action.

In Sherwood v. Hall [Case No. 12,777], it was held by Judge Story, that a master taking a minor on board of a vessel, knowing him to be such, renders the owners liable to the father, not only for the loss of service, but also for extra expenses and losses, the knowledge of the master being constructive notice to the owner. In Plummer v. Webb [Case No. 11,233], Judge Story says, if a minor be "by force or fraud, by abduction or seduction, withdrawn from the power or protection of the father," he is entitled to an action for the tort. In Butterfield v. Ashley, 6 Cush. 250, it is said by the court, enticing away, employing or harboring a servant, entitles the master to an action, but it is a material allegation that the defendant knew that he was the servant of the plaintiff. In Butterfield v. Ashley, 2 Gray, 254, the court say that, if the defendants, "knowing that the said Charles H. was the son and servant of the plaintiff, unlawfully received him, then being such servant, into their service, and harbored, detained and kept him," an action by the father would lie. In all these cases, the court seemed to have considered knowledge of the minority by the defendant, essential to the maintenance of an action, by the father, for a wrong. Such also seems to have been the view of the learned judge in The Platina [Case No. 11,-210].

My decision must be in accordance with the authority of the circuit court of the United States, and the supreme court of Massachusetts, and this suit, therefore, cannot be maintained.

The two remaining objections, viz., the settlement and the lapse of time, I do not think it necessary to consider. I would observe, however, that the evidence leaves it somewhat doubtful, whether the settlement did not embrace all the claims arising out of the shipment of the son, and considering this fact, and the lapse of time, as well as the nature of the claim, the objection of staleness would deserve careful consideration, if the decision turned upon that point. The libel must be dismissed, but considering the hardship of the case, the libellant having received only $100 in the settlement, I shall not subject him to costs. Libel dismissed without costs.

[NOTE. In the case of The Harrisburg, 119 U. S. 206, 7 Sup. Ct. 144, it was settled that a suit in admiralty cannot be maintained in the courts of the United States to recover damages for the death of a human being, independently of statute.]

CUTTS (MASON v.). See Case No. 9,237.

Case No. 3,522.

CUTTS v. UNITED STATES.

[1 Gall. 69.][1]

Circuit Court, D. Massachusetts. May Term, 1812.

DEED—DESTRUCTION OF SEAL.

A deed is not avoided by the seal's being torn off fraudulently or innocently by the obligor, but may be declared on as a subsisting deed.[2]

[Cited in U. S. v. Spalding, Case No. 16,365; Miller v. Stewart, 9 Wheat. (22 U. S.) 717, 718. Distinguished in U. S. v. Williams, Case No. 16,724. Approved in Johnson v. U. S., Id. 7,419; Bottomley v. U. S., Id. 1,688.]

An action of debt was brought in the district court of Maine, to recover the amount of two bonds, given by [Joseph Cutts] the plaintiff in error, to the United States, to secure the payment of duties. The declaration alleged, that the originals were lost, and made profert of copies. To this declaration the paintiff in error pleaded: 1. Non est factum, and 2. payment; upon which pleas, issues to the country were joined. Upon the trial of the cause, a verdict was found for the United States, upon the issue of non est factum; and upon the issue of payment, a verdict was found of non-payment of a part of the sums due by said bonds, and payment of the residue. And for the sums so found unpaid, the court below rendered judgment for the United States; and upon this judgment, and a bill of exceptions, taken and sealed at the trial, the present writ of error was brought. From the bill of exceptions, it appeared, that the plaintiff in error, to support his defence on the first issue, produced the original bonds, which appeared to be cancelled, the name of the plaintiff in error being cut out of each of them. The United States, to prove the same issue, offered evidence to prove, that these bonds had come to the hands of the plaintiff in error wrongfully, and that his name had been cut or torn out, as aforesaid, without the consent or knowledge of the United States, or of any agent by them authorised, and with the consent of the plaintiff in error. This evidence was objected to, and the objection was overruled, and the following facts were proved. That on the 24th or 25th of February, 1809, the plaintiff in error gave to Jeremiah Clark, who was collector of the port of York, where the bonds were executed, and so continued until the 23d of the same February, a negotiable note for the balance then due on said bonds, which note had since that time been endorsed by Clark, and was outstanding in the hands of an endorsee. On the 23d of February, Clark was removed from office, and one Alexander M'Intire appointed in his place, who gave notice thereof to Clark, and was duly sworn into office on the 24th of February, but did not obtain possession of the books and papers of the office until the 27th of February. Some evidence seemed to have been offered, to show that the plaintiff in error had notice of Clark's removal from office at the time of the taking up of the bonds. The judge directed the jury, that if it was proved to their satisfaction, that the plaintiff in error, at the time of his giving said note to Clark, and the cancellation of said bonds, knew that Clark was removed from office, they ought to find a verdict for the United States for the balance due on the bonds at the time said note was given; otherwise, they ought to consider the bonds as fully paid, and legally cancelled. It was argued by the counsel for the plaintiff in error, that the admission of the said evidence and the direction of the court to the jury were wrong, because the seals were actually torn from the bond before the action was commenced, and no recovery can be had on a bond, where an erasure, interlineation or cancellation, has been made, or the seal torn off, before the issue is joined, though it might be otherwise where this happens after issue joined. In support of this position many cases were cited. Mathewson's Case, 5 Coke, 22; Id., Cro. Eliz. 408, 470, 546; Markham v. Gonaston, Id. 626; Pigot's Case, 11 Coke, 27; Whelpdale's Case, 5 Coke, 120; Nichols v. Haywood, Dyer, 59a; Doct. Plac. 259, 262; Smith v. Crooker, 5 Mass. 538.

C. Jackson, for plaintiff in error.

G. Blake, for the United States.

STORY, Circuit Justice, delivered the opinion of the court.

The general rule certainly seems to be, that any material alteration of a bond after its execution, by the obligee (or even, as some authorities assert, by a stranger without his privity), will avoid the bond. Pigot's Case, 11 Coke, 27. See Jackson v. Malin, 15 Johns. 293. Nay, it is said, that an immaterial alteration by the obligee will avoid the bond. Id. But an established exception to this rule is, when the alteration is made by the consent of the obligor himself, after execution, either in pursuance of a previous or a subsequent agreement.[3] But it has been

[1] [Reported by John Gallison, Esq.]

[2] See U. S. v. Spalding, Case No. 16,365; Peters, Dig. 385. See 1 Greenl. Ev. (2d Ed.) § 506, note, where the cases are all collected and ably commented on.

[3] Zouch v. Claye, 2 Lev. 35; Id., 1 Vent. 185; Markham v. Gonaston, Moore, 547, where the previous decision in the same case in Cro. Eliz. 626, to the contrary was overruled. 5 Mass. 538.

supposed, that the like doctrine does not apply to the case of the cancellation or destruction of the seal of the deed, even when done by the fraud or connivance of the obligor himself, without the privity of the obligee, unless it happen after issue joined, as in the cases in Dyer, 59, and Owen, 8, and 5 Coke, 119. If, indeed, a doctrine so unjust be incontrovertibly established, we can only regret it; but we cannot easily be brought to such a result. In Mathewson's Case, 5 Coke, 23, the question was, whether the tearing off a seal of one of the co-contractors in a charter party avoided the deed as to all? Upon the construction of the instrument, the court held that it was a several deed, and therefore good as to all the parties, but him whose seal was torn off. In Whelpdale's Case, Id. 119, the question was, whether, on non est factum pleaded in a suit against one obligor, if it appeared to be a joint obligation, the plaintiff was entitled to recover, and it was adjudged in the affirmative. It is true, in this case, there is a dictum, that "in all cases, where the bond was once his deed, and afterwards before the action brought becomes no deed, either by erasure or addition, or other alteration of the deed, or breaking of the seal," the defendant may safely plead non est factum, and for this is cited Dyer, 59. Now the only point decided in Dyer was, that on such a plea, a tearing off of the seal, after issue joined, would not avoid the deed. As little does Pigot's Case, 11 Coke, 26b, support the position. It was a case of interlineation after execution of the deed, and the question was as to its materiality, and the judgment of the court was for the plaintiff. The case cited in Vin. Abr. Faits. N, a, 2, pl. 17, from 3 Hen. VII. 5, upon examination, decides no more than, that if the seal of the joint obligor be torn off, the other may plead non est factum.

The only remaining authorities which bear in favor of the doctrine, as far as I have been able to discover, are those stated by Rolle in his Abridgment (2 Rolle, Abr. Faits. x. 1-3), and copied from him, by Vin. Abr. (Faits. x. 1-3), and Perk. § 135, and the dictum in Dyer, 59, a, note 12. The positions in Rolle are (1) that if the seal be taken from the deed, it is not any deed. (2) If there be no manner of print remaining, by which it appears that it was ever sealed, this shall avoid the deed. (3) That if the seal be once severed from the deed, and afterwards fixed and sealed to it again, yet the deed is avoided thereby. For the first position he cites 11 Hen. VI. 27. There is nothing to the purpose in that case; but I presume it to be a misprint for 7 Hen. VI. 19b, Id. Brooke, Faits. 27, which fully supports the third position of Rolle. For the second position he cites 14 Hen. IV. 30b, which seems to admit the doctrine, but it was not adjudged. This case however is cited in Brooke, Faits. 22, and put with a quere. As to the dictum in Dyer, "that it is immaterial, what destroyed the seal," it is sufficient that it was the opinion of two justices only, and was not decided by the court. In none of the foregoing authorities does it appear, by whom the seal was defaced; and if done by accident, or by the obligee, or by a stranger, the doctrine may perhaps, on the ancient reasoning, be supported. There is not in them a scintilla juris to support the presumption, that it was applied to an abrasion by the obligor himself.

Now, we shall find, that the case of a destruction of the seal by the obligor himself is expressly excepted from the generality of the foregoing rule in a variety of authorities. In Shep. Touch. p. 69 (a work of great authority), it is said, that if the seal be broken off, "be the same by whatsoever or whomsoever, unless it be by him and his means, that is bound by the deed," the deed is become void. The same doctrine is stated in Shep. Epitome, Deed 405 (a book approved by the late Mr. Justice Buller). 7 East, 312, note. The same seems supported in Beckrow's Case, Het. 138, and was recognised as law in a case cited in Moor v. Salter, 3 Bulst. 79. 13 Vin. Abr. Faits. x. 1, 8. I consider it also fortified by the second resolution in Pigot's Case, 11 Coke, 27, where the word "obligee" is evidently a misprint for "obligor," as will appear from the report of the same case, by Moore, 835. See, also, Bro. Oblig. 83, and Fitz. Debt, 84. In Bayly v. Garford, March, 125, 127, the court said, there was no difference between the razure and interlineation of a deed and the breaking off of the seal. And if so, then the cases, as to interlineations, directly apply to the case of breaking off of the seal. The case of Read v. Brookman, 3 Term R. 151, I cannot but consider as founded on the same doctrine. For it would be difficult to contend, that a party might by pleading a loss of the whole deed by accident, as by fire, recover; and yet he could not recover if a part only were burnt, or that if burnt by accident he might recover, but not if burnt wilfully by the obligor himself. Nor is the argument correct, that this case is not an authority, because it was on a release, which had already had its full effect. The cases cited in the note 3 Term R. 153a, show that the same manner of pleading without a profert is allowed, as to all instruments when lost by time or accident, when destroyed by the party bound by them, or when wrongfully withheld in the possession of such party.

On the whole, I consider the principle of law well established, that the obligor shall never take advantage of his own wrong, and that his own deed fraudulently or innocently destroyed by himself, without payment, does not thereby lose its legal obligation. And the principle still more strongly applies to cases where there are sureties, because, in such a case, the remedy by special action against the original wrong doer would oftentimes prove wholly inefficacious.

Now, if this doctrine be true, the charge of the district judge was undoubtedly correct. By the removal of Clark from office all his official authority ceased, and as an agent of the United States he was functus officio. Sthreshley v. U. S., 4 Cranch [8 U. S.] 169. When, therefore, the plaintiff in error settled with Clark and took up the bonds, the cancellation was either done by himself, or by Clark with his consent. If at this time he knew of Clark's removal, he knew also that the settlement was without authority, and a wrong to the United States. It was an unjust attempt to get possession of papers, which Clark had no authority to deliver, nor the plaintiff in error a right to withhold. Equity therefore, as well as law, in such a case requires, that he should not reap the fruits of a contrivance to defeat the just claims of the United States. The district judge concurs in this opinion, and, therefore, let the judgment be affirmed. We give no opinion, in this case, what would be the effect of any alteration by a stranger. Vide 4 Term R. 320; 6 East, 309, 311.

CUTTS (UNITED STATES v.). See Case No. 14,912.

CUYAHOGA CO. (PALMER v.). See Case No. 10,688.

Case No. 3,523.

CUYLER v. FERRILL.

[1 Abb. (U. S.) 169; 1 Am. Law T. Rep. U. S. Cts. 97; 8 Int. Rev. Rec. 194; 8 Am. Law Reg. (N. S.) 100; 1 Chi. Leg. News, 153; 3 Am. Law Rev. 375; 25 Leg. Int. 412; 1 Leg. Gaz. 148.] [1]

Circuit Court, S. D. Georgia. Oct. Term, 1867.

PAYMENT IN CONFEDERATE NOTES—JURISDICTION—BONA FIDE PURCHASERS.

1. The definition of a vested remainder given in Doe v. Considine, 6 Wall. [73 U. S.] 458,—viz.: "a vested remainder is where a present interest passes to a certain and definite person, but to be enjoyed in future,"— approved and applied.

2. A payment of purchase money made in "Confederate notes," although made while the Civil War of 1861–65 was still pending, and in one of the so-called Confederate States, where such notes were then the usual currency, and although the notes were accepted as money, can not constitute the party making the payment a bona fide purchaser for value, so as to entitle him to equitable protection or relief in the circuit court.

[Explained in Bailey v. Milner, Case No. 740.]

3. Where a purchaser has notice of the facts upon which an adverse claim depends, he is deemed to have notice of the consequences of those facts.

[Cited in Van Epps v. Walsh, Case No. 16,-850.]

4. The courts of the United States will take judicial notice of the existence of the Civil War of 1861–65; and of the facts of public history connected with its origin and progress.

5. During the Civil War of 1861–65, some of the devisees of lands lying in Georgia, commenced proceedings for a partition of the lands, in one of the courts of Georgia. A partition was ordered and a sale made. At the time when the proceedings were pending one of the devisees was in the discharge of his duties as a surgeon in the United States army; and was prevented from communication with the state of Georgia, by the war. *Held*, that the proceedings of the Georgia court were void, as against such devisee, for want of jurisdiction.

[Cited in Kanawha Coal Co. v. Kanawha & O. Coal Co., Case No. 7,606; French v. Tumlin, Id. 5,104.]

6. The rule asserted by some authorities, that a bill in equity for partition should be dismissed where the title is denied, or an adverse possession asserted, and the parties left to establish their rights at law,—questioned.

[Cited in Weston v. Stoddard, 137 N. Y. 126, 33 N. E. 62.]

Hearing in equity, upon pleadings and proofs.

Fitch & Pope, for complainant.

Dougherty & Lloyd, for defendants.

ERSKINE, District Judge. John M. Cuyler, a citizen of the state of Pennsylvania, filed his bill in chancery in this court, for partition and relief, against D. M. Hood, and Frances, his wife; Joel Branham, and Georgia C., his wife; Estelle Cuyler, a minor, all citizens of Georgia, and residents of the northern district; and John C. Ferrill, of the city of Savannah, and a citizen of the state of Georgia. The bill was demurred to; because it was not alleged that any one of the defendants resides in the southern district, and because the forty-first rule of practice was not complied with. The demurrer was argued and overruled.

The cause of complaint finds its origin in the following provision in the will of Jeremiah Cuyler, deceased, made in 1837: "I give and bequeath my two lots and buildings in Savannah, fronting on Broughton and Bull-streets, to my four daughters" (naming them) "for and during their natural lives, and thereafter I give said two lots to my sons, John M. Cuyler and Teleman Cuyler, their heirs and assigns."

Complainant alleges that the life estate ceased in March, 1863, by the death of the last surviving daughter, and that the property, by the terms of the will, vested, in fee, in John M. Cuyler, and in the heirs of his brother Teleman, in undivided halves; Teleman having died, intestate, anterior to the termination of the life estate. He left a widow, Frances, who intermarried with defendant Hood, and left also three children—Thomas, who resides in Alabama; Georgia C., who had intermarried with defendant Branham, and Estelle, a minor.

Complainant also alleges that he has been informed that sometime during the late Civil War, and when all communication was interrupted, and when he was in the discharge of his duties as surgeon in the army of the United States, some of said parties applied

[1] [Reported by Benjamin Vaughan Abbott, Esq., and here reprinted by permission. 3 Am. Law Rev. 375, contains only a partial report.]

for a partition of said property, and under proceedings of which he knew nothing, to which he was not a party, and of which, at the time of filing the bill, he had no definite information, the said property was sold and purchased by John C. Ferrill, aforesaid, who, as he has been informed, paid for the same in notes issued by the late Confederate government. He charges that if such proceedings were had, they were not binding on him; and if intended to affect his rights, they were a fraud upon the same, and unlawful. He prays for a commission to divide and allot the property, so that he may hold a moiety thereof in severalty, and for an account of the rents, income, and profits from the death of the last surviving daughter, on the —— day of March, 1863.

Branham and wife, and Estelle Cuyler, by Hood, as her prochein ami, in answering the bill, admit, in general terms, the allegations therein. They further state that, soon after the vesting of the fee in complainant and the heirs of Teleman, Hood and his wife released to the remaining heirs all their interest in the property, "after which said property was held by such heirs and the complainant." That Brenham, as trustee under a marriage settlement with his wife Georgia C., "applied to the superior court of Chatham county, for partition and sale of said property;" a sale being necessary, because of the impracticability of dividing it by metes and bounds. That on May 16, 1863, the Hon. W. B. Fleming, judge, &c., granted the prayer of the petitioners, appointed commissioners to conduct the sale; and the property, after being advertised in two newspapers in the city of Savannah for thirty days, was sold under the direction of the commissioners, at public outcry, on the first Tuesday in July, 1863, to John C. Ferrill, for thirty-six thousand dollars; to whom, on August 14 of the same year, they made a deed of conveyance of the entire property. They admit that they severally received their distributive shares of the proceeds of the sale in treasury notes of the Confederate States, and believe that the whole of the purchase money was paid by Ferrill to the commissioners in the same kind of currency; and at that time such was the currency of that part of the country. They add that they acted in perfect good faith, and are content so far as their interest is concerned, to stand by such proceedings, and abide by the results.

On June 1, 1864, the commissioners made a return to the court, of their acts and doings in the premises; which may be stated thus: twelve hundred and forty-three dollars and thirty cents for expenses; five thousand eight hundred and seven dollars and eighty-three cents paid to Branham as trustee; the same sum to John R. Freeman, guardian of Thomas H. Cuyler; and the like sum to Ross, guardian of Estelle Cuyler; leaving seventeen thousand three hundred and thirty-three dollars and one cent, "which," they add, "under the will of the said Jeremiah Cuyler, is devised to Dr. John M. Cuyler, a surgeon in the army of the United States. Of this amount these commissioners, under the exigencies of the currency act of the Confederate States, have invested seventeen thousand dollars in five per cent. certificates, and have on hand thirty-three dollars and one cent, currency of the Confederate States, issued prior to February 17, 1864." This return is included in the record of the proceedings for partition, all of which is made a part of the answer of these defendants.

John C. Ferrill in his answer admits the relationship of the complainant to the testator, but avers that he knows nothing of the will, the devises therein, or the probate thereof, or of the enjoyment of the property by the daughters of the testator, or of the vesting of the same in complainant and the heirs of Teleman; or of the residence of Thomas M. Cuyler; and prays strict proof. He substantially, but briefly, states the proceedings for partition; admits the sale of the property and its purchase by himself in 1863, and payment of the purchase money (thirty-six thousand dollars) in a check on the Bank of Commerce, and the receipt of the deed of conveyance from the commissioners. He avers that he believes that complainant was, at the time of the sale, a surgeon in the United States army; but knows not whether he was ignorant of the proceedings, and requires strict proof. He utterly denies any fraud on the rights of complainant in the sale and purchase of the lots aforesaid, "and insists that as a fair and bona fide purchaser for a valuable consideration he hath a full title to said lots of land in fee simple, and that partition cannot be decreed by this court." To these several answers complainant filed his replications.

Before inquiring into the merits of this cause, it may be well to advert to the deed of conveyance of August 14, 1863. The commissioners briefly set forth the proceedings for partition. Then comes this recital: "And whereas the said John M. Cuyler, being resident of the United States of America, the country of an alien enemy, has failed to execute a title to the said John C. Ferrill, the purchaser as aforesaid, and it hath become by law the duty of the aforesaid commissioners, or any two of them, to make and execute to the purchaser at such sale a deed of conveyance of said lots of land," &c. This is followed by a deed of bargain and sale to John C. Ferrill in fee, executed by the three commissioners. George W. Wylly, one of the commissioners, testifies that Ferrill paid for the property in "Confederate notes;" does not know whether he ever got possession of the property further than the delivery of the deed to him; and that it is generally known as Ferrill's property. As already seen by the condensed view presented of the record in this cause, the premises sought to be par-

titioned were devised by Jeremiah Cuyler to his four daughters for life, remainder to his sons, John M. and Teleman, in fee. This devise, on the death of the testator, gave the sons a present fixed interest in the property as tenants in common; and on the falling in of the last of the precedent life estates, in March, 1863, the seizin and implied actual possession and immediate enjoyment of the property was cast upon John M. and the heirs of Teleman, in undivided moieties.

Said Mr. Justice Swayne, in pronouncing the decision of the supreme court of the United States in Doe v. Considine, 6 Wall. [73 U. S.] 458: "A vested remainder is where a present interest passes to a certain and definite person, but to be enjoyed in futuro." Guided by this comprehensive definition, it is plain that the devise in the will of Jeremiah Cuyler is a vested and not a contingent remainder; and that the undivided half of the devised property is still in the complainant, unless he has disposed of it by alienation, or has been dispossessed of his title to and in it by the decree or judgment of a court having jurisdiction of the subject-matter and the rights of complainant.

The proceedings relied upon by the contesting defendant, Ferrill, in bar of the present suit for partition, were had, as it seems, under the Code of Georgia (sections 3896 to 3907, inclusive). These sections provide, among other things here unnecessary to mention, that if the party called upon to answer the application for partition be absent from the state, or has not been notified, he must, within twelve months after the rendition of the judgment, move the court to set it aside, or he will be concluded. "But in no event shall subsequent proceedings affect the title of a bona fide purchaser under a sale ordered by the court." Code, § 3907.

The property, as already noted, was sold in the summer of 1863, and the bill was filed in this court in the winter of 1867, nearly four years thereafter. But from the view which I entertain of this suit, the statute of limitations invoked is not a point for decision. Among other defenses, Ferrill assumed the position that if there was any irregularity in the proceedings of 1863, complainant must address himself to the superior court of Chatham county, that court alone having jurisdiction of the matter under the statutes of Georgia. And that view must be deemed correct unless there be circumstances—circumstances peculiar to the alleged proceedings for the partition—which contravene some governing principle or policy of the common or positive law.

Another position taken by him was that he is a fair and bona fide purchaser for value of the entire property, at a judicial sale, and, therefore, that no partition can be made by this court. If this argument is sound, then the complainant must go elsewhere to seek redress; for this court has no jurisdiction except what is bestowed by the national constitution, and the laws of congress enacted in pursuance thereof. This defense appears to be founded upon the concluding sentence of section 3907 of the Code, but the defense is not, in my judgment, proved by the evidence. To entitle Ferrill to the benefit of it (supposing the proceedings and sale to have been legal), the purchase money—the thirty-six thousand dollars—must have been paid in money; whereas the proof is that it was paid in "Confederate notes." Boone v. Childs, 10 Pet. [35 U. S.] 177.

Here it may be observed that it was fully discussed at the hearing whether the defense of bona fide purchaser can avail against a legal title; but the question seems not to be material to the determination of this cause.

If Ferrill is to be treated as a purchaser, it must be in a very limited sense of the term; he cannot be recognized as a purchaser who has paid, but as one still indebted; as, for example, a defendant in fieri facias would be, after payment to the marshal in a worthless or depreciated currency. Griffin v. Thompson, 2 How. [43 U. S.] 244; Buckhannon v. Tinnin, Id. 258. See, also [Gantly v. Ewing] 3 How. [44 U. S.] 707. Therefore, if the court could abstain from making partition, it would do so on terms, and these terms will necessarily be that Ferrill, as purchaser, pay to complainant his share, being one-half of the purchase money, in legal tender notes, with interest. And even if the court should ultimately so decree, it would not go so far as to accept such performance in lieu of partition, until after a return of the commissioners of this court, and not then, unless by mutual consent of the parties; or, as the last resort, in case equity cannot otherwise be done.

Notwithstanding the contentment of those defendants who received and accepted payment of their respective shares in Confederate currency or notes from their co-defendant Ferrill, under the authority and direction of their freely chosen agent, still my mind fails to comprehend the process of reasoning by which it can be inferred, from such receipt and acceptance, that the rights of the complainant in this bill are in any wise affected, unless he was a party to the transaction, or the tribunal which rendered the judgment had judicial cognizance of the cause.

This court, in Williamson v. Richardson [Case No. 17,754], April term, 1867, and the United States district court for the northern district of Georgia, in Dean v. Harvey [Id. 3,708], Administrator of Youal, in chancery, July, 1867, and the same court in Bailey v. Milner [Id. 740], ruled, that where parties, inhabitants of this state, had, during the Rebellion, sold or otherwise disposed of their property for Confederate notes, and accepted them in payment or exchange for it—where such transaction was fully executed, and free from fraud, covin, misrepresentation, and undue influence—the United States courts for

the state of Georgia would not, unless otherwise instructed by the supreme court of the nation, lend their aid to disturb or to set aside those acts, but would suffer them to remain entombed, and would leave also the parties to repose where they had voluntarily placed themselves. Toler v. Armstrong [Id. 14,078]; Planché v. Fletcher, 1 Doug. 251; Boucher v. Lawson, Cas. t. Hardw. (Lond. Ed.) 85, 89, 184. The owner of property may dispose of it for what he pleases, or even give it away. But this court can not recognize Confederate notes, or as they are more commonly called, "Confederate treasury notes," as money or other thing of value. And in Bailey v. Milner, supra, it was said by the court that these notes were issued by a pretended government, organized in the name of certain states by subjects and citizens of the United States, and who, at the very time, were in rebellion against their rightful government, and whose object and design it was to dismember and destroy it. See, also, Prize Cases, 2 Black [67 U. S.] 635; Shortridge v. Macon [Case No. 12,812].

Ferrill has made the record of proceedings of 1863, and also the deed of conveyance, a part of his answer; and having adopted this mode of defense, he is bound by it, for he cannot contradict that which he has pleaded as a record, nor gainsay the conveyance or the recitals therein; and each shows that he had notice of the claim of complainant to a moiety of the property. Bowman v. Taylor, Scott, 210; Van Rensselaer v. Kearney, 11 How. [52 U. S.] 297; Brush v. Ware, 15 Pet. [40 U. S.] 93. Where a party has knowledge of the facts, he has notice of the legal consequence resulting from those facts.

In the argument in behalf of Ferrill it was said by one of his counsel, Mr. Dougherty,—and I quote from his brief,—that "the superior court of Chatham county had jurisdiction of the subject matter, and of the parties in interest, and its judgment, although (even if) erroneous, cannot be attacked collaterally." Citing and commenting on Griffith v. Frazier, 8 Cranch [12 U. S.] 9; 1 Pick. 439; 2 Burrows, 1009; 2 H. Bl. 415; 1 Kelly, 487; 23 Ga. 186.

If the tribunal which entertained the proceedings for partition really possessed the powers ascribed to it by counsel, then the authorities quoted are apposite, and the judgment cannot be assailed collaterally. But if it had not such jurisdiction, then the judgment, so far, at least, as the rights of the complainant are involved (for I am not called on to notice any jurisdictional question which might, under other circumstances, affect those who applied for partition in 1863), is null and void. And here the inquiry necessarily arises, Had this court jurisdiction of the subject matter of the judgment?

The national legal tribunals take judicial notice of the general enactments of congress, and of the duly promulgated proclamations of the president. The late Civil War being matter of public history,—a fact impressed upon the whole country,—is likewise judicially known to the courts; and from this general historical fact they will also take judicial notice of particular acts which led to it, or happened during its continuance, whenever it becomes essential to the ends of justice to do so. On April 19, 1861, proclamation of blockade was made by the president. This of itself was conclusive evidence that a state of war existed. Prize Cases, 2 Black [67 U. S.] 635. Congress, on July 13, in the same year, passed a law authorizing the president to interdict all trade and intercourse between the citizens of the states in rebellion and the rest of the United States. On August 16 following, he proclaimed the inhabitants of the revolted states, including Georgia, in insurrection; excepting, however, certain named localities. And on April 2, 1863, he proclaimed them in insurrection, revoking the previous exceptions, but again making others. No part of Georgia fell within any of the exceptions. Congress, by a joint resolution, on February 8, 1865, declared that the inhabitants and local authorities of Georgia and ten other states "rebelled against the government of the United States, and were in such condition on November 8, 1864." 12 Stat. 1262, 257; 13 Stat. 731, 567.

In Bailey v. Milner, supra, the court said: "During the latter part of the year 1860 and the early part of 1861, South Carolina, Georgia, Louisiana, Virginia, and other states, by similar modes called on the people to send delegates to meet in convention. Accordingly the conventions assembled, and each passed an 'ordinance of secession,' as it is generally termed, by which ceremony these conventions severally adventured to withdraw the states from the Federal Union, and to release the people from their subjection to the laws of the land and their allegiance to the nation. The constitutional state governments were overthrown, and superseded by spurious and revolutionary governments. The setting up of a pretended central or general government, styled 'The Confederate States of America,' followed, and soon thereafter open rebellion and war of portentous magnitude burst upon the nation." Prize Cases; Shortridge v. Macon, supra.

"In the seceded states (so-called), the sovereign authority being, for the time, displaced, consequently there ceased to be, within any of them, a government under the constitution of the United States." Vide 1 Bish. Cr. Law (3d Ed.) § 129, and Mauran v. Insurance Co., 6 Wall. [73 U. S.] 1.

In 1863 and 1864, the complainant was in the discharge of his duties as a surgeon in the national army; and whether he had knowledge of the pendency of the alleged proceedings for partition is a matter quite immaterial. He, however, in his bill, avers that he knew nothing of them; but admits that he had some indefinite information that the property was sold, and was purchased by

John C. Ferrill, and was paid for in Confederate notes. But suppose notice—actual or constructive—came to him; still he could not be charged with laches, for, had he responded, it would have been ipso facto a breach of his allegiance to the United States. Hanger v. Abbott, 6 Wall. [73 U. S.] *532. And in that case Mr. Justice Clifford, in giving the opinion of the court, said: "War, when duly declared, or recognized as such by the war-making power, imports a prohibition to the subjects or citizens, of all commercial intercourse and correspondence with citizens or persons domiciled in the enemy's country."

In a subsequent part of the same opinion, that eminent judge—while remarking on the temporary cessation of common law and statutory limitations during war—used the following language: "But the exception set up in this case stands upon much more solid reasons, as the right to sue was suspended by the acts of the government, for which all the citizens are responsible. Unless the rule be so, then the citizens of a state may pay their debts by entering into an insurrection or rebellion against the government of the Union, if they are able to close the courts and to successfully resist the laws, until the bar of the statute of limitations becomes complete, which cannot for a moment be admitted."

The last quotation forcibly illustrates the maxim, that no one ought to be allowed to take advantage of his own wrong; a maxim applicable to the case now before this court; not so much, however, in a positive as in a circumstantial sense; yet falling within the principle that no one shall entitle himself to enforce a defense by reason of acts adopted or acquiesced in by him, after full knowledge of their nature and legal ulterior consequences.

If Mr. Ferrill were a bona fide purchaser, who purchased and paid his money for the property, confiding in the judgment of a tribunal of competent jurisdiction, then this court would decline to take cognizance of this suit—notwithstanding irregularities in the original proceedings—if the tribunal which assumed to entertain them had jurisdiction of the subject matter and of the rights of the complainant in this bill.

But my conclusion is, that the proceedings for partition, by the pretended superior court of Chatham county, in 1863 and 1864, so far as the rights of the complainant are concerned, were utterly void. And the court decrees accordingly. In this cause the complainant is endeavoring to establish his legal title to a moiety of the property, and in doing so he has not in his bill charged the defendants with any fraudulent intent upon his rights.

The main question being adjudged adversely to John C. Ferrill, still it seems to be necessary to notice another matter which was pressed with great earnestness. It was said on the part of Ferrill that adverse possession is a bar to a proceeding for partition, both in equity and at law. "If," said the counsel, "the bill states an adverse possession, it should be dismissed without prejudice." Citing 2 Barb. Ch. 398; 3 Barb. Ch. 608; 4 Barb. Ch. 493; 5 Barb. Ch. 51; 9 Barb. Ch. 516; Hoff. 560; 1 Johns. Ch. 111; 9 Cow. 516, 573; and Rich. Eq. 84. These authorities uphold the doctrine contended for.

In addition to those authorities, counsel also relied on the case of Bishop of Ely v. Kenrick, Bunb. 322. There the bill for partition was dismissed, because the title was denied. Without questioning the law of that decision, it must be deemed somewhat novel; for by it every defendant in a suit for partition, who chooses to deny title, holds the complainant at his mercy.

Courts, as eminent for their decisions as those referred to in argument, have of late progressed beyond this ancient technical rule of chancery practice. In Howey v. Goings, 13 Ill. 95, Mr. Justice Trumbull, in delivering the opinion of the supreme court of the state of Illinois, said: "There can be no doubt, however, that a bill in chancery lies for partition, notwithstanding an adverse possession, unless it has been continued sufficiently long to bar a recovery under the statute of limitations, which is not pretended in this case." He cites Overton v. Woolfolk, 6 Dana, 374. I carefully looked into the bill in the present case, and found no allegation of adverse possession, nor is it set up in the answer or proved by the evidence.

It is said that in a bill for partition the averment of possession is not sufficient; there must be an averment of title. 2 Atk. 882; Amb. 236. And the reason of this rule is plain; for it is upon the title that courts of equity act in decreeing partition; and to render the title of each party complete, they compel the parties, when the several portions are allotted, to execute conveyances according to the partition; and the execution of these titles draws to them the possession. If there is no relaxation of the rule which obtained in the English chancery and in the chancery courts of several of the older states of the Union, then where a bill is filed for partition, and an adverse possession is interposed, or where the legal title is disputed, or suspicious circumstances darken it, it is usual for the court to make a decretal order arresting the proceedings until the parties disputant settle the title in a court of law. 1 Ves. & B. 552; 3 Johns. Ch. 303; 4 Johns. Ch. 276. But in some of the states, owing in part, at least, to the peculiar manner in which the tribunals of justice are there constituted, by the blending of the offices of chancellor and common law judge in the same person, the rigid chancery doctrine has been greatly modified. In Georgia, for example, these offices, distinguishable in some degree in a judicial sense, are exercised by the same person. And such, indeed, is likewise the case in this court. See act of September 24, 1789, § 11 (1 Stat. 78). The su-

preme court of the United States, in Parker v. Kane, 22 How. [63 U. S.] 1, speaking of chancery practice in suits for partition, said: "In Great Britain, a chancellor might have considered this a case in which to take the opinion of a court of law, or to stay proceedings in the partition and cross suits until an action at law had been tried to determine the legal title. Rochester v. Lee, 1 MacN. & G. 467; Clapp v. Bromagham, 9 Cow. 530. But such a proceeding could not be expected in a state where the powers of courts of law and equity are exercised by the same persons." But in my opinion this case has not thus far presented any question of fact upon which an issue could be framed for the determination of a jury. The evidence in the cause is unassailed, uncontradicted, and in no way conflicting. John C. Ferrill, the contesting defendant, stands upon the record of the proceedings of 1863 and 1864; and if it be tried it must be by inspection, and this is the province of the court. Indeed, the most that can be said against complainant's title is that it is not free from doubt; but all the doubt there is concerning it is raised by the sale under a pretended judgment of partition; and the validity of that sale depends upon the validity of the judgment.

It is a principle governing all courts of judicature that a judgment of a tribunal which has no jurisdiction of the parties and subject matter is absolutely void, and must be so treated when the record is offered in evidence or used for any other purpose. Buchanan v. Rucker, 9 East, 192; Borden v. Fitch, 15 Johns. 121; Newdigate v. Davy, 1 Ld. Raym. 742. In the case of Newdigate v. Davy, Sir Richard Newdigate gave a donation to Davy, and afterwards removed him and put in S. Davy, in the time of James II., cited Newdigate before the high commissioners, who restored Davy, and made Newdigate pay to him all the arrears he had received. After the revolution of 1688, Newdigate brought indebitatus assumpsit against Davy for money as paid to his use. The court gave judgment for the plaintiff, because it was money paid in pursuance of a void authority.

There must be a decree to the following effect: Decree: This cause came on to be heard at this term of the court, and was argued by counsel, and thereupon, upon consideration thereof, it is ordered, adjudged, and decreed as follows: First. That partition be made of the premises in the bill of complaint described, so that one moiety thereof shall belong to the complainant in severalty, and be to him delivered for his several possession and enjoyment forever. Second. That William R. Boggs, A. R. Wilson, and A. S. Hartridge, Esquires, be appointed commissioners to make such partition in terms of the law, and report their action to the next term of this court; and if the said commissioners should find it impracticable to divide the said premises into two equal moieties, so that one of the same may be assigned to the complainant, then they shall report that fact to the court, and abstain from further action until further order. Third. That Edward J. Harden, Esquire, a counselor of this court, is hereby appointed a master in chancery pro hac vice, in this case to take account between the complainant, John M. Cuyler, and the defendant John C. Ferrill, of all rents and profits (if any) that may be due from the latter to the former, whether by reason of the actual receipt and collection of rents and profits issuing out of said premises, or by reason of the occupation of said premises by said defendant himself; charging said defendant with one moiety of the whole, and giving him credit for one moiety of the actual and necessary expenses incurred and paid by him touching said premises.

Case No. 3,524.

The C. VANDERBILT.

[10 Ben. 607.][1]

District Court, E. D. New York. Oct. Term, 1879.

COLLISION IN NORTH RIVER—TUG AND TOW—CONFLICT OF EVIDENCE.

Where a canal-boat, in a tow coming down the North river, was sunk and the insurance company who paid the loss libelled the steamboat towing the canal-boats and a tug which was helping her, and the owner of the cargo on board the sunken boat also libelled them, both claiming that the sinking was in consequence of a collision between the sunken boat and another boat in the tow, by the fault of the steamboats, *held*, that the only question was whether there was any collision at all, and the conflict of evidence being too great to warrant a finding in favor of the libellants, the libels must be dismissed with costs.

John McDonald, for libellants.

C. & A. Van Santvoord, for claimants.

BENEDICT, District Judge. These two actions are brought to recover for the loss of the canal-boat Willie of Greene, and her cargo of coal, a vessel that sank near Yonkers on the North river while in the tow of the steamboat C. Vanderbilt. The canal-boat was insured in the Mercantile Mutual Insurance Company, and that company, having paid the loss, now brings the first of the above actions. The second action is brought by the owner of the cargo of coal lost with the boat. The allegation of the libellants is, that the cause of the sinking of the Willie was an injury by a collision with the canal-boat Knickerbocker while the Willie was in a tow being made up for the C. Vanderbilt, and the Knickerbocker was being placed in that tow by the tug A. B. Preston, then employed by the owners of the C. Vanderbilt as a helper to assist in making up the tow. The case differs from most collision cases in that the disputed question is not how the collision

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

occurred, but whether there was any collision at all.

In behalf of the libellants there are four witnesses, neither of whom has any pecuniary interest in the suit, each of whom was in a position to know what occurred at the time the Knickerbocker was placed in the tow by the Preston, and each of whom testifies that on that occasion a collision did occur between the Willie of Greene and the Knickerbocker. In behalf of the claimants the captain and part-owner of the Preston, who was on board and in command of the Preston at the time—the deck hand of the Preston, also on board at the time—the collector of the Schuyler line, and a passenger, both of whom were on the Preston at the time of the alleged collision, and the mate of the Vanderbilt, all being in a position to know if a collision had occurred, deny that the Knickerbocker was in contact with the Willie on the occasion referred to. There are, besides, several witnesses from other boats in the tow, more or less favorably situated to know what occurred, who also deny having seen or heard of any collision at the time when the Knickerbocker was brought to the tow by the Preston.

As between these two opposing forces it might perhaps be said that the weight of evidence is with the libellants, inasmuch as none of the libellants' witnesses have any interest in the suit, nor, so far as can be discovered, any motive to fabricate the collision described by them, while one of the witnesses upon the other side is directly interested in the result, and three others likely to be biased in favor of the claimant; moreover, all the evidence of the claimant is to a certain extent negative, while the libellants' witnesses speak affirmatively in regard to an occurrence that, as they say, took place in their presence. If, therefore, I was forced to decide this case upon the testimony as to what occurred at the making up of the tow, I should be inclined to say that the libellants could properly claim to have the weight of the evidence.

But in addition to the testimony in regard to the collision itself, there is evidence in regard to what occurred at the time when the Willie went down and also in regard to the pumping on board of her, and the efforts to call the attention of those on the Vanderbilt to the condition of the Willie after the tow had started. The testimony given by the captain of the Willie in this branch of the case is disputed in several particulars by witnesses who have no interest in the suit, and a state of facts is shown calculated to create a suspicion that the master of the Willie was not unwilling that his boat should sink. The testimony in regard to what occurred after the alleged collision tends, therefore, to discredit the statement of the master in regard to what occurred when the tow was made up, and leaves the case in such doubt that I am unable to say that I am satisfied to hold that the sinking of the boat was occasioned by injuries received by her from a collision with the Knickerbocker while the tow was being made up. The libels must therefore be dismissed and with costs.

C. W. COCHRANE, The (HAYDEN v.). See Case No. 6,258.

Case No. 3,525.

The C. W. RING.

[2 Hughes (1877) 99; 2 Am. Law Rev. 259.][1]

District Court, D. South Carolina.

SALVAGE—DISTRIBUTION.

A brig loaded with 600 bales of cotton, which had lost her anchors and masts in a storm at sea, and was sailing in distress near a lee shore with a jury-mast under a foretop-staysail, hailed a large steamer for a tow, and was taken into port in seven hours, the storm having abated and weather growing calmer during the tow. The steamer was worth $140,000, her cargo was worth $250,000, and her engines $25,000. On a libel for salvage, *held*, that out of the salvage-money decreed, the owners of the steamer should receive three-fifths, and the master, officers, and crew two-fifths.

[Cited in The Pomona, 37 Fed. 816.]

In admiralty. Distribution between owners and crew of the salving steamer, the Alhambra.

Before the Honorable George S. Bryan, district judge for the district of South Carolina, sitting as referee before the organization of the district court.

BRYAN, District Judge. The question to be determined in this case is the distribution of the sum allowed for salvage between the owner of the salving ship, the Alhambra, and the salvors proper, the captain and officers and crew of the Alhambra. The decision of this question is referred to the undersigned by an order of Brevet Major General Devens (the basis of these proceedings), of March 2d, 1866, which orders that the sum of twenty thousand dollars, first proceeds of sale of certain portions of the cargo of the brig C. W. Ring, be deposited in the First National Bank of this city, or with such other depository as the parties interested may select, as the salvage of the said brig C. W. Ring and cargo, subject to the orders of the general commanding the district, or his superior, and "to be paid into the registry of the district court of South Carolina, as a court of admiralty, when such court shall be organized, to be by it distributed to the claimants, or, if the parties interested shall agree upon an arbitrator to settle conflicting claims before such court is established, such fund then, upon the order of the major general commanding as aforesaid, to be paid over to said arbitrator, or upon his award." As such referee, authorized by this order, and agreed upon by said parties in a paper, also of the proceedings in this case of date 21st

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

of March, A. D. 1866, signed by John C. Shaw for Oliver P. Hazard and others of the crew, and by William Alston Pringle for the owners of the Alhambra, I proceed to the consideration of the question involved.

The facts which give character to this case are few and undisputed. The salved brig, C. W. Ring, from Galveston, Texas, with six hundred and twenty bales of cotton, James McLean master, in the month of October last was overtaken by violent gales, in which to save her, her masts had to be cut down, and coming to anchor she lost both of her anchors, and was thus reduced to a very helpless condition. In this condition a jury-mast was erected, to which a foretop-staysail was bent. It was concluded to make the nearest port that could be reached, and on the morning of Tuesday, the 31st day of October, at 10 a. m., she spoke the steamer Alhambra, from New York, bound to Charleston, while in her course, which took the brig in tow and brought her to the port of Charleston, where they arrived the same day at 5 p. m., and the brig was made fast to the wharf. The brig was twenty-two miles from the bar when met by the Alhambra. The facts which occurred when the Alhambra took the Ring in tow were these: The Ring signalled the Alhambra, and the Alhambra ran down to her. The captain of the Ring asked the captain of the Alhambra where she was bound for. Answered, for Charleston. The captain of the Ring then asked for a tow to Charleston. Captain Benson, of the Alhambra, then consulted Captain Edward S. Davenport, the pilot then in command of the Alhambra, whether it would be advisable to do so, if he could get the Alhambra in time to the bar. To which he answered he could. A hawser was then passed from the Alhambra to the Ring, and a hawser also from the Ring to the Alhambra. The hawsers were passed by a line from one vessel to the other. No boat was lowered, and none of the crew of the Alhambra went aboard the brig. The Alhambra was not delayed at all. The weather was fine, a little swell in the morning, but calm and growing calmer in the evening. It was proved by very reliable witnesses that the Alhambra, the salving ship (a steamer), was worth from one hundred and forty to one hundred and fifty thousand dollars, and her cargo from two hundred and fifty to three hundred and fifty thousand dollars, and, by the testimony of highly accomplished engineers, one of them of the greatest authority, that her engine of 340 horse-power was worth from twenty to thirty thousand dollars ($20,000 to $30,000). It was also in evidence that steamers cost three times as much to run them as sailing vessels. It will have been seen, also, from the condition of the Ring, that, though not in actual peril, she was in an exposed position, and from her helplessness in case of a gale from the east, would have been subjected to all the dangers of a lee shore.

The foregoing brief statement of facts presents all the elements which enter into the solution of the question as to the respective merits and claims of the owners and the crew of the salving ship, the steamer Alhambra. It is an elementary, rudimental legal truth, that the crew are, in strictness, the only salvors, and that "the maritime law empowers a master to employ, in a salvage service, a vessel under his command, and to put at hazard the interests of her owner; and it is for this reason only that upon considerations of general policy the owner is indemnified for the risk to which his property is exposed, by being as it were novated as co-salvor. The owner's claim to participate in the salvage reward rests always upon the risk and damage to which his property is or may be exposed, and on no other ground." See Mason v. The Blaireau, 2 Cranch [6 U. S.] 240; McDonough v. Dannery, 3 Dall. [3 U. S.] 188; Bond v. The Cora [Case No. 1,621]. To the same effect writes Conkling in his work on Admiralty Jurisdiction, title, "Salvage" (the most recent American authority): "When, as is generally the case, salvage is effected by one or more vessels, the owners, though they cannot properly be denominated salvors, are entitled to a share of the salvage on account of the exposure of their property to danger and loss. Stoppage on the ocean to save the property of another is a deviation from the voyage which discharges the underwriters—The Henry Ewbank [Id. 6,376]; Bond v. The Cora [supra]—and for this risk incurred the owner is entitled to be indemnified." "But the law (says Judge Story) does not stop short with a mere allowance to the owner of an adequate indemnity for the risk taken. It has a more enlarged policy and a higher aim. It looks to the common safety and interest of the whole commercial world in cases of this nature, and it bestows upon the owner a liberal bounty and reward to stimulate him to a just zeal in the common cause, and not to clog his voyages with narrow instructions, which should interdict his master from any salvage service. The law has a nice regard to considerations of this nature, and it offers not a premium of indemnity only, but an ample reward measured by an enlightened liberality and forecast." The Henry Ewbank [supra]. This view of the subject is in accordance with that taken by Chief Justice Marshall in delivering the opinion of the supreme court in a case where he observes that the same policy which awards a liberal remuneration to captains and crews ought to extend to all owners the same reward for a service which deserves to be encouraged; and it is surely no reward to a man made his own insurer without his consent, to return him little more than the premium he advanced. Mason v. The Blaireau, 2 Cranch [6 U. S.] 240. Mr. Justice Story also suggests that the extension to owners of the same principles of remuneration that are applied to officers and seamen is further recom-

mended by the strong inducement it furnishes to the latter "not to desert his own proper duty to their owner and his interests for selfish purposes, by making them share only in subordination to and in connection with those interests." In the case of Mason v. The Blaireau, the supreme court adjudged to the owners of the salvor ship one-third of the amount of the salvage allowed.

In the case above cited, decided by Mr. Justice Washington, after grave consideration, he awarded to the owner the same proportion, and it was adopted by Mr. Justice Story in the case before him, not only as suitable to the circumstances of the particular case, but as in his opinion constituting the true general rule of remuneration, not as a rule absolutely inflexible and not to yield to any extraordinary merits or perils or losses on the part of owners, for cases may exist in which one-half might with propriety be allowed to the owner, as has sometimes been done. From the authorities carrying with them the weight to be attached to the opinions of the most eminent judges of the supreme court which the country has produced, it will have been seen that the seaman, as has been remarked, is in strictness the only salvor, and that the owner is only associated with him, and the privileges of a salvor conceded and extended to him from considerations of equity and policy; and that as between the salving ship or owner and the crew, unless in very extraordinary cases, the rule has been, and is, to give one-third of the salvage to the owner, and two-thirds to the crew. The mariner has the preference and naturally and reasonably. He is the indispensable human agent by whom in cases of actual danger the salvage is, with displays of courage, hardship, suffering, enterprise, and skilful effort, effected; and in cases where the displays are not called for, as in the case at present under consideration, he is the indispensable actor by whom the salving ship is governed and the work accomplished. Not only so: the law favors him because of his very calling itself, which is one of habitual peril, exposure, and hardship. He is the rational, responsible guardian of all the immense property committed to the chances of the ocean. His presence simply on the ocean in all times of need is at the cost of a life of unequalled dangers and hardships, and at best but poorly requited toil. Like a soldier in an enemy's country, danger is his constant companion. He cannot sleep, but with his weapon in his hand, to be ready at any moment for a mortal assault. Not merely, then, for the efforts he may put forth on any particular occasion, but that he is the only one of the family of man at unceasing and painful cost ever present to extend aid in time of danger to person and property, does the law consider him with peculiar favor and repay him with grateful and generous rewards.

If this, then, were a case in which the salvage was performed by a sailing vessel under the precise circumstances, the law would not warrant more than the award of one-third of the salvage to the owner. But the introduction of steam and the employment of large steamers under the practice in England, whilst it has not modified the principles, has varied the proportion of the salvage distributable between the owner and the master and crew. From the greater costliness and efficiency of these instruments of salvage the law looks upon them with favor and recognizes in the owner a benefactor who deserves to be speedily rewarded for an outlay of capital so largely promotive of the interests of commerce and humanity. This practice of the court of admiralty in England has found sanction and recognition in one case in our country, and that occurred in our own waters in the case of Brooks v. The William Penn [Case No. 1,965]. This case recognized the practice of the courts of England as of obligation in the United States, and since that this practice has the force of authoritative precedent, and addresses itself to us with the combined authority of law and policy and enlightened equity. When duly considered, this practice is only in substance a considerate application of the principles of the general law of salvage, as attempted to be developed in what has heretofore been said. The owner in these mighty machines, so costly, has, whilst he has put so much more at stake, furnished to the ocean instruments proportionately more effective in giving speedy, certain, and prompt aid and rescue to imperilled life and property. His reward should be proportionate to the greater risk, and find also some increase in the greater service. The prominent cases in which this practice is illustrated and these principles enforced are The Raikes, 1 Hagg. Adm. 246; The Earl Grey, 3 Hagg. Adm. 363; and The Beulah, 1 W. Rob. Adm. 477. The first of these cases only furnishes the authority for the greater compensation of steamers than sailing vessels. It does not deal with the comparative remuneration of the ship and the crew. The several portions of each is not stated in the judgment of the court. Lord Stowell remarks: "This is a case of salvage service performed by the Monarch, steam packet; and it is the first case in which compensation has been claimed in this court for the services of a vessel of this peculiar character. I am therefore inclined to give as much encouragement as possible to similar exertions on account of the great skill and great power of vessels of this description." There is no analogy in the two cases; it stops with the instrument. The steamer was sent for to Dover and was empty. The ship saved was an East Indiaman of much value; cargo worth about sixty thousand pounds. "She was in the Downs—in a situation of actual apprehension, though not of actual danger; she had

solicited the attention of a Deal boat—a class of boats, as is well known, very active and eminently useful in conducting vessels into Ramsgate harbor. She had removed the vessel from the sand upon which she had struck; but still there was apprehension of danger, and provision was therefore required for the future safety of the vessel. It was recommended that a steam vessel from Dover should be sent for; it therefore cannot be denied that the agency of a steamboat was highly useful and desirable. The boat has also merit from the alacrity with which she quits the harbor; she goes out, it would seem, at some risk, it being an hour after high water; upon reaching the vessel, lies by her all night—a night in the month of December—watching and attending her, and ready to perform any service that may be required the next day, when she transports her into Ramsgate harbor. The vessel was of great wealth; she resorted to the assistance of a steamboat, after having resorted to one of lower species; so that on the whole, I think, I should have given more than the commissioners. One hundred and fifteen pounds does not seem to me an adequate reward; and I shall propose a moderate addition, by making the retribution two hundred pounds, and the expenses of this appeal." It will be observed that this case throws no light whatever on the relative value and remuneration of the ship and the crew. It is not certain that any was made. It is only sufficient to show the estimate in which such services were held and rewarded and that a steamer should be more handsomely compensated. The case of The Beulah, when carefully read and its true meaning elicited, does not seem to furnish any help in solving the question proposed for our solution. The statement of the case is very brief, and cannot well be abbreviated with advantage. It is thus stated: "In this case the court was moved to decree an apportionment of a salvage award amongst the owners, master, and crew of the steam-tug Copeland for services rendered to the vessel—the Beulah. It appeared that the sum of £500 had been awarded by the court for the service in question, and this sum had been apportioned by the Ship's Owners' Company, to which the steam-tug belonged, according to a scale of distribution laid down and adopted by the company in such cases. By this scale the company (as the owners of the Copeland) took to themselves £415; the master received £41 13s. 6d., the engineer £2 per cent. poundage besides his distributive share, and the stokers and common seamen £4 15s. 3d. per man. An act on petition was given in on behalf of four of the seamen, praying the court to make a more suitable allotment. "The court decreed the following apportionment: To the owners £415 0s. 5d.; to the master £28 6s. 8d.; to the first mate £10 2s. 4d.; to the engineer £10 2s. 4d.; to the second mate £8 1s. 10d.; to three seamen £8 1s. 10d.; to one apprentice-boy £4 0s. 11d." The amount awarded to the owners of the tug, in this case, it appears, was nearly four-fifths. But it cannot escape observation that the captain and crew were rewarded for their service by a scale of distribution laid down and adopted by the company in such cases. So far as appears from the report of the case, it would seem that the captain and crew received as a body, and were paid what they agreed to receive when they took service in the "Shipowners' Company." No point seems to have been made as against the share of the owners. Their share remains undisturbed by the court. The only change in the distribution was among the employés of the company. All that can be safely deduced from the case as reported, is that, as between the owners and the captain and crew the scale of distribution of the salvage upon which they did business, and with reference to which they engaged the services of their employés, was maintained by the court. It was a special contract, and governed by its own terms. No general rule can be deduced from it; and, as previously remarked, it furnishes no precedent or help in the solution of the question before us.

We now come to the case—that of The Earl Grey, 3 Hagg. Adm. 363—which is largely analogous to the one before us, and which, while it maintains the distinction taken in favor of "large steamers," furnishes a valuable precedent as to the proportion of the salvage to be awarded to the owners and the master and crew. The statement of the case is as follows: "The Earl Grey, a vessel of 470 tons, on a voyage from Liverpool to Africa, having been run foul of in St. George's channel, and her bowsprit and foremast carried away, was met in this disabled state, with a signal of distress flying, on the 19th of August, by the Solway steamer (two engines each of forty-five horse-power), bound to Liverpool, and by her towed into that port. The towing occupied twenty-nine hours, and the value of the steamer was twelve thousand pounds, and that of the Earl Grey and her cargo about four thousand pounds. The facts were agreed upon. Sir J. Nicholl, observing upon the hopeless state of the vessel when the steamer came to her assistance, and the necessity of giving an ample reward to large steamers, decreed £900; and on a subsequent day, upon the application of the owners and mariners of the steamer, the learned judge apportioned that sum, giving £450 to the owners,—being half of the whole,—on account of the value of their property, which had been put in some risk." One-half the salvage was given, under the circumstances and with reference to the value of the two vessels, to the owners; a larger amount than appears to have been given in any case which possessed the elements and character of salvage, which has been brought to our attention or is known to us. Before making any remarks upon it I will briefly allude to the case of The William Penn, which has been heretofore noticed, and which has been ad-

duced as an illustration of the large reward given to the owners of steamboats or steamships, in comparison with sailing vessels. The judgment in that case, all would admit, is an eminently sound one. Nearly five-sevenths of the salvage was given to the owners of the steamer Jasper. But the circumstances were in sharp contrast, rather than in analogy to the case we are considering. The salving steamer was placed in the utmost peril. Her very existence was broadly staked in her adventure to save the Penn. Captain Hayden (one of the witnesses in the case) says he ran the Jasper until she was in seven feet of water, her draft being five and a half. It was a stormy-looking night, heavy sea, and dark overhead. He had been a mariner for thirty-three years. He considered the Jasper in great risk—more so than he would ever run again to save property. He was acquainted with the shoals. The Jasper's stern was in the breakers. The sea broke and washed through her after gangways, stove in one of the deadlights, and, though the pumps were going all the time to keep the water under, she had a foot and a half water in her when she reached town. As bearing upon the risk taken by the owner of the Jasper, and the peril she was in, another test is remarked upon by Mr. Justice Wayne in his presentment of the case. He says: "In this instance the presidents of two insurance companies in Charleston, accustomed to calculate marine risks, and well enough acquainted with the reef upon which the William Penn was run aground to form a safe judgment of her danger, and the hazard to be run by a steam packet in the attempt to get her off, declared that they would not have taken a risk at all for such adventure, if any part of the duty was to be done in a night in February, nor under any circumstances for less than a premium of twenty to twenty-five per cent. In such cases then (remarks the judge), the risk must always be run by the owner of the steamer, as it was in this by the owners of the Jasper." And it may be well here to observe that the danger was very unequally shared by the Jasper and her crew. She was in imminent danger, and they not. If in mid ocean, danger to the ship would be danger to the crew, but not so in a harbor, on the coast, or in the present case. The Jasper might have been broken to pieces on the shoal for want of water. The crew could have remained aboard of her safe until taken off, or at any time could have retreated in safety in their boats. The wrecks that strew the beach of Sullivan's and Long Island are proof to show that vessels may be destroyed and no lives lost.

After this careful review of the authorities, we are brought to the conclusion that the case we have to decide is different in many of its elements from any which appear in the books; and the one which is nearest it, and which can alone afford some approximation to a rule and a proper solution, is that of The Earl Grey. It is to be noted that in The Earl Grey the salving ship was at "some risk," the vessel saved was in a "hopeless state" when the Solway steamer came to her rescue, that she was three times the value of the ship saved, that the towage took her twenty-nine hours, and she came within the category of "large steamers," to whom there is "necessity" of giving an "ample reward;" and the share of the salvage in point of fact given to the owner of said ship under such circumstances was "one-half." The case of The Alhambra, though like, was different in many of its elements. It cannot be said that the C. W. Ring was in a "hopeless state" when she signalled to the Alhambra. She was not in any immediate danger, and it is reasonable to suppose that she might have got into harbor without any help, or received timely help from some other quarter. But she certainly was in an exposed position, and might have been brought to imminent danger in a few hours, and before she could have received help. The fact that the gallant and devoted officers and crew who had so nobly done their duty to her and her owners, in the gale which they had with such peril and hardship survived, thought it prudent to seek the aid of the Alhambra, is in itself the best evidence of the dangerous position of their brig, and the best measure of the merit of the services of the Alhambra. The Alhambra, a steamer, and "a large steamer," gave immediate aid, and from her characteristics as a steamer, and a very powerful steamer, made her rescue of the Ring prompt and certain, and in a few hours placed her and her valuable cargo in perfect safety alongside of our wharves. Unlike a sailing vessel, the Alhambra was not subject to calms or head winds, or dangers of a lee shore. It cannot be said that the service of the Alhambra was accompanied by any sensible danger, or that there was any appreciable risk to her and her cargo. The witnesses agree in the statement that "the weather was fine; a little swell in the morning, but calm and becoming calmer and smooth in the evening." The only apprehension of danger, or of delay, was from not arriving at proper time for crossing the bar. But it is in evidence when the captain of the Ring asked for "a line to Charleston," the captain of the Alhambra (very prudently) consulted the pilot as to "whether it would be advisable to do so, if the pilot could get the Alhambra in time to the bar." He was answered, "I could." Yet, though there was not any appreciable danger or risk, discoverable or encountered in point of fact, by the Alhambra, and no delay or deviation from her voyage, which would have forfeited the policy of insurance of the Alhambra and her cargo, yet it cannot be questioned if any accident in the infinite chapter of accidents had happened to the Alhambra, by reason

of the brig attached to her; if in crossing the bar this appendage, by reason of any perverse current or eddy, or obstruction, had disturbed the steerage of the Alhambra, and brought her into troubles, that her policy of insurance would have been forfeited, and that any loss that would have occurred, would have been thrown upon the owners. In this connection, it is proper to bring to view the facts that the steamer was worth from one hundred and forty to one hundred and fifty thousand dollars, and her cargo estimated at two hundred and fifty thousand to three hundred and fifty thousand dollars, and the expense of running such a vessel three times as much as a sailing vessel of the same tonnage. The engines of the Alhambra were worth from twenty-five to thirty thousand dollars, and were of three hundred and forty horse-power. The peculiar claim to consideration in the apportionment of salvage, on the part of the owners, is based on the fact that the salving vessel was a steamer, and a "large steamer," and that there was risk to the large property invested in her and her cargo, which the owners were responsible for. The vessel was a much more costly instrument than the Solway steamer, and the risk, though very slight, was something to the vessel and cargo. On these grounds, instead of one-half, the undersigned feels warranted, and thinks it just that the owners should receive three-fifths of the salvage, and the master, officers, and crew two-fifths thereof, and he so awards. And in assigning the two-fifths to the officers and crew, though they did not put forth any peculiar effort, and were subject to no peculiar hardship in this particular case, they nevertheless, as in the instance of the officers and crew of the Solway steamer, did all that was necessary, and their whole duty. The responsibility was on the captain and pilot to wisely govern this noble ship, and on the engineers, firemen, and sailors to skilfully work her grand machinery. They were the true salvors, and this great ship was committed to them by the law and the well-founded policy of all nations, as the instrument to accomplish their beneficent work. They were both necessary and indispensable to the result. If the reward for the special service is large and liberal, it should be remembered that it was achieved on the theatre of which the mariner alone knows the terrible perils, the unequalled hardships, and the constant anxieties. He had reached the spot to do this very service through a gale which had rendered helpless his brother sailors, and nearly wrecked their vessel and drowned them. Every owner of the property committed to sea, every shipowner especially, is interested in the last degree in seeing to it that the law of salvage be maintained in its strictness, and that the mariner should have the most liberal reward for his services; and if he comes to luck, should be glad of it; and if there be any perquisites in his hard life, should rejoice at it, and see that he gets them. And if this case, both as to the owners and the master and the crew, should partake of this character, it will not be matter of regret either as to the owner, who, at such cost, has put such a noble ship on the ocean, subject to the thousand risks of the sea, or as to the master, pilot, and crew, who, living a life of hardship, have, as in this case, in perfect fidelity and prudence, done their whole duty to their owners and all the interests committed to their care.

[In a special award, the referee will make the allotments of the master, officers, and crew of the Alhambra. He cannot sign this paper without making the acknowledgment that the eminent counsel engaged in this cause, Pringle & Porter for the owners, and Mr. Magrath for the officers and crew, in their ample and learned citation of authorities, and their acute and able expositions of the law and its philosophy, have left him nothing to attempt but to weigh their suggestions and hold the scales between them. He has given to all their citations of the law the most careful consideration, and endeavored to profit by their argument, urged with marked zeal, ability and eloquence. In a case of novel impression without precedent, he has endeavored to hit the truth and do exact justice—so hard to do under such circumstances, and when done so difficult to commend to the judgment of all. His best, anxious, earnest endeavor to attain this result is in the award he has made.] [1]

Case No. 3,526.

The CYANE.

[The case reported under above title in 4 Amer. Law Rev. 769, is the same as Case No. 7,381.]

CYANE, The, (JOHNSON v.). See Case No. 7,381.

Case No. 3,527.

The C. Y. DAVENPORT.

[3 Ben. 63.] [2]

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

COLLISION—TOWBOAT.

1. Where a steam-tug took in tow a schooner, to tow her out from a pier, next to which was a high balance dock, which shut off the view to the west, and, when the schooner got just clear of the pier, another tug was seen coming from the west with a barge in tow, which came in collision with the schooner: *Held*, that the tug having the schooner in tow was negligent, and liable for the collision.

2. That, even if the other tug and the barge were in fault, that would not diminish the liability of this tug, especially as those vessels were not joined in this action.

[1] [From 2 Am. Law Rev. 259.]

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

In admiralty.

Stewart, Rich & Woodford, for libelants.
Beebe, Donohue & Cooke, for claimant.

BLATCHFORD, District Judge. This is a libel by Jeremiah N. Ayres and Theodore Davenport, to recover damages for a collision which occurred on the 9th of August, 1866, between the schooner G. W. Purnell, owned by them, and a barge called the Annie. The schooner was at the time in tow of the C. Y. Davenport. The barge was in tow of the tug Henry Smith. The schooner had been lying on the upper or easterly side of pier No. 42, East river, New York, bow outward, with the end of her bowsprit seven or eight feet inside of the end of the pier. About six o'clock in the morning, the C. Y. Davenport came to the outer end of pier No. 42, in order to take the schooner in tow, to tow her to 12th street, East river. The tide was strong flood. In the slip next west of pier No. 42, and between pier No. 41 and pier No. 42, there was a large high floating balance dock, which projected out about ten feet beyond the end of pier No. 42, and obscured the view down the river from the end of pier No. 42. The C. Y. Davenport was a small propeller, fifty-five or sixty feet long. The schooner was ninety odd feet long from the end of her boom to the end of her bowsprit. The C. Y. Davenport lay at the end of pier No. 42, heading to the westward or down the river, when she hitched on to the schooner by a hawser ten or fifteen fathoms long, running from the windlass bitts of the schooner to the after cleets on the C. Y. Davenport. The order was then given from on board the C. Y. Davenport to the schooner, to put the schooner's helm hard a-port, which order was obeyed. The wind was south-east. The C. Y. Davenport cast off and started ahead and pulled the schooner out just clear from the pier, when the Annie and the Henry Smith were seen coming up close to the ends of the piers, very swiftly, with the tide. When this was seen the C. Y. Davenport backed so as to slack the hawser between her and the schooner, but the schooner was struck by the barge, and her bowsprit and both of her masts were knocked out of her by the collision.

On these facts alone the C. Y. Davenport would be liable for the collision. But, in addition, it is shown by Ryan, a witness for the claimant, and who was on the barge at the time, that he, from the barge, saw the C. Y. Davenport before she left the end of pier No. 42, and while she was lying there, and saw her start and pull the schooner after her. It is very clear that no care was exercised on the C. Y. Davenport, or the barge and her tug would have been seen from on board of the C. Y. Davenport before the latter started.

The only defence set up is, that the barge and her tug were in fault in being so near the piers, and that, if the latter tug had ported her helm, on seeing the C. Y. Davenport and the schooner, there would have been no collision. It may be that there was fault in those vessels, but that does not diminish the liability of the C. Y. Davenport, and those vessels are not sued in this action.

There must be a decree for the libelants with costs, with a reference to a commissioner to ascertain and report the damages sustained by them by the collision.

Case No. 3,528.

The CYNOSURE.

[7 Law Rep. 222.]

District Court, D. Massachusetts. July, 1844.

COLLISION—RULES OF NAVIGATION—LIGHTS.

1. When two vessels approach each other on opposite tacks, each being close-hauled, and it is doubtful which is to windward, the vessel on the starboard tack should keep on her course and the vessel on the larboard tack should keep off.

2. Where, in such a case, from the evidence and the opinion of experts, it appeared that the Cynosure, the vessel on the larboard tack should have seen the light of the Androdus, the vessel on the starboard tack, and have drawn an inference from the bearing of her light respecting her situation, in season to clear her by keeping off, and the Androdus kept on, but the Cynosure, by not keeping off, occasioned a collision; it was *held*, that the Cynosure was liable for the damages.

[Cited in Foster v. The Miranda, Case No. 4,977.]

This was a libel in a case of collision, in which S. G. Nicoll was the libelant, and W. McClure the respondent. The principles upon which this case was decided were chiefly of a nautical character, but may be found important in many cases of collision; and in guiding masters and officers in the management of vessels which are approaching each other at sea.

The hermaphrodite brig Androdus, of New York, owned by Mr. Nicoll, was on a passage from Rochelle to New York, and on the night of the collision was sailing close-hauled upon the starboard tack, the wind being about north, and the vessel heading W. N. W. The Cynosure was bound from Surinam to Boston, and was close-hauled on the larboard tack, heading about E. N. E. The time of the collision was about three o'clock in the morning, the night clear, with starlight, but no moon, and a moderate breeze. It appeared from the testimony on both sides that the Androdus kept her course, hailing the other vessel to bear away, until a collision became inevitable, when she put her helm down, and came into the wind; and that the Cynosure also kept her course until a minute before the contact, when she also put her helm down, came into the wind and struck the Androdus on the lee side, her jibboom running over the Androdus's lee rail, between the fore and main rigging.

The libelant's claim for damages was put

upon the ground that the Cynosure, being on the larboard tack, should have kept off, by the law of the ocean; and, that moreover, being the leeward-most (as appeared from the manner in which she struck the Androdus) she would have gone clear of her, under her stern, had she not luffed. On the part of the defence, it was admitted that no blame was to be attached to the Androdus, but it was contended that the Cynosure did the best she could under the circumstances, and that the collision was one of those inevitable accidents, consequent upon the uncertainties of winds, weather, and the darkness of night, which must be borne by the parties upon whom they fall.

The evidence on the part of the libelant was that the Cynosure was discovered at some distance; that a light was hung out on the Androdus's lee quarter; that when the Cynosure was found to be keeping her course, she was hailed several times through a trumpet to keep off, and put her helm up; that she kept on her course until within a few yards of the Androdus, when she luffed and struck the Androdus in the manner described.

On the part of the defence, the chief mate of the Cynosure testified that the light of the Androdus was seen twelve or fifteen minutes before the collision; that he could not see the vessel or make out which way she was standing; that before he could make out which way she was standing, a collision became inevitable, and he ordered the helm down, to bring the vessel into the wind and diminish the force of the shock. The man at the wheel testified substantially in the same manner, except that he made the time between the discovery of the light and the collision considerably less. The only other witness who was on deck before the Cynosure luffed, said that he saw the light, called out "Light ho!" that the mate came forward, looked over the bow, and gave the order to put the helm down; that he could not see the Androdus distinctly, so as to make out her course, until she was within a few lengths of them; and that there was not more than two minutes between the time of seeing the light and the collision.

The Cynosure is a vessel of about three hundred and fifty tons, and had topgallant sails set. The Androdus is a hermaphrodite brig of about one hundred and forty tons, had nothing above her foretopmast, having lost her topgallant mast a few days before.

On this evidence it was contended, that when the Androdus was first seen by the Cynosure a collision was inevitable, and it was too late to do anything else than come up into the wind and diminish the force of the shock.

In the case of Lowry v. The Portland, [Case No. 8,583], Benjamin Rich, William Sturgis and Francis Dewson, gave their opinions upon several nautical questions, one of which was relied upon in this cause, and was to this effect. When two vessels are approaching each other on opposite tacks, each sailing on the wind, and it is doubtful which is to windward, the vessel to the larboard tack should give way, and thus each pass to the right. And these gentlemen added to their opinions, "These rules are particularly intended to govern vessels approaching each other under circumstances that prevent their course and movements being readily ascertained with accuracy, for instance, in a dark night or dense fog."

In this case the following gentlemen were examined as experts: Benjamin Rich, James W. Sever and Edward H. Faucon, whose opinions upon the general principles governing such cases were substantially as follows:

The rule of the ocean is, that when two vessels approach each other on opposite tacks, each being on a wind, the vessel on the starboard tack keeps on, and the vessel on the larboard tack keeps off. Even if the latter is the weather-most, she attempts to go to windward of the other, at her peril. She may go about, and stand off on the other tack, but she must do this in season, at her peril.

When two vessels approach each other on opposite tacks, each bears on the lee bow of the other. If you are on the larboard tack, and see a light bearing a few points on your lee bow, if there is a tolerable breeze, the course of the other vessel can be determined immediately, without seeing the vessel itself, by the change in the bearing of the light. For if the other vessel is going free, the light will change its bearing instantly and rapidly by passing astern. If the light is from a stationary object, you will leave it astern, though less rapidly. If the light does not change its bearings, and approaches you, it must be from a vessel sailing by the wind on the other tack. In such case, the duty of the vessel on the larboard tack is to keep off, at once. Being cross-examined as to whether the vessel on the larboard tack ought to keep off if the light bore as large as four points on the bow, the witnesses said that four points would be wide for a vessel to come in contact, but that they should feel bound to keep off even in that case, for it is not easy to ascertain the exact number of points without a compass, and because the coming to and falling off of vessels sailing by the wind in a moderate breeze, often varies the apparent bearings a little.

Since the vessel on the starboard tack has a right to keep on, if she finds at last that a collision is inevitable, she has only to come into the wind. So, the vessel on the larboard tack, if she does not discover the other vessel until a collision is inevitable, may come into the wind; but this would only be when she was so much to windward that she could not clear the other vessel by keeping off. If the vessel on the larboard tack luffs before she strikes the other, and yet after coming into the wind strikes her on the lee side nearly amidships, we should say that if she

had not luffed she would have gone clear, passing under the stern. Certainly she would, by keeping off a point.

After a hearing, the court desired further information upon certain points, and it was agreed that the evidence should be submitted to two experts, who should answer questions propounded by the court upon those points. The gentlemen agreed upon were Messrs. Benjamin Rich and William Sturgis. Subsequently Mr. John S. Sleeper was substituted for Mr. Sturgis, who was ill. Their answers were as follows:

To question the first. "It appears that when the Androdus was first seen from the Cynosure, she was on the lee bow, the most unfavorable position for discovering a light or other object. It is usual on board vessels at sea, when sailing on a wind, to keep a sharp look-out to windward and ahead, but little danger being apprehended from vessels coming up under the lee. Therefore, allowing as vigilant a look-out to have been kept on board the Cynosure as is customary at sea, the light on board the Androdus, unless it was a very bright one, might not have been seen until the vessels were within a quarter of a mile of each other, without rendering the watch on deck liable to the charge of neglecting their duty."

To question the second, they answered, that not more than one minute would be necessary to determine that the Androdus was steering close-hauled on the starboard tack. This was predicated upon the fact that the Androdus was coming at such an angle that a considerable portion of her broadside could be seen, and upon the facts as to the bearings of the light, as testified to by the other gentlemen.

To question the third. "This question supposes the vessels to be approaching each other on opposite tacks, and the Androdus to be crossing the bow of the Cynosure, having clearly passed one third of her length across the bow of that vessel. The Cynosure would then be heading for the after part of the fore chains of the Androdus, in a diagonal direction. If the vessels were in this position when only a few lengths from each other, it is plain that the only way to prevent a concussion on the part of the Cynosure would be to put the helm hard up. If the Cynosure would answer her helm, she would rapidly fall off, and the vessels come side by side, in parallel directions, heading opposite ways, and might come in contact, rubbing past each other without sustaining much injury. If, when in the position first stated, and the vessels within a few lengths of each other, the helm of the Cynosure should be put down, it would exhibit a deficiency of nautical skill or presence of mind, as in that case the vessels would inevitably come in dangerous contact. If the vessels, at the time, were a quarter of a mile apart, or perhaps even less, and the Cynosure would work quick without ranging ahead greatly in stays, she might have gone about without coming in contact with the Androdus; but even then, it would have been with plenty of sea room, more safe and consequently advisable, to have put the helm up and shivered the after yards."

R. H. Dana, Jr., for libelant.

F. C. Loring, for respondent.

THE COURT said that upon the evidence in the case, it was satisfied that each vessel was sailing by the wind, the Androdus on the starboard and the Cynosure on the larboard tack; that the Androdus showed a light, kept her course, and when a collision was inevitable, luffed into the wind. No blame was attributable to her. It would seem that the Cynosure either did see or ought to have seen the light of the Androdus in sufficient season to keep off. From the opinions of the nautical gentlemen, it would seem that the Androdus was from one third to one half her length to windward of the Cynosure, and could have cleared her by keeping off a little; perhaps, by simply keeping her course without luffing. His honor thought it proved that the Cynosure ought to have known the course and movements of the Androdus, either by seeing the vessel, or by inferences which, as all the experts say, nautical men would draw at once from the bearing of the light.

Decree for the libelant, for damages and costs.

Case No. 3,529.

The CYNOSURE.

[1 Spr. 88;[1] 7 Law Rep. 226.]

District Court, D. Massachusetts. July Term, 1844.

IMPRISONMENT OF COLORED SEAMEN — CONSTITUTIONALITY OF STATE STATUTE — REMEDIES OF SEAMEN.

1. The statute of Louisiana, which prohibits colored seamen belonging to vessels of the United States from being brought in such vessels into the ports of that state, is unconstitutional.

[Cited in The William Jarvis, Case No. 17,697.]

2. A seaman who was imprisoned at New Orleans under that statute, cannot recover damages of the master therefor.

3. Such seaman is not liable for the prison expenses paid by the master, as required by the statute.

[This was a libel for seaman's wages, in which Martin was libellant, and McClure respondent. The amount of wages was adjusted between the counsel, with the agreement that one item should be left to the decision of the court, the point being a rebate arising under a recent statute of Louisiana. Stat. 1842, No. 123.][2]

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

[2] [From 7 Law Rep. 226.]

R. H. Dana, Jr., for libellant.
A. H. Fiske, for respondent.

SPRAGUE, District Judge. The libellant, a man of color, was a mariner on board the American ship Cynosure, on a voyage to New Orleans. On arriving at that port he was, pursuant to a statute of the state of Louisiana,[3] taken from the ship, and committed to jail. [He was detained there during the stay of the vessel, and delivered up to the master when the vessel sailed.][4] The master was compelled to pay the expenses of that imprisonment, and now claims to have the amount deducted from the wages of the mariner. The libellant, on the other hand, claims compensation in damages, for being carried to New Orleans, and subjected to imprisonment. The statute referred to, prohibits free persons of color from coming into the state, as mariners on board any vessel, and requires them to be imprisoned, and the master to give bonds to carry them out of the state, and compels him to pay the expenses of their imprisonment. A state cannot thus interfere with the navigation of the United States, nor dictate to the owners of an American vessel the composition of her crew. The only ground of disability is color. If one color may be excluded, any other may;—if dark complexions may be subject to prohibition, white may be equally so;—or both whites and blacks may be excluded; or any other physical quality, or religious or political opinion, may be selected as the criterion of exclusion, or admission. If the parties may be subjected to imprisonment, expenses and bonds, any other penalties and punishments may be inflicted. Such legislation is not consistent with the regulations of commerce established by the laws of the United States, pursuant to authority expressly given by the constitution; and this statute is invalid.

Another provision of the constitution declares, that the "citizens of each state shall be entitled to all privileges and immunities of citizens in the several states." Article 4, § 2.

That provision seems to be wholly ignored by the Louisiana statute. This, however, is not material in the present case, because there is no allegation, or proof, that the libellant was a citizen of any state. He is not, therefore, in a position to invoke the protection of that clause of the constitution.

The libellant shipped to go to any port or ports in the United States, for a term of six months. The master, in going to New Orleans, did no more than he lawfully might, and was not bound to anticipate that his crew would there be subjected to unconstitutional imprisonment. The claim for damages is not, therefore, sustained.

The expenses were paid by the master, not by request of the mariner, but by the express requirement of the statute. If this burden was rightfully imposed, it now rests where the law has placed it; if wrongfully, there is no reason why the master, on whom it has fallen, should throw it upon the mariner, who is quite as blameless. No deduction is to be made from the wages.

See the opinion of Mr. Justice Johnson, delivered in South Carolina, in the case of Elkison v. Deliesseline [Case No. 4,366]; The Wilson [Id. 17,846]; Roberts v. Yates [Id. 11,919].

[3] Statute of Louisiana, 1842, No. 123. Sec. 1. Be it enacted by the senate and house of representatives of the state of Louisiana in general assembly convened, that from and after the time specified in this act, no free negro, mulatto or person of color shall come into this state on board of any vessel or steamboat, as a cook, steward, mariner, or in any employment, on board that vessel or steamboat, or as a passenger; and in case any vessel or steamboat shall arrive in any port, or harbor, or landing on any river in this state, from any other state or foreign port, having on board any free negro, mulatto or person of color, the harbor-master or other person having charge of such port shall forthwith notify, &c. . . . Whereupon the judge shall immediately issue a warrant to apprehend and bring every such free negro, mulatto or colored person before him, and shall forthwith commit him or her to the parish jail, there to be confined until such vessel or steamboat is ready to proceed to sea, when the master of such vessel or steamboat, shall, by the written order of the judge, take and carry away out of this state, every such free negro, mulatto or person of color, and pay the expenses of his or her apprehension and detention.

Section 2, requires the master of every vessel having such free negro on board, to give bond with sureties, in $500 for each negro, to pay the expenses of his arrest and detention, and imposes a penalty of $1000 upon the master and owner, if this bond is not given within three days after the vessel's arrival.

Section 3, provides that if the master neglect or refuse to take away such negro in his vessel, the negro shall be sent out of the limits of the state by the sheriff, the expense of which transportation shall be borne by the negro, if he has the means of payment, if not, then at the expense of the state, to be paid out of the penalty recoverable of the master or owner, under this act.

Section 4, imposes a punishment of five years' imprisonment upon any negro, &c., who shall return to the state after having been imprisoned and transported as above.

Section 11, requires every master of a vessel coming from another state or from a foreign port, to make a report under oath, of the name, age and occupation of every free negro, &c., on board his vessel, within twenty-six hours after his arrival, under a penalty of $100 for each omission.

[4] [From 7 Law Rep. 226.]

CYNTHIA, The (BARTELSON v.). See Case No. 1,067.

CYNTHIA, The (GILES v.). See Case No. 5,424.

Case No. 3,530.

The CYPRESS.

[1 Blatchf. & H. 83.][1]

District Court, S. D. New York. Oct., 1829.

LIBELS FOR SEAMEN'S WAGES — COMPETENCY OF WITNESSES — PAROL EVIDENCE TO CONTRADICT SHIPPING ARTICLES—TIME FOR FILING SUITS.

1. Seamen are competent witnesses for each other in suits for wages earned on the same voyage.

2. By the act of congress of July 20, 1790, § 6 (1 Stat. 133), a seaman is restricted from bringing an action for wages against a vessel, in her port of delivery, until ten days after her cargo is discharged, unless she is about to proceed to sea before the expiration of the ten days.

3. Whether the seaman must wait ten days in case of an absolute discharge by the master, quere.

4. Parol evidence on the part of a seaman is admissible to vary or contradict the written contract contained in the shipping articles.

[Limited in Slocum v. Swift, Case No. 12,954. Cited in The Elvine, 19 Fed. 528.]

5. A stipulation in the articles that the seamen shall not in any case demand their wages until the expiration of a certain time, is void, in case the service is completed or the seamen are discharged before the expiration of that time.

6. As soon as a seaman's connection with a vessel is legally dissolved, his right to resort to her eo instanti for his wages is consummated.

[Cited in The Cabot, Case No. 2,277.]

7. Semble, that an agreement in shipping articles that the seamen shall not sue for their wages till three months after their services are ended, will be held void as against the seamen.

[Cited in McCarty v. The City of New Bedford, 4 Fed. 829.]

This was a libel in rem to recover seamen's wages. The libellants shipped in Maine, on the 8th of October, 1828, on a trading voyage for nine months, as they alleged. The vessel entered the port of New-York from Europe in September, 1829, and discharged her cargo. The libellants alleged that she was about to proceed to sea again forthwith, and that they were discharged by the master, their wages remaining unpaid. The master answered, denying that wages were due, and also alleging that the libellants left the ship without his consent, and before their term of service had expired. The proofs on the part of the claimants were the shipping articles, and three depositions taken in the state of Maine, one of the person who filled up the shipping articles and saw two of the libellants subscribe them, and the other two of sailors who shipped at the same time. The evidence for the libellants was the deposition of each libellant for the others. Objections to the admissibility of the proofs were taken on both sides. The remaining facts necessary to the understanding of the case are set forth in the opinion of the court.

Edwin Burr, for libellants.

Alexander H. Dana. for claimants.

[1] [Reported by Samuel Blatchford, Esq., and Francis Howland, Esq.]

BETTS, District Judge. The claimants insist that the libellants are incompetent witnesses for each other, as their rights rest upon precisely the same ground, and the testimony which supports the recovery of one will equally enure to the benefit of all. This position is not, however, accurate in point of fact. The libellants have no joint interest in the matter in suit, nor any concurrence of purpose, further than that their testimony tends to establish a right of action. Each recovers independently of the others, and any matter in abatement or bar of the action of one will in no way affect the rights or remedies of his associates. They do not unite in the action because of any common interest between them, but because, the ship being the fund which is to discharge the wages, the action is made common to all, in accordance with the maritime law and the express provision of the statute, which would compel the suits to be consolidated if brought separately.

In most cases, seamen cannot be witnesses for each other in a suit in which all are involved, the rules of pleading and evidence being then applied to them as to other parties. But they are admitted to testify for each other in relation to their claims for wages earned on the same voyage, because they are only united on the record, whilst their interests in the recovery and their liabilities to costs are wholly distinct. The evidence is certainly not omni exceptione major, still it is not prohibited, and the court, in applying it to the determination of the cause, exercises a legal discretion as to its effect. This will suffice to show why such evidence should be admitted; but it is not necessary to decide whether it is of itself sufficient in this case to sustain the libel, for there is other evidence tending to support the demand of the libellants

The claimants next urge that the action is premature, the libel having been filed the day after the cargo was discharged, and before the expiration of the ten days limited by the act of congress of July 20, 1790 (1 Stat. 133). It will be seen, however, that the same section of the act which withholds from a seaman the right to proceed for his wages until ten days have elapsed after the cargo is fully discharged at the last port of delivery, saves to him the right to an immediate action in case the vessel is about to proceed to sea before the expiration of the ten days; thus leaving him, in that case, the same right he would have under the general maritime law independent of the provisions of the act. The libel alleges, and the answer does not deny, that the vessel was about to proceed to sea forthwith. Admiralty process was, therefore, rightfully taken out, if the wages were due at the time.

I am, moreover, inclined to think, upon the evidence, that the master discharged the libellants, and it is very questionable whether a delay of ten days can be exacted where a

seaman is absolutely discharged from the vessel. That terminates the contract, and takes away his claim for a continuance of wages, and it would seem but a just reciprocity to hold that the ship's term of credit is expired, when, by the act of the master, the seamen can longer charge her with wages.

The claimants urge further, that the period of service stipulated in the shipping articles, which they produce in court, was twelve months, instead of nine, as alleged by the libellants, and that it was also agreed that the wages should not be demandable previous to the expiration of the twelve months. This action was instituted a little more than eleven months after the voyage began. Outside of the articles, the evidence is very satisfactory, that the libellants shipped with the understanding that their engagement was for nine months only. If this fact rested upon the testimony of the libellants alone, that, though admissible, would be received with great distrust, since the men mutually establish each other's right of action, by swearing to the fact as applicable to the crew, without swearing to the act of each libellant by itself. But they are fully corroborated in the fact by the deposition of two seamen who were examined on the part of the claimants. All agree, that when they shipped and signed the articles, they engaged for only nine months; and Long, a witness who has no interest in this point, heard it so asserted on the voyage, in presence of the master, who did not contradict it.

The articles specify the term as twelve months, and that the wages shall not be demandable until the expiration of that time. But, according to the principles which prevail in admiralty courts, there is no difficulty in inquiring into the true terms of the contract, notwithstanding the written agreement. The act of July 20th, 1790, which enjoins upon the master to make his agreement with the seamen in writing, does not make the written agreement conclusive upon the seamen, neither do the courts regard it as such, whatever effect it may have as to the master. Seamen have, in numerous cases, been permitted to prove that the shipping articles did not set forth correctly the agreement entered into by them; and the court, without impeaching proofs, will hold to be void such agreements in the articles as are injurious to the seamen. The Juliana, 2 Dod. 504; The Minerva, 1 Hagg. Adm. 347; Harden v. Gordon [Case No. 6,047]; Abb. Shipp. (Ed. 1830) 435.

In endeavoring to ascertain the true nature of the agreement made in this case, it is to be noticed that the articles themselves are calculated, on their face, to excite suspicion as to this particular stipulation. The body is in a common printed form, and manifestly the parts in writing have been, in some places, gone over a second time with a darker ink, so as to leave it difficult to say whether the words, as originally written, have been preserved, or whether new ones have been substituted. This indistinctness is particularly noticeable in the word twelve, before months, fixing the time of service. This circumstance alone would create so much doubt as to the integrity of the written agreement, that it ought not, unexplained, to outweigh the positive testimony of the libellants to the fact, even if they were not sustained by the two seamen produced on the part of the claimants, both of whom understood the agreement to be for nine months only.

The claimants offer the deposition of a witness resident in Maine, who swears that he filled up the blanks in the articles, and first used a pale ink, and afterwards a darker ink, and that he well recollects that the stipulation that the libellants should not demand their wages until the end of twelve months was inserted before they signed the articles. It is observable that this witness does not swear that the articles, as signed by the seamen, stipulated for a service of twelve months. The fact that he swears so precisely as to the twelve which limits the time for bringing the action, which is of the least importance, while he wholly omits any reference to the doubtful twelve which fixes the time of service, together with the appearance of the writing, is, independent of the other proofs, very impressive evidence that the blank was originally filled with the word nine. When and by what authority the word twelve was substituted, is not explained. It may be added, that the signatures of the libellants and of the witnesses are all in pale ink, and it would be singular if, after having written over the body of the contract in dark ink, because of the indistinctness of that first used, the parties should yet, at the moment of signing, have abandoned the dark ink, and have returned to the use of the pale. I am satisfied that the contract was written and signed with the pale ink, and that subsequently parts were written over with the dark ink, it may be, without the variation of a word. But, the transaction not being explained, the party setting up the contract must bear the consequences of the presumption of its having been altered after its execution without the consent of the other contracting party. This deposition is moreover, not certified in conformity to the requirements of the 30th section of the act of congress of September 24, 1789 (1 Stat. 88, 89); Bell v. Morrison, 1 Pet. [26 U. S.] 351); and, though it has not been formally excepted to by the libellants for that cause, I should have felt constrained to exclude it for informality, had its evidence not stood contradicted and impeached by the evidence against the articles.

The defence that the libellants have deprived themselves of a right of action until the termination of the twelve months' credit stipulated, could not, even if proved, avail the claimants. An engagement written in

shipping articles by a master, and subscribed by seamen, not to sue for their wages when due, and every other restriction of their legal rights, will be treated by maritime courts as an imposition practised upon ignorant and improvident men, and, because of its manifest injustice, will not be enforced against them. It will be adjudged to be nugatory and void. So, also, the discharge of a seaman from a vessel by her master during the running of the shipping articles, will be held to be a surrender or release, in toto, of their obligation upon the man, because every duty imposed on him by the contract arises from and is dependent upon, his legal connection with the vessel. When that is severed, his pay ceases; and the separation would also, almost universally, take from him, at any after period, the benefit secured to him by law for the recovery of his wages—that of a summary arrest of the vessel. The courts are watchful in protecting him from vexatious delays and embarrassments in establishing his right to his hard earnings when withheld from him, and will see to it that he is not entangled and defeated in that, by sharp bargains imposed upon him by masters or ship-brokers. If, then, the agreement in the present case, not to sue for their wages until three months after their services should be ended, was genuine on the part of the libellants, the court would be compelled to reject it as a defence, and to regard it as having been obtained by imposition and deceit. On general principles, every engagement introduced into shipping articles outside of their appropriate end and purpose, should be held void as to the sailors, unless it is satisfactorily proved to have been clearly made known to them, and rests on considerations approved by the court.

I think that in this case this action is well brought, and that the libellants are entitled to recover the wages demanded. A decree will accordingly be entered in their favor to that effect, with an order of reference to the clerk to compute and report the amount, making allowance to the claimants for all just credits.

Decree for libellants, with costs.

CYPRESS RAFT (GASTREL v.). See Case No. 5,266.

CYRUS, The (DIXON v.). See Case No. 3,-930.

Case No. 3,531.

The CZARINA.

[2 Spr. 48.][1]

District Court, D. Massachusetts. Jan. Term, 1862.

SALVAGE COMPENSATION.

Amounts decreed salvors for bringing into port a vessel found without a navigator in the middle of the Atlantic ocean.

[Cited in The J. L. Bowen, Case No. 7,322; The Marie Anne, 48 Fed. 748.]

This was a case of salvage in saving the bark and cargo, valued at about $95,000, found in the middle of the Atlantic ocean, and navigated to the port of Boston. The master of the Czarina, Captain Dwyer, and also the second mate, were killed by the first mate, and the sailors, for their preservation, were obliged to kill the first mate. There was then no one left competent to navigate the vessel; and in this state she was found by the B. D. Metcalf,—the value of which vessel and of her cargo was about $50,000,—and her first mate put aboard. He was twenty days in navigating the vessel into port. The action was brought in behalf of the owners of B. D. Metcalf, the master, mate, and the sailors. The judge decreed to the owners, $3,500; to the master, $800; to the mate, $1,000; to the second mate, $25; and to sixteen sailors, $10 each.

John C. Dodge, for libellants.

M. Andros, for claimants.

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

D.

DABNEY (FOYE v.). See Case No. 5,022.

DADE (GUNNEL v.). See Case No. 5,869.

Case No. 3,532.

DADE v. HERBERT.

[1 Cranch, C. C. 85.][1]

Circuit Court, District of Columbia. April Term, 1802.

RELEASE BY ASSIGNEE.

A release from the assignee of a chose in action is a bar to an action by the assignor for the same cause of action.

Action of assumpsit, upon a promise in writing, not under seal, to convey lands. After the suit brought, Dade assigned his right of action to Flannery, and empowered him to receive the money, and to apply to his own use as much of it as would satisfy a debt due by Dade to Flannery. This assignment and power were not stamped, and therefore could not be given in evidence as a power of attorney.

Mr. Swann, for defendant, having had leave to plead specially, pleaded this assignment and a release from Flannery to the defendant.

Mr. Youngs, for plaintiff, objected to the filing of this plea at this stage of the cause, there having been an office judgment. But it appearing that the plaintiff had, by leave of the court, amended his declaration since the office judgment, the court received the plea. Loft's Gilbert, L. E. 403; Bull. N. P. 150, 151.

The plaintiff prayed oyer, and demurred generally.

Mr. Youngs, for plaintiff. The assignment conveys only a right to such part of the sum as was sufficient to satisfy Flannery's claim. It did not authorize him to release or to dismiss the action. A chose in action is not assignable at law. The question is whether this assignment gave Flannery a right at law to release the debt.

Mr. Swann, for defendant. The operative words of this assignment purport to convey the whole right of action, and they are not controlled by the subsequent expressions contained in the power of attorney. But the assignee of an open account, if the debtor assumes to pay to the assignee, may recover in his own name; Mouldsdale v. Birchall, 2 W. Bl. 820; the assignment being a good consideration of such assumpsit. Fenner v. Meares, 2 W. Bl. 1269. If Herbert had assumed to pay the money to Flannery, he might have supported an action in his own name. But here he not only assumed to pay, but actually did pay. If Flannery had a right to recover in his own name, he had a right to give a release upon payment of the money.

THE COURT overruled the demurrer.

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

Case No. 3,533.

DADE v. MANDEVILLE.

[1 Cranch, C. C. 92.][3]

Circuit Court, District of Columbia. April Term, 1802.

JUDGMENT AGAINST CO-SURETY—JURISDICTION.

The summary remedy given in Virginia by a motion against a co-surety is confined to the court which rendered the original judgment.

Motion by Dade for judgment against Mandeville, as joint surety with Dade for Brown & Co. Judgment had been rendered against Dade in the Fairfax county court.

Mr. Simms, for defendant, contended that the summary remedy by one surety against another, was confined to the court who gave the original judgment. Rev. Code, 292, 337.

THE COURT so decided.

Case No. 3,534.

DADE v. YOUNG.

[1 Cranch, C. C. 123.][3]

Circuit Court, District of Columbia. June Term, 1803.

DEPOSITION—CROSS-EXAMINATION.

If a party has had no opportunity to cross-examine a witness against him whose deposition is taken under the act of congress, the court will continue the cause.

[Cited in Straas v. Marine Ins. Co., Case No. 13,518.]

Continuance granted on the ground that the defendant had no opportunity to cross-examine the witness whose deposition was taken under the act of congress.

Case No. 3,535.

In re DAGGETT et al.

[8 N. B. R. (1873) 287.][1]

District Court, E. D. Missouri.[2]

BANKRUPTCY—DEATH OF PARTNER—CONTROL OF ASSETS.

Where one of the partners has died, and, under the statute of the state, the partnership property is placed in the hands of the personal representative of the deceased partner to be administered, the court in bankruptcy will not, on a petition against the surviving partners,

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

[1] [Reprinted by permission.]

[2] [Affirmed in Case No. 3,536.]

take the estate out of the hands of the administrator.

[Cited in Re Temple, Case No. 13,825.]

In this case the petition stated that the defendants had been partners with one Patrick Rogers, deceased, in the business of docking and repairing vessels; that by the terms of the partnership articles the partnership was not to be dissolved by the death of any of the partners, but that the business should be carried on and continued by the personal representative in conjunction with the surviving partners; that P. Rogers died in Ohio, leaving a will, appointing J. Rogers his executor; that the business had been continued for two years by the executor and surviving partners; that the executor had also died; that after that time letters of administration, with the will annexed, had been granted to D. G. Taylor, and that, under the statute of Missouri, the surviving partners having failed to qualify as administrators of the partnership estate by giving bond, &c., the probate court of St. Louis county had directed the administrator of P. Rogers to take charge of the partnership estate and divide it up; and that the estate was in the custody of the administrator; that the surviving partners had committed an act of bankruptcy within six months by suspending payment of their commercial paper. An application was made for a rule to show cause why the firm should not be adjudged bankrupt.

TREAT, District Judge, refused the rule, stating that as it appeared by the petition that the partnership estate was in the custody of the probate court, the bankrupt court would not interfere with its management by that court, it having first acquired jurisdiction; and, besides, that as one of the partners had died it did not appear that under the provisions of the bankrupt act there was any method of adjudging a dead man bankrupt, or of administering his estate in the bankrupt court, and as process could not issue against the deceased partner it could not issue against the surviving partners.

[NOTE. The petitioners brought the matter to the circuit court for review, and that court affirmed the decision herein. Case No. 3,536.]

Case No. 3,536.

In re DAGGETT.

[8 N. B. R. (1873) 433; 3 Dill. 83.] [1]

Circuit Court, E. D. Missouri.[2]

BANKRUPTCY—DEATH OF PARTNER—CONTROL OF ASSETS.

1. A., B., C. and D. were partners. C. died leaving a will, by the terms of which his interest in the co-partnership was to be continued, and appointing D. his executor. Several years thereafter D. also died, but without a will. The surviving partners declined to give the bond necessary for them to retain possession of the partnership estate, and one M. gave the required bond, became the administrator according to the laws of the state, and took possession of the partnership estate. Subsequently a creditor of the firm filed a petition in bankruptcy against the firm. The district court refused to grant an order to show cause. On appeal, *held*, that the district court properly refused to grant the order to show cause, for the reason that the probate court of the state had first obtained jurisdiction and had the right to continue and also to retain possession of the partnership effects.

[Cited in Adams v. Terrell, 4 Fed. 802.]

2. Semble: The right of an individual copartner to be thrown into bankruptcy for his individual debt would not be precluded by this decision.

[Petition to review a decision of the district court of the United States for the eastern district of Missouri, sitting in bankruptcy.]

DILLON, Circuit Judge. This is a proceeding instituted in the United States district court, upon a petition of Edward Whitaker, to put the Sectional Dock Company into bankruptcy. The dock company is a co-partnership, consisting of John D. Daggett, Mary Thomas, Sarah Morse, administratrix of estate of Thomas Morse, deceased, Ann Eliza Hartshorne, and Patrick Rogers. The record also discloses that, Mrs. Hartshorne being a married lady, her share was held by John D. Daggett, as her trustee, until recently, when Alexander J. P. Garesche was substituted for him. That Patrick Rogers died in 1870, leaving a will whereby Robert C. Rogers was appointed executor, and administration was there had of the estate. The will permitted his interest in the co-partnership to be continued. The record also shows that Robert C. Rogers died June, 1873; that no administration was had here upon the estate of Patrick Rogers, deceased, until June last, when letters, with the will, were granted by the probate court of St. Louis county to Daniel G. Taylor; that the surviving partners, declining to give the bond necessary for them to retain possession of the partnership estate, waived in writing their right to do so in favor of Mr. Taylor; that thereupon Mr. Taylor gave the required bond, took possession, and is now administering the estate according to the state law. The district judge refused the order [Case No. 3,535], and the petitioner, under the second section of the bankrupt act [of 1867 (14 Stat. 518)], appeals to this court. The case is anomalous, not only as to the questions involved, but as to the parties constituting the partnership.

There is one section in the bankrupt act which relates particularly to the bankruptcy of co-partnerships and corporations, section 36: "That where two or more persons who are partners in trade shall be adjudged bankrupt, either on the petition of such partners or of any one of them, or on the petition of any creditor of the partners, a warrant shall issue in the manner provided by this act, upon which all the joint stock and property of

[1] [Reprinted by permission.]

[2] [Affirming Case No. 3,535.]

the co-partnership, and also all the separate estate of each of the partners shall be taken, except such parts thereof as are hereinbefore excepted, and the creditors of the company and separate creditors of each partner shall be allowed to prove their respective rights, and the assignee shall be chosen by the creditors of the co-partners; and he shall also keep separate accounts of the joint stock or property of the co-partnership, and of the separate estate of each member thereof." Then the statute proceeds to provide for the proving up of claims, and adopts the ordinary equity rule that the firm creditor shall have the first claim on the firm assets, and the surplus is to be appropriated to the individual creditors. So, on the other hand, the individual creditor is to be paid out of the separate estate, and any surplus may be appropriated to payment of the joint debts. Now, then, this is a proceeding to throw this co-partnership in bankruptcy and the members of it, whose estate is already in course of administration in the probate court of St. Louis county under the laws of the state. Before this proceeding was instituted, the probate court of St. Louis county, under the authority of the state statute, had already appointed an administrator, and he has now actual possession of this joint estate. And the statute provides that claims against it shall be established, and that they shall be paid out of the partnership funds to the exclusion of individual debts. Now, it is manifest there cannot be two administrators on this same co-partnership property. The partnership affairs must be wound up and settled in one court or the other. There cannot be two concurrent administrations with any satisfactory result. Now, this record presented to me discloses the fact that all of the firm assets, at all events within the jurisdiction of the probate court, are actually in the custody of that court and of its officers, and in course of administration. If this co-partnership be adjudged bankrupt, the first thing to be done is to issue a warrant to seize this joint estate and wrest it from the hands of the administrator. And it is quite clear to my mind that the only way in which this proceeding can be sustained is to hold that the state statute, so far as it authorizes any administration of the estate of the co-partnership, indeed, all that portion of the state statute, is superseded or repealed by the bankrupt act. Otherwise it may be a lawful act, and the administrator appointed is lawfully in possession of the estate. And unless the assignee in bankruptcy be entitled to go there and get that estate he could not make any dividends. There is nothing in his hands to pay the co-partnership debts or to give to the creditors after they come in. The estate is somewhere else.

Now, this does not preclude the right of a creditor, if any one of these co-partners individually be liable to be thrown into bankruptcy, from doing so. Of course, this proceeding, under the state statute, would not preclude it; but, assuming its validity, when the probate court has first possession of the estate of the partnership, only precludes the bankrupt court from going in and taking possession of it. The probate court first obtained jurisdiction, and, if the statute is valid, it has the right to continue on afterward. Now, it has been urged, in arguing the question, that, although it has never been seriously contended that this court of bankruptcy should take forcible possession of the property out of the probate court, perhaps, it is said, it may be surrendered. But, at all events, that this is a step further along in the proceedings, to arise hereafter, and then to be considered, not now, and therefore that the court should have granted the order to show cause. Certainly the district court might have done so, but when it was shown on the very face of the record that that proceeding was instituted after the probate court had acted under the state statute, I think that the district judge was, in his refusal of the application, exercising a sound discretion, seeing that no end was to be gained by granting the order to show cause. I do not see any occasion for me to reverse his order in the premises. His decision is, therefore, affirmed.

Case No. 3,537.

DAGGS v. EWELL et al.

[3 Woods, 344.][1]

Circuit Court, W. D. Texas. Jan. Term, 1879.[2]

MORTGAGE FORECLOSURE—DEFENSES — JUDGMENT LIEN AND UNRECORDED DEED — REPEAL OF USURY LAW — CONSTITUTIONAL AMENDMENTS—RETROACTIVE EFFECT — CONSTRUCTIVE NOTICE FROM POSSESSION OF LANDS.

1. According to the jurisprudence of Texas, the lien of a judgment creditor without notice is superior to the unrecorded deed of the vendee of the defendant in execution.

2. The position of a bona fide mortgagee is still stronger, for he stands in the plight of a purchaser.

3. A deed of lands to a purchaser without notice, duly recorded, cuts off any claim thereto founded on a resulting trust.

4. The repeal of a usury law which forfeited all interest upon the usurious contract leaves the contract in full force, according to its terms, and no forfeiture of interest imposed by such law can be enforced.

[See note at end of case.]

5. The adoption by the state, after such repeal, of a constitution imposing penalties for usurious contracts, can have no effect upon such contracts.

6. A statute of limitation which cannot be pleaded against a note secured by a mortgage, cannot be pleaded against the mortgage.

[See note at end of case.]

7. Where a mortgage on lands is executed by the holder of the legal title duly recorded, to a

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

[2] [Modified and affirmed in Ewell v. Daggs, 108 U. S. 143, 2 Sup. Ct. 408.]

mortgagee without notice of any outstanding equitable title, no defenses against the mortgage are open to the equitable owner which cannot be made by the holder of the legal title.

8. Possession of land is constructive notice of the title of the possessor, but being constructive only, its effect cannot be extended to lands outside the limits of the possession, claimed by another party under the same title.

In equity. Heard upon pleadings and evidence for final decree.

The facts, about which there was little controversy, were as follows: On May 27, 1856, the defendant James B. Ewell and Mary W. Ewell, his wife, made and delivered to the complainant [Thomas J. Daggs,] their promissory note of that date for the payment to his order of $3,556, three years after date, and to secure the same executed and delivered to complainant a deed of mortgage on a tract of land in Gaudaloupe county, Texas, containing sixteen hundred and fifty-three acres of land. Said mortgage was duly proved for record on May 31, 1856, and recorded in the proper office on June 5, 1856. On March 9, 1872, the complainant began an action at law in this court on the said promissory note against James B. Ewell and wife, and recovered a judgment on July 14, 1873, against James B. Ewell for $3,530.95, the cause having been discontinued as to Mary W. Ewell, because at the date of said note she was under coverture. The note and mortgage were taken for complainant, who was a citizen of Virginia, by his agents in Texas. The suit was brought on the note only by attorneys of complainant, who did not know of the existence of the mortgage. the agents having delivered to the attorney the note without the mortgage. The defense set up by James B. Ewell to the note in the action at law was usury, the consideration of the note being $2,000 in cash, loaned by complainant to him, and the residue of the amount named in the note being interest at the rate of twenty per cent. per annum for the period of three years, computed annually. The land covered by the mortgage executed by James B. Ewell was, in the year 1853, the property of one Edward Dwyer. During that year the defendant George W. Ewell, who was a brother of James B. Ewell, made a contract for the purchase of the said premises. He paid, very soon after the making of the contract, to wit, in March, 1854, the cash payment, and on April 13, 1854, by deed of that date, Dwyer conveyed the land, not to George W. Ewell, the purchaser, but to James B. Ewell, his brother. This deed was soon after recorded in the proper office. This conveyance was made by Dwyer to James B. Ewell without the knowledge, consent or authority of George W. Ewell. The entire purchase money for the land was paid by George W. Ewell, who bought for himself alone. His brother had no part whatever in the purchase of the land or in the payment of the consideration. The excuse given by James B. Ewell for the conveyance of the land to himself, and not to his brother, was that Dwyer wanted a mortgage to secure the deferred payment, and as George W. Ewell was living at a distance, it was more convenient to make the deed to James B. Ewell and take a mortgage from him. George W. Ewell, having paid the entire consideration for the land, discovered, in September, 1856, for the first time, that Dwyer had made the deed therefor to his brother, James B. Ewell, and he at once demanded of James B. a conveyance of the land to himself as its rightful owner, and on September 6, 1856, James B. Ewell conveyed, by deed of that date, the land to his brother George W. Ewell, and this deed was soon after recorded in the proper office. George W. Ewell never learned of the mortgage on said land given by his brother, James B., to the complainant until September, 1873. On December 4, 1855, George W. Ewell sold 555½ acres of said tract of land to one James B. Wilson, and gave him a bond for title, and on March 1, 1857, made him a deed for the land so sold to him. During the years 1855, 1856, 1857 and 1858, James B. Wilson resided on the tract of land purchased by him of George W. Ewell, and made improvements and paid the taxes thereon. When the mortgage to Daggs was made by James B. Ewell, neither Daggs nor his agent had any actual notice of the equity of George W. Ewell in the land which the mortgage conveyed, and the only constructive notice of any title adverse to that of James B. Ewell was the possession by Wilson of 555½ acres of the tract covered by the mortgage, and Daggs had no actual notice of that possession. In short, the testimony established, on the one hand, that the mortgage was taken by Daggs in good faith, to secure a loan of money made by him to James B. Ewell, who held the legal title to the land, without notice to Daggs of any equitable title in any one else, save the constructive notice arising from the possession by Wilson of a part of the tract, and, on the other hand, that George B. Ewell bought the land in good faith for himself, paid for it with his own money and never had any notice till September, 1856, that the title had been made to his brother, James B. Ewell, save that constructive notice arising from the registration of the deed to James B. Ewell in 1854, and never had any notice of the mortgage to Daggs till September, 1873.

Wm. M. Walton and John A. Green, for complainant.

A. M. Jackson and David Sheeks, for defendants.

WOODS, Circuit Judge. The case presented in the bill of complaint, which is simply a suit to foreclose a mortgage given to secure a note made by the mortgagor, ought to prevail unless the defendants have succeeded in making good some one or more of the defenses set up by them. The defense made by the heirs of James B. Wilson, who was in

possession of 555½ acres of the mortgaged premises at the time the mortgage was executed, claiming title thereto under a bond for title given by George W. Ewell, the equitable owner of the land, is conceded by complainant to be good, his possession being constructive notice to Daggs, or his agent, of the equitable title of Wilson. The only controversy is, therefore, between Daggs and George W. Ewell.

It is the settled jurisprudence of Texas, that even the lien of a judgment creditor, without notice, is superior to the unrecorded deed of a vendee of the defendant in execution. Grace v. Wade, 45 Tex. 522. The case of a bona fide mortgagee, without notice, is much stronger, for he stands in the plight of a purchaser. The claim of defendant George W. Ewell, that the registration laws of the state have no application to his equity in the mortgaged premises because the same was a resulting trust, will not hold. The defendant George W. Ewell, sets up, by way of defense, that the note to secure which the mortgage was given, was usurious, that the real consideration was $2,000, money loaned; and that the residue of the amount for which the note was given, was made up of interest at twenty per cent. per annum; that at the date of the note, the laws of Texas forbade the taking or receiving of interest more than twelve per cent per annum, and forfeited all interest if that rate was exceeded. He claims that payments have been made on the note to the amount of $1,745, which should be deducted from the principal, leaving only $255 due. It seems to us to be a conclusive reply to this defense, that before suit was brought on the note, the constitution of Texas of 1870 went into effect, and by virtue of its provisions, repealed all existing usury laws, and this constitution continued of force until after the recovery of the judgment. See section 4, art. 12, Const. 1870. This left the contract, as made by the parties, in full force, and no forfeiture or penalty for the usury could be visited upon or against the party holding the usurious contract. Wood v. Kennedy, 19 Ind. 68. The doctrine seems to be well founded in principle and authority. U. S. v. The Helen, 6 Cranch [10 U. S.] 203; Norris v. Crocker, 13 How. [54 U. S.] 429; Maryland v. Baltimore & O. R. Co., 3 How. [44 U. S.] 534. The fact that the constitution of 1876 provided penalties for usurious contracts, could have no effect on a contract which, at the time of the adoption of that constitution, was valid and binding.

The defendant George W. Ewell claims to be protected against a decree of foreclosure by the limitation of four years prescribed by article 4604 of Paschal's Digest of Laws, which declares that "all actions of debt grounded upon any contract in writing, shall be commenced and sued within four years next after the cause of such action or suit, and not after." The complainant replies to this, that he has already brought suit on the note secured by the mortgage, and recovered judgment thereon, and that the limitation cannot be pleaded as against the mortgage, which is a mere incident to the note. Unquestionably this reply would be a good one to the defense of limitations, if set up by James B. Ewell, the maker of the note and mortgage. So far as he is concerned, the note not being barred, the mortgage is not barred. Thus, in Eborn v. Cannon, 32 Tex. 231, the supreme court says: "If the notes were a subsisting debt at the time of the institution of the suit, not barred by the statute of limitations, the mortgage executed contemporaneously to secure their payment was still valid as long as the debt remained unsatisfied. No matter at what time the power of the court was invoked for its correction and foreclosure, and for a decree to subject the mortgaged property to the satisfaction of the debt, it was opportune, if the jurisdiction of the court over the debt itself was not ousted. The mortgage was but an incident of the debt, and the incident in law, as in logic, must abide the fate of its principal." See, also, Perkins v. Sterne, 23 Tex. 561; Duty v. Graham, 12 Tex. 427; Flanagan v. Cushman, 48 Tex. 241. But George W. Ewell insists that, conceding that the mortgage is not barred as to James B. Ewell, yet it is as to him, that he can be in no worse plight than if he had signed the note and mortgage, and if he had done so the lapse of time would have barred any relief as against him. There seems at first sight to be much strength in this position, but we do not think it will stand scrutiny. The legal title to the mortgaged premises was in James B. Ewell, and if the mortgagee was, at the date of the mortgage, without notice, either actual or constructive, of the equity of George W. Ewell, then he is not affected by that equity. He is in the same position that he would be if George W. Ewell's estate in the land commenced with the date of the deed made to him by James B. Ewell, in September, 1856. If this view is correct, then George W. Ewell is in the same position of any other vendee of a mortgagor whose deed bears date subsequent to the mortgage. He cannot set up any defense to the mortgage which is not open to the mortgagor. He is in no better position than the mortgagor. The mortgagor cannot confer on him any rights which he does not possess himself.

It follows, from this, that George W. Ewell, so far as his equities in the mortgaged premises were concerned, was bound by the judgment on the note against James B. Ewell. In other words, he was the privy in estate of James B. Ewell, and, so far as his estate in the land was concerned, was bound by what bound James B. Ewell. If the mortgage was good against James B. Ewell, it was good against him. If it was not barred as to James B. Ewell, it was not barred as to him. These views apply with like effect to the defense of usury. If that defense was

closed as to James B. Ewell, it was also closed as to George W. Ewell. We are of opinion, therefore, that as the mortgage in suit is not barred as against James B. Ewell, it is not barred as against George W. Ewell, and, therefore, that the defense of limitation and staleness of claim set up by George W. Ewell must fail.

It was strongly urged by counsel for George W. Ewell that as complainant conceded that the possession by Wilson of five hundred and fifty-five and one-half acres of the mortgaged premises was notice of his equity, that his possession of a part was notice to complainant of the condition of the title to the entire tract, that Wilson being in possession of a part, complainant was bound to inquire as to his equities, and such inquiry would have revealed the equities of George W. Ewell. We think this position would be sound if the complainant had had actual notice of the possession of Wilson. In that case he would, on inquiry as to Wilson's rights, have learned of the defect in James B. Ewell's title, and would have been bound to follow up the inquiry with diligence, and such inquiry would have revealed the equities of George W. Ewell. But it is not shown that complainant or his agent had any actual notice of the possession of Wilson. The possession of Wilson was, therefore, constructive notice to him of Wilson's rights only, and that notice, being constructive, could not extend its effects beyond Wilson's possession: Watkins v. Edwards, 23 Tex. 443. The case seems to be one where the equities are equal. In such a case the legal title which is in the mortgagee must prevail.

After considering with care the several defenses set up against the decree sought by complainant, we are of opinion that none of them can prevail, and there must be a decree of foreclosure and sale of so much of the mortgaged premises as are not covered by the claim of the heirs of Wilson.

[NOTE. On appeal by defendant George W. Ewell alone the decree in this case was modified in respect to the amount of the judgment and the rate of interest, and was then affirmed on substantially the grounds stated in the foregoing opinion. 108 U. S. 143, 2 Sup. Ct. 408. In regard to the effect of the repeal of a usury law upon existing contracts, the court, through Mr. Justice Mathews, says:

["The effect of the usury statute of Texas was to enable the party sued to resist a recovery against him of the interest which he had contracted to pay, and it was, in its nature, a penal statute inflicting upon the lender a loss and forfeiture to that extent. Such has been the general, if not uniform, construction placed upon such statutes. And it has been quite as generally decided that the repeal of such laws, without a saving clause, operated retrospectively, so as to cut off the defense for the future, even in actions upon contracts previously made. And such laws, operating with that effect, have been upheld as against all objections, on the ground that they deprived parties of vested rights, or impaired the obligation of contracts. The very point was so decided in the following cases: Curtis v. Leavitt, 15 N. Y. 9; Mechanics' & W. M. M. S. B. & B. Ass'n v. Allen, 28 Conn. 97; Welch v. Wadsworth, 30 Conn. 149; Andrews v. Russell, 7 Blackf. 474; Wood v. Kennedy, 19 Ind. 68; Town of Danville v. Pace, 25 Grat. 1; Parmelee v. Lawrence, 48 Ill. 331; Woodruff v. Scruggs, 27 Ark. 26.

["And these decisions rest upon solid ground. Independent of the nature of the forfeiture as a penalty, which is taken away by a repeal of the act, the more general and deeper principle on which they are to be supported is that the right of a defendant to avoid his contract is given to him by statute for purposes of its own, and not because it affects the merits of his obligation; and that whatever the statute gives, under such circumstances, as long as it remains in fieri, and not realized, by having passed into a completed transaction, may, by a subsequent statute, be taken away. It is a privilege that belongs to the remedy, and forms no element in the rights that inhere in the contract. The benefit which he has received as the consideration of the contract which, contrary to law, he actually made, is just ground for imposing upon him, by subsequent legislation, the liability which he intended to incur. That principle has been repeatedly announced and acted upon by this court. Read v. City of Plattsmouth (decided at the present term) 107 U. S. 568, 2 Sup. Ct. 208. And see Lewis v. McElvain, 16 Ohio, 347; Johnson v. Bentley, Id. 97; Trustees of C. F. R. E. Ass'n v. McCaughy, 2 Ohio St. 155; Satterlee v. Matthewson, 16 Serg. & R. 169, 2 Pet. (27 U. S.) 380; Watson v. Mercer, 8 Pet. (33 U. S.) 88.

["The right which the curative or repealing act takes away in such a case is the right in the party to avoid his contract,—a naked legal right, which it is usually unjust to insist upon, and which no constitutional provision was ever designed to protect. Cooley, Const. Lim. 378, and cases cited."]

Case No. 3,538.

DAGGS v. FRAZER et al.

[2 Am. Law J. (N. S.) 73; 1 West. Leg. Obs. 212; 6 West. Law J. 555.]

District Court, D. Iowa. Jan. Term, 1849.

SLAVERY—TROVER.

Trover will not lie in Iowa to recover the value of slaves.

This was an action of trover against the defendants [Elihu Frazer and others], nineteen citizens of Salem, Henry county, in this state. The declaration contained three counts. The first count read as follows, to wit: "For that whereas the said plaintiff [Ruel Daggs] heretofore, to wit: on the 1st day of May, A. D. 1848, (being at the time of the trespasses hereinafter alleged and set forth, a resident in and a citizen of Clark county, and state of Missouri, and still being," &c.,) "in the said county and state, to wit: at the township of Salem, in the county of Henry, and state of Iowa, and the district of Iowa, and within the jurisdiction of this court, was lawfully possessed as of his own property of certain goods and chattels, to wit: one negro man, commonly known and called by the name of Sam, and of the real name of Samuel Fulcher, and of the value of $2,000; one negro woman, of the name of Dorcas, the wife of the said Samuel Fulcher, a tanner by trade, and skilful therein, and of the value of $1,000; one negro man of the name of John Walker, a skil-

ful farmer and tanner, and of the value of $2,-000; one negro woman of the name of Mary, the wife of the said John Walker, and of the value of $1,000; one other negro woman, of the name of Julia, of the value of $1,000; one female negro child of the name of Martha, and one male negro child of the name of William, each of the value of $500; two other male negro children, one aged three years, and one aged one year, and each of the value of $500; consisting in all of nine negroes, the slaves of the said plaintiff, by and under the laws of the state of Missouri, and of the value in all of $10,000. And being so possessed thereof the said plaintiff, afterwards, to wit: on the day and year first above mentioned, at," &c., "casually lost the said goods and chattels out of his possession. And the same, afterwards, to wit: on," &c., "came to the possession of the said defendants by finding. Yet the said defendants, well knowing the said goods and chattels to be the property of the said plaintiff, and of right to belong and appertain to him, but contriving," &c., "have not, as yet, delivered the said goods and chattels, or any or either of them, or any part thereof, to the said plaintiff, although often requested so to do; and afterwards," &c., "converted and disposed of the said goods and chattels to their and each of their own use—to the damage of the plaintiff $10,000, and therefore, he brings his suit," &c. The second count, the same in substance as the first. The third count is for money laid out and expended in endeavoring to re-capture and recover the said goods and chattels; for loss of services of said negroes; for loss of crops, &c. To this declaration, the defendants demurred, and assigned the following causes of demurrer: (1) The said counts set forth and allege the said property to be negroes, men and women, &c., whereas the laws and constitution of Iowa do not recognize men and women as property, and the subject of a suit; (2) the said declaration does not show that the plaintiff had any right to said persons in the state of Iowa; (3) the action of trover will not lie to recover the value of human beings in the state of Iowa; (4) there is no sufficient cause of action set forth in the plaintiff's declaration; and (5) the said declaration does not state or show that said trover and conversion was contrary to the act of congress, in such cases made and provided.

J. C. Hall and J. T. Morton, in support of the demurrer, contended:

(1) The subject matter of trover must be property in the strictest and most technical sense of the term, not only capable of conversion, but such in its character as to raise the presumption that the defendants knew the right of ownership to it was vested in others than themselves.

(2) At common law, there is no remedy for interference with the rights of owner and slave. 7 Bac. Abr. 806; 1 Bl. Comm. 435; 2 McLean, 601 [Jones v. Vanzandt, Case No. 7,501].

(3) The constitution and laws of congress have changed this. To what extent? See Const. U. S. art. 4, § 2; Act Cong. 1793, § 3 (1 Stat. 302); Jones v. Vanzandt [supra].

(4) From the above authorities, slaves, when in a free state, are persons, and not property. The only right of ownership they are then subject to is a compulsory specific performance. See Serg. Const. Law, 397.

(5) The only interference with the rights of master and slave upon the soil of a free state, for which there is now a remedy, is one of the acts forbidden by the act of congress of 1793, § 4. Jones v. Vanzandt [Cases Nos. 7,501, 7,502].

(6) The action must be founded on the statute, and must so appear in the declaration. 1 Chit. Pl. 246; 2 McLean, 604 [Jones v. Vanzandt, supra].

(7) A recovery of the full value in trover vests the property in the defendants. In a free state, (the cause of action there arising,) this must be otherwise, if slaves are the basis of the action. Therefore, by this conflict of laws, the plaintiff must be driven to some other remedy.

J. P. Carleton, S. Whicher, and A. W. Sweet, in reply, contended that the master has the same right to the slave, into whatsoever state he may escape, that he had in the state whence he escaped; that this right is guaranteed by the constitution and laws of the United States, and by no other law; that it is not in the power of any state to change those rights. Consequently, the same form of action and the same rules of evidence may be invoked and applied for an infraction of those rights that are given in Missouri. The idea of conversion may be entertained in law, without supposing benefit to accrue to the defendant in trover. The injury to the plaintiff, and not the benefit to the defendant, is the true rule of damages in trover. That the defendant could not be benefited, under the laws of Iowa, by the wrongful act charged in the declaration, affords no good reason against the maintenance of the action of trover. That this being an action at common law, the same strictness in pleading is not required as would be in an action under the act of congress for a penalty. See Jones v. Vanzandt [supra]; 2 Wheat. Sel., note, 1417; Mahoney v. Ashton, 4 Har. & McH. 210; Com. v Griffin, 7 J. J. Marsh. 588; 2 Mason, 81 [Watt v. Potter, Case No. 17,291]; 9 Johns. 67; Prigg's Case, 16 Pet. [(41 U. S.) 539]; 1 Chit. Pl. 246.

BY THE COURT. The averments in the declaration are not sufficient to support the action. Trover will not lie in this state to recover the value of slaves. See opinion of Coulter, J., 2 Am. Law J. (N. S.) 41 [Kauffman v. Oliver, 10 Pa. St. 514]. Demurrer sustained.

The plaintiff then asked leave to withdraw his joinder in demurrer, and amend his declaration in any manner not inconsistent with the writ, which was granted, and the cause continued at the costs of the plaintiff.

DAHLMAN (WORMSER v.). See Case No. 18,048.

DAIR (UNITED STATES v.). See Case No. 14,913.

Case No. 3,539.

In re DAKIN.

[19 N. B. R. 181.][1]

District Court, S. D. New York. April Term, 1879.

BANKRUPTCY—FRAUDULENT PREFERENCE—RES JUDICATA—SURRENDER—PROOF OF CLAIMS.

1. The bankrupt was the executor of one L., and as such received the sum of eleven thousand three hundred and twenty dollars. Less than four months before the filing of the petition in bankruptcy he made and procured to be recorded a mortgage for that amount on his real estate to himself as executor. Afterwards a prior mortgage was foreclosed, and on the reference as to surplus moneys the assignee and the bankrupt, as executor, appeared and contested with each other the right to such surplus. The referee found that the mortgage was executed in fraud of the bankrupt law, and was void as to the assignee and creditors of the bankrupt. The referee's report was confirmed, and the surplus moneys paid to the assignee. The bankrupt, as executor, afterwards filed a proof of claim in the bankruptcy proceedings for the sum of eleven thousand three hundred and twenty dollars, which stated that the debt had been secured by mortgage which had become worthless by the foreclosure, and stated that the lien of the mortgage was deemed cancelled and abandoned. On motion the proof was expunged by the register. *Held*, no error; that the question of the validity of the mortgage was properly before the referee, and the final decree of the court confirming his report was a determination of the question binding and conclusive upon the claimant.

[Cited in Van Kleeck v. Miller, Case No. 16,860.]

2. The recovery of the surplus moneys by the assignee in the foreclosure proceedings was equivalent to a recovery of the property from the preferred creditors in an action brought for that purpose.

3. There was no voluntary surrender by the claimant, and he could not prove for any part of his debt.

[In bankruptcy. In the matter of Daniel J. Dakin.]

O. D. M. Baker, for assignee.

John P. H. Tallman and A. H. Wilkinson, for claimant.

CHOATE, District Judge. This is a review of the order of the register expunging a proof of debt. The facts are as follows: November 11, 1867, the bankrupt Dakin, as executor of the will of Louisa A. Sturgess, received eleven thousand three hundred and twenty dollars, the proceeds of her estate. July 5, 1877, a petition in bankruptcy was filed against him by creditors, on which he was adjudicated September 19, 1877. An assignee was afterwards appointed. On the 8th of May, 1877, the bankrupt caused to be recorded a mortgage on real estate belonging to him, from himself individually to himself as executor under the will of Louisa A. Sturgess, for eleven thousand three hundred and twenty dollars. The mortgage was dated May 7, 1877. In December, 1877, William T. Merritt, as executor of Hannah K. Merritt, commenced a suit in the New York supreme court for the foreclosure of a prior mortgage on the same real estate. He made the assignee in bankruptcy and Dakin, as executor, parties to the suit, and they appeared therein. Judgment of foreclosure having been given, the property was sold under the decree, and a reference was ordered to ascertain and report the amount due to Dakin as executor, and to any other person, which is a lien on the surplus moneys, and the priorities of the several liens thereupon. The assignee in bankruptcy and Dakin, as executor, appeared before the referee and contested with each other the right to the surplus money. April 15, 1878, the referee reported that the surplus was three thousand two hundred and nineteen dollars and sixty-eight cents; that the bankrupt was indebted to himself, as executor, eleven thousand three hundred and twenty dollars; that when he executed the mortgage he was insolvent, and knew himself to be so; that he executed with intent to prefer the debt he owed to said trust estate, and with a view to prevent his property from coming to his assignee in bankruptcy, and to prevent the same from being distributed under the bankrupt law of 1867 [14 Stat. 517], and to evade the provisions thereof. And he found, as a conclusion of law, that the mortgage was executed in fraud of the provisions of the bankrupt law, and was void as to the creditors and assignee in bankruptcy of said Dakin. April 27, 1878, the report was confirmed on motion and notice, and a decree entered that said surplus moneys, after deducting a prior dower claim and costs, be paid over to the assignee in bankruptcy. The surplus money thus ascertained, two thousand eight hundred and thirty-five dollars and eighteen cents was paid to the assignee.

July 25, 1878, Dakin, as executor, etc., filed with the register his proof of claim against the bankrupt's estate for eleven thousand three hundred and twenty dollars. The proof stated that the debt had been secured by said mortgage when it had become worthless by the foreclosure, and it contained the statement that "it" (the lien of the mortgage) "is hereby deemed cancelled and abandoned."

[1] [Reprinted by permission.]

The assignee moved to expunge the claim, and the register so ordered. This proceeding is to review this decision of the register.

It is insisted by the assignee that the claimant is precluded from the proof of his debt by reason of the determination in favor of the assignee in the surplus money proceeding, which is, as he claims, equivalent to a hostile proceeding on the part of the assignee to recover the property which was transferred to the claimant by way of preference. That therefore Rev. St. § 5084, which prohibits a creditor who has received a fraudulent preference from proving his debt unless he surrenders the property so received to the assignee, bars the claimant from the proof of this debt. The claimant insists that there was no question properly before the referee, except that of the priority of liens; that the referee or the supreme court had no jurisdiction nor authority to determine in that special proceeding that the claimant's mortgage was void as in violation of the provisions of the bankrupt law. I think that the register was clearly right in holding that the question of the validity of the claimant's mortgage was properly before the referee, and that the final decree of the court confirming his report was a determination of this question binding and conclusive upon the claimant. While it is doubtless competent and proper and not unusual, where there is a disputed question of fact involved in the right to surplus moneys, to direct the determination of the right by an action, yet I think the better opinion is that a court of equity in a suit for foreclosure has full power and jurisdiction to determine finally the rights of all parties interested in the property who are parties to the suit, and that where, upon the reference to ascertain and report the priority of liens upon the surplus moneys, parties claiming rights therein adversely to each other actually appear and litigate the question of their respective rights therein, and this, too, without objection on their part to the determination in that way of the question so raised and litigated, and the determination so made is, on notice and hearing, confirmed by a decree of the court, the determination so made is final and conclusive unless appealed from, like any other judicial determination. Mutual Life Ins. Co. v. Bowen, 47 Barb. 618; Eagle Fire Co. v. Flanagan, 1 How. App. Cas. 303; Livingston v. Mildrum, 19 N. Y. 440; Field v. Hawxhurst, 9 How. Pr. 75; Union Ins. Co. v. Van Rensselaer, 4 Paige, 85; King v. West, 10 How. Pr. 333; Husted v. Dakin, 17 Abb. Pr. 137; Union Dime Sav. Inst. v. Osley, 4 Hun, 657.

The determination of the invalidity of the claimant's mortgage as against the assignee is therefore to be deemed as having been made by the judgment of a court of competent jurisdiction upon a trial on the merits. It is res adjudicata. While there has been some conflict of opinion in the courts of New York on the practice in such cases, and proper limits of the inquiry to be made upon such reference, yet I do not think the authorities sustain the position that the court has not jurisdiction to determine such a question, or that in a case like the present the parties would not be bound. See Mathews v. Duryea, 3 Abb. Dec. 220.

On the further question, whether the claimant has surrendered his security or may now claim the right to prove his debt without such surrender, the security having proved worthless in his hands, having, in fact, been taken from him by the judgment of the court in the foreclosure suit, no distinction can be made between this case and the ordinary case of a recovery of the property from the preferred creditors by the assignee by means of an action brought for that purpose. In substance and effect this is what the assignee has done. The prohibition of the statute (section 5084) was not made with reference to any peculiar form of proceedings, nor is it limited in its application to cases where an action at law or suit in equity is brought by the assignee to recover the property. Although this proceeding to determine the right to surplus money is a special proceeding in an equity suit in which another party is the plaintiff, yet in this special proceeding the preferred creditor and the assignee contested with each other the right to the property which was the subject of the preference as clearly as if it had been an action brought to recover that alone, and the assignee prevailed and recovered the property. The case is within both the letter and the spirit of the statute, and the register properly held that the claimant had not voluntarily surrendered the property, but that it had been recovered from him by the assignee by legal proceedings. In re Leland [Case No. 8,230]. This precludes the proof of the debt, and it has also been held that where there has not been a surrender of the property to the assignee before recovery, the creditor cannot prove even for a moiety of this debt under the amendment to section 39 of the bankrupt law, contained in the twelfth section of the act of January 22, 1874 (18 Stat. 181), which provides that a preferred creditor in case of actual fraud, shall not be allowed to prove for more than a moiety of his debt. In the case of In re Atkins, in this court (unreported), Judge Blatchford held that this amendment was a limitation upon the section, the amendment not giving a preferred creditor any new rights or any right to prove at all if he failed to surrender the property, but restricting him, in a case of actual fraud to the proof of a moiety in case under section 23 (Rev. St. § 5084), he had by surrender of the property entitled himself to prove at all.

It is argued on behalf of the claimant that the moneys of the estate of Louisa A. Sturgess were invested by Dakin in the real es-

tate on which this mortgage was given, and that they may be traced into and identified with the surplus moneys which resulted from the foreclosure; and that he is now entitled to an order that the whole of such surplus be paid to him as executor, and can prove for the balance of eleven thousand three hundred and twenty dollars. It appears by the evidence that after Dakin received this money in 1867 he bought government bonds with about eight thousand dollars of it. What he then did with the rest does not appear. except that he mingled it with his own money. Afterwards he sold the bonds, and the proceeds of these were not kept distinct from his other moneys. Somewhere from 1871 to 1874 he expended a large sum of money, exceeding eleven thousand three hundred and twenty dollars, in putting up buildings on the real estate in question; but there was no act done at the time or afterwards by him declaring or creating any trust for the benefit of the trust estate in the land, or any declaration or act indicating that the making of these improvements was an investment of the trust funds. The beneficiaries under the will were the two children of the testatrix, and before they came of age he promised them, or one of them, that he would, when they came of age, give them security. His giving of the mortgage appears to have been intended by him as a compliance with this promise.

No case is cited which would justify the court in holding that these facts show that the trust funds were invested in this real estate so as to fasten on the land a trust, or that the surplus moneys can be identified as part of the trust moneys, as distinguished from the other moneys of Dakin which went into the land; certainly the case of Cook v. Tullis, 18 Wall. [85 U. S.] 332, does not sustain this claim. I think, however, that this question cannot properly be raised upon the present record. The claim is obviously entirely inconsistent with that made in the proof of claim now in question. That proceeds on the theory that there was no investment of the trust money; that it is now in its entirety a mere debt for which the mortgage was given as security. Even if this claim of an investment of the proceeds can be sustained, the decision of the register must be sustained. It is not therefore necessary to determine whether there is any foundation for this claim, or whether the giving of the mortgage itself, or the proceedings of the executor in the foreclosure suit would estop him now from making such a claim. Such questions must be reserved till he shall make an application to have that money paid to him, if he shall be so advised.

Order of the register confirmed.

D'ALBERTI, The (DOMINY v.). See Case No. 3,977.

Case No. 3,540.

Ex parte DALBY.

In re GRIFFITHS.

[1 Lowell, 431;[1] 3 N. B. R. 731 (Quarto, 179).]

District Court, D. Massachusetts. March Term, 1870.

BANKRUPTCY—RIGHTS OF ASSIGNEE—UNRECORDED CHATTEL MORTGAGE—PROOFS FOR DEFICIENCY.

1. The assignee in bankruptcy stands in the place of the bankrupt, and takes only the property which he had, subject to all valid claims, liens, and equities.

[Cited in Bromley v. Smith, Case No. 1,922; Coggeshall v. Potter, Id. 2,955; Casey v. La Societe de Credit Mobilier, Id. 2,496; Johnson v. Patterson, Id. 7,403; Re McKenna, 9 Fed. 34. Approved in Potter v. Coggeshall, Case No. 11,322.]

2. In the absence of actual fraud, a mortgage of chattels made by a resident of Massachusetts is good against the assignee in bankruptcy, though it had not been duly recorded at the date of the bankruptcy.

[Cited in Harvey v. Crane, Case No. 6,178; Re Oliver, Id. 10,492.]

3. If a mortgage on the bankrupt's property is held as security for several notes and indorsements given by the mortgagee for the accommodation of the bankrupt, and the security is insufficient, the several holders of the paper are to have a pro rata share of the proceeds of the mortgaged property; and may prove against the estate for the balance of their respective debts after crediting their shares of the security.

In July, 1867, Griffiths lived and had his principal place of business in Boston, and had a factory in the adjoining city of Roxbury, which has since been annexed to Boston. In that month he gave the petitioner Dalby a mortgage upon the fixtures and tools in his factory, which recited that Dalby had indorsed notes for him on a promise of security; and the condition was, that Griffiths, his executors, administrators, and assigns shall, at or before the expiration of nine months from the date of the mortgage, pay certain promissory notes, and save Dalby harmless from the payment of the same or any part thereof, "said certain notes being described as follows, to wit;" one note is then described, and the condition proceeds, "and any and all other notes given or indorsed by said Dalby for the accommodation of the said Charles W. Griffiths & Co. during the pendency of this deed," then, &c. The mortgage was recorded in Roxbury, whereas by law it should have been recorded in Boston, and no possession was taken under it. The note described in the deed, and all other notes given or indorsed within nine months after the date of the deed, were paid; but the parties continued in the same course of dealing, and there were outstanding at the time of the bankruptcy of Griffiths in January, 1869, notes of the like description to a greater amount than the value of the mortgaged chattels. The property was

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

sold by the assignees, by consent, and the mortgagee petitioned for the proceeds. [The assignees contend that the deed itself does not purport to secure any notes not made or indorsed within nine months of its date, and that it is not valid against them for want of due record.] [2]

T. H. Sweetser and T. F. Nutter, for assignees.

G. A. Somerby and T. S. Dame, for mortgagee.

LOWELL, District Judge. The deed is obscure. What the "pendency of the deed" is, may well be a question. It can hardly mean the nine months, because that is merely the time limited for payment of certain notes which purport to be described; and though only one is in fact described, the facts show that there were others then existing, to which the security was certainly intended to apply. After the nine months the deed would still be pending if there were a breach. The most favorable construction that I can give for the assignees is this, that so long as the mortgage remained a valid and existing lien upon the property, it should secure all notes of the kind mentioned in it. Now, there was no time up to the date of the bankruptcy when notes were not outstanding; no time when the mortgagor could have called upon the mortgagee to cancel his security on the ground that he was no longer liable as indorser for accommodation of the mortgagor; the course of dealing was continuous, and the proceeds of new notes were used, in part, to take up the old notes. But I am much inclined to think that the true reading of this deed is, that it should secure all notes of the kind mentioned until it should be given up, or in some way cancelled or abrogated. In either view, it secures the notes mentioned in the agreed statement.

The important question of law remains to be considered, whether such a mortgage, not duly recorded, is good against the assignee in bankruptcy. Independently of statute, such a mortgage, given for value and in good faith, may be valid without change of possession: Conard v. Atlantic Ins. Co., 1 Pet. [26 U. S.] 449; De Wolf v. Harris [Case No. 4,221]; Briggs v. Parkman, 2 Metc. [Mass.] 263; notes to Twyne's Case, 1 Smith, Lead. Cas. 1. In Massachusetts, since 1832, the statute has required possession to be taken and kept by the mortgagee, or a due record of the mortgage; and if neither is done, it shall not be valid "against any other person than the parties thereto:" Gen. St. c. 151, § 1. The supreme judicial court of the commonwealth have construed this language strictly, and have held that actual notice of the mortgage would not defeat the title of a purchaser. Travis v. Bishop, 13 Metc. 304. And they had before intimated that probably an attaching creditor, with actual notice, would hold his attachment against the mortgage. Denny v. Lincoln, 13 Metc. 200. From these decisions and intimations the step was easy to a ruling that an assignee in insolvency had a better title than such a mortgagee. Bingham v. Jordan, 1 Allen, 373. But before this last case was decided, Judge Story had held a different rule in Winsor v. M'Clellan [Case No. 17,887]. His reasoning is that the assignee, in the absence of fraud in fact, represents the bankrupt, and takes only what he had, subject to all incumbrances and liens which are valid against him, and that he is therefore fairly one of the parties within the statute. This decision does not appear to have been brought to the notice of the court in the argument of Bingham v. Jordan; but the two cases are not necessarily opposed, because by the insolvent law of the state the assignee takes not only all the debtor's property, but all that could be taken on execution against him at the time of the insolvency; and under the earlier decisions and intimations, such chattels could have been taken by an execution creditor even though he had actual notice of the mortgage. There was no such language in the bankrupt act of 1841 [5 Stat. 440], nor is there in that of 1867 [14 Stat. 517].

In the important and celebrated case of Mitford v. Mitford, 9 Ves. 87, on which Mr. Justice Story mainly relied in the decision I have cited, it was held by Sir William Grant that a chose in action of the wife of a bankrupt, not reduced into possession by him or his assignees before his death, survived to the wife. "Assignees in bankruptcy," said the learned master of the rolls, "take subject to whatever equity the bankrupt was liable to. They are not considered purchasers for valuable consideration in the proper sense of the words." He then cites Lord Hardwicke and Lord Thurlow as saying that an assignment by operation of law does nothing more than to place the assignee in the room of the husband. Mr. Christian, in his work on Bankruptcy (2d Ed., vol. 1, p. 490), criticises this opinion with some sharpness, and thinks the rule cannot be considered established until determined at law. It has since been so determined, in accordance with Sir W. Grant's decision. Sherrington v. Yates, 12 Mees. & W. 855.

The doctrine that an assignee in bankruptcy takes only the title of his assignor is now generally recognized. Thus it has been held in Massachusetts, that goods put into the hands of a trader for the very purpose of giving him a false credit will not pass to his assignee in insolvency. Audenried v. Betteley, 5 Allen, 382. And see Butler v. Breck, 7 Metc. [Mass.] 164; Stetson v. Gulliver, 2 Cush. 494; Clarke v. Minot, 4 Metc. [Mass.] 346. In the absence, therefore, of fraud in fact, of which the want of record may often be strong evidence, but which the agree-

[2] [From 3 N. B. R. 731 (Quarto, 179).]

ment of facts in this case disclaims, a mortgage which is good against the bankrupt is good against his assignee. The rule would be different in those states in which the continued possession of the mortgagor is held conclusive of fraud. This is all the uniformity which the bankrupt act can have in its operation on titles created by the diverse laws of the states.

The decision of Mr. Justice Story ought to be followed here, even if I were not agreed with him in opinion, because the bankrupt act of 1867 does not differ specifically in the granting part from that of 1841. By the fourteenth section, it gives to the assignee all the property and estate of the bankrupt, with certain exceptions, and authorizes him to redeem or discharge any mortgage, pledge, or lien, &c. [It nowhere grants any goods that are not the bankrupt's, even if they should be in his possession, and it preserves all liens except attachments.] [3] Much stress was laid upon the fact that in the same section it is provided, that no mortgage of any vessel, or of any other goods or chattels, made as security for any debt or debts, in good faith and for present considerations, and otherwise valid, and duly recorded pursuant to any statute of the United States or of any state, shall be invalidated or affected "hereby." But it does not seem to me that this proviso can enlarge the rights or title of the assignee, or can make a mortgage invalid against him which but for the proviso would have been valid. Suppose possession to have been taken and retained by the mortgagee, no record would be necessary; and the mortgagee's title would be good at common law and by the statute, but the proviso, in terms, only saves mortgages that have been duly recorded, and not those which need no record. By the decision of Judge Story, this mortgage need not be recorded as against the assignee in bankruptcy, who is one of the parties thereto, in the sense of the law. The proviso appears to have been inserted out of greater caution, lest it should be supposed that valid chattel mortgages should be affected by the assignment, and not with any view of construing the state laws which concern the recording of mortgages; and so if the mortgage be one that requires no record, as if it be executed in a state having no statute upon the subject, or if, as in this case, record is not required between the parties, the proviso will not defeat it. [Take the very case of a mortgage of a vessel, mentioned in the act, such a mortgage is good without record against persons having notice of it; and I suppose it is not to be doubted that an assignee in bankruptcy takes as a purchaser with notices of all equities.] [3]

It was said at the argument that the notes indorsed by the mortgagee were more in amount than the whole proceeds, and that the mortgagee had not in fact paid them. If this is so, the order should be that the assignees distribute the proceeds of sale of the mortgaged property pro rata among the bona fide holders of the notes secured thereby, and that these holders have leave to prove for the balance only of their respective debts, after crediting the payments [against the general assets of the estate]. And even if there be enough to pay the secured debts in full, the assignees have a right to see that the money is so applied.

Petition granted.

[3] [From 3 N. B. R. 731 (Quarto, 179).]

DALE (BARKER v.). See Case No. 988.

Case No. 3,541.

DALE v. BARNEY.

[No opinion was written by the court, but the report of Pierrepont, referee, was affirmed by Blatchford, J., and followed in Hennequin v. Barney, 24 Fed. 581, but overruled in Tomes v. Barney, 35 Fed. 115. The report of the referee is nowhere reported, and is not now accessible.]

Case No. 3,542.

DALEY et al. v. UNITED STATES.

[16 Int. Rev. Rec. 147; 4 Leg. Gaz. 347.]

Circuit Court, E. D. Pennsylvania. Oct 24, 1872.

INTERNAL REVENUE TAXES—ASSESSMENT AGAINST DISTILLERS—PRODUCING CAPACITY.

Section 20, Act Cong. July 20, 1868 [15 Stat. 133], requires that the quantity of spirits returned for assessment by a distiller shall not be less than 80 per cent. of the producing capacity of the distillery. *Held* that, where the distiller does not produce the 80 per cent., he is yet liable to tax upon that amount. The tax is not upon the actual quantity of spirits produced, but upon the 80 per cent. of the producing capacity of the distillery, whether that quantity is distilled or not.

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

The question in this case arose under the proviso to the 20th section of the act of congress of July 20, 1868 (15 Stat. 134), which is in these words: "But in no case shall the quantity of spirits returned by the distiller, together with the quantity so assessed, be for a less quantity of spirits than 80 per centum of the producing capacity of the distillery as estimated under the provisions of this act."

Upon the trial in the court below, the counsel of the said United States offered in evidence the distiller's bond of James J. Martin, dated October 8, 1868, signed by himself and John Daley and James A. Waters. This was admitted. The counsel of the United States then called a witness, who produced the survey and returns of the said distiller for the months of October, November, and December, 1868, and January, February, March, and April, 1869, and testified that the quantity of

distilled spirits returned by Jas. J. Martin as manufactured at his distillery during the time above stated was 2,713 gallons less than the 80 per cent. of the producing capacity of the said distillery, and that the tax on this deficiency amounted to $1,628. The survey and the returns were then offered and admitted in evidence, and the case closed.

Whereupon, THE COURT (CADWALADER, District Judge) charged the jury that if they found that the returns of the distiller were for a quantity less than the producing capacity of the said distillery, the defendants were liable for the tax on the deficiency equal to 80 per cent. of the producing capacity of the said distillery, amounting in this case to the sum of $1,628.

Upon exceptions to the charge of the court, and the case being taken up to the circuit court, the argument took place before McKENNAN, Circuit Judge.

John O'Byrne, for plaintiffs in error, cited the case of U. S. v. Singer [Case No. 16,292]. in which Judge Drummond decided that a distiller was not liable beyond the amount actually produced.

John K. Valentine, for the United States, argued that the words of the act were positive, and were intended to fix a minimum capacity, and that what are called by Judge Drummond "the multifarious and complicated provisions" of the act are all necessary, in order to ascertan the true amount of spirits produced, wherever this exceeds 80 per cent. of the producing capacity.

McKENNAN, Circuit Judge. Judgment of the district court of the United States affirmed, and record ordered to be remitted.

DALL (LINDROP v.). See Case No. 8,365.

Case No. 3,543.

DALLAM v. WAMPOLE et al.

[1 Pet. C. C. 116.][1]

Circuit Court, D. Pennsylvania. April Term, 1815.

MARRIED WOMAN—DISPOSITION OF SEPARATE ESTATE.

A wife, entitled, under a marriage settlement, to a sum of money, held to her sole and separate use, and after her death without issue, for her next of kin, may, by an instrument freely and voluntarily executed, under hand and seal, direct the whole amount in the hands of the trustee or of his assignees, to be paid to her husband.

[1] [Reported by Richard Peters, Jr., Esq.]

On the intended marriage between the plaintiff and Frances Smith, the plaintiff executed a deed of trust to Shoemaker, by which he settled all the personal estate of the said Frances on her, to her sole and separate use, and after her death, without issue, to her next of kin. The marriage took effect. Shoemaker having in his hands this personal property, to the amount of sixteen hundred dollars, became insolvent and assigned over his estate to the defendants, for the benefit of his creditors; but with a particular direction in the assignment, to pay the sixteen hundred dollars to Mrs. Dallam. Afterwards Mrs. Dallam, by a sealed instrument, acknowledged before a justice of the peace, to have been freely and voluntarily done, &c. directed the defendants, the assignees of Shoemaker, to pay to her husband the plaintiff, the whole of the monies due and owing, and directed to be paid to her by the said assignment of Shoemaker. The question is, whether the husband, the plaintiff, is entitled to recover.

Hopkinson, for plaintiff, contended, that there is no interest in this money vested in any person, under the deed of trust, but in Mrs. Dallam; for although it is given to her next of kin, yet this is no more than the law would have done, had those words not been inserted. He contended first; that the plaintiff had a right to recover against the defendants, upon the ground of the direction of the trustee to them, to pay to Mrs. Dallam or to her order. It is not for them to inquire, whether she or the person appearing with the order, is entitled to the money. Secondly, by accepting the trust reposed in them by Shoemaker, they agreed to perform it in all its parts; and one part of it is to pay the money to Mrs. Dallam. If the assignees cannot legally pay over the money, then the trust is at an end, as they cannot act, nor can they or Shoemaker, or this court, appoint a trustee; of course the money is due to Mrs. Dallam, or rather to her husband, freed from the trust. Thirdly, the order of Mrs. Dallam, is sufficient. A feme covert having a separate estate, may dispose of it as she pleases, even to her husband, if it is done freely and voluntarily; and in whatever manner this is ascertained, if the fact be proved, the court will confirm her disposition. 2 Brown, Ch. 663; 3 Brown, Ch. 195, 340, 346; 1 Ves. 163, 518; 2 Atk. 67; 2 Ves. 663, 667, 669.

Wallace, for defendant, submitted the case.

THE COURT decided in favor of the complainant, on the last point; being satisfied that the paper given in evidence, as containing an assignment of the money to the complainant, was freely and voluntarily made.

Case No. 3,544.

DALLAS v. FLUES et al.

[28 Leg. Int. 325;[1] 8 Phila. 150; 1 Leg. Gaz. Rep. 288; 19 Pittsb. Leg. J. 173.]

Circuit Court, E. D. Pennsylvania. Oct. 2, 1871.

BANKRUPTCY—DISALLOWANCE OF PROOF—RE-TRANSFER OF COLLATERALS.

Where the court disallows proof of indebtedness against bankrupt's estate, they will not also compel a re-transfer of collaterals.

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

[This was a bill in equity, by George M. Dallas, trustee of the estate of Peter Conrad, a bankrupt, against Flues & Co., to recover collaterals held by the defendants for claims which were disallowed in proof.]

Chas. S. Pancoast and James E. Gowen, for complainant.

C. H. Sidebotham, for respondents.

McKENNAN, Circuit Judge. The specific relief sought by the complainant is the release, surrender and conveyance to him, as trustee of the estate of Peter Conrad, a bankrupt, of certain real estate and personal securities conveyed and transferred to the respondents by the bankrupt to secure the payment of several notes endorsed by him and discounted by them. It is asked on the ground that the respondents have proved their whole claim against the bankrupt, and that this is a conclusive election by them to abandon their securities, and that they cannot assert their claim upon the bankrupt's assets until they surrender such securities to the complainant for the benefit of all the creditors.

As the complainant, by his appeal from the decree of the district court, has invoked the judgment of this court upon the validity of the respondents' claim, and as it has been adjudged to be void and not entitled to allowance, it is unnecessary to pass upon the complainant's right to the relief prayed for. Transfer of their securities to the complainant, or disallowance of their debt, are the alternatives, a choice of which it is sought to impose upon the respondents, but, as the last one has been enforced upon them by the decree in the appeal, the prayer in the bill cannot be granted. The bill is therefore dismissed.

DALLAS, The (KNOX v.). See Case No. 7,904a.

DALLAS (ROBERTS v.). See Case No. 11,-898.

DALLAS & W. R. CO. (ALLEN v.). See Case No. 221.

DALLAS COUNTY (HUIDEKOPER v.). See Case No. 6,850.

[1] [Reprinted from 28 Leg. Int. 325, by permission.]

Case No. 3,544a.

DALLES CITY v. MISSIONARY SOC. OF M. E. CHURCH.

[See 6 Fed. 356.]

Case No. 3,545.

DALLET v. SMYTHE.

[6 Blatchf. 419.][1]

Circuit Court, S. D. New York. April Term, 1869.

CUSTOMS DUTIES—"ANGOSTURA BITTERS."

"Angostura Bitters," an article which, although of some value, as a remedy for some affections of the human body, is principally used in bar-rooms, as a flavoring extract for mixed drinks, is liable to a duty of 100 per cent., under section 2 of the act of June 30, 1864 (13 Stat. 202), as "spirituous liquors, not otherwise enumerated," and not to a duty of 50 per cent., under section 5 of the act of July 14, 1862 (12 Stat. 546), as a medicinal preparation.

This was an action against [Henry A. Smythe] the collector of the port of New York, to recover back certain duties alleged to have been illegally exacted. It was tried before the court, without a jury, upon an agreed statement of facts and oral evidence. The facts were as follows: The plaintiff [James Dallet] imported an article known as "Angostura Bitters," put up in black glass bottles, each containing less than a quart. The plaintiff, upon entry of the goods, reported them as aromatic or Angostura bitters, and claimed that they were subject to a duty of 50 per cent., ad valorem, under section 5 of the act of July 14, 1862 (12 Stat. 546), which provides for that rate of duty on "all pills, powders, tinctures, troches, or lozenges, syrups, cordials, bitters, * * * or other medicinal preparations, or compositions, recommended to the public as proprietary medicines, or prepared according to some private formula or secret art, as remedies or specifics for any disease or diseases or affections whatever, affecting the human or animal body." The appraisers, however, classified the article as "spirituous liquors, not otherwise enumerated," within section 2 of the act of June 30, 1864 (13 Stat. 202), which imposes a duty of 100 per cent. thereon. This rate of duty the plaintiff paid, under protest, claiming that the goods were liable to only 50 per cent. duty, because the chief component was not distilled spirits, and also because the article was a medicinal preparation, prepared by a secret method. An appeal was taken, and the decision of the defendant was sustained. Thereupon this action was brought. The amount of the excessive duties, according to the claim of the plaintiff, was admitted to be $3,728; and it was also stipulated, that, unless the goods were to be classified as a medicinal preparation, prepared according to a private formula

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

or secret art, as a remedy or specific for diseases or affections affecting the human body, the judgment should be for the defendant.

George St. George, for plaintiff.
Simon Towle, for defendant.

BENEDICT, District Judge. The article here in question, known as "Angostura Bitters," cannot, in my opinion, be properly classified as a medicinal preparation, under the 5th section of the act of 1862. It is true, that it has been proved to be of some value as a remedy for some affections of the human body, such as diarrhoea, but it cannot be said to be prepared as a remedy or specific for disease, within the meaning of that act. Its principal and characteristic use has been shown to be in bar-rooms, as a flavoring extract for mixed drinks. That is the purpose for which it is prepared and sold. It is not ordinarily sold by druggists, or prescribed by physicians as a remedy, but is imported mostly by liquor dealers, and sold by them and by grocers. The fact that it has some medicinal properties, is not sufficient to entitle it to be considered as a medicinal preparation, but its common, well-known, and principal mode of use, for which it is prepared and sold, must control its designation.

The judgment will, accordingly, be for the defendant.

DALLETT (PALMER v.). See Case No. 10,-689.

Case No. 3,546.

DALLMEYER v. FARMERS', MERCHANTS' & MANUFACTURERS' FIRE INS. CO.

[4 Cent. Law J. 464, note.][1]

Circuit Court, W. D. Missouri. April Term, 1877.

JURISDICTION — FOREIGN CORPORATIONS — DEFECTIVE SERVICE OF PROCESS—WAIVER.

[1. Jurisdiction is not acquired of a foreign corporation by service of process upon an agent designated by it to receive process in pursuance of a state statute.]

[Cited in Schollenberger v. Phoenix Ins. Co., Case No. 12,476.]

[2. A demurrer to a petition on the ground that it does not set forth facts sufficient to constitute a cause of action is an appearance which cures defective service of process.]

At law.

The plaintiff in this case is a citizen of the western district of Missouri, and the defendant is a corporation created under the laws of the state of Ohio. The plaintiff had a summons issued, directed to the marshal of the eastern district of Missouri; and the same was served on the agent of the defendant corporation, appointed under the provisions of section 4 of the act of the general assembly of Missouri, approved March 23, 1874, which requires all foreign insurance companies doing business in this state "to file with the superintendent of the insurance department a written instrument or power of attorney, duly signed or sealed, authorizing some person, who shall be a citizen of this state, to acknowledge or receive service of process for and in behalf of such company in this state, and consenting that service of process upon such agent or attorney shall be taken and held to be as valid as if served upon the company according to the laws of this or any other state; whether such process is issued by any of the courts of this state or any of the courts of the United States."

At the return term the defendant filed a demurrer, first, to the jurisdiction of the court, on the ground that the defendant was not found here, and was not an "inhabitant" of the district when served with the process of the court, and, second, that the petition did not state facts sufficient to constitute a cause of action. The court sustained the demurrer as to the first ground of objection, but held that the second ground of objection,—viz., to the petition,—was such an "appearance" in the case as to place the defendant in court for all purposes, and the demurrer was accordingly overruled. The court, on this point, cited Rippstein v. St. Louis Mutual Life Ins. Co., 57 Mo. 86.

[NOTE. This case is published in 4 Cent. Law J. 464, as a note to Stillwell v. Empire Fire Ins. Co., Case No. 13,449. Nowhere more fully reported.]

DALLON (KELSEY v.). See Case No. 7,678.

Case No. 3,547.

DALLUM v. BRECKENRIDGE, Etc.

[Brunner, Col. Cas. 210;[1] Cooke, 152.]

Circuit Court, D. Tennessee. 1812.

GRANT — NOTORIETY OF OBJECTS CALLED FOR, NECESSARY — PLAT AND SURVEY TO EXPLAIN CALLS IN GRANT.

1. The calls in an entry to be valid must be for some notorious object, or for some point with reference to a notorious object, so as to lead a person using reasonable diligence to the place located.

2. For the purpose of showing mistake in the calls of a grant, resort may be had to the plat and certificate of survey.

This was an action of ejectment brought [by Dallum's lessee] to recover a tract of land on the south side of Duck river. The lessor of the plaintiff, claimed under a grant from the state of North Carolina, dated the 7th day of April, 1790, calling for five thousand acres, "lying on the south side of Duck river, on both sides of Fountain creek, adjoining Thomas Gill and Elijah Robertson's two tracts, numbers 1,043 and 1,045, beginning on Gill's northeast corner, at a red oak, walnut, and poplar, thence north thirty-five

[1] [Reprinted by permission.]

[1] [Reported by Albert Brunner, Esq., and here reprinted by permission.]

chains and twenty-five links to a poplar, Robertson's line, of number 1,043; thence west with said line forty-six chains to a red oak. Robertson's corner; thence north with said survey to William Gilbert's corner, in all two hundred and eighty-five chains and fifty links to an ash; thence west one hundred and sixty chains and seventy-five links to a stake; thence south one hundred and twenty-two chains to a stake in said Robertson's line of number 1,045; thence east, with said line, sixteen chains to a stake, Robertson's corner; thence south with said survey one hundred and ninety chains and seventy-five links to an ash; thence east one hundred and ninety chains and seventy-five links to the beginning." The plat and certificate of survey, attached to the grant, contained the same courses and distances; and the third line calls to run "north with said survey to William Gilbert's corner, and with said Gilbert's survey, in all two hundred and eighty-five chains and fifty links, to an ash." No marked lines and corners were proved to exist, except where the calls run with other surveys; nor did it appear that any actual survey was made. If the plaintiff was bound to stop at William Gilbert's corner, it would be far short of the two hundred and eighty-five chains and fifty links, and would not produce an interference with the defendants. But by doing so the plaintiff would not get his quantity of land, nor would he comply with a great many calls in his grant, as it respected the places where he was to adjoin, and run with Robertson's claims; by running the full distance of two hundred and eighty-five chains and fifty links, without regard to Gilbert's corner, he would comply with every call of the grant. Gilbert's corner is an ash, hickory, and beech; and the ash is marked as a corner on the south, east, and west sides. Gilbert's corner, at the other extremity of the line, is an ash, hickory, and dogwood. The defendant produced in evidence a grant of a younger date than that of the plaintiff, covering the land in dispute. He also produced an entry, for five thousand acres, upon which the grant issued, calling to lie on the south side of Duck river, on Lytle's creek, beginning at a tree marked L. D. and running up the creek, so as to include a tree marked A. B. for complement. Lytle's creek was proved to have been notorious at the date of the entry, but the existence of the trees was not shown.

Grundy, Whiteside & Hayes, for plaintiff.

We contend that the plaintiff has a right to run his whole distance called for, without regard to the corner of Gilbert. No rule is more universally settled than that if there be one incongruous or inconsistent call in an entry or grant, it shall be disregarded, or so construed as to give efficacy to the claim, provided by doing so consistency is produced in the rest of the calls. The grant calls to run "north to Gilbert's corner, in all two hundred and eighty-five chains and fifty links." If the court and jury should be of opinion that we must stop this line at the corner of Gilbert, the consequence will be that scarcely any subsequent call in the grant can be complied with; whereas, by continuing the course the full distance, consistency will everywhere prevail. But abandoning this idea for the present, let us inquire whether the grant is not sufficiently certain in another point to authorize the construction for which we contend? It is evident that it was not intended to stop at the corner, or wherefore the expression "in all, two hundred and eighty-five chains and fifty links?" This expression is never used, except where it applies to more than one part of a line running the same course. If the object was to terminate the line at the corner of Gilbert, the words would have been, "to Gilbert's corner, two hundred and eighty-five chains and fifty links;" but when "in all" is added, it evidently follows that Gilbert's corner is only spoken of as being on the line which is to run that distance, viz., "to Gilbert's corner, and from Gilbert's corner, in all two hundred and eighty-five chains and fifty links." Should there be, however, any difficulty upon this part of the subject, we have no hesitation in believing that we have a right to resort to the plat and certificate of survey, to ascertain what land was intended to be granted. It does not follow that in all cases, the words of the grant are to be pursued; because if it can be shown, even by parol evidence, where the survey was made, that will control the grant. The land really surveyed is that to which the claimant is entitled; and therefore if the person claiming can show where the survey was made, by proving lines and corners of the survey, although the grant may not correspond with them, yet the calls in the grant shall yield. The reason for this is obvious, and will even apply to cases where the certificate of survey corresponds with the grant. No man shall be injured by the act of officers, over whom he has no control. If then a survey is made for a certain piece of land, but the surveyor in making out his certificate is guilty of a mistake as to either course, distance, or object, which mistake is still continued in the grant, yet the party prejudiced will not be injured by such error, and he will have a right to claim and hold his land as really surveyed. Tayl. 116; 1 Johns. 495; 2 Hayw. 347; 1 Hayw. 378; Hardin, 369. It follows, therefore, that these mistakes of the surveyor or secretary will not prejudice the claimant; and that they may be rectified, upon a trial in ejectment, by parol proof. We would then ask whether the case now under consideration is not infinitely stronger than any other produced? Here we do not rely upon parol proof, but we exhibit record evidence of the particular place where this land was surveyed, and where it was intended to lie. If the calls in

a grant include, by course, distance, or object, more land than was really surveyed, if the error can be shown either by proof of the existence of marked lines and corners, or by the production of the plat and certificate upon which the grant emanated, the person claiming title under a grant thus circumstanced can only hold in conformity with the survey. No person denies but that where marked lines and corners can be shown they will conclusively designate the land appropriated; and upon what principle is this idea bottomed? It is upon the principle that the survey, being that act which alone can authorize the emanation of the grant, shall be the criterion by which to ascertain the land really intended to be conveyed by the state. The superstructure cannot stand upon a broader or other ground than its foundation. If, then, to ascertain this point parol proof has been and can be admitted, it would seem to follow that a kind of testimony much less exceptionable cannot be rejected. The parol proof is to show where the lines and corners are; and surely the certificate of the surveyor, acting in an official capacity, and which is also matter of record upon its being returned to the office of the secretary of state, is much higher and better evidence.

Dickinson & Haywood, for defendants.

Before we enter into an examination of the cases produced by the counsel for the lessor of the plaintiff, it will be necessary to consider a preliminary question. The decisions relied on were not made in this state, nor in any state where similar laws exist upon this subject. They recognize the principle that a claimant to land, if a mistake exists in the grant, may resort to parol proof, for the purpose of showing the land really surveyed. The reason why courts have proceeded in this way may be as is contended on the part of the plaintiff. Perhaps cases may occur where justice cannot be done, unless some such mode of redress is attainable. In this state the legislature have pointed out the mode of redress, which can be sought by the party injured. There exists an express statutory provision, declaring that where there shall be a mistake committed, either by the surveyor or the secretary of state, the person injured by such error may, upon application to the circuit court, by way of petition, have the error corrected, and his grant so amended, as to be as it would have been if no mistake or error had happened. If the legislature conceived that these matters could be corrected by the respective judicial tribunals in the country, upon the trial of the cause in which the mistake occurred, it was surely useless to pass this statute. It would seem that the legislature intended to remedy an evil, not otherwise remediable. The right which courts of justice have to interfere in such cases, where no statute has passed on the subject, is, to say the best of it, rather an assumption of power, intended to be exercised for good purposes. So soon, therefore, as the legislature prescribe a complete and ample mode of redress, that mode alone should be pursued.

The case now under consideration comes within the act of assembly. The plaintiffs allege that the secretary in making out the grant deviated from the plat and certificate of survey, by omitting, in the third line, the words "and along with his survey." If the fact be so, it was an easy matter to remedy the omission, by adopting the course which the legislature have prescribed. This is neither the place nor the occasion to ask redress. But if we are mistaken in this point, still we are safe upon another. The only cases where the party has been admitted to exhibit testimony for the purpose of varying the calls in the grant were where a marked line could be shown, evidencing thereby, conclusively, where the survey was in fact made. The gentlemen have not nor can they produce a solitary decision where such a course has been pursued, except in the case of an actual survey. 1 Hayw. 22, 378. In the present instance no actual survey ever was made; and it cannot be that the calls in a grant can be corrected by showing a survey in idea. The plat and certificate of survey ought not, therefore, to be received as evidence, to vary the calls in the plaintiff's grant. Viewing the subject in this light, and believing, as we do, that the plaintiff must resort alone to his grant to ascertain the land to which he has a legal title, no great difficulty exists. It is a well-settled rule, that where a marked line, or corner, or tree, or natural boundary, is called for, the line must run to such object without regard to either course or distance. 2 Hayw. 3, 75, 139, 160, 183, 353. The call, therefore, in the plaintiff's grant to run "with Robertson's line to the corner of William Gilbert," must terminate at the corner of Gilbert, although the distance mentioned is not completed. By running in this way no interference will be occasioned with the defendants.

McNAIRY, District Judge (TODD, Circuit Justice, absent). I feel no sort of difficulty upon the questions arising out of the evidence in this cause. The defendant's entry can be of no avail; not only because it wants notoriety, but because the objects called for want identity. To make an entry good, both these things must concur and exist. In general a call for a tree is not good; and indeed it never can be a good call, unless there is something else in the entry leading the subsequent locator so near to the place where the tree is, that it will not be imposing an unreasonable degree of trouble on him to make search for it. Every valid entry must contain such a degree of notoriety as to the objects called for, or such a description in relation to a notorious object as will lead a subsequent inquirer, who uses reasonable diligence and industry, to the place located. The first call in

this entry is that the land shall lie on the south side of Duck river. This is a good call to show the part of the country where the land lies. The next call, to wit, on Lytle's creek, is still bringing you nearer to the place. The entry then calls to "begin at a tree marked D. L." This tree is not shown, nor is it established where the tree stood, if it ever existed. In this point of view the entry is void for want of identity. If the tree could be shown, perhaps, as the creek is only six miles long, it would not be unreasonable to require a subsequent locator to search for it. But upon this point no opinion is given; it is not necessary that one should be given. It seems to me that the grant of the plaintiff is sufficiently intelligible upon the face of it, without resorting to the plat and certificate of survey. It is undoubtedly true, as has been argued by the counsel for the defendant, that in general when an object is called for in a grant, the line must terminate at that object, whether it be a tree, marked line, or natural boundary, unless there be something else in the grant evidencing that the object is not called for as a termination of the line. In this case the use of the expression "in all" shows that the grantee did not intend to stop at the corner of Gilbert. Where then must he stop? Surely at the end of the distance. But if this should be doubtful the question is disrobed of all its difficulty by resorting to the plat and certificate of survey, which I have no hesitation in saying may be done. It is admitted, and very properly admitted, that if a mistake is alleged to exist in the calls of the grant, parol proof may be introduced to show where the lines were actually run; and the reason is much stronger in favor of the admission of the plat and certificate of survey.

Verdict for the plaintiff.

DALRYMPLE (WELLS v.). See Case No. 17,392.

Case No. 3,548.

DALTON v. JENNINGS.

[12 Blatchf. 96; 1 Ban. & A. 256; 5 O. G. 615; Merw. Pat. Inv. 142.][1]

Circuit Court, S. D. New York. May 21, 1874.[2]

PATENTS—NOVELTY AND INVENTION—"LADIES' HAIR NETS."

1. The claim of the letters patent granted to Joseph Dalton, March 5th, 1872, for an "improvement in ladies' hair nets," namely, "A head or hair net, composed of a main set of meshes fabricated of coarse thread, combined with an auxiliary set or sets of meshes fabricated of fine thread, substantially as described," covers broadly a head or hair net composed of a main set of meshes fabricated of coarse thread, combined with an auxiliary set or sets of meshes fabricated of fine thread, without reference to the degree of fineness of the finer threads, and without reference to the manner of tying the finer threads to the coarse threads.

2. The patented net, arrived at by taking a net of large squares made by large threads, and filling up partially the large squares by crossings of finer threads, is not a different net from one made by taking a net of small squares, sufficiently small to keep short hairs from protruding, such small squares being formed by fine threads, and all the threads of the net being of uniform size, and substituting for each alternate fine thread, in both directions, a coarse thread, so as to arrive at a net like the patented net.

3. Such a head or hair net, of small squares, sufficiently small to keep short hairs from protruding, such small squares being formed by threads which were so small as to be entitled to be called fine threads, and were, at a certain and reasonable distance away, invisible, all the threads of the net being of uniform size, existed prior to the invention of Dalton; and, to substitute in it, for each alternate fine thread, in both directions, a coarse thread, and so produce the net of Dalton, does not produce a new article of manufacture, capable of sustaining a patent.

[See note at end of case.]

[This was a bill in equity by Joseph Dalton against Abraham G. Jennings to restrain infringement of letters patent No. 124,340, granted to complainant March 5, 1872.]

John Van Santvoord, for plaintiff.

Arthur v. Briesen, for defendant.

BLATCHFORD, District Judge. This suit is brought on letters patent [No. 124,340] granted to the plaintiff, March 5th, 1872, for an "improvement in ladies' hair nets." The specification says: "This invention relates to a net composed of two or more sets of meshes, each formed from different sized threads, they being combined in a manner too fully described hereafter to need preliminary description. In the drawing, the letter A designates a hair net, which is composed of meshes, a, b, formed from different sized threads. The meshes, a, are formed of coarse threads, and they are of considerable width, so that a net formed of these meshes alone, when placed on the head, would permit the short hair to protrude through it, and it is, therefore, desirable to partially fill up these meshes by the secondary meshes, b. These secondary meshes are, by preference, made of very fine silk threads, so that the same are invisible when the net is worn, and at the same time, by these secondary meshes, the hairs are effectually held down. The meshes, b, (when an auxiliary set is used,) are attached to the meshes, a, in the middle of their bars; and, when two or more sets are introduced, they are placed equidistant, or nearly so; and the two sets of meshes—that is, the main set, a, and auxiliary set or sets, b,—are so formed and connected with each other that either set can be entirely broken away without destroying the other. If the fine meshes, or any of the same, are torn, therefore, each torn mesh

[1] [Reported by Hon. Samuel Blatchford, District Judge, and here reprinted by permission. Merw. Pat. Inv. 142, contains only a partial report.]

[2] [Affirmed in Dalton v. Jennings, 93 U. S. 271.]

can be cut out without destroying the main fabric. The meshes a, as well as the meshes b, are, by preference, made of double strands, which pass through each other, as shown in Fig. 2, they being fabricated in a manner well known to lace manufacturers; but I do not confine myself to the precise method of forming the meshes. They may, in some cases, be composed of three or more strands, united by tying, in any manner, at the ties, and of varying qualities and color of thread. The auxiliary meshes, when more than one set is used, may be arranged at acute angles to the main meshes, and may, of preference, be grouped together." The claim is, "A head or hair net, composed of a main set of meshes, fabricated of coarse thread, combined with an auxiliary set or sets of meshes, fabricated of fine thread, substantially as described." There are six figures of drawings. Fig. 1 is a top or plane view of the patented net, and Fig. 2 an enlarged view of a few meshes of it, showing the manner in which the net is formed. Fig. 1 shows squares, the outer edges of which are of large thread, and within each one of those squares are four squares equal in size to each other, formed by the running of small threads parallel with the large threads, there being one small thread equidistant between every two of the large threads. Fig. 3 shows a like construction, with two small threads in the space between every two of the large threads, and dividing equally such space. Fig. 4 shows a like construction with three small threads in the space between every two of the large threads, and dividing equally such space. Fig. 5 shows a like construction with four small threads in the space between every two of the large threads, and dividing equally such space. Fig. 6 shows squares, the outer edges of which are of large thread, and two small threads crossing each other in each of such squares, but running through opposite corners of such squares.

It is very evident, that the inventor starts with a net formed of large squares by large threads, and then proceeds to partially fill up the large squares by crossing the large squares with finer threads. The idea of the finer threads is to keep short hairs from protruding through the large squares, and he says he prefers to have the finer threads so fine as to be invisible. The tenor of the specification and claim shows that the intention was to have the claim cover broadly a head or hair net composed of a main set of meshes fabricated of coarse thread, combined with an auxiliary set or sets of meshes fabricated of fine thread, without reference to the degree of fineness of the finer threads, and without reference to the manner of tying the finer threads to the coarse threads. The history of the steps which led to the making by the inventor of the net described in the patent, shows that he started with a net of large squares, made by large threads, and filled up partially the large squares by crossings of finer threads. But the net thus arrived at was not a different net from what would have resulted if he had taken a net of small squares, sufficiently small to keep short hairs from protruding, such small squares being formed by fine threads, and all the threads of the net being of uniform size, and had substituted for each alternate fine thread, in both directions, a coarse thread, so as to arrive at a net like the patented net. Now, such a head or hair net, of small squares, sufficiently small to keep short hairs from protruding, such small squares being formed by threads which were so small as to be entitled to be called fine threads, and were, at a certain and reasonable distance away, invisible, all the threads of the net being of uniform size, existed prior to the plaintiff's invention. It is defendant's Exhibit No. 10. In such a net, to substitute for each alternate fine thread, in both directions, a coarse thread, cannot be the production of a new article of manufacture. Such substitution produces the patented net. It may be new, as a design, and may be entitled to be patented as a design. But it is not a new article of manufacture. The specification sets forth, as the advantages of the patented net, only the preventing of the protruding of short hairs, and the invisibility of the fine threads. But any person had a right to make defendant's Exhibit No. 10, of as fine threads as should be desirable, and to make it of uniform finer threads or of uniform coarser threads would involve no invention. As it stands, it will prevent short hairs from protruding. The substitution of alternate coarse threads in it for the fine threads has no effect, one way or the other, on the protruding of short hairs, or on the invisibility of the fine threads. No point of advantage, as between the patented net and defendant's Exhibit No. 10, is or can be suggested, except as to mere ornament or taste or outline, in pleasing the eye. The fabrics, as to utility, structure, inherent qualities, and mode of operation in use, are the same. The patented net, in view of the former net, has no patentability, if the claim of the patent is to be construed in the broad manner before suggested.

If the claim, to sustain it in view of the former net, is to be limited to a claim to the combination of the two sets of threads when they are so connected with each other that either set can be entirely broken away without destroying the other, then the defendant has not infringed. The defendant's net, although it has a series of finer threads crossing each other between the coarse threads, so as to prevent short hairs from protruding, does not have its threads so connected that either set can be entirely broken away without destroying the other.

The bill must be dismissed, with costs.

[NOTE. The complainant appealed to the supreme court, where the decree herein was af-

firmed; the court holding, per Mr. Justice Miller, that "the patent of John Dalton for 'a head or hair net composed of a main set of meshes fabricated of coarse thread, combined with an auxiliary set or sets of meshes fabricated of fine thread,' is void because there is no invention in it, and because various fabrics had been made and were in public use for a long time before his application, which are precisely and accurately described by Dalton in the specification and claim of his patent." Dalton v. Jennings, 93 U. S. 271.]

Case No. 3,549.

DALTON et al. v. NELSON et al.

[13 Blatchf. 357;[1] 2 Ban. & A. 225; 9 O. G. 1112; Merw. Pat. Inv. 519.]

District Court, S. D. New York. May 27, 1876.

PATENTS—INVENTION—NEW RESULT—INFRINGEMENT—STEAM GAUGE COCK.

1. The reissued letters patent granted to Oscar T. Earle, assignee of Albert Bisbee, June 14th, 1870, for a compression steam gauge cock (the original patent having been granted to said Bisbee, September 18th, 1855, and extended for seven years from September 18th, 1869,) are valid.

2. The invention consisted in making one of the surfaces that meet to close the water way or steam passage, of a piece of vulcanized rubber, instead of making it of metal and facing it with cork, or leather, or soft metal, the other surface being made of metal. The substitution of the vulcanized rubber for the prior material produced a new result.

3. The use, for one of the bearing surfaces, of vulcanized rubber intermingled with other materials, the whole forming one compound, is an infringement of the patent.

[This was a suit in equity, brought by Henry L. Dalton and others against Charles Nelson and others, for alleged infringement of a patent.]

Solomon J. Gordon, for plaintiffs.
Thomas W. Clarke, for defendants.

SHIPMAN, District Judge. Letters patent [No. 13,563] for an improved steam gauge cock were issued to Albert Bisbee on September 18th, 1855, were extended for seven years from September 18th, 1869, and were reissued [No. 4,027] on June 14th, 1870, to Oscar T. Earle, assignee of Bisbee. This is a bill in equity, in favor of the owners of the reissued letters patent, to restrain the defendants from an alleged infringement, and for an account. Infringement and the novelty of the invention are denied by the answer.

The alleged invention, which is a compression steam gauge cock, was made by Mr. Bisbee in 1853, and consisted, in the language of the specification, "first, in making one of the surfaces that meet to close the water way or steam passage, of a piece of vulcanized rubber, which is protected from spreading, or confined in metal, in such manner that but little more than its bearing or acting surface is exposed;" and, secondly, in making the other surface, which is of metal, in the form of a ring, "so that the rubber may be compressed by the same power more forcibly than if the metal surface were equal in area to that of the rubber."

Prior to this invention, the opposing surfaces of steam gauge cocks had been made of brass or other metal, which was speedily roughened or worn by the dirt or grit in the water. To remedy this difficulty, one of the surfaces was sometimes faced with leather or lead, but the steam soon destroyed the leather and corroded or cut away the surface of the lead. The joints leaked, and the cocks soon needed repair, whatever material was employed. The use of vulcanized rubber, as one of the bearing surfaces, overcame these difficulties. Its advantages are briefly explained by one of the defendants' witnesses to have been, that, "being a rubber or elastic substance, it would not wear and grind as metal surfaces would; by its elasticity, it pressed upon the seat and easily made a tight joint; it has always answered just as well in hot water as cold; while metal surfaces and ground joints, in stop cocks, will not stand at all in hot water." The Bisbee cock has proved to be of great value. It has superseded the use of pre-existing devices, has met with large sales, and "has answered its purpose perfectly."

The main question in the case is as to the validity of the patent. The defendants have introduced a number of devices which are claimed to have anticipated the plaintiffs' patent. Of these, the valve patented by Albert Fuller was clearly antedated by the Bisbee invention. In neither one of the other prior inventions or prior publications was vulcanized rubber used as one of the surfaces to close the steam passage. This fact raises the question which was considered by counsel to be the principal one in the case, viz.: Is the substitution of vulcanized rubber for cork, leather or soft metal, by which substitution a substantially perfect gauge cock was first produced, the subject-matter of a valid patent?

The difficulty which was to be overcome by the patentee was, to make a steam gauge cock which would not readily leak, and which would resist the action of steam. The result which he attained was the invention of a durable gauge cock, which remained tight under various pressures and different degrees of heat, and which did not get out of repair. This result was accomplished by the discovery of the fact, that highly vulcanized rubber, in consequence of its elasticity, would not be ground and abraded by water containing dirt or grit, and, in consequence of its durability and non-corrodible properties, would successfully endure and withstand the power of steam. In the year 1853, the peculiar adaptability of hard rubber to the varied mechanical purposes to which it has since been applied was much less understood than

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

it is at the present time. The invention consisted in the practical application of the discovery, by such mechanical means that an efficient gauge cock was produced. An attempt was made to show that this invention had been anticipated by the application of sheets of vulcanized rubber to the edges of the doors or plates of manholes of steam engines, and also upon the delivery valves of engines; but, the analogy between the edge of a gasket upon the plate of a manhole or upon a delivery valve, and one of the opposing surfaces of a compression steam gauge cock, which is necessarily opened and closed at frequently recurring intervals, and which should be so constructed as not to become leaky from the constant use to which it is subjected, is so remote, that a rubber gasket cannot, with propriety, be considered an anticipation of Bisbee's invention. The remark of Coltman, J., in Walton v. Potter, 4 Scott's N. R. 91, seems to be applicable to this branch of the case: "It appears to me, that it" (the plaintiff's invention) "is a very useful application and adaptation of a substance, the properties and qualities of which for the purpose had never been known before, and, therefore, that it was properly the subject of a patent."

Again, the Bisbee invention comes within the principle which was enunciated in Hicks v. Kelsey, 18 Wall. [85 U. S.] 673. "The use of one material instead of another, in constructing a known machine, is, in most cases, so obviously a matter of mere mechanical judgment, and not of invention, that it cannot be called an invention, unless some new and useful result, an increase of efficiency, or a decided saving in the operation, is clearly attained." Here, the substitution does not merely produce the same result in the same way, but produces a new result, differing from the former one so materially, that it might almost be said that the difference is one of kind and not of degree. The improvement was of such marked character, that the inference is, that the new device must have been the result of inventive thought, experiment and skill, rather than the result of mere mechanical judgment.

The defendants' device is an imitation of the plaintiffs' gauge cock, except that, in lieu of the vulcanized rubber, the defendants use the material which was patented by reissued letters patent issued to Nathaniel Jenkins, August 3d, 1869. The claim of the patent is for "an elastic packing composed of at least four tenths of finely pulverized, refractory, earthy or stony material, intimately mingled with, and held together by, rubber prepared for vulcanizing, and then vulcanized, as and for the purpose described." The defendants have taken the principle or idea of the Bisbee invention, which was the production of a tight steam gauge cock by the use of vulcanized rubber as one of the bearing surfaces, and the same material is used, in the same form and shape in which it appears in the Bisbee invention. It is true, that other materials are intermingled with the vulcanized rubber, forming one compound, but the vulcanized rubber of Bisbee is none the less used because other materials are fused with it. The infringement is manifest.

Let there be a decree for an injunction, and an account.

Case No. 3,550.

DALTON v. RECEIVERS.[1]

[4 Hughes, 180.]

Circuit Court, E. D. Virginia. 1882.

MASTER AND SERVANT—NEGLIGENCE—WIRE ABOVE RAILROAD TRACK IN STREET.

[1. A wire stretched across a public street in a city, 16 feet 5 inches above the track of a railroad, and about the height of a man's chin when standing on the top of a freight car, is not a structure against which a railroad company can be presumed to guarantee its employes from accidents.]

[2. But, even if this were not true in the case of a wire put up by authority of the railroad company, the receivers of the road are not liable for an accident caused by such a wire put up by other parties, and not connected to the railroad premises, nor owned, used, controlled, or known of by the railroad authorities.]

[3. The death of a railroad employe, caused by a telephone wire stretched across the street about five feet above the tops of freight cars, must be considered as due in part to his own negligence and that of his coservants, where it appears that, being employed in switching upon the street, and in the yards in its immediate vicinity, they had passed under the wire a number of times during the several weeks it had been in place, without reporting its existence to their superiors.]

[4. The failure of the yard master, who was the immediate superior of deceased, to report the wire, was not such gross and extraordinary negligence as to be an exception to the rule exempting the master from liability for negligence of coservants.]

[This was an action by A. J. Dalton, administrator of Stephen Campbell, against the receivers of the Atlantic, Mississippi & Ohio Railroad Company, to recover damages for the death of said Campbell.]

OPINION OF THE COURT. This is a proceeding assimilated to the statutory one authorized by state law, to recover from the receivers of the Atlantic, Mississippi & Ohio Railroad (a road now in the custody of this court) damages to the amount of $5,000 for the death of Stephen Campbell, an employe of the receivers. The authorities of this railway have had permission from the city of Norfolk, since 1857, to lay down their tracks in, and to run their cars along, the streets of the city, at a speed not exceeding the rate of five miles per hour. The following is the source of this privilege: Resolution adopted

[1] [The opinion in this case is published from a copy certified by the clerk of the court from the records in his office.]

by the common council, January 26, 1857, and concurred in by the select council, January 27, 1857: "That the Norfolk and Petersburg Railroad Company be, and they are hereby, authorized and granted the right and privilege to enter upon and lay the track of their road in any and upon such of the streets of this city as the directors of said company may deem fit, proper, and prescribe for their use and purposes, either in the loading or unloading of cars, as well as the transit of cars, engines, and trains; on the express condition, however, that the speed of their cars, engines, or trains shall not, within the limits of the city, exceed a rate of five miles per hour." No power over the streets, other than is embraced in this grant of privilege, is given. The train yard and terminal depot of the railroad are at the east end of Wide-Water street. In the exercise of the privilege conferred by the city, the railway authorities have laid down a track from this train yard and depot along Wide-Water street nearly to its western terminus, and thence, by a cross street, northwardly into the yard and wharf of the Boston steamers. Branch tracks are also laid from the track on Wide-Water street, near its eastern end, into the yards and wharves, respectively, of the Clyde steamers and the New York steamers. The yards of these several steamship companies are inclosed by fences and gates, with beams across the tops of the gates, high enough, in each instance, to allow the smokestacks of the engines to pass under them clear; that is to say, at a greater or less number of feet above the tops of the freight cars drawn by the engines. The heights of these several objects above the track of the railroad are, respectively, as follows: Height of walking boards on top of cars of the Atlantic, Mississippi & Ohio Railroad, 11 feet 5 inches. Height of smokestacks of the company's engines used on Wide-Water street, 14 feet 3½ inches. Height of top beam of gate entering Clyde's wharf, 15 feet 7¼ inches. Height of gate entering New York steamer's wharf, 14 feet 9½ inches. Height of gate entering Boston steamer's wharf, 14 feet 9½ inches. The freight cars from one or two distinct roads are somewhat higher than those of the Atlantic, Mississippi & Ohio road. It may also be noted that the trains of the railroad coming in from the country enter its train yard and depot just after passing an iron bridge under a gallows frame at the end of that bridge, which is 15 feet 1¼ inches above the track. From these figures it will be observed that the tops of the smokestacks of the engines are 2 feet 10½ inches higher than the walking boards of the Atlantic, Mississippi & Ohio cars; that the gates of the New York and Boston steamers' wharves are both 3 feet 4½ inches higher; that the gallows frame of the company's iron bridge east of the depot is 3 feet 8¼ inches higher; and that the gate of Clyde's wharf is 4 feet 2¼ inches higher than the top of the Atlantic, Mississippi & Ohio cars. Some time about the 15th of September, 1880, a society of Norfolk cotton merchants put up a fire-alarm wire across Wide-Water street, towards its west end, near the point at which the track of the Atlantic, Mississippi & Ohio road leaves it in the direction of the Boston wharf. This was a private fire alarm intended for the protection of the cotton on the wharves near that point. There is no ordinance of the city forbidding the erection of such a wire, or requiring previous permission for its erection to be obtained, and no previous permission was obtained in this case. This wire was placed at a height which was chin high to a man of medium stature standing erect on the top of the Atlantic, Mississippi & Ohio Railroad cars; that is to say, about five feet above the top of these cars, or 16 feet 5 inches above the railroad track. Stephen Campbell, the deceased, was a switcher and coupler on the trains on Wide-Water street which ran between the train yard and the Clyde, New York, and Boston steamers' wharves. He had been in the employment of the railroad authorities 12 years, and had been on this particular service 5 years. Part of his duty was to see when a train moved that all the cars intended to be taken were coupled, and then to stand forward on top of cars as a lookout and give signals to the engineer on the locomotive. On the 18th of October, 1880, about 8 o'clock in the evening, as a train on which he stood was moving from the direction of the Boston wharf into Wide-Water street, on its way to the yard, this employe, the deceased, Stephen Campbell, while standing on top of a car of the train, facing forward towards the locomotive, was caught under the chin by the fire-alarm wire before mentioned, which had been there erected across the street, thrown suddenly between two of the moving cars, down upon the railroad track, and run over and instantly killed. The night was a bright moonlight night. It was light enough for a sailor, John Burk, who happened to be on the sidewalk of the street at the time, and who testified in this case, to see the accident and how it occurred, and that the wire caught the deceased under the chin, and that he was standing erect at the time, and thrown down and killed. Campbell was a colored man.

The testimony of Hardy, who was the mate of Campbell in the particular duties belonging to him in that service, and that of other employes who testified in this case, is that the men on the trains, in approaching that wire, were in the habit of catching it in their hands and lifting it over their heads as they passed. Hardy says that he did this several times; adding: "At the time I did it I never thought that it would be the occasion of any man's death by pulling any person off. I don't think the wire had been there over thirty days. I never said anything to

Stephen Campbell about it. It was just as handy for me to lift it over my head in the daytime, never thinking it would be the cause of any one's death." Hardy says that the deceased never mentioned the wire to him. The wife of the deceased testifies that Campbell never mentioned the wire to her, or said that it was dangerous. Roberts, the night yard master, and immediate superior of Stephen Campbell, the deceased, testifies: "My attention was first called to the wire across Wide-Water street about two or three weeks before the accident,—may be longer. 'Mind the wire, Mr. Roberts,' was frequently said to me by the train hands as we passed under it, giving me notice before getting to it. * * * I suppose it would have been the business of any one that noticed it to report the condition of the wire." He added that he did not report it. Hickey, the engineer, testifies that he thought the wire was too low, and that he heard that it had been reported, as he supposes, to the yard master. He did not report it. Campbell, the deceased, Hardy, his mate, Roberts, the train yard master, and Hickey, the engineer, had all frequently passed under the wire, had all known that it was there for several weeks before the accident, and had neither of them made any complaint either to each other, or to any one else, that it was too low, or had made report of it to any of their superiors in authority. There is no proof that either of the receivers, the defendants in this proceeding, knew of the existence of the wire, and no ground for believing that any subordinate officer of theirs, superior in grade to Roberts, had any knowledge of it. There is no pretense that Stephen Campbell, the deceased, ever made complaint concerning the wire, either to the receivers, or to any of his superiors in office, or to his equals among the employes, or to any one whatever. It is proper to add that it is not claimed that Stephen Campbell was other than sober at the time of the accident, or was other than a sober man and faithful servant.

I think the foregoing statement embraces all the facts material to the decision of the questions which control this case. The trains of the Atlantic, Mississippi & Ohio road, upon which the deceased was employed, were not running upon premises owned and controlled by the railroad's own authorities. They were running by permission, upon the street of a city, full and complete jurisdiction over which belonged to the government of the city. The wire which caused the accident was not stretched across the property of the railroad, but across the property of the city. It was attached at each end to the property of private citizens. The wire did did not belong to the railroad company, and was not put up by them; it was put up by private individuals under the implied permission of the city, under a natural right not prohibited by any positive law. If the wire was an obstruction to the public in any respect, it was primarily the duty of the city of Norfolk to remove it. If it was an obstruction, I think it cannot justly be contended that the authorities of the railroad would have had the right to remove it except upon the refusal of the city to do so.

The case does not fall within the ruling of those numerous decisions of the courts requiring railroads to remove obstructions from their own property and territory, from premises entirely under their ownership and control. It is a case in which the accident happened upon premises not belonging to the railroad. In the recent case of an accident which happened to an animal from a defect —a hole—in the track of this railroad in this same Wide-Water street in this city, where demand was made upon the city for the damage resulting, the city, acknowledging its responsibility and primary liability, paid the demand, and then sued these receivers for the amount paid, basing its claim on the ground that they were bound to keep their track in good repair, and were responsible for leaving a dangerous hole in the track. See papers in Ex parte Dawley, filed in this Atlantic, Mississippi & Ohio case. Whether the receivers are bound in that case is a question now before me for decision; and I am of impression that, although the receivers are not bound for every structure that may be erected by the city or by individuals in Wide-Water street, they are bound to keep in good order the track which the railroad company has itself laid down for its own exclusive benefit and use by express permission of the city. But because the railroad authorities are bound to keep its track, laid down in a public street, owned and controlled by themselves, in safe condition as to the public, it does not follow that they are bound for all other structures in such a street, such as a telephone wire erected by permission of the city, attached at each end to private property, not owned or used by themselves, and not subject to their control. The distinction between this case and those cited by counsel for plaintiff is palpable. These cases are all cases of railroads or employers erecting or permitting structures on their own premises.

The case of Chicago, B. & Q. R. Co. v. Gregory [58 Ill. 273] was one in which the railway company itself placed near its track on its own property a mail catcher, by which the intestate of the plaintiff was struck and killed, at a place where two other accidents had happened from the same cause, after the company had had full notice. Certainly that was a very different case from the one with which we are now dealing. In the strong case for the plaintiff of Bessex v. Chicago & N. W. Ry. Co. [45 Wis. 477], the plaintiff was employed in the defendant's car shops at Fond du Lac to move cars upon the side tracks near such shops, and while assisting in moving a car by direction of the yard master, and pushing it along, and approaching some boards covering a small pile of lum-

ber eighteen inches or two feet high, which was within three or four feet of the track and had been there for a year or more, and not being able to pass between the pile and the car, he stepped upon a misplaced board covering the pile, which gave way, throwing him down under the car, and causing the injury complained of. The accident happened in the defendant's yard upon its own premises. The pile of lumber had been placed there by the employes of the company, and had been habitually walked over exactly as plaintiff had attempted to do by numerous hands of the company for a year. It was a case in which great indifference was shown to the safety, convenience, and comfort of the employes of the defendant; and yet the court decided nothing in the case except that the question, of negligence or not, was a proper one for the jury. In the case of Lovejoy v. Boston & L. R. R., 125 Mass. 79, where an employe on a moving train was killed by his head coming in contact with a post placed by the side of its track by the company, it was held, there was no negligence as to this post on the part of the defendant, though the post was erected by the company on its own premises for its own purposes, and could be removed at its own will. There was a like ruling in the case of Gibson v. Erie Ry. Co., 63 N. Y. 449, where the injury was sustained from the projecting roof of a depot building of the defendant, standing upon its own premises and absolutely subject to its own control. The ground of the decision was, that this projection of the roof was a fact patent to all, well known to the deceased, and was one of the risks he assumed as an employe of the company. I need not adduce further citations on this point. The cases in the books all seem to apply to obstructions erected on the premises of the defendant railroad companies, either by the act or permission of the companies themselves. None of them seem to apply to obstructions erected in the public streets of cities or on other premises than those of the railroads, by persons who were strangers to the railroad authorities, for purposes either lawful or unlawful in themselves. But assuming, for the sake of argument, that a railroad company is just as responsible for obstructions erected in the public streets of a city in which it is permitted to run its trains, as if they were erected upon its own premises and property, is the present case one in which railroad receivers should be held responsible? As these receivers, living in distant cities, could not know personally of obstructions erected over their railroad track in a street in the city of Norfolk, except by report of their own employes, engaged in service in that street, and as there is no proof that any report of the erection of this wire was made to them, the negligence for which they would be responsible in this case, if responsible at all, would be that of the deceased himself, or of his coemployes, Hardy or Hickey or Roberts, in not so reporting; the last named being one grade higher than the deceased in the service. It is very clear that Hickey and Hardy were no more bound to report the obstruction than Stephen Campbell himself; and his sole claim for damages, therefore, rests upon the theory that Roberts was negligent in not making report of the obstruction. And so the question here is that of the responsibility of an employer for the supposed negligence of one employe as to another employe.

The latest decision of the supreme court of the United States (that in Hough v. Railway Co., 100 U. S. 213) furnishes the general principles of law which control this case. There, the familiar and well-settled general doctrines are distinctly admitted,—that he who engages in the employment of another for the performance of specified services and duties, for compensation, takes upon himself the natural and ordinary risks and perils incident to the performance of such services, and that there is no principle which should except from this rule the perils arising from the carelessness and negligence of those who are in the same employment. Wharton, in his work on Negligence (section 225), thus announces the latter principle: "It is well settled that one who enters the service of another takes upon himself the ordinary risks of the employment in which he engages, including the negligent acts of his fellow workman in the course of the employment." Pierce, in his work on Railroads (page 358), after giving the rule, adds the reason of it, as follows: "To extend the master's liability further, and hold him liable to his servants in like manner as to third persons for negligent acts of fellow-servants, would, it has been deemed by the best judicial opinion, encourage persons engaged in a common service to be less observant of each other's fidelity, and less disposed to report to the employer instances of their incompetency and untrustworthiness." The broad principle, therefore, is that, while the employer is responsible to the employed for the selection of competent employes for the particular services to which they are assigned, he is not in general responsible to their fellow-servants for ordinary negligence in the performance of those services. There are, of course, many exceptions to the rule, where the circumstances of particular cases justify a departure from the general principle; but the rule itself is recognized by all courts. One exception was that shown in the case of Hough v. Railway Co., already cited. The cowcatcher of an engine had got out of order, and the engineer had reported its condition to the master machinist, who had promised a number of times to rectify it, but had failed to do so; and an accident had finally happened from this cause, by which the engineer lost his life. Here was a case of exceptionally gross negligence on the part of a

superior officer to the engineer, in a matter in which he was representative of the company itself; and one of the questions was whether the engineer, in consenting to go upon the engine having this defective cowcatcher attached, had not waived his right to claim damages. The ruling of the court was that the questions of the company's negligence and of the engineer's contributory negligence were such as should be given to a jury to decide; and that the engineer, by continuing in service, notwithstanding the defective machinery, after having been promised that it should be repaired, did not ipso facto forfeit his right to damages. Every case in the books, of exception to the general rule of the nonliability of the master to one servant for the negligence of another servant, turns upon the particular and peculiar circumstances in that especial case extraordinary enough to make it exceptional. Were there any such extraordinary features in the conduct of Roberts, in this case, as to make his conduct exceptional? Stephen Campbell had made no complaint to Roberts, and had not thought the existence of the wire, in the place where it was, a matter of sufficient importance for mention in ordinary conversation. Hardy had made no complaint, and had treated the matter with like indifference. Roberts, although he had passed under the wire several times, and had been warned to stoop to it in passing, had not regarded it as dangerous, or thought it his duty to report it. In fact, there was no complaint of the wire by any one to any one, and no report of it by any employe of the company or other person to any officer of the company whatever. Not until a fatal accident had happened, did any person regard the cause of it with any serious consideration. I do not think, therefore, that there was anything in the failure of Roberts to report the wire to the authorities so extraordinarily reprehensible as to make this case exceptional, and take it out of the operation of the general rule. But, be all that has been said just or not, I think the question above and before all others in the present case is whether the wire stretched across a public street of Norfolk at a height of some 16 feet 5 inches above the railroad track, was in fact an unlawful obstruction. What might be deemed an obstruction if found on a part of a railroad where passenger trains move at the rate of 40 miles an hour, and freight trains at the rate of 15 miles, would not necessarily be so on the street of a city, where trains are required to move more slowly and cautiously, with the warning bell of the locomotive constantly ringing, and at a speed not allowed to be more than 5 miles an hour. The object in sending the freight trains of this road into the city is that they may deposit or receive freight in the wharves of the steamers of the several lines which run in connection with the road; and these wharves are fenced by enclosures the entrances to which are covered by structures some 2 feet lower than this wire. The particular train on which this accident happened had, but a moment before, emerged from the Boston wharf, and passed under a structure much lower than the wire. From the nature of their service on these slowly and cautiously moving trains, running on a crowded street, the employes were required and accustomed to be on the lookout for all such structures as might impede the street, whether permanent or temporary; and a court could not justly presume that the authorities of the railroad undertake to guarantee them against accidents from such objects. I do not think this guarantee existed any more with reference to the wire which caused the accident under consideration than it does with reference to the entrances to the several wharves to and from which the trains ran on which the deceased man was employed. To hold that the wire in question was an obstruction guaranteed against by the authorities of this road would be equivalent to requiring the removal of the gates forming the entrances to all the wharves into which their trains run in this city in conducting the heavy freight business of this road. Indeed, such a ruling would reach much further. To hold that a structure 16 feet 5 inches above the track of a railroad is unlawful and dangerous would be to require the railroads of the country to reconstruct every one of the hundreds and thousands of tunnels and metallic and covered bridges now on their lines. I would shrink from such a ruling in any case; I must especially do so in this.

The petition must be dismissed on several grounds: First, that a structure across a public street in a city, 16 feet 5 inches above the track of a railroad running there, is not one against which a railroad company can be presumed to guarantee its employes from accidents; second, that even if it could be regarded as such, yet this wire, not being on the railroad premises, nor owned, nor used, nor put up, nor controlled, nor known of, by the authorities of this railroad, there can be no recovery against them for an injury sustained from it; and, third, if this wire had been an obstruction, the deceased employe was guilty of neglect in not reporting or complaining of it during the several weeks it was up before the accident happened; and the negligence of Roberts, his immediate superior fellow employe, in not reporting it, was not of so extraordinary and gross a character as to make it an exception to the general rule that an employer does not guarantee one servant against the negligence of a fellow servant in the performance of the duties in which they are regularly employed. Let the petition be dismissed, but without costs.

DALY v. FRELIGH. See Case No. 3,552.

Case No. 3,551.

DALY v. MAGUIRE.

[6 Blatchf. 137.][1]

Circuit Court, S. D. New York. May Term, 1868.

PRACTICE—WITHDRAWING EXHIBITS—PHOTOGRAPHIC SUBSTITUTES.

In this case, the court ordered the originals of printed exhibits, on file as parts of a deposition, to be taken from the files for the purpose of being annexed to a commission, on condition that photographic fac-similes thereof should first be made and placed on file, in lieu of the originals, under the direction of the clerk.

This was an action [by Augustin Daly against Thomas Maguire] for the infringement of the copyright of a play. The deposition of the defendant had been taken and filed. Annexed to it, as exhibits, were the printed programme of a performance at a theatre in San Francisco, and certain slips cut from newspapers published at that place. The plaintiff now applied for leave to take these exhibits from the files, and annex them to a commission which was about to be issued in the cause, for the examination of witnesses at San Francisco.

BLATCHFORD, District Judge. The application is granted on condition that the plaintiff shall, under the direction of the clerk, first cause to be made and placed on file, in lieu of the original exhibits, photographic fac-similes thereof.

Case No. 3,552.

DALY v. PALMER et al.

[6 Blatchf. 256;[1] 8 Am. Law Reg. (N. S.) 286; 36 How. Pr. 206; 3 Am. Law Rev. 453.]

Circuit Court, S. D. New York. Dec. Term, 1868.

COPYRIGHT—"DRAMATIC COMPOSITIONS" DEFINED—PANTOMIME—INFRINGEMENT—SALE OF INFRINGING PLAY.

1. What is meant by the provision in the copyright act of August 18, 1856 (11 Stat. 138), which confers on the author or proprietor of a copyrighted dramatic composition, designed or suited for public representation, along with the sole right to print and publish it, the sole right to act, perform or represent it on a stage or public place, defined.

2. A written play, consisting of directions for its representation by action, without the use of spoken language by the characters, is a dramatic composition, within that act.

[Cited in Carte v. Duff, 25 Fed. 187.]

3. The question of infringement of a copyrighted dramatic composition, considered.

4. The case of D'Almaine v. Boosey, 1 Younge & C. 288, cited and applied.

5. Under the act of 1856, the author of a copyrighted dramatic composition is entitled to be protected against piracy, in whole or in part, by representation.

[Cited in Henderson v. Tompkins, 60 Fed. 764.]

6. Where all that was substantial and material in a scene of a copyrighted play, a great part of such scene being represented by actions and not by spoken language, was used in the same order and sequence of events, and in a manner to convey the same sensations and impressions to those who saw it represented, *held*, that there was an infringement.

[Cited in Serrana v. Jefferson, 33 Fed. 348; Fuller v. Bemis, 50 Fed. 928. Followed in Daly v. Webster, 4 C. C. A. 10, 56 Fed. 483.]

7. The true test of piracy, in respect to a copyright, defined.

8. The sale of an infringing play to another, with a view to its public representation, makes the seller a participant in causing the play to be publicly represented.

In equity. This was an application [by Augustin Daly] for a provisional injunction to restrain the defendants [Henry D. Palmer and Henry C. Jarrett] from the public performance and representation, and from the sale for dramatic representation, of a scene called the "Railroad Scene," in a play called "After Dark."

Thomas S. Alexander, William Tracy, and Joseph F. Daly, for plaintiff.

William D. Booth and Thomas W. Clarke, for defendants.

BLATCHFORD, District Judge. The plaintiff is, by profession, a dramatic author, his business being to compose, write, and produce on the theatrical stage, dramatic compositions, commonly called plays. The defendants are the managers of a public place of theatrical amusement in the city of New York, called "Niblo's Garden." Before the 1st of August, 1867, the plaintiff composed and wrote a dramatic composition called "Under the Gaslight," and on that day he took the proper steps to secure to himself a copyright for the composition, under the provisions of the act of February 3, 1831 (4 Stat. 436), by depositing before publication, a printed copy of the title of the composition, as author and proprietor, in the clerk's office of the district court of the southern district of New York, where he resided at the time.[2] The composition was afterwards printed and published, and, within three months from its publication, he caused a copy of it, as printed and published, to be delivered to said clerk.[3]

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

[2] NOTE [from original report in 3 Am. Law Rev. 456]. The record of title may be made after representation as well as before. Roberts v. Myers [Case No. 11,906], case of the "Octoroon." But it must be made before publication, otherwise the protection of the statute is lost. Bartlett v. Crittenden [Id. 1,076], "System of Bookkeeping." See, also, Jollie v. Jaques [Id. 7,437], case of the "Serious Family Polka;" Baker v. Taylor [Id. 782], case of the "Sacred Mountains;" Wheaton v. Peters, 8 Pet. [33 U. S.] 591, case of "Peters' Condensed Reports;" Dwight v. Appleton [Case No. 4,215], case of "Dwight's Theology;" Ewer v. Coxe [Id. 4,584], case of the "American Dispensatory."

[3] NOTE [from original report in 3 Am. Law Rev. 456]. This delivery of the copy of the published book is a necessary prerequisite to claiming protection of the statute against unauthorized publication, except under § 9, act of 1831 [4

He also gave information of copyright being secured, by causing to be printed and inserted in the several copies published, the words prescribed by the 5th section of the act.

The act of 1831 confers upon the author and proprietor of a dramatic composition, duly copyrighted, the sole right and liberty of printing, reprinting, publishing, and vending such composition, in whole or in part, for the term of twenty-eight years from the time of recording the title of such composition in the manner directed by the act. The act of August 18, 1856 (11 Stat. 138), provides, that any copyright thereafter granted under the laws of the United States, "to the author or proprietor of any dramatic composition, designed or suited for public representation, shall be deemed and taken to confer upon the said author or proprietor, his heirs and assigns, along with the sole right to print and publish the said composition, the sole right also to act, perform, or represent the same, or cause it to be acted, performed, or represented, on any stage or public place, during the whole period for which the copyright is obtained."

The bill alleges that the plaintiff's play was designed and suited for public representation; that it was represented for the first time on the 12th of August, 1867, under his direction and for his benefit, at the New York Theatre, a public place of theatrical amusement in New York, and was thenceforward represented there for eight consecutive weeks; that it met with great success, attracted crowds of persons, and was pecuniarily profitable to the plaintiff to a large amount; that the particular cause of such success was what was commonly called, after such public performance, the "Railroad Scene," at the end of the third scene of the fourth act, in which one of the characters is represented as secured by another, and laid helpless upon the rails of a railroad track, in such manner, and with the presumed intent, that the railroad train, momentarily expected, shall run him down and kill him, and, just at the moment when such a fate seems inevitable, another of the characters contrives to reach the intended victim, and to drag him from the track as the train rushes in and passes over the spot; that this incident and scene was entirely novel, and unlike any dramatic incident known to have been theretofore represented on any stage, or invented by any author before the plaintiff so composed, produced, and represented the same; that the playing of said composition and scene caused the same to become famous in all parts of the United States and Canada, and in England; that the chief value of the composition and its popularity depend upon said "railroad scene;" that it was repeatedly produced and represented by and for the advantage of the plaintiff, in many cities and towns of the United States and Canada,[4] to the profit of the plaintiff; that, before learning of the alleged wrongs mentioned in the bill attempted by the defendants, the plaintiff had made arrangements for representing the play dramatically at New York, and in various places in the United States, during the present winter and the approaching spring; that he accordingly commenced to represent the play at the New York Theatre, in the city of New York, on the 4th of November, 1868; that, soon after the production, representation, and printing of the play in the United States, one Dion Boucicault, a dramatic author and actor and theatrical manager, a subject of Great Britain, residing in England, procured a copy of said play by some means, and, without the knowledge or consent of the plaintiff, prepared therefrom a play, which he called "After Dark," in which play he introduced several of the scenes and incidents of the plaintiff's play, varying them slightly, but following in them the invention and plan of the plaintiff's play, in a manner which was intended to differ from it only slightly, so as colorably to be a different work, while substantially retaining the attractive features of the plaintiff's play, and which contained, with only colorable variations, the said "railroad scene," of the plaintiff's play, substituting for the surface rail-

Stat. 438]. Ewer v. Coxe [Case No. 4,584]; Wheaton v. Peters, 8 Pet. [33 U. S.] 591. But if the book is published in more than one volume, delivery of the first volume within the period limited by law, and of the others before action is brought, is held sufficient. Dwight v. Appleton [Case No. 4,215]. And if the book be not printed, the author may maintain his action for an infringement; and the acting of a play is not such a publication as to require the printed copy to be filed with the clerk. Roberts v. Meyers [Id. 11,906]. The action for infringement of the author's rights, after deposit of title and before the deposit of the book, cannot be maintained under the statute. Keene v. Wheatley [Id. 7,644], Cadwalader, J., 1860, U. S. Cir. Ct. Pa., case of "Our American Cousin." These discrepancies disappear, when we consider, that, before publication by the author, he has a right, independent of the statute, to restrain any and every use of his work, except such as is fairly derived from him by the degree of publicity he may have given it. Keene v. Kimball, 82 Mass. [16 Gray] 545, case of "Our American Cousin;" Id., 2 Abb. Pr. (N. S.) 341, case of "Our American Cousin;" Boucicault v. Wood [Case No. 1,693], cases of the "Octoroon," "Pauvrette," and "Colleen Bawn." And even filing the title gives an equitable right, which a chancery court of the United States will protect till the acts required for perfecting the legal title can be done. Pulte v. Derby [Case No. 11,465], case of "Homeopathic Domestic Physician." After publication the author must rely on the statute only. Jeffries v. Boosey, 4 H. L. Cas. 815, and cases cited; Wheaton v. Peters, 8 Pet. [33 U. S.] 591, 662. See, also, Clayton v. Stone [Case No. 2,872], case of the "Commercial Advertiser;" Blunt v. Patten [Id. 1,580], case of "Chart of Nantucket Shoal;" Stowe v. Thomas [Id. 13,514], translation of "Uncle Tom's Cabin." A very full discussion of the subject of property in unpublished manuscripts is to be found in Woolsey v. Judd, 4 Duer, 379, which was a case of publication of private letters.

[4] NOTE [from original report in 3 Am. Law Rev. 457]. The value of the piece in Canada could not be material to the issue, and it may be questioned if the rights of the English author in Canada can be affected by a decision here.

road an underground railroad, for the rescuer of the victim to be killed on the railroad a man for a woman, for the railroad station in which the rescuer was confined a cellar, and for the breaking down a door to escape and rescue the victim the breaking down a wall or the door in a wall; that the work of Boucicault is a palpable imitation of the plaintiff's said "railroad scene," and is plagiarized therefrom, and put into the play called "After Dark," by Boucicault, for the purpose of obtaining the pecuniary benefit which might otherwise result to the plaintiff from the representation of his play; that the play of "After Dark" was performed in England without the plaintiff's consent,[5] to the great profit of Boucicault, and was indebted for its success and profit to such imitation of said "railroad scene;" that Boucicault has sent copies of his play, containing such plagiarism of said "railroad scene" to the defendants in the United States, for sale and performance for his own profit, and several copies of it are in the defendants' possession; that the defendants are intending and have announced their purpose, to perform such play called "After Dark," publicly on the stage, at Niblo's Garden, in New York, on the 16th of November, 1868, and every night thereafter, till further notice, without the consent of the plaintiff; that such play, and the plagiarism of said "railroad scene" are being rehearsed at Niblo's Garden, under the direction of the defendants, with a view to such public performance thereof; and that the defendant Palmer, acting for Boucicault, is about to sell copies of the play called "After Dark," with said plagiarized scene, to other persons in the United States, to be publicly represented. The bill prays for an injunction to restrain the defendants from the public representation, and from the sale for dramatic representation, of the said "railroad scene" in "After Dark."

The defence to the application, on the facts, is confined to showing, by affidavits, that the following matters were known prior to the taking out by the plaintiff of his copyright, namely, the representation on a stage of a train of cars drawn by a locomotive engine on a railroad; a like representation wherein the train appeared to run over a man lying on the track; and a like representation wherein the train appeared to run over a man lying on the track, who had been thrown thereon in a helpless condition by another of the characters, in order that he might be run over and killed. A story called "Captain Tom's Fright," in "The Galaxy" for March 15th, 1867, is also adduced to affect the validity of the plaintiff's copyright.[6] There is no answer to the bill, nor is there any denial of the allegations that Boucicault procured a copy of the plaintiff's play and prepared therefrom the "railroad scene" in the play of "After Dark," and intended that the latter should only be colorably different from the "railroad scene" in the plaintiff's play, by making the substitutions before mentioned, and that the "railroad scene," in the play of "After Dark," was plagiarized by Boucicault from the "railroad scene" in the plaintiff's play.

In the plaintiff's play, there is a surface railroad, with a railroad station, and a signal-station shed, or store-room. A signal man appears, and a woman named Laura. At the request of Laura, the signal man locks her in the shed. There are some axes in it. One Snorkey then appears. The signal man then goes off. One Byke then enters, with a coil of rope in his hand, and throws it over Snorkey, and tightens it around his arm, and coils it around his legs, and then lays him across the track and fastens him to the rails, and goes off, having, by language, given it to be understood that the intention is that Snorkey shall be run over by the train and killed. Laura, from a window in the shed, sees what is done. The steam whistle of the train is heard. She takes an axe and strikes the door. The whistle is heard again, with the rumble of the approaching train. She gives more blows on the door with the axe, it opens, she runs and unfastens Snorkey, the lights of the engine appear, and she moves Snorkey's head from the track as the train rushes past. This incident occupies the whole of the third scene of the fourth act. There is a good deal of conversation, first, between the signal man and Laura, and then between Snorkey and the signal man, and then between Byke and

[5] NOTE [from original report in 3 Am. Law Rev. 458]. In the absence of an international copyright, the performance of an English play in England, without the consent of an American author, seems immaterial. The English copyright act (7 & 8 Vict. c. 12, § 19) requires the first publication or representation of a work, except such works as come within that statute, to be made in England, in order to have legal protection there. Boucicault v. Delafield, 33 Law Jour. (N. S.) 38, case of the "Colleen Bawn," a play written, copyrighted, and first performed, by an English author, then a resident of the United States, within the United States, never printed by the author's consent, subsequently copyrighted in England, where the vice chancellor held the English copyright bad.

[6] NOTE [from original report in 3 Am. Law Rev. 454]. The outline of this story may be given as follows: Captain Tom is engineer on a railway in charge of a construction gang. His gang mutinies one night, his arms are taken from him, and he is knocked down senseless. When he recovers, he finds he is bound and laid on the ground, an iron bar under his head, another under his legs. By degrees, he finds that he is fastened to the rails of a track on the side of a river, near a bridge, which is under repair by Captain Tom's gang. He wonders if the train has passed, due at eleven o'clock p. m. He sees, far over the prairie, the head-light of the locomotive, like a distant star. He screams for help and hears only the mutineers carousing. The train comes nearer and nearer, the bridge trembles at its approach, the lights glare in his eyes, the hot breath of the engine is in his face. He swoons from terror. The wheels are within a foot of his head. The engine and train had passed on a side track, temporarily laid down for the repairs of the bridge, while Captain Tom was tied on the straight track of the road.

Snorkey, and then between Laura and Snorkey. There are stage directions for Laura to go into the shed, for the signal man to lock her in, for Snorkey to enter, for the signal man to go off, for Byke to enter with the coil of rope, for Byke to throw the coil over Snorkey, and tighten the rope around Snorkey's arm and coil it around his legs, for Byke to lay Snorkey across the track, and fasten him to the rails, for Byke to go off, for the steam whistle to be heard, for blows at the door to be heard, for the steam whistle to be heard again, with the rumble of the train, for more blows on the door to be heard, for the door to open, for Laura to appear with the axe in her hand, for her to run and unfasten Snorkey, for the lights of the engine to be seen, for Laura to take Snorkey's head from the track, and for the train to rush past. These stage directions are separate and apart from the conversation, and are in italics and in parentheses, at the appropriate places in the progress of the scene. The substance and purport of the successive conversations in the scene are, that Laura requests the signal man to lock her in the shed, and he consents, that Snorkey requests the signal man to stop by signal the expected train, and he refuses, that Byke gives Snorkey to understand that he is to be run over and killed by the train, and that Snorkey requests Laura to break down the door and release him. The idea is also conveyed, by the language in the scene, that Byke is about to commit robbery and murder at Laura's house, and that Snorkey is trying to give information of the fact.

In the play of "After Dark," the "railroad scene" is in the third act. In the first scene of that act, one Gordon Chumley is rendered insensible by drugs, and one Old Tom is thrown by force into a wine vault. In the second scene of that act, Old Tom is represented as in the vault. There is an orifice in the vault, which opens upon the track of an underground railroad. The rumbling of cars is heard, and lights flash through the orifice. Old Tom, through a door into an adjoining vault, sees two of the characters carry Chumley, and break a hole through a wall, and pass the body of Chumley through the hole, for concealment, as he supposes, in a well or vault. Old Tom then finds an iron bar, and resolves to attempt escape, by enlarging the orifice in the wall opening on the railroad. Then follows scene third. The railroad is seen, with a circular orifice which ventilates the cellar in which Old Tom is. The body of Chumley is seen lying across the rails, and the arm of Old Tom, and then his head, are passed through the orifice. For this much of the scene there are only stage directions, without spoken words. The following is a verbatim copy of the rest of the scene, the parts in parentheses being stage directions: "Old Tom. About four courses of bricks will leave one room to pass. What is that on the line? There is something, surely, there. (A distant telegraph alarm rings. The semaphore levers play, and the lamps revolve.) Great Heaven! 'tis Gordon. I see his pale upturned face—he lives! Gordon! Gordon! I'm here. He does not answer me. (A whistle is heard, and distant train passes.) Ah! murderers. I see their plan. They have dragged his insensible body to that place, and left him there to be killed by a passing train. Demons! Wretches! (He works madly at the orifice. The bricks fall under his blows. The orifice increases. He tries to struggle through it.) Not yet. Not yet. (The alarm rings again. The levers in the front play. The red light burns, and a white light is turned to L. H. tunnel. The wheels of an approaching train are heard.) Oh, heaven! give me strength—down—down. One moment! (A large piece of wall falls in, and Old Tom comes with it.) See, it comes, the monster comes. (A loud rumbling and crashing sound is heard. He tries to move Gordon, but seeing the locomotive close on him, he flings himself on the body, and, clasping it in his arms, rolls over with it forward. A locomotive, followed by a train of carriages, rushes over the place, and, as it disappears, Old Tom frees himself from Chumley, and gazes after the train.)" The play of "After Dark" has never been published by Boucicault, although printed by him for private use.

The first inquiry is, what is meant, in the act of 1856, by a "dramatic composition," what is meant by the "public representation" of a dramatic composition, and what is meant by the right to "act, perform, or represent" a dramatic composition, on a "stage or public place." The act of 1856 confers on the author or proprietor of a copyrighted "dramatic composition, designed or suited for public representation," the sole right of acting, performing, or representing the same on a stage or public place, in addition to the sole right to print and publish such composition. The latter right must be considered as being conferred by the act of 1831, for, although that act only speaks of a copyright for a "book or books, map, chart, musical composition, print, cut, or engraving," yet, under the language of the act of 1856, a "dramatic composition, designed or suited for public representation," must be regarded as embraced within the act of 1831.

A composition, in the sense in which that word is used in the act of 1856, is a written or literary work invented and set in order. A dramatic composition is such a work in which the narrative is not related, but is represented by dialogue and action. When a dramatic composition is represented, in dialogue and action, by persons who represent it as real, by performing or going through with the various parts or characters assigned to them severally, the composition is acted, performed, or represented; and, if the representation is in public, it is a public representation. To act, in the sense of the

statute, is to represent as real, by countenance, voice, or gesture, that which is not real. A character in a play who goes through with a series of events on the stage without speaking, if such be his part in the play, is none the less an actor in it than one who, in addition to motions and gestures, uses his voice. A pantomime is a species of theatrical entertainment, in which the whole action is represented by gesticulation, without the use of words. A written work, consisting wholly of directions, set in order for conveying the ideas of the author on a stage or public place, by means of characters who represent the narrative wholly by action, is as much a dramatic composition designed or suited for public representation, as if language or dialogue were used in it to convey some of the ideas. The "railroad scene," in the plaintiff's play, is undoubtedly a dramatic composition. Those parts of it represented by motion or gesture, without language, are quite as much a dramatic composition, as those parts of it which are represented by voice. This is true, also, of the "railroad scene" in "After Dark." Indeed, on an analysis of the two scenes in the two plays, it is manifest that the most interesting and attractive dramatic effect in each is produced by what is done by movement and gesture, entirely irrespective of any thing that is spoken. The important dramatic effect, in both plays, is produced by the movements and gestures which are prescribed, and set in order, so as to be read, and which are contained within parentheses. The spoken words in each are of but trifling consequence to the progress of the series of events represented and communicated to the intelligence of the spectator, by those parts of the scene which are directed to be represented by movement and gesture. The series of events so represented, and communicated by movement and gesture alone to the intelligence of the spectator, according to the directions contained in parentheses, in the two plays in question here, embraces the confinement of A. in a receptacle from which there seems to be no feasible means of egress; a railroad track, with the body of B. placed across it, in such manner as to involve the apparently certain destruction of his life by a passing train; the appearance of A. at an opening in the receptacle, from which A. can see the body of B.; audible indications that the train is approaching; successful efforts by A., from within the receptacle, by means of an implement found within it, to obtain egress from it upon the track; and the moving of the body of B., by A., from the impending danger, a moment before the train rushes by. In both of the plays, the idea is conveyed that B. is placed intentionally on the track, with the purpose of having him killed. Such idea is, in the plaintiff's play, conveyed by the joint medium of language uttered, and of movements which are the result of prescribed directions, while, in Boucicault's play, it is conveyed solely by language uttered. The action, the narrative, the dramatic effect and impression, and the series of events in the two scenes, are identical. Both are dramatic compositions, designed, or suited, for public representation. It is true that, in one, A. is a woman, and, in the other, A. is a man; that, in one, A. is confined in a surface railroad station shed, and, in the other, A. is confined in a cellar abutting on the track; that, in one, A. uses an axe, and, in the other, A. uses an iron bar; that, in one. A. breaks down a door, and, in the other, A. enlarges a circular hole; that, in one, B. is conscious, and is fastened to the rails by a rope, and, in the other, B. is insensible, and is not fastened; and that, in one, there is a good deal of dialogue during the scene, and, in the other, only a soliloquy by A., and no dialogue. But the two scenes are identical in substance, as written dramatic compositions, in the particulars in which the plaintiff alleges that what he has invented, and set in order, in the scene, has been appropriated by Boucicault.

Nor is this a case of first impression. An arrangement of musical notes, forming a tune or air, is a musical composition; and the author who has invented it, and set it in order, and copyrighted it, is entitled to protection. The extent of that protection has been the subject of judicial interpretation.[7] In the case of D'Almaine v. Boosey, 1 Younge & C. 288, the plaintiffs, proprietors of the copyright of an opera of Auber's, and also of another copyright of the overture of the same opera, and also of another copyright of the airs of the same opera, filed a bill in equity to restrain the defendant from infringing such copyrights. The defendant had published several of the airs, with some alterations, in the shape of quadrilles and waltzes. It was claimed, on the part of the defendant, that his work was merely an adaptation of the original, and, therefore, not a piracy. But the court (Lord Chief Baron Lyndhurst) held, that if the defendant had published the original air, though with adaptations and harmonies, or for different instruments, it was a piracy, and that it was not like the case of an abridgment of a book, where the purpose of the abridgment was distinct from that of the work from which it was taken. On this subject, the court says: "It is admitted that the defendant has published portions of the opera containing the melodious

[7] NOTE [from original report in 3 Am. Law Rev. 463]. There may be a copyright, as in the case of the "Low-Backed Car," where the author wrote words, accompaniment, and prelude, to the old air of the "Jolly Ploughboy." Lover v. Davidson, 1 C. B. (N. S.) 182; or, as in the case of "Pestel," where an author wrote words for an old air, and got a friend to write an accompaniment, and then entered the whole at Stationer's Hall. It was held, his assignee had copyright in the accompaniment. Leader v. Purday, 7 C. B. 4.

parts of it; that he has also published entire airs; and that, in one of his waltzes, he has introduced seventeen bars, in succession, containing the whole of the original air, although he adds fifteen other bars which are not to be found in it. Now, it is said that this is not a piracy, first, because the whole of each air has not been taken; and, secondly, because what the plaintiffs purchased was the entire opera, and the opera consists, not merely of certain airs and melodies, but of the whole score. But, in the first place, piracy may be of part of an air, as well as of the whole; and, in the second place, admitting that the opera consists of the whole score, yet, if the plaintiffs were entitled to the whole, a fortiori, they were entitled to publish the melodies which form a part. Again, it is said that the present publication is adapted for dancing only, and that some degree of art is needed for the purpose of so adapting it, and that but a small part of the merit belongs to the original composer. That is a nice question. It is a nice question what shall be deemed such a modification of an original work as shall absorb the merit of the original in the new composition. No doubt such a modification may be allowed in some cases, as in that of an abridgment or a digest. Such publications are, in their nature, original. Their compiler intends to make of them a new use, and not that which the author proposed to make. Digests are of great use to practical men, though not so, comparatively speaking, to students. The same may be said of an abridgment of any study; but it must be a bonâ fide abridgment, because, if it contains many chapters of the original work, or such as made that work most saleable, the maker of the abridgment commits a piracy. Now, it will be said, that one author may treat the subject very differently from another who wrote before him. That observation is true in many cases. A man may write upon morals in a manner quite distinct from that of others who preceded him; but the subject of music is to be regarded upon very different principles. It is the air or melody which is the invention of the author, and which may, in such case, be the subject of piracy; and you commit a piracy, if, by taking, not a single bar, but several, you incorporate in the new work that in which the whole meritorious part of the invention consists. * * * Now, it appears to me, that if you take from the composition of an author all those bars consecutively which form the entire air or melody. without any material alteration, it is a piracy; though, on the other hand, you might take them in a different order, or broken by the intersection of others, like words, in such a manner as should not be a piracy. It must depend on whether the air taken is substantially the same with the original. Now, the most unlettered in music can distinguish one song from another, and the mere adaptation of the. air, either by changing it to a dance, or by transferring it from one instrument to another, does not, even to common apprehensions, alter the original subject. The ear tells you that it is the same. The original air requires the aid of genius for its construction, but a mere mechanic in music can make the adaptation or accompaniment. Substantially, the piracy is, where the appropriated music, though adapted to a different purpose from that of the original, may still be recognized by the ear. The adding variations makes no difference in the principle." An injunction was granted. The views of Lord Lyndhurst, in that case, were cited and approved by Mr. Justice Nelson, in this court, in the case of Jollie v. Jaques [Case No. 7,437]. They are eminently sound and just, and are applicable to the case of a dramatic composition designed for public representation. Such a composition, when represented, excites emotions and imparts impressions not merely through the medium of the ear, as music does, but through the medium of the eye as well as the ear. Movement, gesture, and facial expression, which address the eye only, are as much a part of the dramatic composition as is the spoken language which addresses the ear only; and that part of the written composition which gives direction for the movement and gesture, is as much a part of the composition, and protected by the copyright, as is the language prescribed to be uttered by the characters. And this is entirely irrespective of the set of the stage, or of the machinery or mechanical appliances, or of what is called, in the language of the stage, scenery, or the work of the scene-painter.

Now, in consonance with the principles laid down by Lord Lyndhurst, the plaintiff is as much entitled to protection in respect of a substantial and material original part of his "railroad scene" as he is in respect of the whole.[3] Under the act of 1856, construed in

[3] NOTE [from original report in 3 Am. Law Rev. 465]. In the case of Turner v. Robinson, 10 Ir. Ch. 121, on appeal, Id. 510, the plaintiff was proprietor of a picture, "Death of Chatterton," had publicly exhibited it in sundry places, and was having an engraving made from it. The picture had been engraved in a catalogue previously, in a cheap way, and no objection was made to this by the proprietor. The defendant arranged a tableau vivant in his studio following the grouping of, and with a painted background like the one in the picture, and took a pair of photographs for the stereoscope from this group. Sale of the photographs was enjoined. In considering whether there is infringement of copyright, we often have to consider the quality of the matter taken, rather than its quantity. Gray v. Russell [Case No. 5,728], case of "Adam's Latin Grammar;" Folsom v. Marsh [Id. 4,901], case of "Spark's Life of Washington;" Story v. Holcombe [Id. 13,497], case of "Story's Equity Pleadings." And it is no defence that only part of the work is taken, because the owner of the copyright owns it all. Folsom v. Marsh, supra. In an action for penalties the rule is different; the whole work must be taken, not merely so much as to render one liable to action for infringement. Rogers v.

connection with the act of 1831, he is entitled to be protected against piracy, in whole or in part, by representation as well as by printing, publishing, and vending. Although the act of 1831, in regard to printing, publishing, and vending, uses the words "in whole or in part," and the act of 1856, in regard to representing, does not use those words, yet the act of 1856, by referring, as it does, to the right conferred by the act of 1831, as the "sole right to print and publish" the copyrighted composition, when such right is, on the face of the act of 1831, the sole right to print and publish "in whole or in part," and by then conferring "the sole right also to act, perform, or represent the same, or cause it to be acted, performed, or represented, on any stage or public place," must be held to confer the right to represent in whole or in part. All that is substantial and material in the plaintiff's "railroad scene" has been used by Boucicault, in the same order and sequence of events, and in a manner to convey the same sensations and impressions to those who see it represented, as in the plaintiff's play. Boucicault has, indeed, adapted the plaintiff's series of events to the story of his play, and, in doing so, has evinced skill and art; but the same use is made, in both plays, of the same series of events, to excite, by representation, the same emotions, in the same sequence. There is no new use, in the sense of the law, in Boucicault's play, of what is found in the plaintiff's "railroad scene." The "railroad scene" in Boucicault's play contains everything which makes the "railroad scene" in the plaintiff's play attractive, as a representation on the stage. As, in the case of the musical composition, the air is the invention of the author, and a piracy is committed if that in which the whole meritorious part of the invention consists is incorporated in another work, without any material alteration in sequence of bars, so, in the case of the dramatic composition, designed or suited for representation, the series of events directed in writing by the author, in any particular scene, is his invention, and a piracy is committed if that in which the whole merit of the scene consists, is incorporated in another work, without any material alteration in the constituent parts of the series of events, or in the sequence of the events in the series. The adaptation of such series of events to different characters who use different language from the characters and language in the first play, is like the adaptation of the musical air to a different instrument, or the addition to it of variations or of an accompaniment. The original subject of invention, that which required genius to construct it and set it in order, remains the same, in the adaptation. A mere mechanic in dramatic composition can make such adaptation, and it is a piracy, if the appropriated series of events, when represented on the stage, although performed by new and different characters, using different language, is recognized by the spectator, through any of the senses to which the representation is addressed, as conveying substantially the same impressions to, and exciting the same emotions in, the mind, in the same sequence or order. Tested by these principles, the "railroad scene" in Boucicault's play, is, undoubtedly, when acted, performed, or represented on a stage or public place, an invasion and infringement of the copyright of the plaintiff in the "railroad scene" in his play.

The substantial identity between the two scenes would naturally lead to the conclusion, that the later one had been adapted from the earlier one. The charge of actual plagiarism on the part of Boucicault, made in the bill, is not denied. It is hardly possible that the resemblances are accidental, and that the differences are not merely colorable, with a view to disguise the plagiarism. The true test of whether there is piracy or not, is to ascertain whether there is a servile or evasive imitation of the plaintiff's work, or whether there is a bona fide original compilation, made up from common materials, and common sources, with resemblances which are merely accidental, or result from the nature of the subject. Emerson v. Davies [Case No. 4,436].

Nothing that has been adduced on the part of the defendants affects the validity of the plaintiff's copyright, on the question of the originality and novelty of the "railroad scene" in his play.[9]

The sale of Boucicault's play to other persons, with a view to its public representation, makes the seller a participant in causing the play to be publicly represented.

Jewett [Case No. 12,012]. The plaintiff had published a book called "Philosophy of Mysterious Agents, Human and Mundane; or, The Dynamic Laws and Relations of Man, embracing the Natural Philosophy of Phenomena styled Spiritualism," and the defendants had copied a large part of this book in a publication called "Modern Mysteries Explained and Exposed." A demurrer to an action of debt for the penalty of fifty cents a sheet, under St. 1831, c. 16, p. 6, was sustained, though an action on the case for damages might have been sustained. See Atwill v. Ferrett [Case No. 640], case of "Bohemian Girl;" Dwight v. Appleton [Id. 4,215]; and Backus v. Gould, 7 How. [48 U. S.] 798, case of "Cowen's and Wendell's Reports." Quaere, as to the rule of damages under the act of 1856, c. 169, establishing a rate of damages at not less than one hundred dollars for the first, and fifty dollars for subsequent performances of a copyrighted play,—in case only a very small part of the play is borrowed. Consult on this point, cases on confusion of goods, 2 Bl. Comm. 405, and cases cited in Wendell's edition. See, also, Hart v. Ten Eyck, 2 Johns. Ch. 62; Gillespie v. Moon, Id. 585; Brackenridge v. Holland, 2 Blackf. 377.

[9] NOTE [from original report in 3 Am. Law Rev. 467]. Descriptive matter in a record of title is no part of the title. Thus a book described in the record as in a certain number of volumes may be published in a different number. Dwight v. Appleton [Case No. 4,215].

An injunction must, therefore, issue, restraining the defendants from the public performance and representation, and from the sale, for public performance or representation, of the "railroad scene" in the play of "After Dark," or of any scene in substance the same as the "railroad scene" in either of the two plays, as such scene is herein defined.

Case No. 3,553.

DALY v. SHERIFF.

[1 Woods, 175.] [1]

Circuit Court, D. Louisiana. Nov. Term, 1871.

INJUNCTION—REMEDY AT LAW—RESTRAINING EXECUTION SALE—INDEMNITY BOND — ENJOINING STATE COURTS.

1. The property of A., consisting of a lease and stock of goods, was seized by the sheriff to satisfy an execution issued out of a state court against the property of B., and on the demand of the sheriff, an indemnity bond for the benefit of A. was furnished by the execution creditor; *held*, that an action on such bond, or an action of trespass against the sheriff, is not such an adequate and complete remedy at law as would oust the jurisdiction of a court of equity of a bill filed to restrain the sale of the property of A. by the sheriff.

2. But a federal court cannot interfere by injunction to restrain a sale of the property of A. on an execution issued out of a state court against the property of B.

[Cited in Perry v. Sharpe, 8 Fed. 23; American Ass'n v. Hurst, 59 Fed. 4.]

This was a cause in equity which was heard upon the motion of complainant for an injunction.

J. J. Foley, for complainant.

E. Filleul, for defendant.

WOODS, Circuit Judge. The bill of complaint states in substance that complainant is the owner of a lease of certain premises in the city of New Orleans, and of a stock of goods therein contained, where he is doing a profitable business as a merchant tailor. That the defendant, Sauvinet, claiming to act as civil sheriff of the parish of Orleans, has seized the lease and stock of goods as the property of one Dezulter, by virtue of a writ of fieri facias issued on a judgment rendered against Dezulter at the suit of one Gardineir by the fifth district court of said parish; has placed a keeper in possession of the premises and goods, and is about to advertise and sell the property to satisfy the execution. The bill prays for injunction and general relief. The case is now heard upon the motion for a preliminary injunction of which reasonable notice has been served on the defendant. The reply of Sauvinet, defendant, to the motion for injunction, is, that having seized the property mentioned in the bill as the property of the defendant Dezulter, the complainant claimed it, whereupon he, Sauvinet, demanded of the plaintiff in execution, a bond of indemnity, which was furnished, and he therefore delivered the same to the complainant, according to the provisions of section 3579 et seq., Ray's Rev. St. This proceeding he imagines is a bar to the present suit, by virtue of the provisions of article 3580, Id. He further alleges that the complainant has a complete and adequate remedy at law, and that the state court having acquired jurisdiction over said property by the seizure thereof, in execution issued out of the state court, this court cannot and should not interfere to divest that jurisdiction. The bill of complaint is, as usual in such cases, sworn to, and the facts therein alleged are not denied by the defendant, either by averment or proof. It is evident that the complainant has no adequate relief at law. An action of trespass against the sheriff, or a suit on an indemnity bond would afford very inadequate redress for a wrong by which complainant's property was seized and sold, and his business broken up. While an action of replevin might restore the possession of the goods to complainant, it would not prevent a sale of the lease. The bond of indemnity taken by the sheriff may, under the law of this state, protect him from any action brought by the complainant against him for such seizure, but this law cannot control the equity jurisdiction of the United States courts, or preclude them from preventing irreparable mischief by the writ of injunction.

The only sound objection to the granting of an injunction is that the state court has acquired jurisdiction over the property seized, which this court should not interfere with. In Mock v. Kennedy, 11 La. Ann. 525, decided in June, 1856, the supreme court of Louisiana, speaking by Mr. Justice Lea, upheld the right of a state court to restrain by injunction a United States marshal, who, on a writ of fieri facias, directed against the property of A., had seized the property of B. The point is thus forcibly argued by Judge Lea: "The question presented is one of title, which is wholly independent of the proceedings in the federal court. Every court, whether state or federal, has as a general rule an exclusive control over the enforcement of its own process except so far as it is subject to the revision of an appellate tribunal. This court cannot inquire into the validity of the judgment upon which the execution issued, or the validity of the execution itself. But the plaintiff, without inviting any inquiry into the validity of these proceedings to which she is not a party, invokes the protection of the court against an illegal seizure of her property made by the officer charged with the enforcement of a writ of execution against a third person. She tenders an issue of title that has no connection with the proceedings had in the federal tribunal. This question we think the state tribunal may lawfully examine and determine, as it involves no conflict of jurisdiction." So in Cropper v. Coburn [Case No. 3,416], Mr. Justice Curtis

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

took the same view and held that the circuit court of the United States could enjoin a sheriff who on an execution against a judgment debtor had seized the property of a third person. These decisions are sustained by the views of Chancellor Kent, as expressed in his Commentaries (volume 1, p. 410), as follows: "If the officer of the United States who seizes or the court which awards the process to seize has jurisdiction of the subject matter, then the inquiry into the validity of the seizure belongs exclusively to the federal courts. But if there be no jurisdiction in the instance in which it is asserted or if a marshal of the United States under an execution in favor of the United States against A. should seize the person or property of B., then the state courts have jurisdiction to protect the person and property so illegally invaded; and it is to be observed that the jurisdiction of the state court in Rhode Island was admitted by the supreme court of the United States in Slocum v. Maybury upon that very ground."

Unfortunately for complainant, however, all this has been expressly overruled by the supreme court of the United States in Freeman v. Howe, 24 How. [65 U. S.] 453. In that case Mr. Justice Nelson speaking for the court says: "Another and main ground relied on by the defendants in error is that the process in the present instance was directed against the property of the railroad company, and conferred no authority upon the marshal to take property of the plaintiff in the replevin suit. But this involves a question of right and title to the property under the federal process, and which it belongs to the federal and not the state courts to decide." Again he says: "The case of Slocum v. Maybury, 2 Wheat. [15 U. S.] 2, has been referred to as holding a different doctrine from that maintained by the plaintiff in error in the present case. We have examined that case attentively and are satisfied that this is a misapprehension." He adds further on: "Reference was made also in the argument in the present case to an opinion expressed by Chancellor Kent in his Commentaries (volume 1, p. 410)." He then quotes the passage already herein cited and adds: "The error into which the learned chancellor fell, from not being practically familiar with the jurisdiction of the federal courts, arose from not apprehending for the moment the effect of transferring from the jurisdiction of the federal court to that of the state, the decision of the question in the example given, for it is quite clear upon the principle stated, the jurisdiction of the former and the validity and effect of its process would not be what the federal but state court might determine. No doubt if the federal court had no jurisdiction of the case, the process would be invalid, and the seizure of the property illegal, for which the party aggrieved is entitled to his remedy. But the question is, which tribunal, the federal or state, possesses the power to determine the question of jurisdiction or validity of the process. The effect of the principle stated by the chancellor, if admitted, would be most deep and extensive in its operation upon the jurisdiction of the federal court, as a moment's consideration will show. It would draw after it into the state courts not only all questions of the liability of property seized on mesne or final process issued under authority of the federal courts, including the admiralty, for this court can be no exception, for the purpose for which it was seized, but also arrests upon mesne and imprisonment on final process, of the person both in civil and criminal cases; for in every case the question of jurisdiction could be made; and until the power was assumed by the state court, and the question of jurisdiction of the federal court was heard and determined by it, it could not be known whether in the given case it existed or not. We need scarcely remark that no government could maintain the execution or administration of the laws, civil or criminal, if the jurisdiction of its judicial tribunals were subject to the determination of another." This decision is affirmed and approved in the late case of Buck v. Colbath, 3 Wall. [70 U. S.] 334. It seems clear that the converse of the proposition thus enforced by the supreme court is true, namely, that the federal courts cannot interfere with the powers of the state courts save in cases where the jurisdiction of the subject matter is exclusively vested in the federal courts, as in proceedings in bankruptcy, and cases arising upon letters patent and copyright. The motion for the injunction must be overruled.

DAMIANI (UNITED STATES v.). See Cases Nos. 14,914 and 14,915.

DAMRON (LAMB v.). See Case No. 8,014.

Case No. 3,554.

In re DANA.

[7 Ben. 1.][1]

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

CONSTITUTIONAL LAW — RIGHT TO JURY TRIAL — POLICE COURT OF DISTRICT OF COLUMBIA.

By the act of June 17, 1870 (16 Stat. 153), a police court was established in the District of Columbia, having jurisdiction over certain offences committed in the District. Trial in that court was to be without a jury, but any party aggrieved might appeal to the criminal court of the District, and the appeal was to be there tried by jury. An information was filed in the police court, charging D. with libel committed in the District, and a warrant was issued against him, but he could not be found, being in the city of New York. Thereupon, on complaint before a United States commissioner in the city of New York, a warrant was issued by him for the arrest of D., and he was committed, and an

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

application was made to the district judge for a warrant to remove him to the District of Columbia for trial on the information: *Held*, that so much of the act of 1870, above referred to, as provided for the trial of the information in this case by the court without a jury, was repugnant to the provisions of the 3d subdivision of the 2d section of the 3d article of the constitution of the United States, and of the 6th amendment to that constitution, and was, therefore, void; that the application for the warrant, therefore, must be denied.

[Cited in Callan v. Wilson, 127 U. S. 540, 8 Sup. Ct. 1306; Re Palliser, 136 U. S. 267, 10 Sup. Ct. 1034; U. S. v. Horner, 44 Fed. 677.]

This was an application to the district judge to issue a warrant to the marshal of this district to remove Charles A. Dana to the District of Columbia for trial, for an alleged criminal offence. The application was made under the 33d section of the act of September 24, 1789 (1 Stat. 91), which provides, "that, for any crime or offence against the United States, the offender may * * * be arrested, and imprisoned or bailed, as the case may be, for trial before such court of the United States as by this act has cognizance of the offence. * * * And, if such commitment of the offender * * * shall be in a district other than that in which the offence is to be tried, it shall be the duty of the judge of that district where the delinquent is imprisoned, seasonably to issue, and of the marshal of the same district to execute, a warrant for the removal of the offender * * * to the district in which the trial is to be had." The defendant was the editor and publisher of a daily newspaper printed and published in the city of New York, called the Sun. A complaint, on oath, had been made before the police court of the District of Columbia, alleging that the defendant had published a libel in the District of Columbia, the publication consisting in the uttering, in said District, of a copy of the said newspaper, containing an article wherein the alleged libel was charged to have been contained. Upon such complaint, an information, in the name of the United States, was filed in said court, against the defendant, for the offence, and a warrant was issued thereon, by said court, to the marshal of the District of Columbia, for the arrest of the defendant. He could not be found, being in the city of New York. Thereupon, on complaint before a United States commissioner in the city of New York, a warrant was issued by him for the arrest of the defendant, the proceedings whereon resulted in the commitment of the defendant, by said commissioner, to await the issuing of the warrant now applied for. The act of June 17, 1870 (16 Stat. 153), provided (section 1), that there should be established, in the District of Columbia, a court, to be called the "Police Court of the District of Columbia," which should have "original and exclusive jurisdiction of all offences against the United States, committed in the District of Columbia, not deemed capital or otherwise infamous crimes, that is to say, of all simple assaults and batteries, and all other misdemeanors not punishable by imprisonment in the penitentiary," the court to be composed of one judge, appointed by the president and senate, for six years. The 3d section of said act provided, "that prosecutions in said police court shall be by information under oath, without indictment by grand jury or trial by petit jury, but any party deeming himself aggrieved by the judgment of said court may appeal to the criminal court held by a justice of the supreme court of the District of Columbia, and, in such case, the appeal shall be tried on the information filed in the court below, certified to said criminal court, by a jury in attendance thereat, as though the case had originated therein." The 4th section of said act provided, that the court might enforce any of its judgments or sentences by fine or imprisonment, or by both.

George Bliss, Jr., Dist. Atty., for the United States, contended, that the offence of publishing a libel in the District of Columbia was an offence against the United States, and was a misdemeanor not punishable by imprisonment in the penitentiary (Act March 2, 1831; 4 Stat. 448), and was, therefore, an offence of which the police court of the District of Columbia had jurisdiction.

William D. Shipman and William O. Bartlett, for defendant.

BLATCHFORD, District Judge, in refusing to grant the application, said, in substance: The 3d subdivision of the 2d section of the 3d article of the constitution of the United States is in these words: "The trial of all crimes, except in cases of impeachment, shall be by jury; and such trial shall be held in the state where the said crimes shall have been committed; but when not committed within any state, the trial shall be at such place or places as the congress may by law have directed." The 6th amendment to the constitution is as follows: "In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor; and to have the assistance of counsel for his defence." The application for the granting of the warrant of removal is resisted on the part of the defendant, on the ground that so much of the act of June 17, 1870, as provides for a trial of the information in this case by the court without a jury, is repugnant to the foregoing provisions of the constitution, and, therefore, void. It seems to me impossible to doubt the correctness of this proposition with reference to the offence of libel, charged in this case. Even if it were to be conceded, that, notwith-

standing the provision in the constitution, "the trial of all crimes, except in cases of impeachment, shall be by jury," congress has the right to provide for the trial, in the District of Columbia, by a court without a jury, of such offences as were, by the laws and usages in force at the time of the adoption of the constitution, triable without a jury, it is a matter of history, that the offence of libel was always triable, and tried, by a jury. It is, therefore, one of the crimes which must, under the constitution, be tried by a jury. The act of 1870 provides that the information in this case shall not be tried by a jury, but shall be tried by the court. It is true, that it gives to the defendant, after judgment, if he deems himself aggrieved thereby, the right to appeal to another court, where the information must be tried by a jury. But this does not remove the objection. If congress has the power to deprive the defendant of his right to a trial by jury, for one trial, and to put him, if convicted, to an appeal to another court, to secure a trial by jury, it is difficult to see why it may not also have the power to provide for several trials by a court, without a jury, on several successive convictions, before allowing a trial by a jury. In my judgment, the accused is entitled, not to be first convicted by a court, and then to be acquitted by a jury, but to be convicted or acquitted in the first instance by a jury. As, therefore, the defendant, if removed to the District of Columbia, will be tried in a manner forbidden by the constitution, I must decline to grant the warrant.

DANA (BETTES v.). See Case No. 1,368.

DANA (LAMAR v.). See Cases Nos. 8,005 and 8,006.

DANA (LAWRENCE v.). See Case No. 8,136.

Case No. 3,555.

DANA et al. v. UNITED STATES.

[1 Hoff. Land Cas. 87.][1]

District Court, N. D. California. Dec. Term, 1855.

APPEALS FROM LAND COMMISSIONERS.

Objections removed by further testimony taken in this court.

[Appeal by William A. Dana and others from a decision of the board of land commissioners rejecting their claim to part of the rancho San Antonio.]

Claim for about six thousand acres of land in Santa Clara county, rejected by the board, and appealed by the claimants. The claimants in this case derive their title from a grant made by Governor Alvarado on the twenty-sixth of March, 1839, and confirmed by the departmental assembly on the twenty-sixth of May, 1840. The nonproduction of the original grant is accounted for by the depositions of various witnesses taken in case number two hundred and seventy-five, and by stipulation made evidence in this case: and a copy has been introduced, duly certified by Manuel Jimeno and two assisting witnesses as true and legal, from the original expediente in the office of the secretary. This certificate is dated October 14th, 1843. A certificate signed by Manuel Micheltorena, governor, and M. Jimeno, secretary, dated October 12th, 1843, is also produced, from which it appears that the grant was confirmed by the departmental assembly on the twenty-sixth of May, 1841. It also directs that this certificate be delivered to the interested party in confirmation of his grant. A copy of the expediente from the archives is also produced, containing the original petition and diseño of the land solicited and the subsequent proceedings thereon, including the decree of concession, the approval of the departmental assembly, the governor's certificate in confirmation of the grant, and a copy of the title delivered to the grantee. The authenticity and genuineness of these documents are fully established by proof.

The conditions of the grant appear to have been fully complied with, and the description in the grant and the delineation of the tract on the diseño identify the land with sufficient certainty. The claim in this case was rejected by the board of commissioners for defect in the chain of mesne conveyances, through which the claimants derive their title. Those defects have since been supplied, and the title of the claimants seems to be regularly deduced from the original grantee. With respect to the original grant, there seems to be no controversy. Its validity was not doubted by the board, and it has been confirmed in another case now before this court. But the claim in the present case is for a certain part of the tract originally granted, which is alleged to have been sold after the decease of the grantee by his executor to pay his debts. A deed from the heirs of the grantee is also produced, conveying to the purchaser the same land bought by him at the sale by the executor. The present claimants have thus shown a prima facie right to the land petitioned for, and as it is clear that the United States have no rights in the land as part of the public domain, we consider it our duty to confirm this claim and to leave the parties to litigate between themselves any questions which may arise as to the validity of the executor's sale or the conveyance by the heirs of the original grantee. The decree of this court can have no effect upon the conflicting rights of third parties, and merely determines the validity of the claim as against the United States. The elaborate and conclusive argument of Mr. Commissioner Thornton, on the right of contesting claimants to intervene in a suit before the board, relieves us from the necessity

[1] [Reported by Hon. Ogden Hoffman, District Judge, and here reprinted by permission.]

of discussing the question involved in this case, especially as no opposition is made to the confirmation of this claim on the part of any persons holding adverse titles to the land. The claim must therefore be confirmed to so much of the land petitioned for as is contained within the boundaries of the tract granted to Prado Mesa.

Jeremiah Clarke, for appellants.
S. W. Inge, U. S. Atty.

Case No. 3,556.

The DAN BROWN.

[9 Ben. 309.][1]

District Court, E. D. New York. Jan. Term, 1878.

ADMIRALTY PRACTICE—MARSHALING OF ASSETS—LIEN UNDER STATE LAW.

1. The lien of a material man for repairs, arising under the law of the state of New York, *held* entitled to priority of payment out of the proceeds of the sale of a vessel under order of court, over a claim for towage services.

2. The present rules and the decisions of the supreme court create no distinction between the liens on a domestic vessel given by the local law, and liens under the general maritime law.

BENEDICT, District Judge. The question presented in these cases relates to the order of payment out of the proceeds of a domestic vessel, sold under the decree of this court in an action in rem. In the first-named case, the libellant has a lien arising out of a towage service performed for the vessel. In the second case the libellant's claim arises out of repairs done to the vessel, for which repairs the law of the state of New York gives a lien upon the vessel. The towing service was performed prior to the making of the repairs, and the libel for the towing was filed prior to the libel of the material man.

Were the vessel foreign, there would be no doubt that the claim of the material man would be held entitled to priority in payment over the towage claim. Equity would require that the labor and material of the shipwright, which were necessary to the preservation and had gone to increase the value of the security, should not be postponed in order of payment to an antecedent lien for towage. This equitable consideration has often been resorted to in determining the question of priority in admiralty cases. The Jerusalem [Case No. 7,294].

The present case is supposed to require the application of a different rule, owing to the fact that as the vessel is a domestic vessel the lien of the material man is derived from the law of the state, while the lien for towage is given by the maritime law. I am unable to see any substantial difference in character between a lien upon a vessel arising out of a maritime contract, and given by the maritime law, and a lien arising out of a maritime contract and given by the law of the state.

The benefit to the vessel is the same in both cases. The relation of the repairs to the employment of the vessel is the same in both cases. The character of the labor and material is alike in both, and resort to the same process for enforcement is open to both. Nor do I understand the effect of the decisions and rules of the supreme court of the United States to be to create a distinction between these two classes of demands. On the contrary those decisions and rules give to a lien engrafted by the state law upon a maritime contract the same standing in a court of admiralty as that possessed by liens arising under the general maritime law. And according to my recollection of the practice, no such distinction was recognized in determining the question of priority where liens given by the local law were enforced in the admiralty before the change of the twelfth admiralty rule in 1844.

There are decided cases since the first change of the twelfth rule in which a priority has been given to maritime liens over liens given by the local law, but so far as I know all those cases were decided while the law was that no lien given by the local law could be enforced in admiralty. Under such a law there was room for a distinction which cannot now be drawn, as according to the present law, the two classes of liens under consideration stand on the same footing in regard to their enforcement by a court of admiralty.

I am unable therefore to find any ground for refusing to accord to a lien for materials given by the state law the same rank accorded to liens given by the maritime law for like services.

In this case then the fact that the vessel was domestic has no effect upon the question of priority, and that question must be determined according to the general rule applied to maritime liens. Inasmuch therefore as the repairs done to this boat were made while the boat was subject to the lien for towage and by so much increased the value of the security, payment for such repairs should be made before paying the bill for towage.

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

DANBURY & NORWALK R. CO. (RAYMOND v.). See Case No. 11,593.

DANDRIDGE (BANK OF THE UNITED STATES v.). See Case No. 914.

DANDRIDGE (WILSON v.). See Case No. 17,801.

Case No. 3,557.

DANE et al. v. CHICAGO MANUF'G CO.

[3 Biss. 380; 2 O. G. 677; 6 Fish. Pat. Cas. 130; Merw. Pat. Inv. 219; 2 Bench & Bar, 321.] [1]

Circuit Court, N. D. Illinois. Nov. Term, 1872.

PATENTS — DATE OF INVENTION — WHAT CONSTITUTES INVENTION — "GERSTEN" LANTERN DEFLECTOR.

1. The date of an invention must be taken to be when the application was filed, if it does not appear when the model and drawings were made which show it to have been perfected, although the patentee had previously commenced experiments upon it.

[Cited in American Roll-Paper Co. v. Knopp, 44 Fed. 610.]

2. Lamps have been well known with chimneys surrounding the flame, and thus promoting combustion, and with deflectors which closed the base of the chimney, and directed the air admitted through apertures upon the flame; and there can be no valid monopoly for enlarging the chimney, so as to form a globe and the deflector so as to close the increased aperture at its base, although the glass is thereby removed further from the flame and protected from the heat.

3. How far the globe shall be enlarged, and the chimney removed from the flame, is a question of judgment, and involves no invention.

In equity. Bill for an accounting and to restrain alleged infringement of the Gersten patent for "lantern deflector."

The bill of complainant sets forth that on the 25th of January, 1859, a patent [No. 22,723] was duly issued from the United States patent office to Conrad Gersten for an improvement in lanterns; that said Gersten afterwards duly assigned the said patent to the complainants, Dane & Westlake; that after receiving said assignment, said Dane & Westlake surrendered said letters patent, and made application for two new patents to be issued for the same invention, with corrected descriptions and specifications; and that on the 17th day of September, 1867, new letters patent, each for a distinct and separate part of the thing patented as aforesaid, and each for some material part of the original invention, were duly issued to said Dane & Westlake, as assignees of said Gersten, one part of which re-issued letters patent was numbered 2,765, and that a legal, corrected description of that part of the original improvement contained in said re-issued patent 2,765, was given in the words of said Dane & Westlake, annexed to the said part of the said re-issued patent; that afterwards an equal undivided interest in said re-issued letters patent was duly assigned by the said Dane & Westlake to the complainant, John P. Covert; that the defendant was making and vending lanterns containing substantially the improvement and invention described in, and secured to, the said complainant, by the said re-issued letters patent 2,765. Defendant denied the validity of the said re-issued letters patent, and also any infringement thereof [and evidence upon both these points has been taken and fully discussed by counsel on both sides].[2]

West & Bond, for complainants.

L. L. Coburn, for defendant.

BLODGETT, District Judge. The main point in regard to the validity of the patent is made upon the question of novelty; and on that question, the state of the art at the time, and before the time of Gersten's alleged invention, has been very fully discussed and examined by counsel.

The feature in the Gersten patent, of which the infringement is alleged, is the plate or deflector, q.

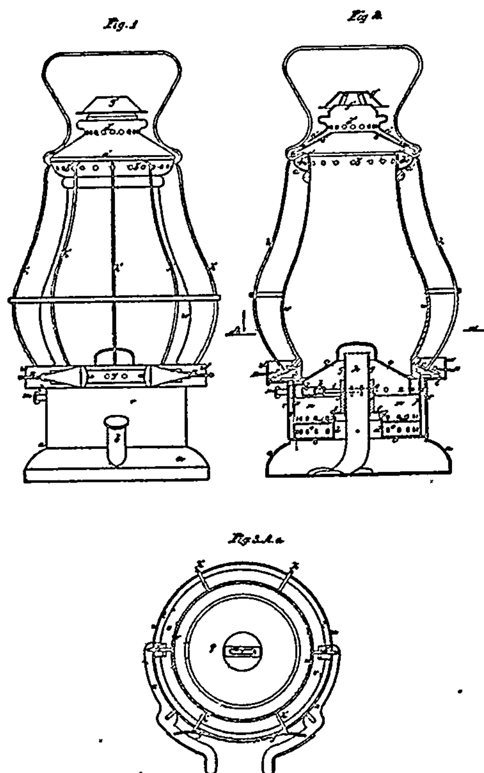
It appears from Gersten's specifications that the general scope and purpose of his invention was a lantern in which kerosene or carbon oils could be used for illuminating purposes.

To accomplish this he constructed a burner, the main features of which were, first, a cylindrical metallic ring or band, setting upon the top of the oil-cup, and divided into two compartments by a horizontal plate m, filling the entire ring. The lower apartment was termed a "cooling chamber," and was intended to prevent the heating of the oil in the oil cup. Into this cooling chamber air was admitted by holes in the band and near the lower edge. Above the plate forming the top of the cooling chamber, the band was perforated with holes sufficient to admit air for the supply of the flame. In the top of the ring is set the deflector q, which, extending to the periphery of the ring forms what Gersten calls the flame chamber. The deflector, q, is swelled up in a conical form, and in the center is a boss, which has a slot cut in it a little wider than the thickness of the wick to be used. A wick tube passes up from the oil cup in the center of the ring, through the cooling chamber into the flame chamber, and near enough through the boss in the deflector to secure a clear flame above the boss or apex of the deflector. The ring is perforated with holes for the admission of a small quantity of air above the deflector. Into the top of this ring immediately above the deflector, is set the glass shade or globe of the lantern, and to the top of the globe a suitable dome is affixed, of a form and mode of construction particularly described; but as that part cuts no figure in this controversy, I will not take time to describe it.

The cylindrical ring p, is surrounded by an outer case or jacket, leaving a space between the two, which is closed at the bottom and open at the top, and down the annular space between the outer jacket and the ring p, the air passes and is admitted into the cooling chamber, the flame chamber, and the globe, through the holes before described in the inner ring for that purpose. This outer

[1] [Reported by Josiah H. Bissell, Esq., and here reprinted by permission. Merw. Pat. Inv. 219, contains only a partial report.]

[2] [From 2 O. G. 677.]



ring or jacket was intended to protect the air in the flame chamber from disturbing outside currents, and secure a steady flame, while the function of the deflector, q, was to deflect or concentrate all the air that entered the flame chamber to the base of the flame within the boss. In this combination, the globe of the lantern acts as a chimney to the burner, and at the same time protects the flame from external air.

The defendant's lantern, which complainants claim infringes their patent, is what is known to the public as the tubular lantern, the chief characteristics of which are a dome above the top of the globe, into which the air, which is heated by the flame of the burner in the globe, rises, and from which it passes by tubes into a tight chamber above the oil cup, the top plate of which chamber extends to the base of the cone of the burner.

In some cases, perhaps, the cone has been made by swelling a portion of the cone in the top plate of the defendant's air chamber, in the same manner as Gersten's cone was made by the boss and slot.

There can be no doubt but what there is a striking external similarity—almost identity—between Gersten's deflector, q, and the top plate of defendant's flame or air chamber.

The deflector was a tight plate continued closely around and filling the band or flame chamber, and concentrating all the air which came within the plate into the cone.

If this case was to be determined by a comparison of the mere external appearance, the court would have little difficulty in finding a manifest infringement, but the defendant denies that Gersten was the inventor of the deflector q, as used in his, defendant's, lantern, and also denies that the top plate in the air chamber of the tubular lantern performs the same functions as the deflector q in Gersten's does, and the evidence on one or both of these issues determines the case.

It appears from the proofs that Gersten commenced his experiments in May, 1858, but just when he made the model and drawings showing the perfected arrangement, does not appear, save that, as appears from the testimony, he filed his petition for a patent with the model, drawings, and specifications in the patent office on the 5th of November, 1858, which, for the purpose of this case, must be presumed, under the proof, as the date of his invention.

For several years prior to the date of Gersten's experiment, carbon or petroleum oils had been brought into use for illuminating purposes, and many devices had been tried, some of which had been generally adopted, for the construction of burners for this class of oils.

The most important difference between these oils and the animal oils or fatty matters previously used for illuminating purposes, was the fact that the carbon oils contained no oxygen in their composition, while the animal oils contained eight or ten per cent. of oxygen.

For this or some other reason, the carbon oils required a much higher degree of heat to secure combustion than the animal oils, and this could only be obtained by an increased supply of air to the flame at or near its base, where the combustion must take place. This supply of air was generally obtained by the employment of a glass or metallic cone setting over the top of the wick tube, with a slot through which the flame could pass freely, and a glass chimney fitted closely around the base of the cone, so as to secure a strong draught of air under the cone and in contact with the flame, as it passed into or through the slot.

It was, however, found necessary that some air should be admitted also to the chimney above the cone, and provision was usually made for that purpose by perforation of the band or burner above the cone.

The burner invented by M. A. Dietz, and referred to in the proof as "Exhibit Dietz," is perhaps the best illustration of the state of the art of constructing burners at the time Gersten began his experiments, although several other inventors, both English and American, had used cones a long time prior to Dietz.

Indeed the cone seems to have originated in a much earlier class of experiments having for their object a lamp or lantern for the burning of camphene, resin oil, oleic acid,

etc., all which, like the coal oils, were highly carbonaceous, and required a copious supply of air to secure perfect combustion.

It is an indisputable fact that nearly all of the inventors who preceded Gersten whose devices are put in evidence in this case, called their cone or cap by which the supply of air is concentrated upon the base of the flame, a "deflector," so that it seems Gersten did not invent the name.

We have not time, however, to settle who invented the cone or deflector. It is sufficient to say that when Gersten entered the field, experience had demonstrated the necessity of the cone, the periphery of which must extend far enough to fill the chimney so as to induce a strong current of air through the cone and impinge it upon the flame in the slot; a small supply of air being also admitted into the chimney above the cone, to feed the flame after it passed into the chimney, and secure the combustion of the particles of soot which were drawn along with the flame into the chimney.

These burners secured a strong white light without smoking, and lamps with this device for burning kerosene or coal oil, had come into general use before Gersten's attempted invention, and Gersten's effort was to make a lantern in which kerosene could be used as it then was in lamps.

He prefaces his specifications by the statement that "the lanterns which have heretofore been made for burning coal oil will not admit of being moved through the atmosphere with any degree of velocity, or of being exposed to the wind without being extinguished, and that currents of air affect the flame so as to cause them to smoke to a very considerable extent." "The object of my invention," he says, "is to avoid the effects above enumerated, and others not necessary to enumerate."

He then proceeds to describe the mechanism by which he claims to accomplish the result aimed at, the substance of which I have already quoted.

It will be observed that Gersten does not claim to be the first inventor of kerosene lanterns, but says, in substance, that those in use could not be carried in the wind, and that they smoked.

It is manifest, on an inspection of Gersten's model, (which must be taken as illustrating his idea of the best method of applying his invention,) that Gersten took as the initial or starting point of his device, the Dietz burner then in common use, the inventor and manufacturer of which resided and carried on business in his immediate vicinity.

This (indicating) is the Dietz burner, and it will be seen by those who have followed the specifications, that it contains everything of the Gersten burner or Gersten flame chamber, with the exception that it is not as much extended. Here is the cooling chamber, provided for the same as Gersten has; here is a cone, and here is the perforated ring for allowing the admission of air into the flame chamber. When this ring is placed upon the cooling chamber it makes a flame chamber precisely as Gersten did, except that it is not extended out as broadly. Here is also a provision for admitting air above the flame into the chimney.

We find in the Dietz burner all the elements of the Gersten cylindrical ring, or the band p, which surrounds and forms the external walls of the cooling chamber and a flame chamber as Gersten's is, and it is also perforated as Gersten's is, to admit air in the proper proportion into the cooling chamber, the flame chamber, and to the flame above the cone.

He wished to dispense with the chimney, or rather to make the globe perform the functions of a chimney, and to do so he had no alternative but to extend the cone outward to the base of the globe.

No experimenter or inventor had determined just how far outwardly the base of the cone should extend, but all had recognized the inexorable necessity of making the cone form a substantially tight bottom to the chimney, by which alone a draught through the cone could be obtained.

Gersten did this and nothing more, so far as the cone is concerned. His deflector performs the same function in the same way as the Dietz cone does. It required a mere mechanical alteration and not an invention to expand the base of the cone until it met and filled the walls of the globe at the base of the globe. Thus expanded, it was nothing but Dietz's cone, because it did nothing more. I say Dietz's cone, because Dietz used it in his combination—for he was not and did not pretend to be the inventor of the cone—it was old when Dietz took it up.

I said just now that no one had fixed the size of the cone, and so it is true no one had determined any fixed size for the base of the chimney; but it was settled that to secure a good draught the chimney must be contracted at the top, and this Gersten accepted.

It was urged by counsel in the argument that the chimney would get heated and be liable to break on being exposed to cold currents of air or drops of rain, but this would depend upon how far the sides of the chimney were removed from the flame, and Gersten gives no rule for that, and other inventors had fixed no limit.

Indeed, I can but think that the counsel have shown more inventive genius in constructing this part of their argument than Gersten did in the combination of his deflectors [and globe].[3]

A lantern is but a lamp so arranged as to be carried and protected from currents of air. The distinction is not a broad one. Lanterns and lamps both perform substantially the same functions in the same way.

[3] [From 2 O. G. 677.]

One is so arranged that it may be carried in the open air, and be protected against currents of air; the other is not thus protected. The distance at which a chimney should be removed from the flame in order that it may not be broken by currents of cold air in case of use as a lantern, must be determined by experience, and that alone—and it will be remarked that Gersten gives us no rules by which we are to determine that.

I find, then, in the deflector of Gersten, nothing more than the cone of the common hand lamp then in use.

Of the remainder of his device I have nothing to say, but it seems palpable to my mind that if he is to receive credit for inventing anything, it must be the device of screening the flame from external currents of air by the outer jacket, in combination with the other parts. His globe is but an enlarged chimney, the walls of which were far enough removed from the flame to be kept cool, and his deflector only an enlarged cone, which he was obliged to use in order to make this chimney draw.

It might be enough to stop here in the discussion of the testimony, on the question of novelty, but the record shows that some months prior to his invention, one Max Miller, a resident of Brooklyn, had attempted the construction of a coal oil lantern in which he used the cone or deflector precisely like Gersten, except that he perforated with small holes his cone near the base of the boss, so that some of the air which came into the flame chamber escaped into the space above the cone, without going through the slot. He placed a deflector over the old cone of Dietz's, extending out to the wall of the lantern, making provision for the passage of a small portion of air between his deflector and the cone—this arrangement being necessary as he made no provision for admitting air into the globe in any other manner. Miller also used his globe as a chimney and removed it so far away from the flame that it would not get heated; and he also accepted the condition that he must, from the necessity of the case, put a substantially tight bottom into his chimney.

So that when Gersten claimed broadly a deflector extending to the walls of the lantern, he claimed too much, for Max Miller, his neighbor, had done that before him. If he could show that his cone was better than Miller's, by reason of leaving out the holes through which the air escaped into the chimney at the base of the cone, he might have had a patent on his improvement on the Miller deflector, but he did not ask for or obtain that. He claimed broadly in the reissued patent the deflector as such, and it seems clear to me the testimony proves that Miller had, in all essential particulars, anticipated Gersten in the application of the cone to a lantern.

Arriving at this conclusion in regard to the question of novelty raised against the patent, I have not taken the time necessary to analyze and carefully consider the question of infringement, but will say that from some illustrations and experiments given at the trial, I think there may have been some force in the suggestion of defendant's counsel that the deflector, q, of Gersten's lantern performs a different function from what the top plate of the air chamber does in defendant's lantern. It forms the bottom of the globe or chimney in the Gersten patent, and that, at least, does not seem to be the function of the plate in defendant's lantern.

Bill dismissed with costs.

DANE (GINDRAT v.). See Case No. 5,455.

Case No. 3,558.

DANE et al. v. ILLINOIS MANUF'G CO.

[3 Biss. 374; 2 O. G. 680; 6 Fish. Pat. Cas. 124; Merw. Pat. Inv. 212; 2 Bench & Bar, 325.][1]

Circuit Court, N. D. Illinois. Nov. Term, 1872.

PATENTABLE INVENTION — IMMATERIAL CHANGES — LANTERNS.

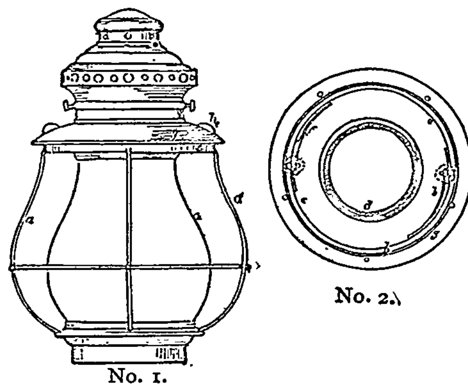
1. The mere change of the location of the parts of a mechanism, so long as no different or additional function is performed, does not make the mechanism patentable.

2. Such change is not aided by the fact that one of the parts thus transposed performs a double function, if the same device has before been used to perform the same functions separately.

3. A patent for removing from the bottom of a lantern certain devices, by means of which it could be separated and the globe taken out below, and placing them at the top so that the globe could be taken out above, can not be sustained, although a disc-ring, which closes the opening between the parts, is thereby made to reflect the light downward, such downward reflection, by a disc, being well known.

Final hearing on pleadings and proofs.

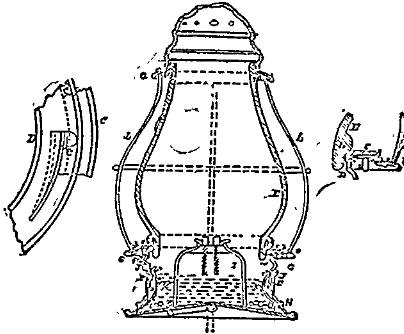
Suit brought upon letters patent [No. 42,520] for improvement in lanterns, granted to William Westlake, April 26, 1864, assigned to complainants, and reissued to them November 23, 1869 [No. 3,747]. The claims of the patent, which were involved in the suit, will be found in the opinion.



No. 1. No. 2.

[1] [Reported by Josiah H. Bissell, Esq., and here reprinted by permission. Merw. Pat. Inv. 212, contains only a partial report.]

The engravings Nos. 1 and 2 represent the Westlake lantern. The guard-rods a are attached at the upper end to a ring b, which, in turn, is connected by two spring-catches, which are shown in drawing No. 2, to a disc g, extending from the dome to the ring b.



No. 3.

No. 3 is an engraving of the Waters lantern, in which the guard-rods are attached at their lower ends to a ring connected with the band which sustains the globe, by lips extending over the ring on one side and a spring-catch on the opposite side of the globe.

West & Bond, for complainants.
L. L. Coburn, for defendant.

BLODGETT, District Judge. The nature and object of the invention as set forth by the patentee in his specifications. "consists in the construction of a lantern guard, without hooks, projections or catches sticking out or interfering with the safe and convenient use of the lantern, so that the same can be readily attached or detached in the employment of a band or disc to fill or cover the space between the enlarged band or ring at the upper end of the guard and the top of the globe, and in the application of suitable fastenings to secure the dome to the guard."

The upper ring of the guard is designated in the drawings and specifications by the letter b.

This upper ring of the guard is provided with a flange or ring on the inside, to receive the catches which fasten the ring to the upper part or dome of the lantern.

Extending outwardly from the lower edge of the band forming the dome, is a flange or disc g, which must be wide enough to fill the space between the dome and the top ring of the guard. Upon the under side of this disc g are fixed spring catches by which the guard ring is attached to the disc. The ring b must be large enough to allow the globe to pass through it in the act of removing the globe from the lantern, and the top of the globe must be held within the inner ring of the disc g, that is to say, it must enter far enough into the dome to be held securely in its place.

I have not followed literally the language of the specifications, but stated their substance, as I understand them.

The claims covered by the re-issued patent are—first, the removable guard made as described—but as this has been abandoned since the re-issue, and since this suit was commenced, no comment is necessary upon this part of the claim.

Second—The disc g in combination with the ring or band, b of the guard, and the fastening e, substantially as and for the purposes described; and,

Third—The guard a, in combination with the disc g, the fastening e and the removable globe d, substantially as specified.

The defendant by its answer denies the validity of the letters patent, for want of novelty, and also denies that the lanterns manufactured by it, infringe the complainants' patent.

Upon these issues several witnesses have been examined as experts by both parties, and a large number of exhibits and models, describing and illustrating prior inventions in the same line, have been put into the case.

I shall not take up time to analyze or pass on all the devices claimed by the defendant to have anticipated Westlake's invention, as many of them, at the most, contain only portions and suggestions of the now perfected mechanism. The leading object of Westlake and his associates, especially in their reissued patent, was to secure to themselves the exclusive right to make and vend a lantern with a loose globe, removable through the top of the guard by means of the band or ring b, and the disc g, with the fastenings e.

Does the evidence in the case entitle them to the claims on which they still insist, that is the second and third claims?

On the 17th of July, 1855, one Charles Waters, as the evidence shows, received from the United States patent office a patent for an improvement in lanterns, the main feature of which was, as shown in his specifications and drawings, a loose, removable globe; but he removed his globe through the bottom instead of the top of the guard. The mechanism by which he accomplished this result was a flange, or ring, extending outwardly from the lower edge of the top, or dome, of the lantern, into which the top of the guard rods was securely fastened, the lower ends of the guard rods were fastened into an annular ring or plate, large enough to allow the globe to pass freely through it. This lower guard ring was fastened by spring catches and lips to a flange projecting outwardly from the top of the base of the lantern, as is shown in the model.

It seems to me that we have in this device the idea of a removable globe fully worked out and applied, and it does not appear that any advantage is gained by taking the globe out through the top, instead of the bottom, of the guard, and the elements of the combination by which the same result is obtained, are the same in both lanterns. The parts

of the Waters lantern are transposed or changed by Westlake from the bottom to the top of the guard; and there perform the same, and no additional functions.

The band D, with its flange C, in Waters' combination is inverted by Westlake; and becomes the disc g in his combination, while the annular plate c of Waters' lantern is carried from the bottom to the top of the guard by Westlake, and there becomes Westlake's ring b. The spring catches are the same in both lanterns and fill the same office.

So, by simply inverting Waters' guard, you have exactly Westlake's combination, and you have only to fasten the springs in the bottom of the lantern to the inverted Waters' band D, and you have precisely Westlake's combination. They are built right up of the same parts—the Waters lantern complete—without changing the functions of a single part, or doing anything except to take the globe from the top instead of the bottom of the guard.

It is needless to cite authorities to show that the mere change of the location of the parts of a mechanism, so long as no different or additional function is performed, does not make the mechanism patentable. Westlake cannot take Waters' mechanism, forming a loose globe lantern, and make it his own by simply re-locating the effective parts, so long as no different result is gained, and certainly there seems to me no substantial change in the results to take the globe out of the top instead of the bottom of a lantern guard.

The idea was to take the globe readily from the guard and lantern for the purpose of cleaning it, or replacing it if broken.

If Waters, by the specifications of his patent of July 17, 1855, had taught the whole world how to make a lantern from which the globe could be readily removed through the lower ring of the guard, with the whole mechanism made to operate together as appears to that end, he, in effect, had taught Westlake how to remove the globe from the top of the guard, because it required no invention to make the change. Waters taught everybody how the space between the enlarged ring b, as Westlake calls it, and the body of the lantern should be filled up by the disc g, and how the lantern should be put together in sections, as it were, and the place where the attachment should be accomplished, whether at the top or the bottom of the guard, was, after that, a mere matter of mechanical convenience, or artistic taste; in the construction of the lantern.

It appears to me there can be no doubt that Waters, in his lantern, has anticipated all that Westlake now claims in his patent—his re-issued patent.

It is true, as was suggested in the argument, that the disc g in Westlake's patent performs the double function of a reflector, as well as a means of attaching the guard to the dome; but a disc for a reflector in that place, as the proof shows, was old, and so I do not think the suggestion aids the complainants; as if it proves anything, it is that Westlake did not invent the disc, but only put the spring catches upon it wherewith to fasten the guard to the dome or disc.

I will only take time to allude to one other device, shown in the evidence as prior in point of time and foreshadowing, if it did not accomplish, the same result as Westlake's; and that is Max Miller's patent, obtained August 17th, 1858.

This lantern has a loose globe, removable through the top guard ring, but the disc g or c does not appear in the combination; the same result is accomplished without the disc.

It is true it was urged that Miller's globe is a plain cylinder, and that his device would not allow the use of a globe shaped as Westlake's was; that is, bulging in the middle and contracted at the top. But he made his contraction by a cone above the globe, so as to accomplish the same result.

Finding, then, from the testimony, that Westlake's alleged invention had been successfully accomplished by the prior invention of Waters, it is hardly necessary to discuss the question of infringement.

I will, however, say that his disc, at the top of the globe, was old for the purpose of a reflector, and Waters having used a flange turned outwardly from the bottom of his dome band for the purpose of fastening his guard rods into it, it seems to me Irwin had a right to use it for the purpose of hinging the top ring of the guard of his lantern thereto, thereby making a basket, in which the globe was securely held, and obtaining a result different from that accomplished by Westlake and without the use of any part of the combination to which Westlake had an exclusive right. Irwin's fastenings are not the same as Westlake's—one uses two spring catches, and the other a hinge and spring catch, whereby Irwin makes a basket of his guard in which the globe is safely held. This bill must, therefore, stand dismissed with costs.

The suit of the same complainants against the Chicago Manufacturing Company on the same patent, and involving substantially the same facts, was heard at the same time and same order entered.[2]

DANE (IRWIN v.). See Cases Nos. 7,081 and 7,082.

DANFORD (PARRISH v.). See Case No. 10,-770.

DANFORD (VARNUM v.). See Case No. 16,-888.

Case No. 3,559.

Ex parte DANFORTH.

See Case No. 3,560.

[2] [The complainants appealed from this judgment to the supreme court of the United States, which affirmed the same. Dane v. Chicago Manuf'g Co., 131 U. S. cxxvi.]

Case No. 3,560.

In re DANFORTH.

[1 Pa. Law J. Rep. 31; 1 Pa. Law J. 148.]

District Court, E. D. Pennsylvania. 1842.

BANKRUPTCY — WITNESSES BEFORE COMMISSIONER —PRIVILEGES—CRIMINATING QUESTIONS.

In the examination of a witness before the commissioner, the witness cannot refuse to answer a question which may subject him to no other injury than one of a civil nature.

On the 26th of May, 1842, Danforth's creditors petitioned for a decree of bankruptcy against him, and one of the acts of bankruptcy specified in the petition was, that Danforth, carrying on an individual business, and also a partnership with Hildeburn, and his individual business being indebted to his partnership business, he had, on or about the 15th of February last, assigned various items of his individual property to his co-partner Hildeburn, for the security of the said co-partner, and of the partnership creditors. It was referred to a commissioner to take proofs, &c., and among other witnesses called by the petitioner, was Hildeburn, the co-partner. Mr. Hildeburn submitted to the examination until he was asked, what was the state of his knowledge in regard to Danforth's affairs at the time he accepted the assignment. This he declined answering, and the refusal having been reported by the commissioner to the court, the subject was discussed before his honour, on a motion for an attachment.

Ferdinand W. Hubbell, Esq., with whom was H. Binney, Jr., Esq., on behalf of the witness, stated that the inquiry might prejudice the witness's rights in an action which, thereafter, might be brought by the bankrupt's assignee against the witness to recover the assigned property. The two months mentioned in the proviso of the 2d section of the bankrupt act of 1841 [5 Stat. 442], having elapsed before the petition was filed, the witness's title to the property was indefeasible, unless he had notice of the act of bankruptcy, or of the intention of the bankrupt to take the benefit of the act. The question put to the witness bore directly upon these exceptions of the proviso. He did not resist on the broad ground that a witness was not bound to answer questions which would subject him to civil injury. He considered that question, though at one time much debated, to be settled against the privilege of the witness; but he resisted on the ground of the irrelevancy of the question to the issue. The act of bankruptcy was complete, without any reference to the knowledge of the witness as to Danforth's affairs. Being irrelevant to the issue presented in the case, and being capable of prejudicing the witness's civil rights, the question ought not to be put to him.

B. Gerhard, Esq., in support of his rule, said that any evidence tending to prove any of the alleged acts of bankruptcy, was relevant. The assignment charged to be an act of bankruptcy was not so, as of course, inasmuch as an assignment of part of a trader's effects to a particular creditor did not necessarily infer fraud. Eden, 31, 32. It became an act of bankruptcy only when made in contemplation of bankruptcy, voluntarily, and with an intent to give a preference to the grantee over general creditors. Hartshorn v. Slodden, 2 Bos. & P. 582; Crosby v. Crouch, 11 East, 256. The defence in this case would be, that the assignment was not voluntary, but was yielded to importunity and threats. But this importunity must have been bonâ fide. If the threats had been made merely for the purpose of satisfying the decisions on the bankrupt law, they could not save the assignment from being an act of bankruptcy. Hildeburn's knowing that Danforth's affairs were desperate, may tend, at least, to throw light on this part of the case. Danforth's own knowledge as to his condition may, moreover, in some sort be inferred from that of Hildeburn. But the court would observe, that the question of privilege (though after all, it had been made the basis of the argument on the other side), had been expressly waived by Mr. Hubbell. The objection had been, irrelevancy to the issue. But that was not a ground on which a witness could object; and in the present case the counsel appeared for the witness alone. The respondents had made no objection to the question.

RANDALL, District Judge, after hearing the argument, said, that the subject had already been in his mind, and that he was much inclined to think that the witness was bound to answer. But he would think of it.

A day or two after he said, that the witness was bound to answer the question, unless by the answer, he would accuse himself of something penal, criminal, or infamous.

DANFORTH (DYSON v.). See Case No. 4,-229.

DANFORTH (HUNT v.). See Cases Nos. 6,-887 and 6,888.

DANGBERG (UNION MILL & MIN. CO. v.). See Case No. 14,370.

DANIEL (DAWSON v.). See Cases Nos. 3,-668 and 3,669.

Case No. 3,561.

DANIEL v. KINCHELOE.

[2 Cranch, C. C. 295.][1]

Circuit Court, District of Columbia. April Term, 1822.

SLAVERY—POWER TO HIRE OUT—LAWFUL IMPORTATION.

1. From a power to hire out a slave, and receive his wages, the jury cannot infer a power to sell him.

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

2. If the importation of a slave into this county be with intent that he should be hired out for a limited time only, it is not such an importation as is forbidden by the Maryland act of 1796, c. 67, § 1.

Petition for freedom.

Upon the trial, THE COURT (nem. con.) instructed the jury that from the fact that young Kincheloe had authority to hire out the slave and receive his wages, they could not infer that he had authority to sell the slave; and further instructed the jury (MORSELL, Circuit Judge, contra) that if they should be satisfied by the evidence, that the importation of the petitioner into the county of Washington was with the intent that he should be hired to remain a limited time only, and not to reside permanently, it was not such an importation as is within the first section of the Maryland act of 1796, c. 67.

Case No. 3,562.

DANIEL v. MITCHELL et al.

[1 Story, 172;[1] 3 Law Rep. 412.]

Circuit Court, D. Maine. May Term, 1840.

EQUITY—ANSWER AS EVIDENCE — RESCISSION OF CONTRACT—MISTAKE—LIABILITY OF AGENT.

1. The rule in equity is, that an answer, responsive to the allegations and charges made in the bill, and containing clear and positive denials thereof, must prevail, unless it is overcome by the testimony of two witnesses, or by one witness and other attendant circumstances, supplying the want of another witness.

[Cited in Towne v. Smith, Case No. 14,115; Carpenter v. Providence Washington Ins. Co., 4 How. (45 U. S.) 218; Clark v. Hackett, Case No. 2,823; Delano v. Winsor, Id. 3,754; Scammon v. Cole, Id. 12,432; Godden v. Kimmell, 99 U. S. 206; Ivinson v. Hutton, 98 U. S. 82.]

2. A bargain, founded upon material misrepresentations of matters of fact, even though they were inadvertently made through the mutual mistake of the parties, or by the mistake of the grantors alone, will be annulled in equity.

[Cited in Smith v. Richards, 13 Pet. (38 U. S.) 36; Doggett v. Emerson, Case No. 3,960; Warner v. Daniels, Id. 17,181; Yates v. Little, Id. 18,128.]

3. In equity, mistake as well as fraud, in any representation of a fact, material to the contract, furnishes a sufficient ground to set it aside, and to declare it a nullity.

[Cited in Warner v. Daniels, Case No. 17,181; Mason v. Crosby, Id. 9,234; Delano v. Winsor, Id. 3,754.]

4. A contract was made by certain parties, wherein it was agreed, that one party should sell and the other should purchase a certain tract of timber-land in the state of Maine, and if, upon an exploration, it did not contain sixty millions of pine timber, and there was not a stream running through it, which would, with an ordinary freshet, carry logs from the tract to the Kennebec river, without difficulty, the agreement should be void. The parties procured an exploration, and upon a favorable report of their agent, purchased the tract, taking a deed of the same, and making the stipulated payments. It subsequently appeared, that there was a gross mistake in the estimation of the quantity of timber, that the exploration was not made entirely upon the tract in question, but partly upon an adjacent one, and that the pine timber did not, in fact, exceed five millions. Under these circumstances, a bill in equity was brought by one of the purchasers to rescind the contract, and praying for general relief. *Held*, (1.) That the original contract must be set aside as founded in gross mistake. (2.) That the conveyance to the plaintiff must be rescinded, and the purchase money restored. (3.) That the agent of the owners, who had effected the sale in his own name, having received the purchase money, was primarily liable to repay it; and in his aid, such of the other defendants for whom he acted as agent, and such as had received any part thereof, with a full knowledge of all the circumstances, must repay the proportions thereof respectively received by them.

[Cited in Warner v. Daniels, Case No. 17,181; Doggett v. Emerson, Id. 3,962; Ferson v. Sanger, Id. 4,752; Mason v. Crosby, Id. 9,234; Smith v. Babcock, Id. 13,006.]

5. An agreement having been made between the defendants, by which they mutually agreed, upon the division of the notes, taken for the purchase money, among them according to their respective interests, that they would bear their respective proportions of any losses, which might arise from any inability of the purchasers to pay the same; it was *held*, that the plaintiff could not, in equity, have any benefit from this agreement, so as to avail himself of it in case he was not able, from the parties directly liable to him, to obtain back the purchase money decreed to him.

Bill in equity [by Otis Daniel against William C. Mitchell and others] to rescind a contract for the purchase and sale of timber-lands in the state of Maine, to set aside the conveyance thereof, to recover back the consideration paid in money, and to have the notes given for the balance delivered up. The bill set forth, that William C. Mitchell, Tristram G. Mitchell, David Wescott, William Wescott, Erastus Hayes, Israel Waterhouse, Thomas Warren, and William B. Gooch, claimed to be the owners of certain undivided portions of a tract of land in the state of Maine, called the Ford tract, situated upon the upper Austin stream, being a part of the Bingham Kennebec purchase, in the county of Somerset; that they employed James Todd as their agent, to contract for the sale of the tract, and gave him a bond by which he was authorized to dispose of it as he should see fit, and delivered to him certain certificates of the quantity of timber thereon, &c.; and that Todd employed one Thomas W. Haskins to aid him in effecting a sale, representing and authorizing him to represent, that the tract contained pine timber sufficient to make sixty millions feet of boards, and that there was a suitable stream for floating and getting the logs out into the Kennebec. That upon such representations and assurances, the plaintiff, in connexion with other persons, was induced to purchase three undivided sixteenth parts of the tract, and subsequently seven sixteenths more, making in the whole, ten sixteenth parts of said tract, at the price of four dollars per acre; for which he paid one fourth part in cash, and gave his notes, secured by mort-

[1] [Reported by William W. Story, Esq.]

gage, for the other three fourths, payable in one, two, and three years. The money was paid to Todd, and the notes taken by him, on his own account, so far as he was concerned, and as agent, and for the benefit of the other defendants, who received and appropriated the cash and notes to their own use, according to agreement among themselves. The bill complained, that practices and artifices had been used to produce an erroneous and exaggerated estimate of the quantity of pine timber upon the land, and of the facilities for floating it, and getting it out by water; and alleged, that in an exploration of the tract, which was made previous to completing the contract, in which Haskins was employed as an agent for the plaintiff, and the other proposed purchasers, he and others with him, on the part of the purchasers, were so guided and deceived, as to be carried through the same births or glades of pine timber several times, as though they were distinct and different, and thus great quantities of good pine timber were exhibited to them as standing on that tract, when they were in fact standing on adjacent lands; and further, that the tract did not contain nearly so much pine timber as was represented, nor in fact more than enough to make five millions feet of boards; that it was worth very much less than it was represented; and that the plaintiff had requested the defendants to rescind the purchase, and restore the money, and give up the notes; but they had refused to comply. The bill called upon the defendants to set forth their respective interests in the tract at the time of the sale; and what portion of the consideration each received; and how the distribution was made among them; and prayed, that the contract might be rescinded and annulled, the money might be repaid, and the notes discharged and cancelled, or compensation made, and the plaintiff indemnified. It also prayed for general relief. William Wescott died without putting in an answer, and the suit was discontinued in regard to him. David Wescott and Israel Waterhouse died after making answers, and the bill was revived against their representatives.

The answer of Todd recited a verbal agreement, made between him and another person, to join in obtaining a bond for the sale of some good timber tract, for the purpose of disposing of it again at a profit; and that upon hearing of the Ford tract as one of that description, in which several persons were interested, they applied to the Wescotts for information respecting it; that learning it was estimated to contain from fifty to seventy millions feet of pine timber, and that there were undoubted certificates of its containing from fifty to sixty millions, they first took a bond from the Wescotts, for the conveyance of six thousand acres, at four dollars an acre; the Wescotts having obtained the consent of some of the owners, provided efforts were made to sell without loss of time; that the bond was dated about the last of May, 1835, and was to run ten days; that failing to make a sale, this bond expired; that finding the Wescotts had the disposal of about ten thousand or twelve thousand acres of the tract, a new bond was procured from them June 9th, 1835, for the conveyance thereof, in common and undivided, on the payment of four dollars an acre in thirty days, one quarter in cash, and the rest in notes at one, two, and three years; and that, upon performance of the new agreement, the Wescotts were to cause a deed of the title derived from Massachusetts, to be made by Mason Greenwood. At the same time it was agreed, that the holders of the bond should go to Boston immediately, and endeavour to effect a sale; and if they did not succeed in getting up a company in ten days, who should undertake to explore it with a view to purchase, the bond should be given up. That Todd having delayed to proceed to Boston, and the Mitchells having objected to his going on with the business any further; and William Wescott having, on the 15th of June, disposed of his interest in the ten sixteenths mentioned in the bond, to the Mitchells, it was at length arranged, that one week from that time should be allowed to afford an opportunity to get up such a company; provided, that, if said Todd should succeed in so making a sale, they, who were interested in the tract should also have one half of what it should sell for, per acre, over the four dollars, the price fixed in the bond. That about the same time, the Wescotts put into the hands of Todd and his partner, sundry letters and certificates, containing the opinions of the signers thereto, in regard to the character of the tract as timber land, and of the streams, which ran through it, and the quantity of timber upon it. That the defendants never authorized Todd to exhibit the certificates and letters as certainly true and correct, but only that they fully believed them to be so; that when he went to Boston, which he did accordingly within the week, he placed these papers in the hands of Haskins, to be exhibited by him to whomsoever he pleased; and that he (Todd) himself believed, and so stated to Haskins, that the statements were in his opinion correct and conformable to fact; but that he did not authorize Haskins to represent, that they were absolutely free from error or mistake, nor to undertake to guaranty to that effect, because he was not authorized to do so, and had made up his mind not to do so; the intention being, that whoever should purchase, should not do so merely on the faith of those certificates, but should take their own steps to satisfy themselves of the truth of the statements. That he, Todd, employed Haskins to assist him in hunting up purchasers and getting up a company for the purpose; for which Haskins was to receive a certain compensation, as was known to the plaintiff. He denies, that he gave Haskins power to make any absolute

assurances; but he admits, that he believed there were at least sixty millions of pine timber on the tract, besides other timber, and that the streams running through it were sufficient, with an ordinary freshet, to float the timber, when cut into logs, into the Kennebec river; and that Haskins was authorized to represent, that, in the opinion of those interested in the sale, there was that or a greater amount of timber, and that such was the nature of the streams. But that this was a matter of opinion merely, on their own part, of the correctness of which the purchasers must inform and satisfy themselves. That Haskins did interest himself accordingly, in finding purchasers, and getting up a company, consisting of the plaintiff and others, who, on the 18th of June, 1835, entered into articles of agreement for the purchase; and that, previous to that time, he, Todd, conversed with the complainant, and repeated to him substantially what he had said to Haskins, concerning the tract, and the certificates, &c. concerning it. He, Todd, admits, that he stated to Haskins, and also to the plaintiff, that he had but a week to make up his company; that the time limited would then expire; and that the owners then would not sell at so low a rate as four dollars and a half per acre as they all believed, that timber lands were rising; that he himself had not, and did not profess to have, any personal or practical knowledge of the tract, or of the subject, but merely expressed his own actual and honest opinion, founded on, and referring to, the sources, whence it was derived, leaving it entirely for the intended purchasers to ascertain the actual truth of facts in regard to the premises, which they were to take upon themselves; for which purpose, they were to take such means, and appoint such persons to go and examine as they should think proper, he stipulating to pay the expense of one person, at any rate, and also of another to be sent by the purchasers, in case the result should not turn out as represented. That the purchasers accordingly selected Haskins as their agent for this purpose, and that he, Todd, taking up William Wescott by the way, accompanied him to the Ford tract, to show it to them, being informed, as he also informed Haskins, that William Wescott had sold out his interest in the ten sixteenths, although he retained an interest in another undivided portion of the same tract; that William Wescott recommended one Luther Moore as a person accustomed to traversing the woods, and well acquainted with the tract, and that he, Todd, employed him as a guide in making the exploration, and for nothing else, as he was only a hunter, and not a getter of timber. That Haskins also employed one Thomas Chase to assist in exploring and making the estimate, for which he, Todd, believed him to be perfectly competent; and they were also accompanied by Mollineaux, one of the company of purchasers; that every thing in relation to the business of the exploration was conducted fairly, and without any wish or attempt to mislead, deceive, or influence Haskins, or any other person engaged in forming an estimate, or in making their report; that they arrived on the ground on the evening of the 22d of June, and having spent two days in the exploration, and Chase having made the quantity of timber on the tract to be seventy millions, and Haskins and Mollineaux declaring their satisfaction therewith, Haskins informed him, Todd, on the 24th of June, that he, as agent, concluded to complete the purchase, as he was authorized to do, and that he should explore the tract no further; that on the 25th they all left the tract on their return; that at the request of Haskins, on the next day, the certificates were signed at Bingham, by Wescott, Moore, and himself, stating the result of the exploration, which he, Todd, signed, after making some objections to them, both as being mere matters of opinion, based upon the opinions of others, and, also, as being too general in its terms. But, he says, that in company with Haskins, he did see on the tract much pine timber of a large size, and apparently of the first quality; and so far as he could judge, he did believe, that the tract contained the full quantity of pine timber which had been represented; and that every one of them did believe, that there was more than seventy millions of pine timber upon the tract, and that the streams were such as set forth in the certificate of Chase; that Wescott and Moore went with Haskins, Mollineaux, and Chase to visit the Austin stream, and that Haskins sent Chase and Moore to visit parts of the Ford tract not explored by Haskins, and they reported to him; and that William Wescott stated to Haskins, that there was a glade of pine timber on the northwest side of it, and that he was not acquainted with a certain other part of it, called the L part. That having been so informed, the parties, who employed Haskins, concluded to take the land and make the purchase, and that a deed of warranty was procured from Mason Greenwood, according to the bond, and accepted by the parties, as a full compliance with whatever was to be done on his part. That the plaintiff and the other parties to the purchase thereupon paid him $12,500, being one quarter of the price, and gave their several promissory notes for the remainder, according to the terms of agreement, amounting to $37,500, of which he, Todd, paid over to the other defendants $11,250 in money, and delivered to them all the notes, which were divided and distributed among them in their several proportions, retaining $1250, and taking back from some of the defendants their several notes, and from others two of the notes of one of the purchasers, in full of the share of the purchase money, belonging to himself and his partner, amounting to $3750.

David Wescott's answer stated, that he had originally purchased part of the Ford tract

with William Wescott, his brother, who had employed one Jonas Brown to explore and estimate the timber, accompanied by Luther Moore, a hunter, who had traversed the tract. That Brown said, that there was nearer eighty millions than fifty; and that Brown, Moore, and William Wescott made a certificate of there being fifty millions. That he first agreed to take three thousand acres at one dollar and sixty-seven cents per acre, and afterwards agreed with William to take three thousand more, at an increased price of over forty cents per acre. That the certificate was delivered by William Wescott, deceased, to Todd and his associate, at their request; but that no farther use was to be made of it, than to invite purchasers to look and examine. No representations whatever were authorized, but the defendants offered to pay the expenses of any person sent to explore, if there did not prove to be fifty millions. Wescott's answer denied any knowledge or belief, that any means were made use of to mislead or deceive the agent sent by the proposed purchasers, or that any artifices were practised to influence the result of the exploration, or to raise the estimate of the quantity of timber upon the tract, or that the plaintiff was induced to purchase upon the report of the agent. It averred, that they all believed, that the tract contained good pine timber enough to make sixty millions feet of boards, and that they were not apprized of any grounds for concluding that it only contained a less quantity.

The joint answer of the Mitchells, stated their own original purchase of four thousand acres of the tract, and that William C. Mitchell purchased one thousand acres separately; that one of the Wescotts applied to them for leave to include a portion of their interest in a bond to be made to Todd and another, setting forth that circumstance in a manner similar to the statement in the answer of David Wescott. That they had letters and certificate of one Hill in relation to the timber on the tract, which were put into the hands of Todd; and that William Wescott delivered to Todd the certificate of the exploration made with Brown and Moore. That none of the defendants meant to authorize Todd to guaranty the statements in letters or certificate as free from error of judgment, or as being founded on certain and correct information as to the quantity of timber; but that they were only intended to recommend the tract, as an object of attention, to any persons who should wish to purchase, and to induce such persons to inquire and satisfy themselves; and they advised Todd to make it the condition, that they should do so. They denied knowledge of any particulars in regard to the explorations or proceedings attributed to Todd and William Wescott, or of the original certificates, and they disbelieved that any such artifices were practised, as supposed; that they did believe, that the proceedings were conducted in perfect good faith, and without any fraudulent intent; and they denied, that they represented Brown, William Wescott, and Hill, to be men of character and acquainted with timber; but stated, that William Wescott was a man of integrity, and Brown was a judge of timber; that all the signers of the certificates were disinterested persons, without any inducement to make an exaggerated report; and that William Wescott actually rated the quantity less than he believed there was on the tract. That they themselves did verily believe, that the Ford tract contained more than sufficient to make sixty millions feet of boards, and never had any reason to suppose it contained less, nor heard of any lower estimate, excepting the certificate of Brown; and that all the defendants believed that the tract contained sixty millions.

The answers of the other defendants set forth their several relations to the transaction, and the manner in which they became possessed of, or concerned in, their respective proportions of the tract. They denied authorizing, or that they knew of the delivery of certificates, or authorized Todd to make any representations concerning the quantity of the timber, the character of the stream, or the facilities of conveyance; they averred that the defendants generally thought it to be a well timbered tract, and believed, that it contained not less than from fifty to sixty millions of pine timber; and one of them added, that the streams were sufficient, with an ordinary freshet, to float it into the Kennebec. They denied any knowledge or participation in any fraudulent or improper practices in regard to the procurement or use of the certificates, or any belief, that any such were used to falsify or affect the exploration, or effect a sale. They averred, that the object was to enable Haskins to satisfy himself, by means of the exploration, in such a manner, and to such an extent, as he should think for the interest of his employers. They avouched for the general good character and respectability of the signers of the certificates and explorers, and expressed the belief, that all the proceedings in respect to the exploration were conducted with perfect fairness and good faith. An agreement was entered into on the 22d of July, 1835, between the Wescotts, Mitchell, Warren, Waterhouse, Hayes, and Gooch, who were jointly concerned in the sale of the ten sixteenths, which recited the conveyance to the plaintiff and others, and the receiving of the notes of the purchasers in payment of their respective shares, secured by mortgage, and set forth the proportions, in which the parties to this agreement were interested in the land, of which the fee was in said Greenwood, and in which they had consequently become the holders of the notes, and interested or accountable as such. By this agreement they stipulated with each other, that in case any of the promissors should become insolvent before the notes should become payable, so

that any loss should arise, or in case of any loss on the same, arising from any cause other than the negligence of the holders, such loss should be borne by all the parties, in the proportion of their respective interests; and the holder of any note who should experience any such loss, should, after notice and request, have his right of a remedy for contribution against any other of said parties refusing to pay his proportion of such loss, either by action of assumpsit, or on the agreement.

The certificates referred to, were in the following terms:

"Bingham, May 13, 1833. We, the subscribers, do hereby certify that we have this day returned of exploring the Ford tract, and our estimation is, that there is fifty millions, to speak within bounds, of prime pine timber, that is to say, as good as any on the Kennebec waters; and we have also examined the Austin stream, and find sufficient to run the above timber in the main Kennebec river. Jonas Brown, Luther Moore, William Wescott."

"This is to certify, that from the knowledge I have of the Ford tract, it is unquestionably one of the best timber tracts upon the Kennebec waters. And I would also state, that I have just sold my interest in the Saco tract, being on part of the same stream, at seven dollars and fifty cents per acre. John Hill."

"Bingham, June 26, 1835. I, the subscriber, hereby certify, that I have this day returned from an exploration of the Ford tract, and having been also frequently over the tract in hunting, I am fully satisfied, that the estimation made by Jonas Brown, William Wescott, and myself, in May, 1833, will fall short of the quantity of timber; and that the one made this date by Mr. Thomas Chase, is within bounds. The reason they fell short was, that they did not explore at that time the part called the L, which we have done this time, and find more timber on it than was anticipated. And I also certify, that I have been well acquainted with the stream called the Austin stream, for these twenty years past, and consider it good and sufficient to run logs to the main Kennebec river; and the north and south branches of it on the tract sufficient to run them into the main Austin stream with a common freshet after building one, and repairing two, dams on the said streams, or even without a freshet. Luther Moore."

"I hereby certify, that I agree to the above, and consider it perfectly true. William Wescott."

"Bingham, June 26, 1835. I, the subscriber, do hereby certify, that I have this day returned from exploring the Ford tract, in company with R. W. Mollineaux and Thomas Haskins of Boston, Massachusetts, and my estimation is, that the Ford tract, it is unquestionably one of the best timber there is not less than four and a half thousands to the acre, on an average, of prime pine timber, as good as any on the Kennebec waters, and one and a half thousands of good spruce timber, worth as much as pine, also to the acre,—and have also explored the stream called the Austin stream, which runs through the tract, and do certify, that I consider it a good and sufficient stream to run logs to the main Kennebec river. Thomas Chase."

"I hereby certify, that I was also with Mr. Thomas Chase, in exploring the Ford tract, and was fully satisfied, that the estimation is within bounds, and the quality of the timber is the first, and the stream is as represented, and that it may be made, with very little expense, so as to run logs even without a freshet. James Todd."

It appeared from the proof, that the land was purchased as a timber tract, and principally with reference to the quantity of timber upon the tract, and that the purchasers relied upon the representation made to them in that respect. In pursuance of the agreement, Haskins and Mollineaux, one of the purchasers, were carried on to the land by Todd, accompanied by William Wescott, and taking Moore and Chase with them as guides, to explore it. They were employed two or three days, exploring different parts together; but having become fatigued, and their provisions having given out, they concluded to finish the business, and leave Chase and Moore upon the land to report the result, to which they had then arrived, as exhibited in the certificates, and with which Haskins was, at the time, understood to be satisfied. From a subsequent survey of the tract, pursuing the route of the recent exploration, it appeared, that in the course of that exploration, Haskins and others had, by some means, been led off from it, and that timber had been shown, as being upon land, that was not included in the tract, but which lay adjacent to it; and that there was a considerable quantity of timber upon the contiguous tract, and upon different borders of the Ford tract. Certain persons were afterwards sent to examine the tract; and the defendant being previously requested to join them, who estimated, that at the time of the sale, in 1835, the quantity of timber, suitable to be sawed into boards, did not exceed three and a half millions feet. Some of the witnesses, who examined it afterwards, with a view of making a more accurate estimate, made it less. But from the testimony of Samuel Homans, who, some time after the purchase, was employed in driving the logs cut off the Ford tract, out of the Austin stream, it might be inferred, that the tract contained fully that quantity. And from the testimony of Samuel Chamberlain, that there might have been more, but not much. There was evidence, also, that there were some spruce and cedar upon the Ford tract. Jonas Brown, one of the signers of the original certificate of May, 1833, who was examined for the defendants, testified, that the usual course of explorers was to go to a high ridge

or elevation on the tract, to take a compass and mount with it to the top of a tree, where the timber could be seen to a considerable distance, there to set their compass, and take the bearings of the several glades of timber in sight; then to go to the glades, and make a general estimate, according to their best judgment, as to the quantity and quality of the timber, without actually counting, scaling, or measuring. He thought it would have taken six months to make an exact estimate of the quantity of timber in this tract at the time when he explored it in 1833. He was the agent for the Wescotts in lumbering on it in the winter of 1833-4, and cut two millions four hundred thousand feet. He did not remember giving any certificate of the quantity of timber on the Ford tract, when he explored it with Wescott in 1833; but, if he did give a certificate, that there were "fifty millions of good pine timber." the words, "and spruce," were, or ought to have been, inserted after the word "pine." He believed, that more than half of that quantity of timber was pine. He did not estimate the pine separately from the spruce, and in his opinion, there was about an equal quantity of each upon the tract. None of the witnesses examined for the defendants undertook to make any precise estimate of the actual quantity of pine timber upon the tract at the time of purchase. Thomas Chase, who was one of the explorers, and signed one of the certificates, June 26th, 1835, testified, that according to his best recollection, he estimated the whole at four and a half thousand feet to the acre, including pine and spruce.

A cross bill was filed by the defendants in the original suit, upon the alleged ground, that during the pendency of that suit a compromise and adjustment of it had taken place, by virtue of which, the original defendants (now plaintiffs) had agreed to receive, and had accepted fifty per cent. upon the notes given for the balance of the price of the land, in addition to the first payment of money, and had thereby been discharged from any further claim or prosecution of the former suit. The cross bill charged, that all the original purchasers of the ten sixteenths had a common interest and concern, which induced them to unite together as in one cause, and they had authorized the original plaintiff (Daniel) to compound and settle the whole matter. That it was mutually agreed between the parties to the suit, that the notes given for the balance of the consideration of the land, should be given up on payment, or securing the payment of fifty per cent., and that the suit should thereupon be finally compromised and settled. And it was particularly alleged, that, during the course of negotiation to this end, Daniel assigned and urged as a reason for not consenting to pay any larger amount upon the notes, that he himself and the other parties concerned in the purchase, had been put to much trouble, and had incurred great expense in prosecuting their bill, which they should lose by adjusting and taking up the notes. The bill thereupon prayed for an injunction against Daniel, and a dismissal of his suit. The answer of Daniel contained a positive denial of the principal allegations of the cross bill. Only one witness, Greenwood, testified upon the subject.

Charles S. Daveis, for plaintiff.
William Pitt Preble, for defendants.

STORY, Circuit Justice, delivered the opinion of the court to the following effect:

The cross bill is founded upon an asserted compromise of settlement of the cause of suit, stated in the original bill, pending the suit; and, of course, if established in point of fact, it puts an end to the whole controversy. It has, accordingly, been first argued by counsel; and we are of opinion, that the compromise and settlement are not sufficiently established by the proofs in the cause to overcome the full and positive denials in the answer, that any such transactions were ever agreed upon by the parties. The known rule in equity is, that an answer, which is responsive to the allegations and charges made in the bill, and contains clear and positive denials thereof, must prevail, unless it is overcome by the testimony of two witnesses to the substantial facts, or at least by one witness, and other attendant circumstances, which supply the want of another witness, and thus destroy the statements of the answer, or demonstrate its incredibility or insufficiency as evidence. There is no pretence to say, that this state of things exists in the present case, and therefore, the cross bill must be dismissed with costs.

The original bill seeks to set aside a contract, made on the 18th of June, 1835, between James Todd, one of the defendants, for himself, and as agent of several of the other defendants, with the plaintiff and several other persons, stated in the bill, for the purchase of ten undivided sixteenth parts of a certain tract of land in the state of Maine, containing about 16,000 acres of land, of which the plaintiff was to have three sixteenth parts, and his copartners certain other proportions, for the sum of $50,000, payable in certain instalments, a part in cash, and a part at future periods, for which the respective purchasers were to give their several notes and mortgages respectively. The bill mainly insists, that the agreement was entered into upon gross and fraudulent representations made to the plaintiff, and the other purchasers, as to the true character of the land, and especially as to the quality of timber thereon; and that, upon the faith of those representations, the purchases were completed, the conveyances taken, and the moneys paid, and securities given by them respectively; and that, therefore, it ought to be set aside and cancelled; and that the plaintiff, who sues for his own separate right

and interest in the premises, he having subsequently become a sub-purchaser of 1-32 more of the tract, and, therefore, being entitled to 7-32 parts thereof, ought to be restored to all he has paid; and the bill prays for other relief. We have said, that the bill mainly proceeds upon the imputation of fraud; but its allegations are sufficient to found a claim for relief, if the bargain was made upon material representations of matters of facts, constituting the basis thereof, which are untrue, even although innocently made by the mistake of the parties, or by the mistake of the sellers alone. Nothing is more clear in equity than the doctrine, that a bargain founded in a mutual mistake of the facts, constituting the very basis or essence of the contract, or founded upon representations of the sellers, material to the bargain, and constituting the essence thereof, although made by innocent mistake, will avoid it. Mistake, as well as fraud, in any representation of a fact, material to the contract, furnishes a sufficient ground to set it aside, and to declare it a nullity. The Reports are full of cases to this effect; and many of them will be found collected in the elementary writers on equity jurisprudence.[2] In the view, which the court are disposed to take of the bill and evidence, we do not deem it at all necessary to enter upon the consideration of the question of fraud, as we are entirely satisfied, that, if there has been no fraud, there has been such a mistake of both parties, as to a fact, not only material, but constituting the very basis of the agreement, as requires the court to decree, that the agreement be rescinded and the conveyance made in pursuance thereof be set aside, and the parties be restored to their original rights and interests, antecedent to the agreement.

Let us, in the first place, examine the written agreement between the parties, taking along with us the fact, that Todd was acting as principal, as to a portion of the land, and as agent of the other owners, as to other parts thereof, which were included in the sale. The agreement is in the following words: "Articles of agreement made this eighteenth day of June, A. D. eighteen hundred and thirty-five, by and between James Todd, of Portland, in the state of Maine, on the one part, and Otis Daniel, Josiah Daniel, Robert W. Mollineaux, E. F. Messenger, Jonathan A. Richards, and James H. Champney, and Barnum Field, all of Boston, in the county of Suffolk, and commonwealth of Massachusetts, and Daniel A. Sigourney, and John F. Soren, of Roxbury, in the county of Norfolk, and state of Massachusetts, on the other part. The said Todd, in consideration of the agreement herein contained of said parties to the second part, hereby agrees with them respectively, to sell and convey to them by good and sufficient deeds, with warranty and a good and indefeasible title, in fee simple, ten undivided sixteenth parts of a tract of land situated in township No. 2, second range, Bingham Kennebec purchase, east of the Kennebec river, in Somerset county, state of Maine, containing sixteen thousand acres, called the Ford tract, to be conveyed to said parties of the second part, as follows: Three undivided sixteenth parts to said Otis Daniel; two undivided sixteenth parts to said Josiah Daniel; one undivided sixteenth part to said Mollineaux and Messenger; two undivided sixteenth parts to Daniel A. Sigourney and Jonathan A. Richards; one undivided sixteenth part to John F. Soren and James H. Champney; and one undivided sixteenth part to Barnum Field; the said parties to the second part paying for their purchase their respective proportions of the sum of fifty thousand dollars, to be paid as follows: one quarter part in cash, and the remainder, one third in one year; one third in two years; and one third in three years, with interest annually, secured by their respective notes and mortgages on the premises, and the said premises are to be conveyed to said parties of the second part in the proportions above mentioned, at any time on demand within sixteen days from the date of these presents, which time is allowed to said parties of the second part to explore said tract. And the said parties of the second part, in consideration of said Todd's agreement, hereby agree with said Todd to purchase and pay for their respective parts of said tract as before mentioned; and if they do not complete the purchase within the said term of sixteen days, they will respectively forfeit and pay said Todd their respective parts of the sum of three thousand dollars. Provided, nevertheless, that said parties of the second part shall be under no obligation to take said land, or to pay therefor, unless said Ford tract contains sixty millions of pine timber, and a stream runs through said tract, which will, with an ordinary freshet, carry logs from said tract to Kennebec river, without difficulty. In case said tract does not contain sixty millions of pine timber, and such a stream as is mentioned above, said Todd hereby agrees with said parties of the second part, to pay the expense of one person, to be sent from Boston, to examine said tract, and also, whatever may be paid to one other suitable person for exploring said tract for the time he is on the tract. It is understood, that if said parties of the second part, or their agent, notify said Todd of their agreement to take the said premises at any time within sixteen days, they shall be allowed till July 9th, to make the payments and exchange the papers. In witness whereof, said parties have interchangeably set their hands and seals." (Signed by the parties, and witnessed by S. E. Sewall and Thomas W. Haskins.)

Now, we think it impossible to doubt, upon the reading of this agreement, that it was

[2] See 1 Story, Eq. Jur. §§ 140–152, and the cases there cited.

understood by all the parties, that the tract of land did contain sixty millions of pine timber, and that a stream ran through the tract, which would, with an ordinary freshet, carry logs from the tract to the river Kennebec without difficulty; and that these constituted the very basis of the contract, and were so fundamental, that if either did not exist, the bargain was understood not to be obligatory on the purchasers. The proviso, in our judgment, clearly imports this. The subsequent clause, as to the exploration of the tract, was not designed in any manner to waive or control this fundamental stipulation; but merely to afford to the purchasers more complete means of ascertaining the verity of the statements, and thus to secure the purchasers from loss in case of any fraud or substantial mistake. An exploration was accordingly made by an agent of the purchasers, accompanied by an agent of the vendors. How it was conducted, the evidence sufficiently discloses. A more complete example of credulity and delusion on one side, and of mistake and misrepresentation (whether innocent or designed is not material to be examined) on the other side, perhaps, cannot be found in the annals of our country. The survey was not, indeed, even made upon the tract, as it was actually bounded; but, by the mistake or ignorance of the guides, the exploration was in part off of the tract; so that here again there was a fundamental mistake, which made it a new source of error in completing the bargain. The purchasers were further misled by the representations founded on that exploration, as to the nature of the land, and the quantity of the timber thereon, which they had no means of knowing were untrue and grossly exaggerated. The exploration being thus made, in part off of the tract, through mistake or ignorance, so far from strengthening the case for the defendants, furnishes of itself a strong ground of relief for the purchasers. But we do not dwell on this circumstance further than merely to show, that it cannot afford any substantial aid to the defence. It is unnecessary, also, to dwell on the question, whether the evidence shows, that there was any such stream on the tract, as the agreement vouched for, about which there might be some reason for doubt and hesitation. What we desire to place our opinion upon, is the other ground, that the quantity of timber on the tract was grossly mistaken, and extravagantly over estimated. What is the case made out by the entire evidence, with the exception of a single witness? It is, that the pine timber upon the tract does not probably exceed three millions, and at the farthest does not exceed five millions. One witness, indeed, seems to think, that it may contain more, and go to the extent, perhaps, of twenty-five millions. But he stands alone; and his testimony is of small weight, compared with the mass of intelligent witnesses, establishing the more limited quantity. Here, then, we have a tract, represented by the vendors in their contract as containing sixty millions of timber, and that supposed fact constituting the very basis of the bargain, when, in fact, it does not contain more than one twelfth part of that quantity. A court of equity would be unworthy of the name or character, if a contract, founded in such a gross mistake and fundamental error, were permitted to stand, and were not declared to be utterly invalid. We do not meddle with cases, where the error in quantity is of a slight nature, not going to the essence of the bargain. Here the error is vital. The purchasers have contracted to give fifty thousand dollars for a tract of land, represented to contain sixty millions of pine timber. It cannot be possible, that they ought in law, or in justice, or in common sense, to be bound to pay that amount for five millions only. There is a great deal of other evidence in the cause, as to the representation of the quantity of timber on the tract, made by and through the agent of the owners to the purchasers, as well orally, as by certificates, produced and read in the cause. They confirm the conclusions deducible from the agreement itself; but it does not seem necessary to dwell on them.

These short views exhaust the merits of the case, so far as they belong to the general character of the bill. We are of opinion, that the original contract ought to be set aside, as founded in gross error or mistake; that the conveyance made to the plaintiff, Daniel, ought to be rescinded, and that he ought to be restored to the purchase money, which has been paid by him, deducting whatever he may have been repaid out of any proceeds of the sales of timber, cut on the land. Todd, having received the purchase money from Daniel, ought to be held primarily liable to repay it; and in his aid, such of the other defendants, for whom he acted as agent, and such as have received any part thereof, with a full knowledge of all the circumstances, ought to be decreed to repay the proportions thereof respectively received by them.

There is an agreement, found in the case, by which the defendants, who are the vendors, mutually agreed among them, in the division of the notes, taken for the purchase money, that they would, according to their respective interests, bear their respective proportions of any losses, which might arise from the insolvency or inability of the purchasers to pay the same. We have been asked by the plaintiff to give him the benefit of that agreement, in order that he might avail himself of it, in case he is not able, from the parties directly liable to him, to obtain back the purchase money decreed to him by the court. We are of opinion, that he is not entitled to any such aid or relief. That agreement is strictly res inter alios acta, with which he has no manner of connexion, by which he is not bound, and to which he cannot justly, in equity, claim any derivative

title. There are some other circumstances, which may be proper for consideration before the master, under the interlocutory decree, which we propose to pass, for the purpose of carrying into full effect the present opinion. The decree will accordingly be drawn up, and will contain certain declaratory clauses, and institute the proper inquiries necessary for a final decree in the premises.

The decree was afterwards drawn up as follows: This cause came on to be heard at this term upon the bill, answer, exhibits, and proofs produced by the parties, and was argued by counsel, on consideration whereof, it is declared by the court, that the contract of sale, and the conveyance of the premises and the notes of the said Daniel thereupon, as set forth in the bill, were made by and between the said Otis Daniel and the said James Todd, and other parties, upon material misrepresentations and mutual mistakes as to the quantity of timber on the premises so sold, and therefore ought to be set aside, and held null and void; and the said Otis Daniel ought to be repaid the amount of the said purchase money, actually paid by him thereupon and therefor, by the said Todd, who received the notes for the same, and in his aid and for his relief, by such of the other parties, defendants to the bill respectively, for whom the said Todd acted as agent, or who, with a full knowledge of, and assent to, the said contract of sale and misrepresentations and mistakes, have received any of the said notes, or any part of the purchase money paid thereon by the said Daniel; but not for the part thereof received by any other party. And thereupon, in furtherance of the declarations aforesaid, it is further ordered, adjudged, and decreed, that the same contract of sale, and conveyance, and notes be and hereby are annulled, rescinded, and declared utterly void, and of no effect. And the said Otis Daniel is further ordered, adjudged, and decreed to reconvey the premises by such due and reasonable conveyance or conveyances as shall be devised and reported by a master, when and so soon as the purchase money actually paid by him shall be repaid as hereinafter mentioned. And it is further ordered, adjudged, and decreed, by the court, that the said James Todd be, and hereby is, held directly liable to the plaintiff for the whole amount of moneys paid as aforesaid, deducting, however, therefrom the proceeds of timber sold, as well as the value of timber taken from said lands, by and under the authority of the said Otis Daniel, and remaining unsold, and making all due allowances for all proper charges and expenses incurred in regard to said timber, and for taxes paid on the said lands. And it is further ordered, adjudged, and decreed, that such of the other parties, defendants to said bill, as with a full knowledge of the premises, or for whom the said Todd acted as agent, or who assented to the said contract of sale and conveyance, with a full knowledge of the premises, shall be, and hereby are decreed to be liable in aid and relief of the said Todd, to pay and deliver back to the said Otis Daniel, such parts or portions of the purchase money paid by the said Daniel for the said lands, as have been received by them respectively in the premises, or on the notes of the said Daniel so received by them; but no one of them to be liable for any purchase money or notes received by any of the other parties, defendants. And it is further ordered, adjudged, and decreed, by the court, that no damage or interest on the aforesaid moneys be allowed, except the proceeds of such timber, sold and unsold, as aforesaid, shall furnish a fund therefor; and in that event, interest upon said purchase money to be added thereto, as an offset pro tanto to the excess of said proceeds, and not exceeding the amount of such excess. And it is further ordered, adjudged, and decreed by the court, that it be referred to Stephen Longfellow, Esquire, as master, to ascertain the amount due to the plaintiff on the basis of this decree, and also the particular notes and sums received by each of said defendants of said purchase money, so paid and secured as aforesaid, and to report the same to the court. And it is further ordered, adjudged, and decreed, by the court, that the master be clothed with full power and authorities to examine, as well the parties, as any other witnesses, orally or upon written interrogatories, under oath, in the premises, and to require the production of all vouchers, papers, and other documents pertinent and proper in the premises; and that he state a full account in the premises, upon the basis of this decree. And that he be and hereby is clothed with all the usual powers and authorities of a master, in all things touching the premises. And all further orders and decrees are reserved for the consideration of the court.

[NOTE. After the entry of the above decree, and after the cross bill had been dismissed, defendants applied for a rehearing of both the original and cross bill, and also for leave to file a supplemental bill. Both applications were denied. Case No. 3,563.]

Case No. 3,563.

DANIEL v. MITCHELL.

[1 Story, 198.][1]

Circuit Court, D. Maine. May Term, 1840.

EQUITY—REHEARINGS AFTER DECREE—NEWLY-DISCOVERED EVIDENCE—CONFESSIONS—DISCRETION OF COURT.

1. Rehearings in equity after a decree are not a matter of right, but rest in the sound discretion of the court.

[Cited in Doggett v. Emerson, Case No. 3,961; Steines v. Franklin Co., 14 Wall. (81 U. S.) 22; Reeves v. Keystone Bridge Co., Case

[1] [Reported by William W. Story, Esq.]

No. 11,661; American Diamond Rock Boring Co. v. Sheldon, 1 Fed. 870; Bentley v. Phelps, Case No. 1,332.]

2. Where a rehearing is applied for upon the ground of newly discovered evidence, the application is mainly governed by the same considerations as apply to cases, where leave is asked to file a supplemental bill after the publication of the testimony, taken on a cause, and before the hearing, in order to bring newly discovered evidence before the court; or where leave is asked, after a decree, to file a bill of review upon the ground of the like evidence.

3. Quere, whether the court will grant any such application after a decree, where the newly discovered evidence consists wholly of confessions made by the plaintiff since the decree, and affecting the merits of the original bill.

4. If the court will grant any such application, it will grant it only when the confessions are of the most full and direct character, and are proved by disinterested testimony, and are not susceptible of different interpretations.

5. A fortiori, the application will be more difficult to be maintained (if it can be maintained at all) where the supposed confessions made by the plaintiff are directly contradictory to the answer of the plaintiff to a cross bill filed in the same cause for the very purpose of obtaining an admission of the same facts, as the confessions purport to state, and are also contradicted by the plaintiff by his affidavit, filed upon the application for the rehearing.

After the hearing upon the original bill and the interlocutory decree therein [Case No. 3,562], and after the cross bill had been dismissed with costs, the defendants filed a petition for a rehearing of the original bill, and cross bill, and also for leave to file a supplemental bill or other proper proceedings, to bring before the court, upon the rehearing, certain confessions of the plaintiff, alleged to have been made since the hearing of the original and cross bill to the defendant, Todd, and his counsel, in which he admitted the material facts stated in the cross bill, and also one point of defence set up in the answer to the original bill, viz. that there had been a parol compromise made and assented to by the parties, pending the suit, by which it was agreed, that the original suit should be dismissed upon the plaintiff's paying the fifty per cent. of the amount of the note given for the purchase money of the land in controversy, and that the notes should be thereupon delivered up to the plaintiff. That the plaintiff accordingly paid the fifty per cent., which was accepted by the defendants, in the faith, that the suit was to be dismissed; but that the plaintiff now insisted upon pushing it to a decree, in violation of the parol agreement and compromise. The plaintiff, in his answer to the cross bill, directly and pointedly denied, that any such agreement was ever made for the dismissal of the bill; but he admitted, that he had paid fifty per cent. upon the delivering up of the notes to him by an arrangement with the holders; and he insisted, that this was done on their part solely on the ground, that they knew he meant to resist payment thereof at law, and the compromise was made for the purpose of settling the notes, and was not intended or understood to prevent his prosecuting the original suit in this case. When the cause came on to be reheard in its regular course upon the petition for a rehearing, some discussion took place between the counsel on both sides and the court.

Fessenden & Deblois, for petitioners.
C. S. Daveis, for original plaintiff.

STORY, Circuit Justice. I am far from desiring, that the counsel on both sides should not be allowed the fullest opportunity of being heard upon the present petition. But as all the papers were sent to me some time since, without any intimation, that an argument was to be made, I supposed the papers were submitted for the consideration of the court for their decision without argument, and I accordingly devoted my attention to the examination of the subject. As there are intrinsic difficulties in the case, and the application stands upon very unusual circumstances, and the counsel seem desirous of knowing those points, to which the court would especially wish them to turn their attention at the argument, I will briefly suggest such considerations, as have occurred to my mind upon the subject.

Rehearings rest in the sound discretion of the court; and where they are petitioned for upon the ground of newly discovered evidence, they are mainly governed by the same considerations, as apply to cases, where leave is asked, after the publication of testimony, and before the hearing, to file a supplemental bill, in order to bring such new evidence before the court; or where, after a decree, leave is asked to file a bill of review, or a bill in the nature of a bill of review, upon the like ground of newly discovered evidence. This subject has been a good deal discussed in this court; and I am not aware, that there are any important authorities, bearing on it, which were not brought before the court and examined in the case of Dexter v. Arnold [Case No. 3,856].

There are several leading points, which must necessarily come before the court whenever the argument upon the present petition is heard. (1.) Whether the nature of the evidence proposed to be offered, viz. that of parol confessions, asserted to have been made since the hearing and decree, is such as properly to justify the court in granting a rehearing, supposing it to be full and explicit to the purpose. (2.) Whether, in fact, the evidence now offered of the supposed confessions, is of such a character, as is, or ought to be satisfactory, as proof, to contradict the solemn declarations contained in the answer of the plaintiff to the cross bill, to the very point on which those confessions hinge. (3.) Whether, if admitted, they could be of any just avail in the cause; or would do more than justify the court in rescinding the compromise, supposed to have been made

between the parties and the holders of the notes, and thus to restore them to the status ante pactum (if I may so say), or to the state, in which they stood after the bill was filed, and before the compromise was entered into. If this latter view be the true one, it would be wholly unnecessary to rehear the cause; for the present decree, rescinding the original contract for the purchase of the lands, is precisely what in substance it would be, if the compromise were held a nullity. The rehearing, therefore, under such circumstances, would be utterly without object or use. This, therefore, will naturally, at the argument, constitute a point of discussion in the cause. I merely suggest it, without intending to dwell on it.

The second point is one of no small embarrassment and difficulty, upon the actual posture of the confessions, offered as proof by the petition. These confessions, at least so far as the testimony of Mr. Preble goes, are susceptible of an interpretation favorable to the plaintiff, or, at least, consistent with his good faith and honesty, to the extent of delivering him from the imputation of wanton and deliberate perjury. The affidavit of the defendant, Todd, as to the confessions of the plaintiff, cannot certainly be admitted as evidence in such a cause as this; for in equity no defendant can be a witness to testify in his own favor to a matter, not called for by the plaintiff in his bill. The case, therefore, presented upon this application, on this point, is the affidavit of one witness, as to the supposed confessions of the plaintiff, and the testimony of the plaintiff, directly and positively denying the material facts of the confessions, not merely in his affidavit, but in the most explicit and deliberate manner in his answer to the cross bill. If, therefore, we order a rehearing upon the testimony thus adduced, we must come to the conclusion, in granting this application, that the plaintiff has been guilty of gross and deliberate perjury in his answer to the cross bill, as well as in his affidavit; and that he is not worthy of any, even the slightest credit. Indeed, it might well be said, that, under such circumstances, he was not falsus in uno, but falsus in omnibus. Now, I need scarcely say, that a court of equity, in granting a rehearing in its discretion would be slow to come to a conclusion of this sort, unless it was forced upon it by the most irresistible evidence, and that, in its nature and character, it was of the highest credit, and the farthest removed from the chance or possibility of mistake. Certainly, it cannot be said, that parol evidence of mere confessions is entitled to such a high distinction. It has been well said, that it is the easiest to be manufactured, and the most difficult to be repelled or refuted, of any species of evidence. And although, in the present case, the character of the gentleman, whose affidavit has been given, places his own testimony beyond any suspicion with regard to his belief in its entire accuracy; yet it is to be recollected, that no portion of human testimony is more open to just doubts, than confessions arising from the frailty of human memory, and the mistakes, which may constantly occur in understanding the exact purport and meaning of the language, used by parties in conversation. Judges, therefore, in acting upon the proof of confessions, are not at liberty to draw inferences from their own personal knowledge of individuals; but they must deal with such evidence, as if the parties were unknown, and it were to be judged of upon its own intrinsic force, connected with the other circumstances of the case. But, when such confessions are to establish the solemn charge of deliberate perjury by any party, I am sure, that the court is called upon to exercise the most scrupulous caution, before it arrives at the conclusion, that mere confessions establish such criminality. These, however, will properly occur as matters of observation at the argument; and they are now suggested, because they must be met and considered, whenever the petition comes on for a final hearing.

But the other point is a matter of great practical importance, and is that, upon which, I confess, I have a strong impression. It is, whether a court of equity ought ever to open a cause for a rehearing and to admit new evidence, founded upon parol confessions made subsequently to the time of the original decree. I have searched the authorities to find some case of this sort; but I have not found any. The counsel have frankly admitted, that in their own researches they have discovered none. My judgment is, that no such case does exist. And this universal silence in a case, which must frequently have occurred in practice, affords an exceedingly strong presumption, that it has not been deemed admissible as a ground for a rehearing.

Upon these suggestions the counsel submitted the case to the court without farther argument, and the court overruled the application on the petition for a rehearing, and refused leave to file a supplemental bill.

DANIEL (WHARTENBY v.). See Case No. 17,479.

DANIEL AUGUSTA. The (MILBOURNE v.). See Case No. 9,540.

Case No. 3,564.

The DANIEL BALL.

[1 Brown, Adm. (1876) 193.][1]

District Court, W. D. Michigan.

NAVIGABLE WATERS — POWER TO REGULATE COMMERCE BETWEEN DIFFERENT STATES — TO WHAT VESSELS INSPECTION LAWS ARE APPLICABLE.

A small steamer was engaged in transporting freight and passengers upon Grand river, be-

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

tween Grand Rapids and Grand Haven, in the state of Michigan. Although her route was wholly within the state, she carried freight consigned to and from other states, which was transhipped at Grand Haven. She also carried passengers on their way to and from Chicago and Milwaukee. In the opinion of the court, she was subject to inspection and license under the navigation laws of the United States, but as a different view of the law had been taken in the same and other districts: *Held*, out of deference to these opinions, and for the sake of uniformity, the libel should be dismissed.

The steamer Daniel Ball was libelled for want of inspection and license under the navigation laws. The owners set up by way of defense that the Ball was not, by law, required to be inspected or licensed. The facts agreed upon were as follows: The Ball was a steamer of 123 tons burden, drawing about two feet of water, running on Grand river, a river entirely within the state of Michigan. She was so constructed as to be incapable of navigating the waters of Lake Michigan, or of continuing her voyage further than Grand Haven, a port on Lake Michigan, at the mouth of Grand river. She took in freight at Grand Rapids, forty miles up the river, and received and delivered at other places along the river. At Grand Haven her cargo, not previously discharged, was unloaded. A part of her freight was goods and merchandise shipped from Grand Rapids, and destined to places in other states, viz.: Chicago and Milwaukee, in Illinois and Wisconsin; but such goods were delivered at Grand Haven, to warehouse and forwarding agents, to whom they were consigned at that port, who forwarded such goods to their place of destination in other states by lake boats. Passengers were carried by the Ball who were on their way to Chicago and Milwaukee. The second section of the act of congress of July 7, 1838 [5 Stat. 304], provides, "that it shall not be lawful for the owner, master, or captain, of any steamboat, * * * to transport any goods, wares and merchandise, or passengers, in or upon the bays, lakes, rivers, or other navigable waters of the United States, * * * without having first obtained a license," etc. The owner incurs the penalty of $500 for a violation of this section, and the boat is liable to be proceeded against to enforce the forfeiture against her. The act requires all such steamers to be inspected annually. The amendatory act of August 30, 1852 [10 Stat. 61], provides, "that no license, register or enrollment, under the provisions of this or the act to which this is an amendment, shall be granted, or other papers issued by any collector, to any vessel, propelled in whole or in part by steam, and carrying passengers, until he shall have satisfactory evidence that all the provisions of this act have been fully complied with; and if any such vessel shall be navigated with passengers on board, without complying with the terms of this act, the owner thereof, and the vessel itself, shall be subject to the penalties contained in the second section of the act to which this is an amendment." This act further provides for the inspection of the hulls of steamers, and of their boilers, engines, etc. On the part of the owners, it was claimed that the act, in terms, goes beyond the constitutional powers of congress to legislate, inasmuch as it includes boats navigating only the internal waters of a state, which do not transport goods or passengers between two or more states. The constitutional provision under which the navigation law in question is passed, is as follows: "Congress shall have power to regulate commerce with foreign nations, and among the several states, and with the Indian tribes."

E. S. Eggleston, Dist. Atty., for the United States.

John S. Newberry, for claimant.

WITHEY, District Judge. It has been repeatedly held by the courts of the United States that a commerce which is purely internal, carried on entirely within a state, and which does not affect other states, is not within the power of congress under the constitution to regulate, but belongs exclusively to the state. Commerce is defined to be "an exchange of commodities;" it is "trade and traffic," and "includes navigation and intercourse." The power to regulate commerce, then, includes the power to regulate navigation; but the navigation, like the commodity which is transported for exchange, trade and traffic, must be such as is embraced within and is a part of the commerce among the states. We are brought to the single question, therefore, whether the navigation in which the Ball was engaged on Grand river, carrying goods and passengers exclusively within the state of Michigan but which were shipped for places in other states, is "commerce among the several states." If this question was now presented and to be decided for the first time, I should have no hesitation, from the consideration I have given it, in holding the Ball to be employed in commerce between the states, and liable for the penalty of $500.

The first authority which I notice is the decision, in manuscript, by Judge Wilkins, pronounced in 1856 or 1857, in two cases. The Forest Queen and the Pontiac were running on Grand river, which was then within the jurisdiction of what is now the eastern district court. Goods and passengers were conveyed on these river boats to Grand Haven, and there transhipped, destined and shipped from inland towns on the river to other states; and goods and passengers coming from other states across the lakes were landed at the mouth of Grand river in Michigan, and there transhipped and conveyed to places in the interior of the state by the Queen and Pontiac. The learned judge says: "The commerce stopped at Grand Haven, so far as

the lake vessels were concerned, and the subsequent instrumentality of Grand river in the business was not such as to constitute this upward, new and interior state navigation, a commerce between Michigan, as to that trade, and other states." Again, "This commerce, then, was altogether internal, and subject only to the control and government of the state of Michigan, and is not within either the letter or spirit of the constitution." That case is the only one where the precise question has been before a court and decided, so far as I can discover, that is involved in the case at bar. The following cases cited at the bar are not regarded as presenting the question I am considering, for the reason that in none of them do the facts disclosed show that goods were being conveyed which had been shipped from one state to another: U. S. v. The Seneca [Case No. 16,251]; Brooks v. The Peytona [Id. 1,959]; Whitaker v. The Fred. Lorents [Id. 17,527]; U. S. v. The William Pope [Id. 16,703]; U. S. v. The James Morrison [Id. 15,465]; U. S. v. The W. K. Muir and The Davidson [Id. 16,749]; U. S. v. The S. K. Kirby [Id. 16,310]. The steam ferry Pope, was a ferry-boat across the Missouri, at St. Louis, and it was held that in no proper sense could the Pope be said to be engaged in any trade, or be employed in the coasting trade. "A ferry I deem nothing but a continuation of a road." "I admit," says the judge, "that congress might, constitutionally, regulate the transit on roads and over ferries, so far as it is necessary to regulate the commerce with foreign nations, among the several states and with the Indian tribes, but no farther." In The James Morrison [supra], the same judge discusses the question involved in the case at bar, though not involved in that case, and the argument is an able one in support of the views I have suggested. In that case, the judge says: "The coasting trade is a part of the commerce among the several states, and it is not the less a part of that commerce because the vessel navigates only from port to port in the same state, up and down a navigable river of the United States, and never goes beyond the state boundary."

I have examined, with care, the other cases referred to and commented upon by the counsel for the owners, viz.: Gibbons v. Ogden, 9 Wheat. [22 U. S.] 1; Wilson v. Black Bird Creek Marsh Co., 2 Pet. [27 U. S.] 245; New Jersey Steam Nav. Co. v. Merchants' Bank, 6 How. [47 U. S.] 344; Passenger Cases, 7 How. [48 U. S.] 283; Veazie v. Moor, 14 How. [55 U. S.] 568; Allen v. Newberry, 21 How. [62 U. S.] 244; Maguire v. Card, Id. 248. I am unable to discover that any or all of these cases support the view taken by the defense. The case of Wilson v. Black Bird Creek Co., 2 Pet. [27 U. S.] 245, was referred to as authority that Grand river is not a navigable water of the United States, and is cited by Judge Wilkins in The Forest Queen and The Pontiac as conclusive authority on that question. I do not understand the opinion of Judge Marshall, in this case, to go so far as is claimed. On the contrary, I regard it to be the well settled doctrine of the supreme court of the United States, that all waters within the United States which are navigable for the purpose of commerce, or in other words, waters whose navigation successfully aids commerce, are waters of the United States, and in the late case of Hine v. Trevor, 4 Wall. [71 U. S.] 555, it was decided that the admiralty jurisdiction of the United States "extends wherever ships float and navigation successfully aids commerce, whether internal or external." That Grand river successfully aids commerce I need not discuss; vessels from Chicago and other lake ports can navigate for miles up this river, and steamers run daily forty miles up its stream. If, then, admiralty jurisdiction may be exercised in a case arising on Grand river, it must be a navigable water of the United States.

In the leading case touching the power of congress under the constitution to regulate commerce, of Gibbons v. Ogden, 9 Wheat. [22 U. S.] 1, decided by the supreme court in 1824, at page 194, Chief Justice Marshall says: "The subject to which the power is next applied is to commerce among the several states. The word 'among' means intermingled with. A thing which is among others is intermingled with them. Commerce among the states cannot stop at the external boundary line of each state, but may be introduced into the interior. It is not intended to say that these words comprehend that commerce which is completely internal, which is carried on between man and man in a state, or between different parts of the same state, and which does not extend to or affect other states. Comprehensive as the term 'among' is, it may very properly be restricted to that commerce which concerns more states than one." Was not the merchandise transported on the steamer Ball, shipped and destined for other states, a commerce which affected more states than one? Was it a commerce completely internal, carried on between man and man in a state, or between different parts of the same state, and not extended to or affecting other states?—as it would have been if it were to have stopped at Grand Haven, and not to go on from thence to other states. The carriage between Grand Rapids and Grand Haven was internal, but the commodity carried was proceeding to another state, and such other state, as well as Michigan, was interested in the trade and traffic of that commodity from the time it left Grand Rapids. As an article of export from the latter and of import to the former, both states were interested in the traffic, trade or exchange of that commodity; hence it was commerce among the states. The means used in transporting that commodity was navigation, which is included in commerce. At page 197 of the same case the court says: "The power of congress, then,

comprehends navigation within the limits of every state in the Union, so far as that navigation may be in any manner connected with commerce with foreign nations, or among the several states, or with the Indian tribes." Thus it would appear that the power of congress to regulate commerce with foreign nations, or among the several states, is co-extensive with the subject itself, and touches and controls both the commodity and the means employed in the conveyance at every step, from the point of shipment to the place of destination, in different states. At page 204, the court further says: "If congress license vessels to sail from one port to another in the same state, the act is supposed to be, necessarily, incidental to the power expressly granted to congress, and implies no claim of a direct power to regulate the purely internal commerce of a state, or to act directly on its system of police."

Clearly, here is an intimation of a power in congress to require of vessels employed in the coasting trade, exclusively from point to point in the same state, to take a license, and it must be upon the ground that such vessels carry commodities which are in transit from a place in one state to a place in another, and therefore engaged in commerce among the states. In none of the other cases referred to does the supreme court of the United States vary the doctrine laid down in Gibbons v. Ogden [supra], but, by repeated declarations in discussing the various questions presented, affirm the views which I have quoted from that case. Considerable importance was attached in the argument of this case to Allen v. Newberry, 21 How. [62 U. S.] 244, by the counsel for the defense, but I am unable to discover that it is authority against the views which I have expressed. The steamer Fashion was engaged in a general carrying business between ports in different states, and at the time was on a voyage from Two Rivers, in Wisconsin, to Chicago, in Illinois. She was libelled for goods lost on the voyage, which had been shipped on her from Two Rivers to Milwaukee, in the same state. The court held there was no jurisdiction, because the shipment of the particular goods was between ports and places in the same state, and therefore not commerce among the states. In speaking of the act of 1845 [5 Stat. 726], the court says: "There is some ground for saying, upon the words of the act of 1845, that the contracts over which the jurisdiction (in admiralty) is conferred are contracts of shipments with a vessel engaged in the business of commerce between the ports of different states, but the court is of opinion that this is not the true construction and import of the act. On the contrary, that the contracts mentioned relate to the goods carried as well as to the vessel, and that the shipment must be made between ports of different states." Clearly, according to this decision, it is not the fact that the boat does or does not run between places in different states, which determines the character of the commerce carried, as to whether it be purely domestic or among the states. On the contrary, it is whether the shipment "be made between ports of different states;" when this is the case, the vessel carrying that commerce is to be regarded as employed in commerce among the states. How can it be said that a transhipment at the border of the state, into or from which the commodity is shipped, affects the subject of the commerce, and changes that which was commerce among the states to a purely domestic commerce?

When a commodity has commenced to move, as an article of trade or traffic, between a place in one state and a place in another state, it denotes commerce between the states, and the means employed in moving it from place to place, over every part of the entire line, is an employment in that commerce; and it seems to me that a law of congress which regulates in any respect the means used in the transportation of that commodity is an exercise of the power to regulate commerce among the states, within the constitution. It is wholly inadmissible to say that so far as merchandise is conveyed within a state it is purely internal, and becomes commerce among the states only when it is carried between states, or from one boundary line to another. If merchandise is taken on board a vessel 100 miles in the interior of a state, and by that vessel is transported without unloading to a point 100 miles in the interior of another state, it involves both navigation and commerce among the states, from the place of shipment to the place of unloading. Is it any the less commerce among the states, on its entire route, simply because conveyed, for the first fifty or one hundred miles, on a navigable river, by a boat navigating only that river, and entirely within the boundary of a state? Is it any the less such commerce because this boat forms a link in a line of boats, though in no way connected, covering the whole route, and that there is a transhipment on the way?

If I am correct in the views taken, it can hardly be successfully claimed that it affects the question by showing that the goods cannot be carried on without transhipment, because of the incapacity of the river boat to navigate the lakes—nor vice versa, because the lake boat cannot find a depth of water in the river for her to navigate. The solution of the question lies deeper, and compels us to determine from the subject and the traffic if it be commerce among the states at the time the Ball transported the commodity. Nevertheless, as the question of jurisdiction in this class of cases is of considerable importance, and a decision by this court adverse to that given in The Queen and The Pontiac would not be authoritative out of this district and would result in a want of uniformity in the two districts of this state as to the

liability of boat owners, and inasmuch as I am informed that some of the other judges of the district courts, having jurisdiction bordering the lakes and on the navigable waters emptying into the lakes, entertain opinions in harmony with those expressed by Judge Wilkins in The Forest Queen and The Pontiac, it may be advisable to dismiss the libel in this case, for the sake of uniformity of decisions, if for no other reason.

Certainly, one rule, in reference to what classes of boats come within the inspection and license laws, should prevail in all the districts. Besides, the great experience and learning of Judge Wilkins, and of the other judges who are said to hold views in harmony with his on this subject, I may well acknowledge and allow to govern my action in this case, after having given expression to some of the reasons which would control my decision in the absence of such previous rulings.

There is a further consideration which is of weight in determining the course I should pursue, in justice to the owners of the steamers running on the internal waters of the state within this district, viz.: The government has for more than ten years rested apparently contented with the decision in The Forest Queen and The Pontiac, never having taken an appeal to the circuit court. Boat owners had a right to suppose, therefore, that the United States acquiesced in the view of a want of liability on the part of owners in this class of cases. I am disposed, therefore, contrary to my own judgment upon the law of the case, for the sake of that uniformity which is desirable in the rulings of the district courts, to dismiss the libel, treating the question as within the rule of stare decisis, and to leave it for the United States to appeal to the circuit court, if not content. Libel dismissed.

NOTE [from original report]. On appeal, the supreme court reversed this decree, adopting the reasoning, but not the conclusion, of the district judge. See 10 Wall. [77 U. S.] 557.

Case No. 3,565.

The DANIEL DREW.

[13 Blatchf. 523.] [1]

Circuit Court, E. D. New York. Sept. Term, 1876.

SHIPPING — NAVIGATION OF HUDSON RIVER — STEAMER PASSING TUG WITH TOWS—SWELLS.

1. The Hudson river is a national highway, upon which steamtugs with their tows, and steam passenger boats, are equally at liberty to travel. Each class of boats may occupy the river with their boats of such size and construction as they may choose, and at the speed they may think fit, subject to the qualification, that the rights and interests of others are not unreasonably impaired.

[Cited in The Rhode Island, 24 Fed. 295; The New York, 34 Fed. 758.]

2. There is no absolute rule of law which limits the space a boat or its accompaniments may occupy upon a public river, or which prescribes the speed it may use, or the swell it may make, or how near it may come to another boat. It depends upon the reasonableness of the thing done, under all the circumstances of each particular case. It is not the rule, that, in the event of an injury from a swell, the boat causing the swell is at all events responsible.

3. The steamtug Ohio, with one boat at her side, and a tow of twenty boats, in five tiers, at her stern, was passed by the steam passenger boat Daniel Drew, in deep water and with a light wind, and, by the swell and motion caused by the Drew, and by the slacking of the tug's hawser, the boats in the tow were thrown against each other, and the libellant's boat was injured. It appeared that the speed was that usually kept up in passing a tow in deep water, that the swell made was not unusual, that neither those on the Ohio nor those on the Drew apprehended danger at the time from passing at the speed kept up, that the boats in the tow were not well arranged, and that the Drew exercised reasonable care and diligence: *Held*, that the Drew was not liable for an injury to one of the boats in the tow, from the collision mentioned.

[Cited in The Morrisania, Case No. 9,838; The Drew, 22 Fed. 853.]

4. The accident was in part, at least, attributable to the fact that the tiers of boats were towed by lines only six or eight feet in length, with nothing to prevent their coming together when operated upon by a force in the rear, and with a slackened hawser from the tug.

5. The English cases on the subject examined.

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

Beebe, Wilcox & Hobbs, for libellant.
Cornelius Van Santvoord, for claimants.

HUNT, Circuit Justice. On the 2d of June, 1873, the tug-boat Ohio left Albany on her voyage down the Hudson river to New York. She had lashed to her port side the canal-boat Billy Lape, and had, in addition, a tow of twenty canal-boats. These boats were in five tiers, of four boats in each tier. The port boat of the first tier was the George H. Price; the port boat of the second tier was the Marion; the port boat of the third tier was the Shoo Fly. The boat in the first tier next to the George H. Price was the Chick Henly; the boat in the second tier next to the Marion was the H. A. Peck. All of the boats were loaded. At about 11 o'clock of the next day this tow had reached a point known as Camp Crossover, six miles below Catskill, and ten miles below the city of Hudson. At this point there was a shallow in the river, on each side of which was a channel of nearly a thousand feet in width. It is unusual for passenger boats to take the west channel. The eastern is the main channel, and is usually taken by the boats going down the river. The Ohio had taken this eastern channel with her tow, and was about in the middle of the channel, heading a little to the southwest, and was making about three miles an hour. As the Ohio was near the lower end of the shallow or middle ground, the

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

steamboat Daniel Drew, also going down the river, entered the eastern channel. The Drew was a daily passenger boat between Albany and New York, and had left Albany at 8.30 a. m. of the same morning, in the performance of one of her regular trips. She passed the Ohio and her tow in this passage, and, by the swell and suction caused by her, the libellant's boat, the Marion, was brought into collision with the boat George H. Price, which was in front of it, and the boat Shoo Fly, which was in the rear of it, and received damage. The usual speed of the Drew was seventeen miles to eighteen miles per hour, and she kept up that speed while passing the tow on this occasion. The Drew passed within one hundred feet of the tow, to the east of it, and within one hundred feet of the easterly shore of the channel, and as near to the east shore as was safe. No signal to slacken speed in passing was given to the Drew by the Ohio or any of its tow. The passage to the east of the Ohio was safer than a passage to the west of her in the same channel. It is not the custom of boats navigating the river to slacken their speed while passing a tow in this part of the river, nor at any point south of or below the city of Hudson. There were two hawsers from the Ohio, reaching to the outer boats of the first tier, one attached to the George H. Price, and the other to the canal-boat on the starboard side of the first tier. These hawsers were from 450 to 480 feet in length. The middle boats were fastened to the outer ones by breast lines and spring lines, and the tiers following to the tiers in front by spring lines. The length of lines between the different tiers was six to eight feet. As the Drew passed the Ohio, the lines by which the boat Billy Lape was fastened to the Ohio broke. The lines of some of the boats in the tow at the rear were also broken. Before this breaking of the lines, the Ohio had slowed for the purpose of easing her hawsers. The Drew was proceeding at her customary speed, which was not unusual for passenger boats, and not unreasonable, and made no unusual swell. She had no reason to apprehend danger to the Ohio or her tow in passing her, and received no intimations from the Ohio that danger would be incurred if she passed her on her appointed course, and at the speed she was using. The Ohio apprehended no danger, from the Drew's passing as she did. The water was deep at the point in question. The injury to the libellant's boat was caused by the coming together of the sterns and stems of the boats in line with each other, caused by the swell of the water and the suction made by the Drew, and the nearness to each other of the several tiers of boats. The forward swell of the Drew threw the Shoo Fly into the stern of the Marion, and the stem of the Marion into the stern of the Price, by which collisions the damage complained of was occasioned. The breaking of the lines of the Billy Lape, and her parting from the Ohio, had no material effect upon the collision of the boats in the hawser tiers. The tiers of boats were lashed too close together for safe navigation.

The district judge held that the Drew was in fault, and gave judgment against her for the damage sustained by the libellant.

These several steamboats were engaged in a lawful occupation, upon a great public highway, and by the use of lawful means. The Hudson river is a national water-course, open to all who choose to use it. The owners of the Ohio had the right to navigate it with their steamboats and tows. The owners of the canal-boats had the right to be towed thereon by the steamboat. The Daniel Drew was engaged in an occupation equally legitimate. Her owners had the same right to the use of the river for the purpose of carrying passengers upon their vessels, that the Ohio and her tow had for their purposes. All had the right to its use, in the manner necessary for their lawful pursuits. The Ohio occupied a much greater width of the stream than did the Drew. She towed her boats in tiers of four boats in width, and other like boats often carry their entire tow of boats alongside of the steamer, occupying much more space than did the Ohio on the present occasion. So far as was necessary, and connecting it with the qualification that the interests of the general public are not to be impaired unreasonably, the owners of the Ohio properly exercised their own judgment as to the size, arrangement and management of their enterprise. The Drew, on the other hand, requiring little room upon the surface of the river, found speed in passage indispensable to the success of its business, necessarily causing more swell and agitation than is made by the slower passage of a tow-boat. There is no law which limits the space a boat may occupy, or which prescribes how fast it may go, or how much swell it may cause, or how near it may pass to another boat. The rule of permission or of restriction depends in each case upon the reasonableness of the thing done. A dull sailing tow may not occupy unreasonably the entire channel of the river, and thus impede its navigation by all other vessels. A leviathan may not rush through the water with a speed that will overwhelm in its surges all the craft ordinarily to be found upon the river. Nor is a large vessel, under all circumstances, absolutely liable for an injury caused by its swells to an inferior vessel. The waters are open to the use of all kinds of crafts, large as well as small, and, while the rights of the smaller are to be carefully guarded, they are not to be made a pretence for excluding, or preventing the practical use of, larger or different vessels. Sea going steamers move at a rapid rate of speed. They are large and bulky. They necessarily create much motion in the water. Vessels used in the bays and harbors, and in the rivers near New York, for the carriage of passengers,

are built for speed, and without speed their trade would soon come to an end. Their speed also creates much motion in the waters. Is there any rule of law which prescribes that these vessels shall absolutely be liable for injuries occasioned to smaller craft by a swell or motion caused by their passage through the water? Is there any greater or more stringent test of liability than that a large vessel shall use its large powers with care and diligence, and in the mode recognized by those accustomed to the business in which it is engaged as being prudent and proper?

To apply these suggestions to the present case. The Ohio and its tow were lawfully sailing down the Hudson river, at a speed of three miles an hour. The bulk or quantity to be transported, and not speed, is the consideration of her owners. The Drew comes on her passage in the same direction, at the rate of eighteen miles per hour. Speed is the consideration of her owners. If she cannot have this, her business is as effectually destroyed as if the river should be bridged or dammed. The rule of law would seem to be that she is entitled to pass the Ohio. She must, however, have the means and possess the skill to pass her, with knowledge of the waters and with care and prudence. Whatever the usage and practice of those engaged in such navigation adjudge to be necessary precautions, she must take. So, the Ohio and her owners must know that vessels like the Drew are engaged in rapid navigation, and that she must be passed by such vessels, as they overtake her. The towing vessels and the vessels towed must be so constructed and so managed as to meet the contingency of being passed by other vessels. If an overtaking and passing vessel, in prudent navigation, creates swell and suction, arrangements must be made that the boats in a tow shall not be injured thereby. If the swell and suction created by the passing vessel are those to be expected in the ordinary navigation of a rapid vessel, which is managed with prudence and equipped and constructed in a suitable manner, and if the passing vessel has no reason to apprehend that she will do an injury, and a tow is injured thereby, the passing vessel is not responsible. She has but exercised her lawful rights, and the loss must be borne by the injured party. The rule is essentially the same as if a collision had occurred. The vessel is to continue its course as before. The other vessel is to see to it that no collision occurs. But this is not an absolute rule of law. If the passing vessel shall appear to have performed all of its duty, in everything required by care, prudence, knowledge and management, and shall appear to have been thoroughly manned and equipped, but, by some occurrence beyond its control or impossible to foresee, a collision had occurred, the passing vessel is not responsible. So, a superior vessel is bound to great care and diligence, but is not an absolute insurer against injury to an inferior.

That the Drew was right in taking the eastern channel is established by the libellant's own witnesses. The captain and the pilot of the Ohio both testify that the eastern channel is the one usually taken, that it is the main channel, and that passage through the western channel is unusual. The same witnesses on the part of the libellant establish the fact that it was not the practice for passing boats to slacken their speed in deep water like that in this channel, nor at any point south of the city of Hudson. The weight of the evidence is, that the Drew passed as near the eastern shore as it was safe for her to go, and that there was, at least, as much space between the Drew and the tow as between the Drew and the shore. The position of the tow in the middle of the channel, with a slight westerly heading, indicated that a passage to the east of her would be safer than one on her westerly side. I do not, therefore, discover any fault in the Drew for taking the easterly channel or the easterly side of that channel.

The pilots and managers of the Ohio all saw the Drew approaching, and recognized her rate of speed. If they had supposed she was going too rapidly for their safety, a signal to slow up should have been given at once, and, we may suppose, would have been obeyed. Its absence furnishes strong ground to believe that the managers of the Ohio supposed, as did the managers of the Drew, that no change of speed was necessary.

A swell was no doubt created by the Drew, and this threw together the boats in the tow, as it struck them. The hawser line was some four hundred and fifty feet in length, while the length of lines between the different tiers was but six or eight feet. There was nothing to stay the Shoo Fly as she was washed against the Marion, or the Marion as she was washed against the Price. With boats prevented from being more than six or eight feet apart, and nothing to prevent their coming together, it would seem to be almost a necessary consequence that any swell or motion from the rear would precipitate them against each other. If the lines betweeen these tiers had extended fifty or one hundred feet, there is nothing to show that there would have been any difficulty in the present case. I cannot but think that the accident was largely attributable to the different tiers of boats being tied so close to each other. It is quite likely that this compact arrangement enables the steamer the better to manage the tow in its forward motion, but it is defective in protecting it against a power moving from the rear. If struck by a stern wind or tide or swell, and the steamer slackens her hawser, the tow is exposed to this difficulty.

I am not justified in holding, upon the testimony of all the witnesses, that the swell made by the Drew was unusually large, or

that it was dangerous in any other manner than as danger is necessarily incident to the swell from a passing vessel. The pilot of the Ohio says: "I don't think the swells from the Drew were unusual for a boat that came as close as that to us; the swell was not an unusual one for coming so close; the closer they come the more swell they throw on the boats." The captain gives the same evidence. One pilot and some of the captains of the canal-boats thought the swell was large. The result of the whole evidence seems to be, that the Drew, as she passed, created a swell, but that there was nothing unusual about it, or anything to excite the attention of those who managed her. The water was deep, the weather calm and pleasant, with a light wind and a light flood tide.

I have not been able to discover any fault in the equipment or the management of the Drew. She exercised her acknowledged rights in a careful, prudent, and in the accustomed manner. The injury to the boats arose either from the faulty manner in which the tow was made up, or the breaking of insufficient lines, or from the effect of a swell such as was ordinarily made by a boat like the Drew, and such as the Ohio knew she was accustomed to make. Against her speed or her swell the Ohio made no remonstrance. The officers of the Drew testify that they saw no reason to apprehend danger in passing as they did. The officers of the Ohio state, that, at the time, they apprehended no danger.

In his brief, the libellant's counsel insists, "that the swell and suction were caused by the claimants' boat. They were bound, at all events, to prevent it." This is stronger language than the authorities justify. The principle is much the same as that involved in Philadelphia, W. & B. R. Co. v. Stinger, 78 Pa. St. 219, where it was held as follows: "1. A railroad company, having a chartered right to propel their cars by steam, are not responsible for injuries resulting from the proper use of such agency. 2. Whether alarming a horse and causing an accident by a rapidly moving train, or sounding a whistle, will make the company liable for damages, depends upon whether it was from want of proper care in those in charge of the train. 3. What would be due care in running a train through a sparsely settled rural district might be negligence in approaching a large city. 4. A train was passing through a city on a railroad which had a number of short curves, so that persons could see the train but for a short distance; it was crossed by several streets and passed over a river on a drawbridge; the rule of the company required that the whistle should be sounded about a certain point, to warn the bridge-tender and persons about to cross at other streets: Held, the use of the whistle at that point in the ordinary manner was not negligence. 5. If the whistle had not been sounded at such point, and one had been injured by reason of the omission, it would have been negligence per se. 6. One driving an unbroken or vicious horse, or one easily frightened by a locomotive, along a public road running side by side with a railroad, does so at his own peril; the right of the company to move their trains on their road is as high as that of the individual to use the public road." See, also, Favor v. Boston & L. R. Co., 114 Mass. 350.

Some cases in the English courts are supposed to bear upon the question. In the case of The Batavier, 1 Spinks, 378, tried before Dr. Lushington and the Trinity masters, the barge Ann, loaded with forty-nine tons of coal, was sunk in the Thames, on the afternoon of October 5th, 1853. The case states that the barge was sunk by the swell made by the steamer Batavier, both vessels being on their passage up the Thames. The Batavier passed the barge within one hundred and fifty feet, at the speed of nine or ten miles an hour. Her speed caused a swell which flowed over the barge and sank her. A speed exceeding six miles per hour was, by statute, prohibited at the place in question. The court held and found: 1. That the barge had no fault or defect. 2. That the Batavier was in fault in not having seen the swell she made, and in not stopping in time to avoid the accident; that, if she had kept a proper lookout, she would have seen it; and that neither the swell nor the barge were in fact seen from the steamer. 3. That the owners of the Batavier were responsible. This case affords no light by which to decide a case where the vessel libelled was well equipped, kept a good lookout, took the ordinary channel, passed the other vessel at an accustomed rate of speed, and created no unusual or dangerous swell. The case of The Batavier was affirmed by the privy council. 9 Moore, P. C. 286. The points were ruled as in the court below: 1. That no blame or negligence was attributable to the barge. 2. That the steamer was in fault in her speed, and, "if going at such a rate as made it dangerous to any craft which she ought to have seen, and might have seen, she had no right to go at that rate; at all events she was bound to stop if it was necessary to do so, in order to prevent damage being done by the swell to the craft that were in the river." "She ought not to have made that swell in the river if she was aware that there was any vessel which might be damaged and put in jeopardy by her doing so." 3. That an insufficient lookout was kept by the steamer. The principles sustained are those put forth by Dr. Lushington in the case as reported in Spinks.

The case of Luxford v. Large, 5 Car. & P. 421, was at nisi prius before Lord Denman. He charged the jury, that if the swell was occasioned by the improper speed of the defendant's vessel, and if the injury arose from the swell caused by such speed, the defendant was liable.

In Smith v. Dobson, 3 Man. & G. 59, the judgment was based upon the evidence that the defendant's barge was improperly and negligently navigated. The questions debated were chiefly upon the form of the verdict.

I see nothing in these cases in hostility to the principles hereinbefore announced. They do not countenance the idea that the superior vessel is necessarily and absolutely liable to the inferior, in the event of an injury from the swell of the former. They place the decision, in every instance, upon the question of negligence or improper management in the larger vessel. The principles of this opinion are in entire harmony with those laid down in The Alleghany, 9 Wall. [76 U. S.] 522, and in The Syracuse, Id. 672. The cases of The Leo [Case No. 8,250], and The C. H. Northam [Id. 2,689], I have carefully considered.

The decree of the district court must be reversed, and a decree entered dismissing the libel.

Case No. 3,566.

In re DANIELS.

[6 Biss. 405;[1] 13 N. B. R. 46; 1 N. Y. Wkly. Dig. 271; 8 Chi. Leg. News, 17.]

District Court, N. D. Illinois. July Term, 1875.

BANKRUPTCY—STOCK BROKER'S CLAIMS—LOSS ON STOCK SOLD WITHOUT LEAVE OF COURT.

1. Brokers carrying stocks on a margin, which at the time of the commencement of bankruptcy proceedings could have been sold out at a profit, but who carry it until a decline, and finally close it out at a loss, all without application to the court, cannot prove their claim for differences against the estate.

2. A broker who holds stocks on a margin is bound to take notice of the buyer's bankruptcy.

3. If a broker, who holds stocks on a margin, continues to hold them for an unreasonable length of time after the buyer's bankruptcy, and then sells them without notice, he must sustain the loss.

In bankruptcy. This was an application on the part of the assignee of said bankrupt [John H. Daniels] to expunge a claim filed for between fourteen and fifteen thousand dollars, by the firm of F. B. Wallace & Co., of New York City.

Hutchinson & Luff, for creditors.
John Van Arman, for assignee.

BLODGETT, District Judge. It appears from the evidence in the case, that Daniels was for some years prior to his being declared bankrupt, a banker at Wilmington, in Will county, in this district; that F. B. Wallace & Co., the claimants, were engaged in the business of stock brokers in the city of New York; that Daniels filed his voluntary petition in bankruptcy on the 3d day of July, 1873, upon which he was immediately adjudged bankrupt; that for two or three years prior to his bankruptcy, Daniels had been operating to a greater or less extent in stocks upon the New York market, through the firm of F. B. Wallace & Co., who purchased stocks upon the orders of Daniels, paying the money therefor and receiving and holding the stocks together with a margin of ten per cent., or less, as security for the money advanced by them.

At the time Daniels was declared bankrupt, Wallace & Co. held seven hundred and fifty shares of the stock of the Chicago & Alton Railroad Company, which had been purchased pursuant to the arrangement I have mentioned, upon which, however, the margin was nearly exhausted, but the stock at that time could have been sold so as to have left some balance to the credit of Daniels in the hands of the brokers. After Daniels' adjudication, and until about the 18th of September, 1873, said stock remained at about the same price. After the 18th of September—being about the time that Jay Cooke & Co. failed—said stock declined rapidly in value, and on the 24th of October, Wallace & Co. sold the same, and passed the proceeds to the credit of Daniels, leaving Daniels, by their account rendered, in debt to said brokers in the sum of thirteen thousand four hundred dollars. This amount, together with the interest accrued thereon, said Wallace & Co. have brought as a claim against the estate of Daniels, and the assignee seeks to have the same expunged on the ground that it is not a valid claim to be paid out of the assets of said estate.

It will be noticed from the recital of facts, that at the time Daniels became bankrupt, the adventure in these stocks could have been closed so as to have left something to the credit of the bankrupt; in other words, the bankrupt did not owe his brokers anything at that time. True, it is claimed on the part of the brokers that this transaction was in all respects that of a loan from Wallace to Daniels of the amount of money necessary to buy the stocks in question, and that they simply held the stocks as security for their loan, but it is equally apparent from the evidence and from the nature of the transaction as developed by the proof, that Daniels was engaged merely in speculating upon the fluctuations in the value of this stock. He never intended to become the owner of this stock upon the books of the corporation by whom it was issued, but simply bought the stocks upon a margin which he had put up with his brokers for the purpose of making a profit, if any should accrue, in an advance on the price of said stocks. The real owners of said stocks were the brokers who had advanced the money to buy the same and held the stocks in their own name for their own security, together with whatever margin Daniels might have from time to time remaining in their hands.

It does not appear that any application was made by Wallace & Co. to this court for

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

leave to sell these stocks, nor did the assignee of the bankrupt, who was elected on the 18th of August, receive any notice from Wallace & Co. of any such intention, but the brokers held such stocks probably as long as under the circumstances they thought it profitable or safe to themselves to hold them, and then, without notice, sold them upon the market for whatever price they would bring.

The bankrupt in his schedule refers to these stocks as held on a margin, and in which he had no interest except for a disputed difference between himself and his brokers in regard to the interest which had been charged him. As I said before, there was no indebtedness between the broker and the bankrupt at the time Daniels became bankrupt.

It was undoubtedly the duty of Wallace & Co., under the circumstances, to take notice of Daniels' adjudication in bankruptcy. They were bound to know that their correspondent had lost the ability to control this venture from the time of his adjudication, and that the management of the affair was thereafter in the hands of this court; and as it is no part of the duty of an assignee in bankruptcy to speculate in stocks, there can be no doubt but what this court, on information being imparted to it of the condition of the bankrupt's estate with reference to these dealings with Wallace & Co., would have at once ordered said stocks sold and the adventure terminated; but without disclosing the relations which they bore to the court, Wallace & Co. continue to hold these stocks upon a declining market, through a critical financial period, and finally sell them out without leave of court, and seek now to make the bankrupt's estate responsible for this large difference.

I do not think the claim, as it is presented under the evidence, should be allowed. It has all accrued since Daniels was adjudged bankrupt, and under such circumstances that I cannot conceive that the creditors or assignee of Daniels are morally or legally bound to sustain this loss.

The claim is therefore expunged.

Generally as to the rights of creditors holding securities or collaterals, consult Bump, Bankr. § 5075, and notes under said section.

DANIELS (BELL v.). See Case No. 1,247.

Case No. 3,567.

DANIELS et al. v. McCABE.

[3 Cliff. 114.][1]

Circuit Court, D. New Hampshire. May Term, 1868.

SALE OF INTOXICATING LIQUORS—PROHIBITION BY STATE STATUTE—FEDERAL LICENSE AND TAX.

Where goods were sold, and the contract and account of sale and delivery completed in a state where a sale of that description of merchandise was prohibited by statute, the vendor is not entitled to recover the contract price, although he holds a license for the sale of such goods under the internal-revenue act of the United States, and although the internal-revenue tax upon such goods had also been paid.

Assumpsit for goods sold and delivered. Facts agreed.

Plaintiffs [Nathaniel A. Daniels and others] were citizens of Massachusetts, and the defendant [Michael McCabe] a citizen of New Hampshire. The agreed statement showed that the amount claimed was for liquors sold, which were not imported. They were sold by the plaintiffs at their store in Boston, in December, 1863, and by them delivered to the defendant at the depot of the Boston and Maine Railroad in that city. At the time of the sale the plaintiffs were licensed as wholesale and retail dealers in liquors, under the internal-revenue law of the United States, and said liquors had paid an internal-revenue tax prior to the sale. Although licensed under the internal-revenue law of the United States, the plaintiffs, at the time of the sale, had no license to sell the liquor, under the law of the state. Sections 28, 30, and 61 of chapter 86 of the General Statutes of Massachusetts were made a part of the case.

Hackett & Smith, for plaintiffs, cited Sartwell v. Hughes [Case No. 13,177]; Holman v. Johnson, Cowp. 341; Hodgson v. Temple, 5 Taunt. 181; Langton v. Hughes, 1 Maule & S. 593; Cope v. Rowlands, 2 Mees. & W. 149; Cannan v. Bryce, 3 Barn. & Ald. 179; Harris v. Runnels, 12 How. [53 U. S.] 79.

This action is not founded upon any cause of action enumerated in the Massachusetts General Statutes (section 61), upon which it is there provided no action shall be maintained. This provision is not only to be construed strictly, but by implication any instrument or contract not enumerated therein may be a good cause of action.

I. A. Eastman, for defendant.

Gen. St. Mass. §§ 28–30, which make a part of this case, impose a penalty for the sale of liquors. Such penalty implies a prohibition of the act of sale, and the price cannot be recovered. Lewis v. Welch, 14 N. H. 294; Carlton v. Bailey, 27 N. H. 230. Section 61, Gen. St. Mass., prohibits recovery. The fact that the liquors had paid a revenue tax does not impair the force of the Massachusetts statute, for the internal revenue act expressly provides that the laws of the states in regard to such sales shall not be affected by the revenue act.

CLIFFORD, Circuit Justice. The substantial finding of the case is, that the liquors were sold at the store of the plaintiffs in Boston, and were by them delivered to the defendant at the depot of the railroad named in that city, so that it clearly appears that the contract was made and the sale com-

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

pleted in the state where the plaintiffs reside. Actual delivery of the liquors to the defendant at that place must be understood as found by the statement of facts. Such is the clear import of the statement; but if it be considered as a delivery to a carrier for the defendant, it was equally valid, as between the parties, and the same conclusion must follow. Orcutt v. Nelson, 1 Gray, 542.

"Delivery to a common carrier," says Shaw, C. J., in that case, "completes the contract of sale, vests the property in the vendee, and consequently the goods, during the transit, are at the risk of the vendee." Section 28 prohibits the manufacture for sale, and the selling of spirituous and intoxicating liquors, or any mixed liquor, part of which is spirituous or intoxicating, unless the party doing any of those acts is authorized, as provided in that chapter (page 442). The penalty prescribed by the thirtieth section of the act is ten dollars, and imprisonment in the house of correction not less than twenty nor more than thirty days for the first offence, which is increased for subsequent violations. All payments or compensations for spirituous or intoxicating liquors sold in violation of law, whether in money, labor, or personal property, are declared by the sixty-first section to have been received without consideration, and against equity, law, and good conscience. Page 448. These several sections are, by the agreed statement, made a part of the case. The settled law in Massachusetts is, that no action can be maintained to enforce an executory contract for the price of liquors sold and delivered. Adjudged cases to that effect, in the reported decisions of the highest court of that state, are quite numerous.

Consignors of spirituous liquors, it is held, cannot maintain an action against their consignees, for the breach of an agreement to render an account of sales, pay the value of the liquors sold, and return the residue. King v. McEvoy, 4 Allen, 110.

The express rule also, as laid down by that court is, that no action lies to recover the proceeds of spirituous liquors sold in violation of law, by one to whom they had been intrusted, for the purpose of being sold by the owner. Justification for such a principle, which refuses damages for a breach of trust, can only be found in some positive rule of law, denying any power in the court to grant relief. Galligan v. Fannan, 7 Allen, 255.

Damages cannot be recovered for a breach of warranty in the sale of a horse, where it appears that the price of the horse is to be paid in liquors, which the purchaser cannot legally sell. Howard v. Harris, 8 Allen, 297; Baker v. Collins, 9 Allen, 253.

Taken together, it would seem that these decisions are sufficient to show what the rule upon the subject is; but the highest court of that state has formally decided that no action will lie against a surety upon a promissory note, given in part for the price of cider sold for a beverage, within that state. Nourse v. Pope, 13 Allen, 87.

Neither authority nor argument is necessary to show that these decisions of the state court furnish the rule of decision in this case, as the proposition is universally acknowledged. Such is the rule upon general principles, but it is expressly made so by the thirty-fourth section of the judiciary act. 1 Stat. 92.

Payment of a license fee or tax, or both, to the United States, under the internal-revenue laws passed by congress, does not authorize the sale of intoxicating liquors, in violation of the laws of a state. Com. v. Holbrook, 10 Allen, 200.

Discussion of that question, however, is now unnecessary, as it is now authoritatively settled by the decision of the supreme court. Pervear v. Com., 5 Wall. [72 U. S.] 475.

Case No. 3,568.

DANIELS et al. v. TARBOX.

[9 Blatchf. 176.] [1]

Circuit Court, N. D. New York. Oct. 10, 1871.

INTERNAL REVENUE — SUSPENSION OF DISTILLERY — REGULARITY AND COMPLETENESS — IRREGULAR NOTICE.

1. Under section 22 of the internal revenue act of July 20, 1868 (15 Stat. 134), a regular suspension of work by a distiller relieves him from assessment for taxation during the interval between the time he so regularly suspends work, and the time he actually resumes work, whether the resumption is regular, according to that section, or not.

[Cited in U. S. v. Black, Case No. 14,600.]

2. If he resumes work without previously complying with the provisions of that section in regard to resumption, he is liable to the forfeitures and punishment provided by that section; but the regularity of the suspension does not depend upon the regularity of the resumption.

3. Having mash or wort on the premises during the period of suspension, does not make the distiller liable to assessment for tax during such period.

4. A notice in writing of an intention to suspend work, under that section, was addressed to the assessor, instead of the assistant assessor, but was written in the office of the assistant assessor, and came to his hands, and contained the information required by the statute, and was acted upon by the assistant assessor. *Held*, that it was no objection to the regularity of the notice that it was addressed to the assessor.

5. A non-compliance with the statute in regard to one interval of suspension, cannot affect the question of the regularity of another suspension.

6. Where it was impossible to lock the door of the furnace of the still, and impossible to make a fire in the furnace, and the assistant assessor attended during the interval of suspension, and saw that no work of distilling was done, *held*, that the right of the distiller to be treated as having duly suspended work, was not affected by the omission of the assistant assessor to

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

comply with the statute by locking the door of the furnace.

7. Such right was not affected by the omission of the assessor to comply with the statute by reporting the suspension, and the action of the assistant assessor thereon, to the commissioner of internal revenue.

This was an action [by Samuel R. Daniels and Selden W. Lackor] against [Henry F. Tarbox] a collector of internal revenue, to recover back money paid as an internal revenue tax upon the plaintiffs, as distillers, under the name and firm of S. W. Lackor & Co.

L. F. & G. W. Bowen, for plaintiffs.
Richard Crowley, Dist. Atty., for defendant.

WOODRUFF, Circuit Judge. Several questions were raised on this trial, which, in the view I take of the single question hereafter considered, it will be unnecessary to decide. Whether, under the provisions of section 20 of the act of July 20, 1868 (15 Stat. 133), imposing taxes on distilled spirits and tobacco, and for other purposes, distillers are liable to be assessed upon eighty per cent. of the producing capacity of their distillery, although the actual production is far less—whether, when distillers make a true return, in the form and containing all the particulars required by law, and have been assessed in due form, and have paid the tax assessed, the United States have any remedy in the nature of an appeal from the act of the assessors—whether, where the assessors are deemed by the commissioner of internal revenue to have erred in the assessments, he can direct a reassessment and the collection of additional taxes, based upon the same facts and no other, or whether the assessor is responsible to the government for his own failure to assess and collect the just amount due by the distiller upon a true assessment, and, as bearing on this question, whether the 20th section of the act of June 30, 1864 [13 Stat. 229], as amended by the 9th section of the act of July 13, 1866 (14 Stat. 103), authorizing a reassessment in certain cases, has any application to a case in which the return of the party to the assessor contains truly every fact which it is his duty to return, or which is material to a correct assessment—it will not be material to discuss. The single question, whether the plaintiffs were liable to be assessed eighty per cent. on the capacity of their distillery, during eight days in the months of September and October, 1868, during which their distillery was not run at all, will, if decided in the negative, dispose of this case.

Assuming, therefore, for the purposes of this case, that the assessment, when legally made, should never be for a less quantity of spirits than eighty per cent. per diem of the whole capacity of the distillery, the period at which the assessment shall commence, and the time when the estimate may be suspended, and the day on which it shall cease, are vital to the ascertainment of the tax to which the distiller is liable. On that subject, section 22 of the act of July 20, 1868, above referred to, provides, "that every distiller, at the hour of twelve, meridian, on the third day after that on which his bond shall have been approved by the assessor, shall be deemed to have commenced, and thereafter to be continuously engaged in, the production of distilled spirits in his distillery, except in the intervals when he shall have suspended work, as hereinafter authorized or provided. Any distiller, desiring to suspend work in his distillery, may give notice in writing to the assistant assessor of his division, stating when he will suspend work; and, on the day mentioned in said notice, said assistant assessor shall, at the expense of the distiller, proceed to fasten securely the door of every furnace of every still or boiler in said distillery, by locks and otherwise, and shall adopt such other means as the commissioner of internal revenue shall prescribe, to prevent the lighting of any fire in such furnace, or under such stills or boilers. The locks and seals, and other materials required for such purpose, shall be furnished to the assessor of the district by the commissioner of internal revenue, to be duly accounted for by said assessor. Such notice by any distiller, and the action taken by the assistant assessor in pursuance thereof, shall be immediately reported to the assessor of the district, and by him transmitted to the commissioner of internal revenue. No distiller, after having given such notice, shall, after the time stated therein, carry on the business of a distiller on said premises, until he shall have given another notice in writing to said assessor, stating the time when he will resume work; and, at the time so stated for resuming work, the assistant assessor shall attend at the distillery, to remove said locks and other fastenings; and thereupon, and not before, work may be resumed in said distillery, which fact shall be immediately reported to the assessor of the district, and by him transmitted to the commissioner of internal revenue. Any distiller, after the time fixed in said notice declaring his intention to suspend work, who shall carry on the business of a distillery on said premises, or shall have mash, wort, or beer in his distillery, or on any premises connected therewith, or who shall have in his possession, or under his control, any mash, wort or beer, with intent to distil the same on said premises, shall incur the forfeitures, and be subject to the same punishment as provided for persons who carry on the business of a distiller without having paid the special tax."

The proof shows, that the plaintiffs, after commencing the business of distilling, on four different occasions desired to suspend work, and gave notice of their intention to do so, and actually suspended, in precise accordance with the terms of their notice. The cause of suspension on three of these occasions was the need of repairs or alterations in their fix-

tures. These suspensions were September 16th, one day; September 22d and 23d, two days; October 1st, one day; and from October 7th to October 12th, (the 11th being Sunday,) four days, these being the eight days for which the tax was nevertheless exacted, to compel the repayment of which this action is brought. The notices of the intended suspension given by the plaintiffs were in form addressed to the assessor of the district. The assistant assessor of the division in which the distillery was included, occupied the same office with the assessor of the district, both he and the assessor being in the same apartment. Such assistant assessor was present when most if not all of the notices were drawn and signed. One of them he himself presented to one of the plaintiffs, and received the signature of the latter thereto, and he had actual knowledge of each of the notices when given. It was the duty of the assistant assessor to be at the distillery every day, and he was there each day of the suspension. On the days during which work was suspended in October, the assistant assessor locked the furnace, as required by the act. On the three days of the suspension in September, he did not lock the door of the furnace, and the reason for not doing so was, (as he explicitly testifies,) that the plaintiffs were repairing it and it could not be locked. This, certainly, was so on one of those occasions, and the reason it was not locked on the other occasion was, either that the repairing rendered it impossible, or that it was in such a condition that no fire could be made in it; and nothing was or could be distilled on either day of suspension in September or October, in the then condition of the distillery. It does not appear that any notice of either suspension, or of the action of the assistant assessor thereupon, was reported by the assessor of the district to the commissioner of internal revenue. The plaintiffs gave no subsequent notice in writing to the assessor, stating the time when they would resume work. They embodied in the one notice given in each case, a statement of the number of days which they would suspend and of the day they would resume; but no report of that fact was made by the assessor to the commissioner of internal revenue.

It is proper to say, preliminarily, that this case in no wise depends upon the question whether one notice is sufficient to satisfy all the requirements of the law, so as to justify the plaintiffs in resuming work after a suspension. The section cited is reasonably explicit in requiring "another notice in writing to said assessor." But, whether these notices must be on separate papers, with separate address and signature, or may be embodied in one, is immaterial to the present case, for the reason, that the regularity of the suspension does not at all depend upon the regularity of the resumption. If the law was so far complied with that the plaintiffs were duly in suspension from work, that state of things continued until they resumed. If they resumed without previous compliance with the law relating to resumption, they became liable to the consequences prescribed specifically for that act, namely, they incurred the forfeitures, and became subject to the same punishment, provided for persons distilling without paying the special tax. The law excepts from the assessment for taxation on the production of the distillery, and on its capacity for production, the intervals when the distiller shall have suspended work, as authorized or provided. Whether he ever resumes or not, and whether he resumes lawfully or unlawfully, is immaterial for the purposes of assessment for those intervals. There is no connection between the two subjects. A regular suspension relieves him from assessment during the interval. An irregular resumption subjects him to forfeitures and punishment. The same observations are pertinent to the fact proved in this case, that, during the periods of suspension, the plaintiffs had mash or wort on the premises in the distillery, though without any intent to distil it. If they thereby exposed themselves to forfeiture or penalties, be it so. It is no where provided that that fact made them liable to assessment upon the producing capacity of the distillery. I do not intend, by this, to say that a suspension (which may often be the necessary result of causes they cannot control) while they have mash on hand, subjects them to forfeiture or penalty. I mean to say, that the regularity of the suspension does not depend at all on their having or not having it on hand. And yet it appears, by a letter produced on the trial, signed by the deputy commissioner, that the reason why he deemed the plaintiffs were liable to assessment for the eight days of actual suspension was, that the assistant assessor, in his certificate of the suspension, on file in his office, did not certify, that, when he placed the locks on the furnace doors, there was no mash, beer or wort on hand on the premises. This is, I think, a misconstruction of the act. If the plaintiffs were proceeded against for a forfeiture, or to enforce punishment, as provided in the concluding paragraph of the section, it would be material to consider, what having of mash, or wort, or beer in the distillery makes them liable, and, whether the intent or purpose thereof is material, may be then a very important inquiry. Here, I deem it wholly irrelevant. Again, it is proper to say, that this case does not require any decision of the question, what, as between the government and its officers, are the consequences of a neglect by the latter to comply with the requirements of the law prescribing their duty. The question, therefore, is reduced to this—Were the plaintiffs liable to assessment for the days of actual suspension, or were those days "intervals" when they had "suspended work," as in the act "authorized or provided?"

The act, in terms, authorizes any distiller

desiring to suspend work, to give notice in writing, stating when he will suspend, and provides that, having given such notice, he shall not, after the time stated therein, resume work, until he shall have given another notice in writing, stating the time when he will resume. The other objections claimed, on the trial, to affect the plaintiffs' position in this respect, rest on the sufficiency of their notice of an intention to suspend, the neglect of the assistant assessor to lock the doors of the furnace on the three days of suspension in September, and the want of proof that the assessor immediately reported the suspension, and the action of the assistant assessor thereupon, to the commissioner of internal revenue.

The only suggestion of defect in the notice is, that it contained an address to the assessor of the district. Surely, this objection has no merit. The notices came to the assistant assessor; they are in writing; they were written in his office. He, himself, presented one of them to one of the plaintiffs for signature. They contain, and they actually communicated to the assistant assessor, the precise information necessary to comply with the law. They were in due form to produce the effect designed, and he received them as notices, and acted thereupon; and it is a circumstance showing that no importance belongs to the mere fact that they contained an address to the assessor, that, when the law speaks of the notice of intent to resume, it terms it a notice to the assessor. The purpose and design of the requirement here was fully satisfied, and the objection is untenable.

The neglect of the assistant assessor to place locks on the door of the furnace during the three days of suspension in September, surely did not affect the regularity of the suspension of five days in October. Then the door was locked, so that this objection cannot be urged to defeat the claim of the plaintiffs here as to those five days. These intervals of suspension were distinct, and irregularity in some could not affect others.

But I am, also, of opinion, that there was no fault in the plaintiffs, affecting their liability to assessment, arising from the omission to lock the door of the furnace in September. The act should receive a sensible construction, if possible. The proof is, that the nature of the repairs rendered it impossible to lock the door, and impossible to make a fire in the furnace; and the assistant assessor attended and saw that no work of distilling was done. The law did not propose an impossibility; or, if it did, it is not the fault of the plaintiffs if the law prescribed to the assistant assessor a precaution impossible of application. It does not appear that the commissioner has prescribed any "other means" "to prevent the lighting of any fire in such furnace, or under such stills or boilers." When, therefore, the assistant assessor found locking the door impracticable, and the lighting of any fires impossible, and further interposed his personal presence to see to it that no distilling was done, and did see that no distilling was or could be done, I think the law was fully satisfied—certainly, so far as the plaintiffs' right to be treated as having duly suspended work is affected thereby. If, however, it can be successfully insisted that the assistant assessor ought to have actually devised some means of locking the door, and failed to do his duty in this respect, we are brought to the same question involved in the next objection, namely, that there is no proof that the suspension was reported to the commissioner; and that question is—Must the plaintiffs pay taxes according to the capacity of their distillery, because the officers of the government neglect their duty, and so long as such neglect continues? It seems to me that this point requires very little discussion. The duties imposed in this statute on the assessor and assistant assessor are directory merely. For the discharge of their duties they are responsible to the government. The plaintiffs have no control over them, and ought not to be affected by their acts or omissions, which they can neither guard against nor prevent. Suppose, for example, a distiller gives the required notice, and actually suspends in accordance with his expressed intention. What more can he do? The assistant assessor may wholly neglect or refuse to secure or lock the door of his furnace; and can it be claimed, that, for that reason, the distiller must continue to pay taxes, as in this case assessed, at over $300 per day? Such suspension may not always be for a few days only, but may be for a period which, if the neglect of the assistant assessor involved such a consequence, would result in the distiller's utter ruin. No such claim can be reasonably urged on behalf of the government, and such is not the meaning or effect of the law, neither in regard to the neglect of the assistant assessor, nor to the neglect of the assessor to make due and timely report to his superiors.

For these reasons, I think the tax imposed on the plaintiffs, for eighty per cent. of the capacity of their distillery, and the penalty exacted for its non-payment pending their appeal, amounting to $2,524.26, were illegally exacted from them by the defendant, as collector of internal revenue, and that they are entitled to recover the same, with interest from December 30th, 1869, when the same appears to have been paid, with costs.

DANIELS (UNITED STATES v.). See Case No. 14,916.

DANIELS (WARNER v.). See Case No. 17,181.

DANTZLER (UNITED STATES v.). See Case No. 14,917.

Case No. 3,569.

DA PONTE v. LOUISIANA STATE LOTTERY CO.

[1 La. Law J. 184.]

Circuit Court, D. Louisiana. June 8, 1876.

CORPORATIONS—ULTRA VIRES CONTRACTS—RIGHTS OF STOCKHOLDERS—ACQUIESCENCE — WHO ARE STOCKHOLDERS.

[1. One purchasing shares of stock standing on the corporate books in the name of a third person, who holds them as security for a debt due from the seller, and, without obtaining any transfer, certificate, or other evidence of title, immediately pledges the stock to such third person, who continues to holds it, is not in a position to maintain a suit to enjoin the corporation from carrying out an alleged illegal contract.]

[2. It was not unlawful for the original directors of the Louisiana Lottery Company, who were its incorporators, and at the time the owners of all its stock, to make a contract in its behalf granting to certain individuals the right to exercise for 24 out of 25 years (the term of the charter) all the lottery rights, privileges, and franchises belonging to the company, and retaining merely a right to share in the profits and superintend the drawings.]

[3. A contract made by a corporation cannot be attacked as unauthorized, by a stockholder whose stock was derived from persons who had long acquiesced in such contract, and received profits thereunder.]

Eustis & Lazarus, for complainant.
John A. Campbell, for defendant.

BILLINGS, District Judge, sitting in the place of WOODS, Circuit Judge, rendered the following decision:

This is a motion for an injunction founded on a bill and affidavits, and resisted by counter affidavits. The complainant [Henry Da Ponte] claims to have acquired sixty shares of the stock of the Louisiana State Lottery Company in March, 1876. The stock which he claims to have acquired, stands in the name of T. S. Serrell on the books of the corporation. The plaintiff's name is not on the books of the corporation, nor is the name of his father, Durant Da Ponte, who claims to have sold the stock to the son, in March, 1876, for his note for the sum of $4,663, payable in March, 1877, nor is there any separation of any sixty shares of stock. Serrell was a creditor of the father, and held as security for the payment of the father's debt, 400 shares of stock, all of which stood on the books in the name of Serrell. The son gives his father the note above described, and the son executes to Serrell an act of pledge, whereby the son pledges sixty shares, gives Serrell the power to sell the same in case a note for $4,565.80, described above, is not paid, and authorizes Serrell to transfer the same upon the books of the company in case of foreclosure of the pledge. Indorsed upon this act of pledge thus executed by the complainant, is the following: "The undersigned, T. S. Serrell, hereby accepts said pledge and acknowledges to have received said property pledged by said pledgor. T. S. Serrell."

It is to be observed that the son has no certificate of shares, no transfer upon the books of any shares, and no power to transfer given in blank or otherwise, as is customary in case of pledge. The only proper title is from himself to Serrell, and the sixty shares in a parcel of four hundred shares not separated or separable therefrom. What sixty shares were sold no one has attempted to indicate, nor what stock was pledged, save only that both father and son have testified that there was a sale of sixty shares. Without criticising the conflict between the statements of the bill and the proofs, and without any imputation upon either the father or the son, I am unable to conclude that the complainant is competent to maintain the title he has set out. The plaintiff, to maintain this suit, must be a bona fide shareholder, and sue bona fide for the company. In case of corporations, any member may sue, but he must be a full and complete member for all purposes, and not simply a person having an inchoate right. Green, Ultra Vires, 588, 589. In this case the plaintiff nowhere appears on the books of the corporation. No transfer has been made to him on the books, nor has he any assignment of the certificate, —the certificate which must, according to the by-laws of the company, disclose that T. S. Serrell is the owner of sixty shares of stock (if there be any collection of such shares separate from that of the 400), and that it is only transferable upon the surrender and cancellation of the certificate, and which contains no mention of the complainant. Addison, in his work on Contracts (7th Ed., p. 998), says: "So, if he has never been a shareholder at all, and there never has been any privity between him and the company, but he has simply purchased shares in the name of another person, who has been accepted as a shareholder," he cannot be made a contributory. King's Case, 6 Ch. App. 196.

The solicitors for the complainant concede that there must be a transfer on the books to entitle a member to vote. I think it follows that, if he cannot vote, he cannot attend corporate meetings and deliberate on the corporation business. Ang. & A. Corp. §§ 101–113. Neither can the holder of shares, who has been admitted to register, escape the lien which the corporation may have for debts due to it. Ang. & A. In 2 Barb. 294, 298, a trustee without interest—a vendor who had sold but had not transferred—was convicted of a liability to pay. The principle is stated with great exactness, in 4 Eng. Law & Eq. 34, 14 Beav. 64. The court held that between the seller and buyer of shares there were relations of contract, and there might be a trustee or a cestui que trust; but, in the absence of any contract with the company, there were no relations between the company and the purchaser; that the company had no claim on him, and retained all of its claim on the registered owner. 36 Eng. Law & Eq. 126; Ang. & A. Corp. § 534.

The bill says that the complainant is an onwer of stock encumbered with a charge of three-quarters of its par value for money borrowed by him from the person who is named as the stockholder. The plaintiff has certainly nothing better than a contract to convey upon the payment of his note one year hence. He has no certificate, no deed of conveyance, no transfer on the books, no power to transfer, no evidence of title, and no shares set apart to him. I conclude he has no standing in court for the purpose of rectifying the affairs of this corporation.

Passing the question of the right of the plaintiff to complain, I come to that of which he complains. The gravamen of his bill is that the contract of 1868 is illegal, and therefore he asks to enjoin its further execution or the further conduct of the business of the corporation under it. The contract, on the first part, consists of the president, directors and corporators, and that without an exception and prior to the issuance of any stock. The parties by the act itself are made corporators and directors; their powers are, inter alia "to do any lawful act, such as any person or persons may do for defence, interest or safety." The board may exercise all the corporate powers granted. By the terms of the contract under this charter the contractors were empowered to exercise for twenty-four out of twenty-five years (the term of the charter) all the lottery rights, privileges and franchises. Nine persons agreed for this period to conduct and carry on this business and share the profits with the corporation. The payment of the prizes is secured and the company superintends the drawing. It will be observed there is no interdict upon the corporation to make such a contract. Neither the Civil Code of the state, nor the statutes relative to corporations, nor this particular statute, place any restraint upon the corporation to make any contract which an individual might make.

The object of a corporation is, by the union of persons, to promote a useful or profitable enterprise. Civ. Code, 428. Nearly every form of union is permitted by the Revised Statutes (sections 683, 677). The only motive for asking this special act of incorporation was to obtain a modification of the laws relative to lotteries. By the constitution of 1852 the legislature had been prohibited from authorizing lotteries at all. This prohibition was omitted in the constitution of 1868, but prohibitory laws still remained. These laws, by this act, were repealed, and a power was granted to seven persons, their heirs, executors and assigns, who were constituted and declared to be a corporation, and were endowed with the sole and exclusive privilege of authorizing and establishing lotteries or a series of lotteries, and selling and disposing of lottery tickets, etc. The terms of this grant are very frank. They may establish—they may authorize—a series of lotteries; that is, they may constitute, construct, arrange, conduct, accomplish; they may empower, allow or permit, sanction, license, confer a right to a lottery or series of lotteries. The Civil Code defines in article 433 the powers of corporations, and in that article there is no expression of jealousy with respect to corporate unions. It is acknowledged that their business must be performed by others, and that these others have their authority from the corporation, and that the corporation may exercise full discretion in determining their powers. Civ. Code, 438, 439. The agreement in this case was made by the president and directors with the full assent of all the corporators,—no dissenting voice. These articles of the Code enter into the constitution of all private corporations. State v. New Orleans Gaslight & Banking Co., 2 Rob. (La.) 529.

The principle upon which the court of chancery acts is not to interfere between members of companies for the purpose of enforcing duties arising out of matters which are properly the subjects of internal regulation. It will not interfere to control a majority, unless it sees that the majority has been or is doing, or is about to do, that which is illegal even for a majority to do. It follows from this that the court will not interfere in matters of internal management until all reasonable attempts have been made to take the sense of the general body on the matter in question, nor unless it is then called upon to interfere, either by a majority to control a factious minority, or by the minority to control a majority which declines to do that which it is legally bound to do. Lindl. Partn. 754, side page. The Civil Code establishes the majority principle by a distinct provision. Civ. Code, 444. When the contract was made there was not only a majority but entire unanimity in the corporation, and among the president and directors assenting to it. It was the act of every party concerned in the charter. Since 1868 it has been enforced and not infringed. The rule undoubtedly is that illegal acts, though sanctioned by the majorty, and even if approved by all except one, will not be approved, but will be set aside by courts. But here I think this contract not at all opposed to the purposes of the act of incorporation, and within the powers of the corporators, and approved of and participated in by the corporators, one and all, and therefore I find the contract valid and operative upon all the shareholders, for they all derive their shares from some one who, when clothed with ownership, assented to it.

It was urged that the corporation could not farm out its business, because it was vested with power to enforce the prohibitions of its charter by the recovery of penalties. But the corporation still acts. It is still quickened by self-interest to recover the penalties, to enforce the law, and all this

the same as if there had been no contract.

In the case of Wood v. Howard,[1] Mr. Justice Bradley passed upon the legality and validity of this contract. In that case the claim of Wood was rejected because he had assigned his interest by a deed of trust, but before coming to that conclusion the learned justice takes up the question of this contract and says: "The Louisiana charter does not indicate any special trust or confidence with corporators therein named. They are merely made directors of the corporation for two years. After that, directors are to be elected by the stockholders; and the stock is transferable like any other stock. The body of stockholders is, or at least may be, for aught anything in the charter, a floating body of persons,—consisting of the first subscribers to the stock and their successors and assigns. The stock is divided into 10,000 shares of $100 each. It is the corporation, not any special set of corporators, directors or stockholders, which sustains any particular relations to the state, and the state has provided the proper security for the faithful action of the corporation, by requiring it to furnish heavy bonds for the prompt payment of the dues to the state, to wit, the $40,000 per annum, payable quarterly in advance. A monopoly of the lottery business is given to the corporation, and a violation of that monopoly subjects the party to a penalty of $5,000 for each offence, payable, not to the state, but to the corporation. The only benefit the act professes to secure to the state is the advantage of a 'home institution,' so that the money paid for the sale of lottery tickets shall not go out of the state, and the annual tax of $40,000. For the rest, the directors may establish such and so many agencies as they see fit. There is nothing in the charter to prevent the company from farming out its agencies in such manner as it has done to the defendants, or in any other manner it may see fit. And hence, there is nothing therein to prevent the substantial benefit of the franchises from being acquired and held, and lawfully acquired and held, by the defendants, as they have acquired it by the contract, or by any other body of capitalists." I think his reasoning conclusive.

There is still another impediment which, it seems to me, stands in the way of complainant's bill. It is the acquiescence on the part of those under whom he claims to derive his title in this contract, and their continued appropriation of its fruits. It has been often held that a consenting shareholder cannot maintain a suit on the ground that the thing done by the corporation was unwarranted. 1 Daniell, Ch. Pr. 452, or 244, 245 (4th Ed.); 4 De Gex & J. 125. In such a case it is as if the plaintiff had granted a release. Now, in this case, for eight years this contract has formed the basis of all of the transactions of this company. Every successive shareholder (including the plaintiff's vendor) has assented to it, and availed himself of it, and it commenced, originally, upon the consent of the whole of the corporate body. No stockholder can now repudiate it as not authorized and not warranted. Kerr, Fraud & M. 298-301. Let the interlocutory injunction be denied.

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

Case No. 3,570.

In re DARBY.

[4 N. B. R. 309 (Quarto. 98); 4 N. B. R. 211 (Quarto, 61); 18 Pittsb. Leg. J. 154.][1]

District Court, E. D. Missouri. 1873.

BANKRUPTCY — SETTLEMENT OF ESTATE BY TRUSTEES.

Although the winding up and settlement of the estate are to be deemed proceedings in bankruptcy under the 43d section of the bankrupt act of 1867 [14 Stat. 538], which contemplates the superseding of proceedings under the act, and, in given contingencies, the "resumption" of such proceedings, yet it is evident that the true meaning is the substitution of the modes prescribed in this section for the ordinary modes. Such proceedings are none the less "proceedings in bankruptcy" under the act because they are special in their nature. Either mode can be adopted, the ordinary one or this special one. The trustees, under direction of the committee, can wind up the estate just as the bankrupt could have done, or they may be restricted to the more limited powers and duties of ordinary assignees.

[Cited in Re Bakewell, Case No. 788; Re Trowbridge, Id. 14,191; Re Cooke, Id. 3,172.]

The questions submitted to the court involve the course of proceedings under section 43 of the bankrupt act, the terms of which are very obscure. The general purport of said section seems to be, to substitute trustees "under the inspection and direction of a committee of the creditors" for the ordinary machinery provided by the act, and on their appointment, confirmation, etc., to cause said ordinary proceedings to be "superseded." Provision is made for "resuming the proceedings" in certain contingencies, and for the discharge of the bankrupt as if the ordinary course has been pursued. The trustees "have and hold" all the bankrupt's property and estate "in the same manner and with same power and rights in all respects as the bankrupt would have had or held the same if no proceedings in bankruptcy had been taken, or as the assignee would have done had such resolution (of the creditors) not been passed. * * * And the court, by order, shall direct all acts and things needful to be done to carry into effect such resolution of the creditors," which resolution is "that the estate of the bankrupt should be wound up and settled, and distribution made among

[1] [Reprinted from 4 N. B. R. 309 (Quarto, 98), by permission. 4 N. B. R. 211 (Quarto, 61), and 18 Pittsb. Leg. J. 154, contain only partial reports.]

the creditors by trustees, under the inspection and direction of a committee of the creditors." The act then provides that "said trustees shall proceed to wind up and settle the estate under the direction and inspection of such committee of the creditors for the equal benefit of all such creditors." Resting on those provisions alone, it would seem to be the duty of the trustees, under said inspection and direction, subject to the orders of the court, to proceed to wind up the estate just as the bankrupt himself could have done if no proceedings in bankruptcy had been had; distributing the proceeds, however, equally among the creditors, or as the assignee would have done if such resolution had not been passed. These are alternative modes; yet the section proceeds: "And the winding up or settlement of any estate under the provisions of this section shall be deemed to be proceedings in bankruptcy under this act; and the said trustees shall have all the rights and powers of assignees in bankruptcy." Is the last clause cited a limitation on the powers of the trustees? Are they clothed merely with the powers of the assignees? If so, wherein has the section any substantive force? If the substitution of trustees to act under the direction of a committee works only a change of name, what necessity for a committee, and what its legal functions? An assignee acting under the direction of the court has prescribed duties to perform without the intervention of a committee, and cannot adjudicate upon claims against an estate. The trustees are to act under the direction of a committee, and, although they are subject to the orders of the court, must all claims be first heard and allowed by a register? Are their functions confined merely to the management, sale, or disposal of the estate, without reference to what claims there may be against it, further than those claims are established in the ordinary mode before the register? Although "the winding up and settlement of estates" are to "be deemed proceedings in bankruptcy," and the section contemplates the "superseding" of proceedings under the act, and, in given contingencies, the "resumption" of such proceedings; yet it is evident that the true meaning is the substitution of the modes prescribed in this section for the ordinary modes. Such proceedings are none the less "proceedings in bankruptcy under the act" because they are special in their nature. Either mode can be adopted, the ordinary one or this special one. If the special mode be chosen, either of the alternative courses named can be pursued, as the court may order; viz., the trustees under the direction of the committee, can wind up the estate just as the bankrupt could have done if he had not gone into bankruptcy, exercising all his rights, powers, and duties over the whole estate, for the purpose of collecting dues, disposing of property, compromising, allowing demands, etc., subject only to the necessity of an equal distribution of assets among creditors; or, they may be restricted to the more limited powers and duties of ordinary assignees. If they act under the broader or more general powers, it is obvious that they will often need the interposition of the court in various ways, such as compelling the attendance of witnesses, causing examinations to be had under oath, etc., for they are not clothed with "judicial" authority. "The court * * * shall have power to summon and examine on oath or otherwise, etc., in the same manner as in other proceedings in bankruptcy under this act;" that power is vested solely in the court, not in the trustees. Hence, when such interposition is needed, the trustees must apply to the court therefor. The powers of the "court" in such cases, are exercised, not necessarily in all instances, by the judge of the court personally, but often by the register, under his direction, on special or general reference to him. It is not necessary to attempt here an accurate statement of all questions cognizable before the register without a special order of the judge in the first instance, because the points submitted require no such statement. Applications can be made to the judge in all doubtful matters, and he can make such orders as such application may demand. In the case under consideration, the original order of this court was not so full and explicit as is desirable. The ordinary course was originally taken in this case, but subsequently, under an order of the court, a special meeting was called to determine whether the creditors would elect to have the estate "wound up" under section 43. At that special meeting, the desired action having been had, and the necessary course thereunder having been pursued and the proper transfer made by the assignee to the trustee, the order of the court should have determined in what manner the trustees were to act, whether with the limited powers of assignees, or the broader powers stated. This was more important, inasmuch as many demands had previously been proved before the register, and most of the creditors had voted at the election of the assignee.

TREAT, District Judge. Under section 43 the trustees, under direction of the committee, may, if so ordered by the court, proceed to settle the estate just as if there had been no adjudication of bankruptcy and the bankrupt was managing his own affairs, taking care always to secure legal protection to each of the creditors. If, under such a general order, the interposition of the court is needed for the examination of witnesses under oath, etc., application therefor may be made to the judge or register, and, if made to the judge, he, on granting the same, will order the examination to be had before the register or otherwise. In other words, whenever the trustees and committee are satisfied that demands are correct, and need no testimony to be taken, they can allow the same. When

they are not satisfied, the demand should be proved before the register on notice to the trustees. All demands not allowed already should be presented to the trustees for allowance in the first instance, and, if allowed by them, no further action need be had; but, if the trustees demand proof, they can apply to the register or judge for an order to have testimony taken with respect thereto before the register or otherwise, and for the claims to be passéd upon by the register. The trustees can proceed in all cases and in all matters, if the court so orders, just as the bankrupt could have done if he had not gone into bankruptcy, and, consequently, if they cannot dispose of a matter before them without "judicial" investigation, they must have the action of the register or judge. This follows from the fact that the trustees have no judicial authority, and that, when such authority is needed, they must resort to it just as the bankrupt would have been compelled to do if no proceedings in bankruptcy had been instituted.

The court has heretofore granted orders for examination of witnesses, stating that the testimony must be taken before some one competent to swear the witnesses; said testimony having the force of ordinary depositions when properly reduced to writing. The trustees have no power to administer oaths. All disputed demands will hereafter be referred to the register, and when the trustees need ordinary orders concerning the taking of testimony, etc., they can apply to him therefor. Where no action strictly judicial is needed, they will, under a general order to be now entered, proceed with all the matters committed to them as fully as the bankrupt could have done, if he had made no application in bankruptcy. Thus, under section 43, the estate can be "wound up" by said trustees under the direction of the committee, without any interposition of the register or judge, further than resort to judicial action may from time to time require. The claim against the estate allowed by the register before the appointment of an assignee or of the trustees, if the trustees so elect, can, on notice to the respective claimants, be opened and passed upon anew by the register. It will not be necessary, except where the register has no power to act in the first instance, for the trustees to apply to the judge. When they are satisfied a demand is correct they can allow it. They can dispose of assets and settle the estate without special orders in each matter before them; keep their own accounts and records of their proceedings; have the aid of the register or judge when needed, and finally have their actions ultimately closed by the formal decree of the court. The register will hereafter allow no claims except such as are disputed, or are submitted to him for decision by the trustees. As the original notice to the creditors required them to prove their demands before the register, and formal proofs thereof may, in many instances, still be sent to him, he should not pass on them without notice to the trustees. The latter should give such notice to the creditors as will cause further demands to be presented to them, in the first instance, and thus avoid unnecessary delay and costs.

In accordance with the views above stated the court now makes the following order: Whereas, Andrew Park and John K. Tiffany have been duly elected trustees of the estate of John F. Darby, bankrupt, under section 43 of the bankrupt act, and this court has heretofore confirmed the resolution of the creditors and their selection of trustees, it is ordered that said trustees have and hold the estate of said bankrupt in the same manner and with the same powers and rights, in all respects, as the bankrupt would have had or held the same if no proceedings in bankruptcy had been taken; and that said trustees proceeded to wind up and settle said estate under the direction and inspection of the committee of creditors appointed therefor, for the equal benefit of all the creditors of said estate; and also do all and singular which by law and this order they may lawfully do to carry into effect the resolution of said creditors.

Case No. 3,571.

DARBY v. BOATMAN'S SAV. INST.

[1 Dill. 141;[1] 4 N. B. R. 600 (Quarto, 195); 3 Chi. Leg. News, 249; 4 Am. Law T. 117; 1 Leg. Op. 146; 1 Am. Law T. Rep. Bankr. 251.]

Circuit Court, D. Missouri. 1870.[2]

BANKRUPTCY—LOANS TO INSOLVENTS—USURY—EQUITY JURISDICTION.

1. The bankrupt act does not prohibit a person from loaning money at legal rates to one whom he has reason to believe to be insolvent, and taking security for such loan, provided it be made bona fide and without any intent, or participation in any intent, to defraud creditors or defeat the bankrupt act.

[Cited in Gaffney v. Signaigo, Case No. 5,169; Bean v. Brookmire, Id. 1,169; Babbitt v. Walbrun, Id. 695; Lewis v. Clarendon, Id. 8,320; Clark v. Hezekiah, 24 Fed. 667.]

[See note at end of case.]

2. Advances made in good faith to an indebted person, to enable him to carry on his business, upon security taken at the time, do not violate either the terms or policy of the bankrupt act, since the debtor gets a present equivalent for the new debt he creates and the security he gives.

[Cited in Darby v. Lucas, Case No. 3,573; Re Coulter, Id. 3,276; Re Union Pac. R. Co., Id. 14,376; Crocker v. First Nat. Bank, Id. 3,397.]

[See note at end of case.]

3. Where the charter of a bank prohibited it from taking greater than a specified rate of interest, but was silent as to the effect or penalty if more than the charter rate be taken, it was *held* that if an illegal rate be contracted for,

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

[2] [Reversed in Tiffany v. Boatman's Inst., 18 Wall. (85 U. S.) 375.]

the effect was not to render the whole note void, but only the excess beyond the legal rate, and that, at all events, if such a note be voluntarily paid, neither the borrower nor his assignee in bankruptcy can recover back the principal sum, or any thing more than the excess beyond the legal rate of interest.

[Cited in Re Pittock, Case No. 11,189; Markson v. First Nat. Bank, Id. 9,097.]

[See note at end of case.]

4. Equity will entertain a bill to recover such excess: the remedy is not exclusively at law.

The complainants are trustees, under the 43d section of the bankrupt act of 1867 [14 Stat. 538], of John F. Darby, who was decreed a bankrupt on the 2d day of July, 1869. After stating that Darby was decreed a bankrupt, and Park and Tiffany appointed his trustees, the bill avers that Darby had for a long time prior to October, 1868, been doing an unprofitable business as a private banker, which defendant well knew. That being largely indebted, he had been in the constant habit of making and issuing his promissory and negotiable notes in sums of from $2,000 to $5,000, bearing interest on their face; that they were constantly placed in the hands of street brokers and sold or shaved at a heavy discount thereon for a commission paid by Darby, which defendant knew. That Darby's real estate was all fully incumbered and the incumbrances recorded, and of which defendants had notice. That on or about the 14th of October, 1868, defendants, knowing that Darby was acting in contemplation of insolvency, and that his course of business must inevitably render him bankrupt, conspiring together for their own benefit, and intending to enrich themselves at the expense of Darby and his creditors, and conspiring with Darby himself to "gain and maintain for him an unreal, false and fictitious credit," and in fraud of his creditors, and designing, etc., to defeat the bankrupt law, did, being limited by its charter to eight per cent., agree to lend, and did lend to said Darby $128,137.50 and receive therefor his note for $135,000, dated 14th October, 1868, bearing ten per cent. interest after maturity, and payable six months after date; on the face of this note was written, "One hundred and fifty, seven per cent. jail bonds, $1,000 each, as collateral to this note, are deposited in the Bank of America, New York," and on the back of it were certain memoranda of payments beginning 5th March, 1869, and ending June 3d, 1869, extinguishing the note and ten per cent. That the note was utterly void and fraudulent. When it became due, defendant fraudulently extended it, knowing, etc., that they allowed him to sell and dispose of the said bonds within four months of his bankruptcy, knowing, etc., and received the proceeds thereof from him in payment of said note. That the defendant well knowing, etc., refused to discount certain other notes of Darby indorsed by responsible persons, but did purchase from street brokers the following, namely: Two notes, each indorsed by Marshall Brotherton, dated 21st September, 1868, and at five and six months respectively, each for $5,000; three notes dated about 3d, 7th, and 27th of November, 1868, payable three months, sixty days, and six months after date, for $5,000 each, indorsed by S. Knox. Defendant knew that these notes were indorsed for the mere accommodation of Darby, and sold by note brokers at usurious and illegal rates, as high as from twelve to fifteen per cent., and contrary to their charter. That all such notes were void. That afterwards, having reasonable cause to believe Darby to be acting in contemplation of bankruptcy, defendants received the amount of said notes at maturity from said Darby. Defendants also bought another note, dated 6th February, 1869, at sixty days, for $5,000, indorsed by Brotherton, and received the amount at maturity. Plaintiffs charge that defendants had reasonable cause to believe at the time of the negotiation of said notes that Darby was insolvent and acting in contemplation of insolvency; that the course and tendency of his business must lead to ruin; that the mode of selling his paper was not the usual one; that all his real estate was largely encumbered. That notes taken from Darby were void ab initio. That for the purpose of acquiring a fictitious credit Darby bid for the jail bonds of St. Louis county more than their market value; that at the time he had no funds, etc., and applied to the National Bank of the State of Missouri to loan him the money; the bank lent him the money. Darby lost large sums by the purchase, and was indebted therefor to the bank, and being unable to pay, applied to the defendants to lend him $128,137.50 and to discount his note for $135,000, to enable him to discharge in part, at least, his said indebtedness to the bank, and not for the purpose of his ordinary and legitimate business; all of which defendant well knew, and conspired with Darby to maintain for him his said fictitious credit, and to defeat the provisions of said act, and discounted the said note in furtherance of said plan. Said bonds had never been in Darby's possession, but had been delivered to the bank; purchasing them had been noised about in the public prints, with the intent, etc., but had been bought by said Darby and paid for by said national bank. That they never were in good faith absolutely delivered to defendant, but that defendants, upon the delivery of the bonds, made an arrangement with Darby that he might at any time sell the same, and dispose thereof before or after the maturity of the note for $135,000, applying proceeds to the payment of the note; permitted Darby to deal with the bonds and coupons as his own property, and not as held and pledged to defendants; and allowing him to be considered as the absolute owner, thereby giving him a false and fictitious credit, "necessarily productive of loss to Darby and his creditors," in fraud of

the bankrupt act. All of which was done to prevent the property of Darby from being distributed under the bankrupt law. Wherefore plaintiff "ought in equity and in accordance with the terms of said act, to recover of said defendants all the said sums of money to them paid by the said Darby in fraud of said act and in payment of said fraudulent and void notes," and the prayer is for a decree to that end. A general demurrer to the bill is filed, on which the questions decided arise.

Glover & Shepley and Samuel Knox, for complainant.

Thos. T. Gannt and Lackland, Martin & Lackland, for defendant.

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

DILLON, Circuit Judge. This is a bill in equity by the trustees in bankruptcy of John F. Darby, to recover from the defendants the sum of $165,000, to which, for the reasons stated in the bill, the trustees claim to be entitled. The facts set forth in the bill are numerous, and several transactions are detailed. The questions presented may be best treated by first stating some principles of law which underlie this controversy, and then by applying these principles to the case made by the bill.

There is no provision of the bankrupt law which prohibits a person from loaning money to, or discounting at legal rates, the note of a person whom he has reason to believe to be insolvent, provided the former makes such a loan or discount bona fide, and without any intent or participation in any intent or scheme to defraud creditors or defeat the bankrupt act. As such loans may be lawfully made, so security therefor may be lawfully taken. The distinction is here: the act under the circumstances stated in the bill does prohibit a debtor from giving, or a creditor from receiving, security for a pre-existing debt, thereby obtaining a preference which it is one of the chief purposes of the law to prevent. So the bankrupt act prohibits an insolvent person from making any conveyance or disposition of his property to those not creditors which shall work a fraud upon creditors and upon the act. Sections 14, 35, 39; Bean v. Brookmire [Case No. 1,168]. The cardinal idea is that all the property of a person in Darby's situation ought to be appropriated for the equal and indiscriminating benefit of all his creditors; and therefore, he can neither fraudulently diminish the amount of his assets, nor give one creditor or class a preference over others, since such preferences are stamped by the inexorable policy of the enactment as void. But an insolvent person may properly make efforts to extricate himself from his embarrassments, and therefore he may borrow money and give at the time security therefor, provided always the transaction be free from fraud in fact and upon the bankrupt act. And hence it is a settled principle of bankrupt law, both in England and in this country, that advances made in good faith to a debtor to carry on business, upon security taken at the time, do not violate either the terms or policy of the bankrupt act. This is manifestly right, since the power to raise ready money may save the party from bankruptcy and ruin, and since his creditors are not injured nor his estate impaired, because he gets a present equivalent for the debt he creates and the security he gives. To this effect are all the authorities. Deac. Bankr. 68, 69, 75, and cases cited; Shelf. Bankr. 146; Hill. Bankr. c. 10, p. 333, § 16; Hutten v. Cruttwell, 1 El. & Bl. 15; Harris v. Rickett, 4 Hurl. & N. 1; Bittlestone v. Cooke, 6 El. & Bl. 296; Lee v. Hart, 34 Eng. Law & Eq. 569; Ex parte Shouse [Case No. 12,815]; Bell v. Simpson, 2 Hurl. & N. 410; Hunt v. Mortimer, 10 Barn. & C. 44; Wadsworth v. Tyler [Case No. 17,032]; Bankrupt Act, § 14, second proviso; Id. § 20; In re Wynne [Case No. 18,117].

If, therefore, the advances made under the circumstances set forth by the defendants to Darby contemporaneously with the receiving of the securities had been at legal or authorized rates, they would have been valid; and the transaction not being forbidden by the bankrupt act, the security received could be enforced by law, and if so, then Darby could lawfully pay such advances out of the proceeds of the securities which he had pledged. What the law will compel one to do may be legally done by him without such compulsion.

The bill does not charge that the money was borrowed by Darby fraudulently to put it beyond the reach of creditors, but to enable him to pay a debt to the National Bank of the State of Missouri, from which he had originally borrowed the money to pay for the jail bonds, and which then had them in pledge; and there is nothing shown to invalidate the debt or security to the national bank, and the effect of the loan made by the defendants was simply to substitute them in the place of that bank, and did not work any fraud upon the creditors of Darby. The intent to defeat the bankrupt act charged in the bill is based upon the assumption that the loans and advances to Darby are void because made at illegal rates, and not upon the ground that Darby intended to conceal his property or to prefer or otherwise defraud his creditors. Having thus settled that if the loan had been at authorized rates it would not under the facts charged have been in violation of the bankrupt act, we next proceed to inquire into the effect of receiving and taking interest in excess of such rates.

The complainant's fundamental proposition is, that although the defendant actually paid Darby $128,137.50 in cash for the note of $135,000, secured by a concurrent pledge of the jail bonds as collateral, yet since the loan was made at more than eight per cent., the transaction was, to use the clear language

of the complainant's counsel, "without any authority in the charter, was ultra vires and void, created no debt in favor of the defendants, imposed no legal liability on Darby, and hence no payments could be legally made upon it; if made, were without consideration, and in fraud of the right of creditors."

The charter of the defendant granted by the state of Missouri contains this provision: "The said institution shall be authorized to loan the money deposited with her at any rate of interest not exceeding eight per cent. per annum, any law to the contrary notwithstanding." Section 14. The charter is silent respecting the effect or penalty if more than the prescribed rate of interest be taken. By the general usury laws of the state, money may be loaned at a rate not exceeding ten per cent., but if the law is violated the contract is not wholly void, as the plaintiff can recover for himself the principal sum; and the defendant is also compelled to pay legal interest for the use of the school fund, and usurious interest voluntarily paid is not under this statute recoverable back by the borrower from the usurer. Ransom v. Hays, 39 Mo. 445.

The complainant's counsel disclaim all rights grounded upon the general usury laws, since the bill is not, as they say, intended to enforce them, and is not one to recover back usury. They plant themselves wholly upon the provision in the charter above mentioned restricting the defendants to interest not exceeding the specified rate; and the argument is, as above stated, that if this provision be violated the loan is ultra vires and void. The rate of some of the loans set out in the bill exceeded not only eight, but ten per cent., and the question is, what is the effect of this violation of the law?

In our opinion the defendant, if more than ten per cent. be taken, is within the operation of the usury laws of the state, if the debtor chooses to plead them. Rev. St. 1865, p. 83, § 4. And see State v. Boatmen's Sav. Inst.,—quo warranto case,—MS. Sup. Ct. Mo. [48 Mo. 189]. If so, the effect is that under those laws it would lose its right to recover any but the principal sum, but the debt having been paid, the usurious interest could not have been recovered back by Darby had he not been put in bankruptcy, nor can it in this state be recovered by his assignees, much less could he or they recover back the principal sum. Ransom v. Hays, 39 Mo. 445. But suppose that the charter alone applies to the transaction, what is the effect upon it? The charter itself is silent on this subject. Upon the best consideration we have been able to give to the matter, our conclusion is that the effect of taking more than the specified rate of interest on loans, is not to avoid the whole note—to nullify the transaction—to forfeit the entire debt or sum loaned, but only the excess over the charter limit, so that the note, as to the principal sum at least, if not the principal sum and eight per cent. interest, was valid, the security taken therefor valid, and so could be enforced, and the bonds sold against Darby's will, and hence could be lawfully sold by him, with defendants' consent, and the proceeds paid on the debt they were pledged to secure. This is a case where the line which separates that which is authorized from that which is prohibited, is plainly drawn, and the division easily made, and hence there is no necessity, in order to enforce the prohibition or to secure its policy, to sacrifice the good that the bad may be destroyed. In contracts usurious under the state law, the same division is constantly made; the plaintiff recovers that which is not prohibited, and loses his right to that which is. If we look at the legislative history of banking and similar corporations in the state, we find no such severe policy declared as that, if more than a given rate of interest be taken, the whole sum loaned shall be forfeited, but quite the contrary.

The power of the defendant to make loans is expressly conferred, and therefore exists; the limitation is only as to the rate. Up to the limitation line all is good; beyond that, bad. And such is the general, though not quite uniform, doctrine of the authorities. Harris v. Runnells, 12 How. [53 U. S.] 78; Bank of U. S. v. Fleckner, 8 Wheat. [21 U. S.] 338 (to which the court "deliberately adhered" in Bank of U. S. v. Waggoner, 9 Pet. [34 U. S.] 378); Farmers' Bank v. Burchard, 33 Vt. 346, and cases cited; Commercial Bank v. Nolan, 7 How. (Miss.) 508; Rock River Bank v. Sherwood, 10 Wis. 230; National Exch. Bank v. Moore [Case No. 10,041]; Lyon v. State Bank, 1 Stew. (Ala.) 468; Grand Gulf Bank v. Archer, 8 Smedes & M. 151; McLean v. Lafayette Bank [Case No. 8,888]. This last case contains a highly interesting discussion of the subject by Judge McLean, whose views have our approval. Before leaving this point it should be observed that we have not overlooked the case of Bank of U. S. v. Owens, 2 Pet. [27 U. S.] 557, but upon examination of the other cases referred to in the same court, it is quite clear that its doctrine is modified, but if not, it has no rightful application to a case where, as in the one now under consideration, the illegal contract is not, as in that case, sought to be enforced, but where having been performed, the money voluntarily paid under it is sought to be recovered back. If, as shown above, the loan was not a fraud in fact or upon the bankrupt law, Darby's trustees have no more right to recover back the money which Darby voluntarily paid, because paid in violation of the charter, than Darby himself would have had if he were not in bankruptcy. Suppose, for the argument, however, that the note was void because the charter rate was exceeded, does it then follow that the bill to recover back the whole sum received will lie? This bill is in equity, and the rule is well settled that

under statutes which declared contracts affected with usury utterly null and void, equity would only relieve against them on condition that the borrower should tender or pay the sum actually lent, and lawful interest; and if paid, neither at law nor in equity could he recover back anything more than the excess beyond principal and lawful interest, unless the action be expressly given. 1 Story, Eq. Jur. 301, 302; Spain v. Hamilton's Adm'r, 1 Wall. [68 U. S.] 604. The analogy is good here, and Darby having received the defendant's money and paid it, there is no equity whatever to recover back any part of it except the excess beyond the principal and the eight per cent. interest. In equity, if not at law, there was a debt for the amount borrowed, and a right to the security of the bonds pledged. The debt was paid out of the securities, and if the pledging of the securities was valid, as we have seen it was, the defendant had the right to make its debt out of the securities, notwithstanding its officers knew when they received payment that Darby was insolvent. So that the question of the defendants' liability turns upon the point first discussed, to-wit: whether the bankrupt act was violated by the loans to Darby, and the taking of the securities from him by the defendants under the circumstances set forth in the bill, and that question we have felt constrained to resolve against the complainants.

Counsel concede that the other transactions mentioned in the bill involve the same principles, and it is unnecessary to notice them specially.

In view of the charter restriction and its policy, the parties were not in pari delicto, and as to the excess above the principal and eight per cent. interest, we think, under the facts charged in the bill, there is liability, at least to some extent, on the part of the defendants, and the authorities show that relief may, in proper cases, be had in equity, and that the remedy is not exclusively at law. Indeed, the original remedy in such cases was given in equity. Fonbl. Eq. bk. 1, c. 4, § 7; Story, Eq. Jur. § 302; Id. §§ 64, 81; Browning v. Morris, Cowp. 790; Mare v. Sandford, 1 Giff. 288, 295; Atkinson v. Denby, 6 Hurl. & N. 778; Id., 7 Hurl. & N. 934. As to the $135,000 transaction, certainly this liability is not affected by reason of the non-liability under the usury statute of the state for usurious interest voluntarily paid, for that statute does not apply to this transaction.

For the reasons above stated, the demurrer to the bill must be overruled, and the bill may be retained to determine the liability of the defendant in respect to the illegal interest received. Demurrer overruled.

NOTE [from original report]. On appeal the supreme court affirmed the principles of the foregoing opinion, and the decree on all points, except that it directed "the circuit court to ascertain the excess of interest over the charter rate paid on the six accommodation notes, and to enlarge the decree so as to cover that sum." Tiffany v. Boatman's Inst., 18 Wall. [85 U. S.] 375. Compare [Farmers' Nat. Bank v. Dearing] 91 U. S. 35; [Bernhisel v. Firman] 22 Wall. [89 U. S.] 170.

Loans on Security in Good Faith to Insolvents not Prohibited by the Bankrupt Act. Followed, Babbitt v. Walbrun [Case No. 695]; In re Union Pac. R. Co. [Id. 14,376]; Bean v. Brookmire [Id. 1,169]; Gaffney v. Signaigo [Id. 5,169]; Darby v. Lucas [Id. 3,573]; In re Coulter [Id. 3,276]. Cited, Crocker v. First Nat. Bank [Id. 3,397].

Jurisdiction of Law and Equity Courts in Cases of Fraud Concurrent. Followed, Bean v. Brookmire [supra].

Contracts Respecting Interest Void as to Excess over Statutory Rate. Followed, Lewis v. Clarendon [Case No. 8,320]. Explained, In re Pittock [Id. 11,189].

Case No. 3,572.

DARBY v. LUCAS.

[5 N. B. R. 437.][1]

District Court, E. D. Missouri. Feb. 14, 1871.[2]

BANKRUPTCY—PREFERENCES—KNOWLEDGE OF CREDITOR.

A creditor who has reasonable cause to believe his debtor insolvent, and who receives payment of his debt or security, necessarily knows or has reasonable cause to believe that he is thereby obtaining a preference which is forbidden by law; but persons other than creditors dealing with an insolvent, even if they have reasonable cause to believe him insolvent, are not on the same footing, inasmuch as they do not necessarily enable the debtor to contravene the act, or defeat any of its requirements.

[See Alderdice v. State Bank of Virginia, Case No. 154.]

[See note at end of case.]

TREAT, District Judge. Under the provisions of the bankrupt act of 1867 [14 Stat. 517], on a correct exposition of which several cases depend, the ordinary dealings of men are not to be interrupted further than is necessary to secure equality among creditors, and honesty and lawful dealing by and with debtors. A creditor who has reasonable cause to believe his debtor insolvent, and who receives payment of his debt or security, necessarily knows or has reasonable cause to believe that he is thereby obtaining a preference which is forbidden by law. The fact that the debtor cannot pay all, and then pays some, works in itself the prohibited preference. Under such circumstances the debtor can ordinarily be forced into bankruptcy, and if not forced, it is his duty, unless all his creditors consent to indulge him, to apply for the benefit of the act. As soon as suit is brought by a creditor, if the debtor has no defence, he should apply to the bankrupt court, and thus have his creditors placed on a footing of equality. Hence a preference obtained through the voluntary action of a debtor, or by his passiveness, is a preference either procured or suffered by him. But persons other than creditors deal-

[1] [Reprinted by permission.]

[2] [Affirmed in Case No. 3,573.]

ing with an insolvent, even if they have reasonable cause to believe him insolvent, are not on the same footing, inasmuch as their purchases do not necessarily enable the debtor to contravene the act or defeat any of its requirements. The purchase money may furnish the needed means of extricating the debtor from his embarrassments, especially if he be engaged in a pursuit whereby insolvency is not determinable by the ultimate outcome, but by his ability to meet his liabilities as they mature in the ordinary course of business. Mr. Darby was a banker, and therefore would have been insolvent whenever his banking liabilities were not promptly met. It seems that they had been met up to the date of this sale of real estate, though by extraordinary shifts in borrowing, and that some of his real estate paper had been past due for some time. But it also seems that he had resorted to street brokers for ten or more years, and that he has had a reputation for wealth, as owning large landed interests. Some of this paper passed through the hands of street brokers into the possession of the savings institution of which the defendant was a director, and the cashier of that institution was the agent of Mr. Darby in negotiating the sales. It seems that the inference is as natural that the officers of the institution, though they may have thought him embarrassed, also deemed his paper good, as it would not have been bought, as that they believed it to be as uncertain or worthless. The sale of realty was not out of the usual course of business within the meaning of the bankrupt act, and therefore it is for the plaintiff to make out his case affirmatively. The fact that paper secured by a deed of trust is permitted to remain past due for a length of time, indicates either a virtual renewal of the loan, or consent given and does not therefore necessarily subject the debtor to the penalties of the act.

Without, however, analyzing the testimony in detail, or passing formally upon each of the many incidental points of law presented, it must suffice that this court holds that to void the deed it must be satisfactorily proved that the defendant had reasonable cause to believe: First, that Mr. Darby was insolvent or in contemplation of insolvency; and, second, that by the transaction Mr. Darby intended to contravene the bankrupt act. Now, if for the sake of argument, it were admitted that defendant knew Darby to be technically insolvent, still the second element would have to be proved, without which the highly penal provisions of sections 35 and 39 are not applicable. As it is clear to the mind of the court that the proof falls far short of making out the second element named, it is unnecessary to inquire particularly into the first. The court holds that under the second clause of section 35, in a case like that under consideration, the reasonable cause to believe each of the two elementary facts must be satisfactorily proved in order to void the deed.

[NOTE. The bill having been dismissed, pursuant to the above opinion, complainants appealed to the circuit court, where the decree was affirmed on substantially the same grounds. Case No. 3,573. Complainants then took an appeal to the supreme court, which in turn affirmed the judgment of the circuit court on like grounds. Tiffany v. Lucas, 15 Wall. (82 U. S.) 410.]

Case No. 3,573.

DARBY v. LUCAS.

[1 Dill. 164.][1]

Circuit Court, D. Missouri. 1870.[2]

BANKRUPTCY—FRAUDULENT CONVEYANCES.

1. To avoid a deed made by the bankrupt to a purchaser for value, it must be satisfactorily established that the latter had reasonable cause to believe that the vendor, in making the sale, intended to contravene the bankrupt act.

[Cited in Borland v. Phillips, Case No. 1,661.]

2. What will avoid a conveyance under the second clause of the 35th section of the bankrupt act of 1867 [14 Stat. 534] considered.

3. A debtor who is known, or believed to be embarrassed, is not disabled from making a fair and honest sale of his property with a view to keep out of bankruptcy.

[Cited in Re Union Pacific R. Co., Case No. 14,376.]

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

On the 24th day of April, 1869, John F. Darby, who was then, and for many years had been a private banker, made to defendant, Lucas, a deed for a certain building and grounds in St. Louis, situate at the corner of 5th and Olive streets. The consideration for the conveyance was $200,000, of which $150,000 were paid by Lucas assuming a mortgage of that amount, on the property, in favor of the American Life Insurance Company of Philadelphia, and the remaining $50,000 were paid to Darby in cash. This $50,000 was placed by Darby in his bank, and paid out by him in the course of his business, in a few days thereafter. Darby continued his business until July 1, 1869, when he filed his petition to be adjudicated a bankrupt, and the plaintiffs are his trustees, under the 43d section of the bankrupt act. The present bill is filed by these trustees against the defendant, and states in substance, that at the date of the deed above mentioned, Darby was insolvent, and acting in contemplation of insolvency, and that the defendant at the time of making the purchase had reasonable cause to believe that Darby was insolvent, and that the transfer was made with a view to defeat, &c., the bankrupt act, and that the property was, and is worth, the sum of $300,000. The prayer of the bill is, that the deed be de-

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

[2] [Affirming Case No. 3,572. Affirmed in Tiffany v. Lucas, 15 Wall. (82 U. S.) 410.]

clared void, and the title to be in the trustees in bankruptcy. The answer admits the purchase, but claims that it was made in good faith, at the instance of Darby's agents, for $200,000, its full value, and without any knowledge, suspicion, or belief at the time, that Darby was insolvent, or was acting in contemplation of insolvency, and states certain facts intended to show the good faith of the defendant in the transaction. Testimony was taken upon both sides, and at the hearing, the bill was dismissed. In ordering the dismissal, the court (TREAT, District Judge) observed:

"Under the provisions of the bankrupt act, on a correct exposition of which the case depends, the ordinary dealings of men are not to be interrupted further than is necessary to secure equality among creditors, and honest and lawful dealing by and with debtors. A creditor who has reasonable cause to believe his debtor insolvent, and who receives payment of his debt, or security therefor, necessarily knows, or has reasonable cause to believe that he is thereby obtaining a preference which is forbidden by law. But persons other than creditors dealing with an insolvent, even if they have reasonable cause to believe him insolvent, are not on the same footing, inasmuch as their purchases do not necessarily enable the debtor to contravene the act or defeat any of its requirements. The purchase money may furnish the needed means of extricating the debtor from his embarrassments, especially if he be engaged in a pursuit whereby insolvency is not determinable by the ultimate outcome, but by his ability to meet his liabilities as they mature in the ordinary course of business. Mr. Darby was a banker, and therefore would have been insolvent whenever his banking liabilities were not promptly met. It seems that they had been met up to the date of this sale of real estate, though by extraordinary shifts in borrowing; and that some of his real estate paper had been past due for some time. But it also seems that he had resorted to street brokers for ten or more years, and that he has had a reputation for wealth, as owning large landed interests. Some of this paper passed through the hands of street brokers into the possession of the savings institution of which the defendant was a director, and the cashier of that institution was the agent of Mr. Darby in negotiating the sale. It seems that the inference is natural that the officers of the institution, though they may have thought him embarrassed, also deemed his paper good, or it would not have been bought. The sale of realty, was not out of the usual course of business within the meaning of the bankrupt act, and therefore, it is for the plaintiff to make out his case affirmatively. The fact that paper secured by a deed of trust is permitted to remain past due for a length of time, indicates either a virtual renewal of the loan, or consent given; and does not therefore necessarily subject the debtor to the penalties of the act. Without, however, analyzing the testimony in detail, or passing formally upon each of the many incidental points of law presented, it must suffice that this court holds that to avoid the deed it must be satisfactorily proved that the defendant had reasonable cause to believe: First, that Mr. Darby was insolvent, or in contemplation of insolvency; and second, that by the transaction Mr. Darby intended to contravene the bankrupt act. Now, if for the sake of argument, it were admitted that defendant knew Darby to be technically insolvent, still the second element would have to be proved, without which the highly penal provisions of sections 35 and 39 are not applicable. As it is clear to the mind of the court that the proof falls far short of making out the second element named, it is unnecessary to inquire particularly into the first. The court holds that under the second clause of section 35, in a case like that under consideration, the reasonable cause to believe each of the two elementary facts must be satisfactorily proved in order to avoid the deed."

The complainants appeal.

Samuel Knox and Glover & Shepley, for complainants.

Thomas T. Gantt, for respondent.

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

DILLON, Circuit Judge. This is a bill by trustees in bankruptcy to avoid a deed of real estate, made by the bankrupt to the defendant. The bill is based upon the second clause of the 35th section of the bankrupt act, and charges that the sale was made in contravention thereof. Darby, the grantor, at the time the deed was executed, was a private banker, and continued in business for over two months afterwards. The defendant, the grantee, was not a creditor of Darby, and has paid the consideration for the purchase, by assuming a valid mortgage upon the property for $150,000, and by giving his check for $50,000, on which the money was received by Darby and used in his business. An agent of Darby offered the property for sale, and the same was purchased at the price of $200,000, which was the highest sum the defendant would give for it. The property was in the hands of another agent for sale at $250,000, but he had not found a purchaser at that sum. It is not claimed that there was any fraud in fact in the transaction, or that there was any collusion between the defendant and Darby to defraud the creditors; but it is maintained by the complainants that the defendant's purchase is prohibited by, and operates as a fraud upon, the bankrupt act.

It quite satisfactorily appears that at the time of the sale Mr. Darby did not contemplate insolvency or going into bankruptcy, but that his expectation was that he would

be able by the sale of this property and by the aid of the rents and income of other property, and by the sale thereof as advantageous opportunity offered, to keep on in business and pay all of his debts. But it is clear, also, that he was technically, if not really insolvent, at the time the deed was made, although he was generally believed to be possessed of considerable wealth and property.

By the bankrupt act a sale, or conveyance of property by a person who is insolvent to a person who has then reasonable cause to believe him to be insolvent, and to believe that such sale or conveyance is made with a view to prevent his property from coming to his assignee in bankruptcy, or to defeat the object, or to evade the act, is declared to be void; and it is provided in such case, that the assignee may recover the property or its value as assets of the bankrupt. (Section 35.)

The district court dismissed the bill on the ground that upon the proofs it did not appear that Lucas had reasonable cause to believe that Darby, in making the sale. intended to contravene the bankrupt act. Upon an attentive examination of the evidence it is our opinion that Mr. Lucas did not know or believe Darby to be insolvent, but on the contrary believed him to be a man of considerable estate over his liabilities, and it is quite clear, we think, that he acted in good faith and without any belief that a fraud upon the bankrupt act was intended. In point of fact, no fraud upon it was intended, either by Darby or Lucas.

But the real inquiry is not what Mr. Lucas's actual belief was; but whether he had good grounds or reasonable cause to believe, under all the circumstances, considering Mr. Darby's general reputation as a man of considerable wealth and property, his known integrity and energy, the nature of his business, the defendant's want of any intimate familiarity with the exact state of Mr. Darby's affairs, and his ignorance of any change in them, we cannot say that the defendant had reasonable cause to believe Mr. Darby's purpose in selling was to evade or defeat the bankrupt act, and on this ground we are content to affirm the decree below. It is due, however, to the counsel for the complainants, that we should notice briefly the view they urge in favor of a reversal of the decree. Darby being shown to have been insolvent when the deed to the defendant was made, they claim that there are but two questions left: 1. Had Mr. Lucas reasonable cause to believe he was insolvent. 2. Was the conveyance made with a view to defeat the bankrupt act?

Assuming it to be shown that Mr. Lucas had reasonable cause to believe Mr. Darby to be insolvent, they claim that the latter could not under any circumstances make a sale of property to the former; and that any sale of property, although for full value, and although no actual fraud upon creditors was intended or effected, is necessarily void under the bankrupt law. The position assumed is thus stated in the printed argument submitted to the court:

"Whenever a merchant, trader, or banker is insolvent, that is, is unable to pay his debts in the usual course of business, and when the facts show that he is unable to pay his debts in full, the law requires him to file his petition to be adjudicated a bankrupt. It is his duty so to do, and all persons who have reasonable cause to believe the debtor to be insolvent, are under obligations to do nothing to prevent or induce him to refrain from filing his petition to be adjudicated a bankrupt, in order that his property may be equally divided amongst his creditors. If the debtor fail to discharge his duty as aforesaid, and if any person deal with the person as aforesaid, both are guilty of a fraud upon the bankrupt law, and are subject to its provisions and penalties."

We will not stop to discuss the correctness of these views as respects dealings between a bankrupt and his creditors. In the cause before us the purchase was made by one not a creditor, and it is maintained that such a purchase is constructively fraudulent if the purchaser had reasonable cause to believe that the vendor was insolvent; that is, unable to meet his debts in the usual course of business. In other words, it is claimed that a person who is insolvent owes a duty to his creditors to go at once into voluntary bankruptcy, and that this duty is of such a nature that he cannot lawfully make any sale of his property with a view to extricate himself from his embarrassment. That a person who is known or believed to be in embarrassed circumstances, may, in good faith, borrow money and give at the time a valid security for it upon his property, was held by this court in Darby v. Boatman's Sav. Inst. [Case No. 3,571], at the last term.

And for the same reasons such a person may in good faith make a sale of property for a consideration received at the time, although the purchaser may know or have cause to believe the vendor is insolvent. In such a case, all depends upon the good faith of parties. If the vendor's purpose in selling is to defraud his creditors, or if it is to work a fraud upon the law by illegal payments, preferences, or the like, and the purchaser knows, or has good grounds or reasonable cause to believe that such is the purpose of the vendor, then his purchase is void.

But it would never do to hold, because a man is unable to meet his debts as they mature, that he is disabled from making a fair and honest sale of his property with a view to keep out of bankruptcy. The notion is a mistaken one which supposes that the law makes it the duty of such a person not to sell, but at once to go to the

bankrupt court and ask to be adjudged a bankrupt. It is true that the law declares that such a person shall not make any preferences. It is also true that, ordinarily, creditors may force such a person into bankruptcy. But it is not true that he cannot by means of pledges or sales of his property fairly made, endeavor to keep along in business, and to avoid, if possible, going into bankruptcy. On this point we concur in the views expressed by the learned judge of the district court in dismissing the bill. If therefore it was an established fact that Lucas had reasonable cause to believe Darby was insolvent, our opinion would still be that the bill ought to be dismissed because the sale was fairly made by Darby from the conviction that it would enable him to keep along in business, and the property was purchased by Lucas with no good ground to believe that Darby intended to delay, defeat, or evade the bankrupt act, or that such would be the effect of the transaction. Affirmed.

[NOTE. Complainants took an appeal to the supreme court, which affirmed the decree. Tiffany v. Lucas, 15 Wall. (82 U. S.) 410. Mr. Justice Davis, delivering the opinion of the court, said: "The law does not recognize that every sale of property by an embarrassed person is necessarily in fraud of the bankrupt act. If it were so, no would know with whom he could safely deal, and, besides, a person in this condition would have no encouragement to make proper efforts to extricate himself from difficulty. It is for the interest of the community that every one should continue his business, and avoid, if possible, going into bankruptcy; and yet how could this result be obtained if the privilege were denied a person, who was unable to command ready money to meet his debts as they fell due, of making a fair disposition of his property in order to accomplish this object? It is true he may fail, notwithstanding all his efforts, in keeping out of bankruptcy, and in that case any sale he has made within six months of that event is subject to examination. If it shall turn out on that examination that it was made in good faith, for the honest purpose of discharging his indebtedness, and in the confident expectation that by so doing he could continue his business, it will be upheld. On the contrary, if he made it to evade the provisions of the bankrupt act, and to withdraw his property from its control, and his vendee either knew, or had reasonable cause to believe, that his intention was of this character, it will be avoided. Two things must concur to bring the sale within the prohibition of the law,—the fraudulent design of the bankrupt, and the knowledge of it on the part of the vendee, or reasonable cause to believe that it existed."]

Case No. 3,574.

DARBY et al. v. WRIGHT et al.

[3 Blatchf. 170.][1]

Circuit Court, N. D. New York. May, 1854.

CONSTITUTIONAL LAW — JUDICIAL POWERS — RELEASE OF STATE LIENS AGAINST CORPORATIONS —CONSTRUCTION OF STATUTE.

1. The authority of the judiciary to declare void any act of the legislature that is manifestly in conflict with the constitution, is well settled; but such authority should always be exercised with great caution and deliberation.

2. The act of the legislature of New York, passed December 14th, 1847 (Laws 1847, c. 471), to release the prior lien of the state on the Hudson and Berkshire Railroad, does not violate the 4th section of the 7th article of the constitution of New York, of 1846, which forbids the release or compromise of the claims of the state against any incorporated company, to pay the interest and redeem the principal of the stock of the state theretofore loaned or advanced to such company, and provides that such claims shall be fairly enforced.

3. The act of 1847 does not release, reduce, or compromise the debt created against the Hudson and Berkshire Railroad Company by the act of April 28, 1840 (Laws 1840, c. 178), passed for the aid of said company; nor does it release from the mortgage to the state, created by the act of 1840, any of the property covered by that mortgage.

4. The constitution only requires that claims originating in loans of state credit, made before its adoption, and the securities taken on such loans, shall be held as the property of the state, and be managed for its direct pecuniary benefit, and shall not be released, reduced, or surrendered for the benefit of the borrowing corporations, in disregard of the pecuniary interest of the state, in its distinct and single character of a creditor of the corporation. With those restrictions, the exercise of the ordinary legislative discretion in the management of the claims is not prohibited.

5. The validity of the act of 1847 must be determined by its character and purposes at the time it was passed; and the rights of those who have, on the faith of its validity, advanced money on bonds issued under it and made by it a first lien on the road, cannot depend on the yet unsettled question, whether the arrangement authorized by it will, in the end, prove beneficial or injurious to the state, as a creditor of the corporation.

6. The act of 1847 is not in violation of the 9th section of the 7th article of the constitution of 1846, which forbids the giving or loaning of the credit of the state in aid of any corporation.

7. The comptroller of the state being about to sell the road, and appropriate its proceeds to the sole benefit of the state, to the exclusion of the holders of the bonds issued under the act of 1847, this court enjoined him from so doing in a suit brought by such bondholders.

In equity. [Bill by Abraham Darby and others against John C. Wright, comptroller of the state of New York, and others.] This was a motion to dissolve an injunction that had been granted by Mr. Justice NELSON. The facts sufficiently appear in the opinion of the court.

HALL, District Judge. The principal question presented in this case is one of constitutional construction. The material facts of the case, as substantially conceded upon the argument, are as follows:

On the 28th of April, 1840, an act was passed by the legislature of the state of New York, entitled "An act in aid of the Hudson and Berkshire Railroad Company." By this act, the comptroller of the state was authorized, whenever it should be made to appear to him, by the affidavits of the president and two of the directors of the company, that $500,000 had been expended by the company

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

in the construction of their road and its necessary accommodations, to issue and deliver to the company special certificates of stock, to the amount of $150,000, bearing an interest of not exceeding six per cent., as a loan to the company. This stock was subsequently issued, and, by force of the provisions of such act, and the proceedings had under the same, a certificate under the corporate seal of the company, signed by their president, and duly recorded in the office of the secretary of state, became a mortgage to the people of the state of New York, upon the Hudson and Berkshire Railroad, and every part thereof, with the appurtenances, for securing the payment of the principal and interest of the money for which such stock was issued. And such mortgage was by said act declared to be, and in fact was, a first and prior lien on the said road and appurtenances, before any other lien or incumbrance thereon.

On the 3d of November, 1846, the present constitution was adopted. The 4th section of the 7th article thereof is in the following words: "The claims of the state against any incorporated company, to pay the interest and redeem the principal of the stock of the state, loaned or advanced to such company, shall be fairly enforced and not released or compromised; and the moneys arising from such claims shall be set apart and applied as part of the sinking fund provided in the second section of this article. But the time limited for the fulfilment of any condition of any release or compromise heretofore made or provided for, may be extended by law."

By an act passed December 14th, 1847, entitled, "An act to release the prior lien of the state on the Hudson and Berkshire Railroad, and to authorize the stockholders thereof to relay the same with a heavy T rail," the directors were authorized to make further calls of ten dollars a share on the capital stock of the company; and, whenever $50,000 had been paid on such calls, and expended as required by said act, upon filing with the comptroller the affidavit of the president and two of the directors of the company, showing that the sum of $50,000 had been actually expended "in improving said road, by relaying the superstructure thereof with a heavy iron rail, and by rebuilding or repairing the bridges thereon;" and that an additional indebtedness, after expending that sum, had arisen for expenditures on account of such specified improvements, the bonds of such company, to the amount of such additional expenditures, not exceeding in all the sum of $175,000, were authorized to be made by the company, and numbered and registered, and countersigned and issued by the comptroller of the state; and the act then declared, that the same should thereupon immediately become a mortgage lien upon said road, and its appurtenances, and should have priority of lien over the said mortgage to the state. This act also authorized the sale of the road by the comptroller, in case of the non-payment of the interest or principal of such bonds, in the same manner in which, by the former act, its sale was authorized, in case the bonds issued under that act were not paid by the company.

The bonds for this sum of $175,000 were afterwards duly made by the company, and numbered and registered, and countersigned and issued by the comptroller, under the provisions of the act of 1847; and the plaintiffs are holders of a portion of such bonds.

The state having commenced proceedings for a sale of the road, in pursuance of an opinion given by a former attorney-general, declaring that the act of 1847 was unconstitutional and void, and that it was therefore manifestly the duty of the comptroller to set apart the whole proceeds of the sale of such road, and apply them to the sinking fund provided by the constitution for the payment of the general fund debt of the state, this bill was filed, and an injunction granted, to prevent such sale and the appropriation of its proceeds to the sole benefit of the state, to the exclusion of the rights of the bondholders. This case, therefore, presents the difficult question whether the act of 1847 is unconstitutional and void.

I am not aware that this question had ever, before the commencement of this suit, been the subject of legal controversy. It must, therefore, be determined without the benefit of any prior judicial decision; and the opinion of a former attorney-general, that the act of 1847 is unconstitutional, being opposed by an official opinion of his successor that it is free from any constitutional objection, the question may be considered as unaffected by the official opinions of the law-officers of the state.

It must, of course, be conceded, that any act of the legislature manifestly in conflict with the constitution, must be declared void, without hesitation, whenever the question of its validity is distinctly and necessarily presented, in the course of any judicial proceeding in the courts of the state or of the United States. The authority of the judiciary in such cases is well settled, and is, in truth, the obvious and necessary result of our American system of government, in which the powers of the legislative department are given, defined, and restricted by a written constitution. The authority to annul laws deliberately and solemnly passed, in the form prescribed by the constitution, is, nevertheless, one of great delicacy, and should always be exercised with great caution and deliberation. Such was undoubtedly the opinion of Mr. Senator Verplanck, when he said, in the case of Cochran v. Van Surlay, 20 Wend. 365: "But it is only in express constitutional provisions, limiting legislative power and controlling the temporary will of a majority, by a permanent and paramount law, settled by the deliberate wisdom of the nation, that I

can find a safe and solid ground for the authority of courts of justice to declare void any legislative enactment. Any assumption of authority beyond this, would be to place in the hands of a judiciary powers too great and too undefined either for its own security or the protection of private rights." And again: "I cannot bring myself to approve of the power of courts to annul any law solemnly passed, either on an assumed ground of its being contrary to natural equity, or from a broad, loose and vague interpretation of a constitutional provision, beyond its natural and obvious sense."

In this case, the constitution inhibited the release or compromise of the claims of the state against the Hudson and Berkshire Railroad Company, to pay the interest and redeem the principal of the stocks of the state loaned or advanced to that company under the act of 1840, and required that such claims should be fairly enforced; and the first and principal question is, whether the act of 1847 provided for a release or compromise of such claims, or was in conflict with the provision that such claims should be fairly enforced.

The stock having been issued to the company by way of loan, and the company being liable for the full amount of the loan, irrespective of the lien or mortgage, and therefore liable to have the claim of the state enforced against it by the ordinary process of law, it may, possibly, admit of some question, whether the legislature could not have relinquished the lien, leaving the liability of the company untouched, without a violation of the provisions of the constitution. I do not intend to discuss this question, but shall assume that the terms, "claims of the state," must be held to embrace the lien upon the road, as well as the mere liability of the corporation—the security for its payment as well as the debt itself. Conceding this to be the correct construction of the constitutional provision, I am still of the opinion that the act of 1847 is valid.

The act does not expressly release, reduce or compromise the debt, nor does it, in terms, or by necessary implication, or in its necessary or natural result, release from the lien of the state all or any portion of the property covered by such lien. The debt still continues, undischarged and undiminished, notwithstanding the provisions of that act, and the lien of the state remains undischarged. Although it is true that the provision, that bonds to the extent of $175,000 may be issued and made a previous lien upon the road, in case $225,000 shall be added to the substantial and permanent value thereof, may in the end prove to be an injudicious financial arrangement, yet, on the other hand, it may have added strength to the then doubtful security held by the state; and it is to be presumed that the legislature had in view the substantial interests of the state, and supposed that the arrangement would give equal and perhaps greater security to its claim.

Considered in the very worse aspect for the plaintiffs, the arrangement was at most but a change of securities; and, if this act be unconstitutional, the legislature could not, under any circumstances, have discharged the lien on receiving other and better security for the debt. I cannot think that such a construction of the constitution can be required or justified. It would hardly be contended, in a suit between private parties, that a contract made by an agent, whose delegated powers over a debt due to his principal are conceded to be unlimited, except by an express prohibition to release or compromise it, by which contract one set of collateral securities for the payment of the debt is given up, and another set, which both parties believe in good faith to be equally or more valuable, is substituted in its place, with a view to some ulterior arrangements supposed to promise advantages alike to the debtor and the creditor, is void and of no effect, for want of power in the agent. But, in this case, there was no actual change of security, no release of one pledge and acceptance of another; although for an object deemed beneficial to the state, and upon what was deemed an abundant consideration, the state agreed to risk the chance of its own security being diminished, to secure a chance that it might be increased. The substantial and enduring character of the value to be added to the road, by relaying it with a heavy rail, and making other improvements, of a like permanent character, to the whole extent of the money raised by the new bonds, and the requirement that $50,000 in addition should be raised by calls on the stockholders, and expended in like permanent improvements, before the lien of the state should be postponed, shows that the legislature deemed the added value of $225,000 to be the real and substantial security for the $175,000, and sufficient to prevent any loss to the state in consequence of the new and permanent lien which the act of 1847 gave to the holders of the bonds issued under that act.

The transaction authorized by that act, in its practical effect upon the prior claims of the state, may be likened to the giving of a subsequent bottomry bond, for the permanent repair of a vessel already subject to a previously existing bottomry lien. In both cases, the postponement of the payment of the first lien out of the funds arising from the sale of the property originally pledged and of the added value, is substantially effected; but, in the case supposed, no one would think of saying that the claim under the prior bond was released or compromised, or that it could not still be fairly enforced.

The intent and object and just effect of the constitutional provision appear to me to require only, that claims originating in loans of state credit made prior to the adoption of the constitution, and the securities taken upon

such loans, shall be held as the property of the state, and shall be managed for its direct pecuniary benefit, and shall not be released, reduced or surrendered for the benefit of the borrowing corporations, in disregard of the pecuniary interest of the state, in its distinct and single character of a creditor of the corporation. It does not prohibit the exercise of the ordinary legislative discretion, in the management of these claims, farther than to prohibit the doing of any act which, in its intention and purpose, or natural or necessary result, is inconsistent with the constitutional duty of the legislature, to disregard the interests of the debtor corporation, when those interests conflict with the paramount interests of the state as its creditor.

The fact that the act of 1847 was passed by the legislature with the constitutional provision before them, must, under the circumstances, be considered as sufficient evidence that, at the time of its passage, the legislature had no intention of releasing or compromising the claim of the state, but considered the arrangement authorized as an expedient and judicious financial measure, which would not, in its necessary, natural, or probable results, be inconsistent with the pecuniary interests of the state. To hold otherwise, would convey an imputation upon the legislature, which no court should sanction, until forced to do so by clear and conclusive testimony.

The validity of the act in question must necessarily be determined by its character and purposes at the time it was passed; and the rights of those who have advanced money on the faith of its validity, cannot depend upon the yet unsettled question, whether the arrangement it authorized will, in the end, and after the lapse of more than seven years, be found to be beneficial or injurious to the state, in the simple character of an ordinary creditor of the corporation. As it was not then, in form or in substance, opposed to the provisions of the constitution, and as there is no ground whatever for imputing a design to evade those provisions, I cannot, in any view of the case, convince myself that the act, either in itself or in connection with the proceedings under it, was, in substance and effect, an infraction of the constitution.

Having fully considered the objection, that the act of 1847 was, in effect, a release or compromise of the claim of the state, the other questions presented on the argument can be disposed of without difficulty. There is certainly nothing in the act which can prevent the claim of the state from being fairly enforced. To repudiate the law and subject the heavy iron purchased by the bonds held by the plaintiffs and others to a paramount lien in favor of the state, would be a most unfair and unequitable enforcement of the claim of the state, and one which a court of equity would, in my judgment, be required to restrain. If the state could lawfully repudiate the agreement made in the act of 1847, and should assert its invalidity, it could not equitable appropriate to the payment of its own debt the iron rails paid for with the money which the bondholders advanced in undoubting confidence that the act of 1847 was the law of the land. But, in the view I have taken of the case, it is unnecessary to consider this question, because I find no constitutional objection to the act of 1847.

It is suggested, in the opinion of the former attorney-general, that the act of 1847 is unconstitutional upon the ground that it may be regarded as a new loan of the credit of the state to the company, in violation of section 9 of article 7 of the constitution, which declares that "the credit of the state shall not, in any manner, be given or loaned to, or in aid of, any individual, association or corporation." But I cannot perceive that the credit of the state is given or loaned, where the state has assumed no debt, and has incurred no obligation, present or prospective, absolute or contingent. The motion to dissolve the injunction is denied.

DARDEN (CHITTENDEN v.). See Case No. 2,688.

Case No. 3,575.

The DARIEN.

[6 Adm. Rec. 21.]

District Court, S. D. Florida. Nov. 5, 1857.

[Salvage in the sum of $1,800 allowed for services to a brig and cargo.]

[Before MARVIN, District Judge.]

[Nowhere reported; no opinion accessible.]

S. R. Mallory, for libelants.

S. J. Douglas, for respondent.

DARIEUX (RAMDULOLLDAY v.). See Case No. 11,543.

DARLING, The GRACE. See Case No. 5,651.

DARLING (GREENE v.). See Case No. 5,765.

DARLING v. The IRMA. See Case No. 7,064.

DARLING (KELLEHER v.). See Case No. 7,653.

DARLING (PATTEN v.). See Case No. 10,812.

DARLING (TAPPAN v.). See Case No. 13,746.

Case No. 3,576.

DARLINGTON v. GROVERMAN.

[1 Cranch, C. C. 416.][1]

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

DEBT ON BOND—PRACTICE.

After oyer, and issue on the plea of payment, the plaintiff is not bound to produce the bond again.

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

Debt on a bond. Oyer and plea of payment.

Mr. Young and Mr. Taylor, for the defendant, contended that the plaintiff was obliged to produce the original bond at the trial, and cited Act Assem. [1792] p. 89, § 33; Drummond v. Crutcher, 2 Wash. [Va.] 218; Taylor v. Peyton, 1 Wash. [Va.] 252; Evans v. Smith, 1 Wash. [Va.] 72; Act Assem. p. 11; Peter v. Cooke, 1 Wash. [Va.] 257; Governor of Virginia v. Turner's Securities [Cases Nos. 16,970, 16,971]; Gordon v. Frazier, 2 Wash. [Va.] 130.

THE COURT did not hear Mr. Jones in answer; but said that the only thing which could make a difference between the law here and at Washington is the act of assembly; and the court does not perceive that that act requires a bond to be filed which is not produced in evidence. The issue is that the defendant has paid the money due on the bond, and the burden of proof lies on him. It is not incumbent on the plaintiff to give evidence of any fact admitted by the pleadings.

THE COURT said the point had been decided at the last term in Washington; and they thought the present case did not materially differ from that. After oyer and issue on the plea of payment the plaintiff is not bound to produce the bond again. The jury found a verdict for the defendant without any evidence of the payment, and THE COURT granted a new trial, without costs, upon the ground that the verdict was against law and without evidence.

DUCKETT, Circuit Judge, absent.

Case No. 3,577.

DARLINGTON v. LA CLEDE COUNTY.

[4 Dill. 200.][1]

Circuit Court, W. D. Missouri. 1877.

MUNICIPAL RAILWAY AID BONDS—BONA FIDE PURCHASERS—PRELIMINARY CONDITIONS.

Bonds issued by the defendant county in 1870, under the act of January 11, 1860, to the La Clede and Fort Scott Railroad Company, are valid in the hands of an innocent holder, although not sanctioned by a popular vote, and although the said railroad company—the payee—was not at the time a corporation de jure.

The facts, as agreed upon, are these:

1. That this action is brought for the collection of interest coupons originally attached to bonds of the following tenor and terms: "United States of America, State of Missouri. No. ——. Twenty years. $1,000. Interest seven per cent, payable semi-annually, on the first days of January and July in each year. Know all men by these presents: That the county of La Clede, in the state of Missouri, acknowledges itself indebted and firmly bound to the La Clede and Fort Scott Railroad Company in the sum of one thousand dollars, which sum the said county, for value received, hereby promises to pay to said company or bearer, at the National Bank of the State of Missouri, twenty years after date, with interest thereon from the date hereof at the rate of seven per cent per annum, payable semi-annually, on the first days of January and July of each year, on the presentation and delivery at said bank of the interest coupons hereto attached. The county hereby reserving the right to redeem this bond at any time after the expiration of ten years. This bond is issued pursuant to the order of the county court of the county of La Clede, made on the 17th day of August, 1869, by authority granted in the charter of the La Clede and Fort Scott Railroad Company, by an act of the general assembly of the state of Missouri, entitled 'An act to incorporate the La Clede and Fort Scott Railroad Company,' approved January 11th, 1860. In testimony whereof, the said county of La Clede has executed this bond by the presiding justice of the county court of said county, under the order of said court, signing his name hereto, and by the clerk of said court, under the order thereof, attesting the same, and affixing hereto the seal of said court. This done at the office of said clerk of said court, this 1st day of July, A. D. 1870. (Seal.) John W. Smith, Presiding Justice County Court. Attest: J. T. Tallioferro, Clerk County Court." And the said coupons are each of the following terms and tenor: "($35.) Lebanon, La Clede County, Missouri. The county of La Clede, state of Missouri, will pay to the bearer, at the National Bank of the State of Missouri, at St. Louis, Missouri, on the 1st day of ——, 18—, thirty-five dollars, being the semi-annual interest due on bond No. —. John W. Smith, Presiding Justice County Court. Attest: J. T. Tallioferro, Clerk County Court."

2. That by an act of the general assembly of the state of Missouri, entitled "An act to incorporate the La Clede and Fort Scott Railroad Company," approved January 11th, 1860, it was, inter alia, enacted as follows: "Sec. 14. It shall be lawful for the county court of any county in the state to subscribe to the stock of said company (the La Clede and Fort Scott Railroad Company), or invest its three per cent fund, or any other internal improvement fund belonging to the county, as stock in said road, and for the stock subscribed in behalf of the county, may issue the bonds of the county to raise the funds to pay the same, and, to take proper steps to protect the interests of the county, may appoint an agent to represent the county, vote for it, and receive its dividends."

3. That on the 1st day of June, 1860, six of the corporators named in said charter met, pursuant to a call for that purpose, at Stockton, Missouri, to organize the La Clede and Fort Scott Railroad Company, and a

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

board of directors, and at said meeting said persons selected themselves, and added one Dodson, who was not present at said meeting, as directors, and said directors elected a president, secretary, and treasurer, which was the only meeting this board ever held, and no by-laws were adopted or subscription books opened, nor subscriptions made to the stock of said company, and the records or minutes of said meeting are not known to exist at present. That from the first Monday of June, 1860, to the first Monday of June, 1869, no meeting was held to organize a board of directors, and no subscription books were opened during that period of time, nor was any survey made of said proposed railroad, nor any work done thereon of any kind. That on the said first Monday of June, 1869, another meeting was held by persons, two of whom were named as corporators in said charter, at Bolivar, Missouri, to organize the La Clede and Fort Scott Railroad Company, and certain six persons were named at said meeting as directors, who proceeded to designate officers, adopt by-laws, and take subscriptions to capital stock, and to perform acts for and in the name of the La Clede and Fort Scott Railroad Company.

4. That the association claiming to be organized as the La Clede and Fort Scott Railroad Company commenced the construction of its railroad in the county of Vernon, Missouri, between Nevada and Fort Scott, in the year 1869, but did not commence the construction of its railroad in the counties of La Clede or Dallas until the spring of 1870.

5. That the constitution of the state of Missouri, which went into effect on the 4th day of July, 1865, by section 14, art. 11, provided: "The general assembly shall not authorize any city, county, or town to become a stockholder in, or to loan its credit to, any company, association, or corporation, unless two-thirds of the qualified voters of such county, city or town, at a regular or special election to be held therein, shall assent thereto."

6. That the county court of La Clede county made and adopted the following orders, and caused the same to be entered of record, viz.: "On the 17th day of August, 1869. It is ordered by the court, that one hundred thousand dollars be, and the same is hereby, subscribed to the capital stock of the La Clede and Fort Scott Railroad Company, for and on behalf of the county of La Clede, upon the following expressed conditions, and none other." (Here follow the conditions.) "On the 14th day of June, 1870. Ordered by the court, that the president and the clerk of this court be, and they are hereby, authorized and directed to sign and countersign, under the seal of the court, the bonds prepared and directed to be issued under the order of this court, dated August 17, 1869, to pay the subscription of one hundred thousand dollars to the capital stock of the La Clede and Fort Scott Railroad Company, and, when signed and countersigned as aforesaid, shall notify the president of said company that the same are ready to be delivered, in accordance with said order. It is further ordered that Charles W. Rubey be, and he is hereby, appointed county railroad agent, under the provisions of the order of this court made as aforesaid, August 17, 1869; and upon his giving bond in the penalty of two hundred thousand dollars, to be approved by the court, or the clerk thereof in vacation, the clerk shall deliver to him the bonds aforesaid, to be disposed of by him as provided in said order. Further ordered, that the clerk of this court keep a correct record of the issue and delivery of the said bonds—John W. Smith and John Esther concurring, and James Partlow dissenting."

7. That the taking of stock in the La Clede and Fort Scott Railroad Company, or the issue of bonds thereto by the county of La Clede, was never submitted to the voters of La Clede county, and that many of the people of La Clede county, at and before the taking of said stock and the issue of said bonds, remonstrated with the county court of La Clede county against taking any stock in said company or issuing bonds therefor.

8. That in the year 1870 one hundred bonds, of the form and tenor hereinbefore set forth, were signed by the said John W. Smith, styling himself and then acting as the presiding justice of the county court of La Clede county, and attested by one J. T. Tallioferro, who was then the clerk of said court, and sealed with the corporate seal of said county affixed by said clerk, of which the bonds mentioned and described in plaintiff's petition were a part.

9. That subsequently, in the year 1870, said bonds were sold by the officers of said county in the city of St. Louis, for cash, at prices ranging from fifty-five to sixty-five cents on the dollar of their par value, which prices were then and there the fair market value of said bonds, and the proceeds thereof were disbursed by said county's railroad agent in paying for the construction of the railroad bed or grading of said railroad company within the boundaries of said county; all of which was done pursuant to and in accordance with the terms and conditions of said orders of subscription.

10. That said county received from said railroad company, in consideration of said bonds, or the proceeds thereof, certificates for one thousand shares of full-paid capital stock, having a par value of one hundred dollars per share, amounting in the aggregate to one hundred thousand dollars, and said county now still holds and owns said stock and certificates, but the said stock has a market cash value of only ten cents on the dollar, and its highest market cash value in St. Louis, for any prior year, did not exceed thirty-five cents on the dollar.

11. That said county subsequently claimed and exercised its rights as the holder and owner of said one thousand shares of stock, at the meetings and elections of the stockholders of said railroad company in the years 1870, 1871, 1872, and 1873, by its county railroad agent appointed for such purpose.

12. That the county court of said county levied, and caused to be collected, special taxes, in the years 1871 and 1872, for the payment of the interest upon the said bonds, and applied the funds so raised by taxation to the payment of the first three installments of semi-annual interest on said bonds, represented by coupons that were detached therefrom and surrendered to said county, and to these taxes, and to the payment thereof, many citizens and tax-payers of La Clede county objected, on the ground that the whole of the proceedings for the issue of bonds to said railroad, and the levy of taxes for the interest thereon, was illegal, unconstitutional, and void. And from the spring of the year 1873, the county of La Clede, by its constituted authorities and its county court, has refused the payment of taxes on account of said bonds, for the same reasons last above stated.

13. That the plaintiff herein is the purchaser and holder of the bonds and coupons mentioned in his petition, before maturity, in the usual course of business, at the market rate at which they were selling at the time, and he did not know anything against the validity of the bonds at the time he bought them, but if there was any constitutional, legislative, or other legal objection that may appear in law or equity against the validity of the bonds, the defendant is entitled thereto in its defence.

Joseph Shippen, for plaintiff.
Britton A. Hill, for defendant.

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

DILLON, Circuit Judge. By the agreed statement of facts herein, it appears that this is an action by a bona fide holder of bonds issued by the defendant to the La Clede and Fort Scott Railroad Company or bearer.

The bonds recite as follows: "This bond is issued pursuant to the order of the county court of the county of La Clede, made on the 17th day of August, 1869, by authority granted in the charter of the La Clede and Fort Scott Railroad Company by an act of the general assembly of the state of Missouri, entitled 'An act to incorporate the La Clede and Fort Scott Railroad Company,' approved January 11, 1860." This act has the following provision: "Sec. 14. It shall be lawful for the county court of any county in the state to subscribe to the stock of said company, or invest its three per cent fund, or any other internal improvement fund belonging to the county, as stock in said road, and for the stock subscribed in behalf of the county may issue the bonds of the county to raise the funds to pay for the same, and, to take proper steps to protect the interests of the county, may appoint an agent to represent the county, vote for it, and receive its dividends." The twenty-second section exempts this charter from the general statutes of the state with certain specified exceptions.

In this case no popular vote was taken. The defendant's first position is that the true construction of this charter, in connection with the then existing general law, required a vote of the people of the county to authorize the subscription to the stock and the issue of bonds. If the charter stands alone, there was no need of any vote; but if the general law is to be construed with the charter, then there is room for the defendant's argument. Under the well established doctrine of the United States supreme court it might be conceded, for the purpose of this case, that a vote was necessary, and yet the defendant would be estopped by the recitals of the bonds. The holder for value is authorized to suppose that a vote, if required, was had. Such is the ruling in the cases of Humboldt Tp. v. Long and Marcy v. Oswego Tp. and Coloma v. Eaves, reported in [92 U. S.] 484, 637, 642.

In all the cases in the supreme court of the United States, that tribunal has held that the municipal or local officers were constituted the judges to decide whether antecedent or preliminary steps or conditions have been complied with, and that their decision, stated or implied in the recital, was conclusive against the corporate maker when the bonds have found their way into the hands of innocent holders. The supreme court so decided long ago, in the case of Knox Co. v. Aspinwall [21 How. (62 U. S.) 539], and the principle has been affirmed time and again.

The defendant's second objection is that the railroad company was not a corporation de jure. The county issued its bonds payable to said railroad company, which was an admission that it was a corporation. Under the agreed statement of facts there can be no question but that it was a corporation de facto. The company issued to the county its stock, and did work upon the projected railroad. On the other hand, the county issued its bonds to the company. Against these securities, in the hands of a bona fide holder, the county defends on the ground that the railroad company was not duly and legally organized. The defendant is estopped to make this defence. This point has been decided the same way by the supreme court of Missouri.

Upon the agreed statement of facts, we hold that the plaintiff is entitled to judgment upon his coupons. Judgment for plaintiff.

Case No. 3,578.

DARNALL v. TALBOT.

[2 Cranch, C. C. 249.][1]

Circuit Court, District of Columbia. Oct. Term, 1821.

PRACTICE—PLEADING.

The court, at the imparlance term, will permit the defendant to plead any issuable plea to the merits, although the rule to plead shall have expired.

On the first day of the term the rule to plead expired. Mr. Key and Mr. Dunlop, afterwards entered their appearance for the defendant, on the imparlance docket, and offered to plead.

Mr. Ashton, for plaintiff, moved for judgment by default on the rule to plead; and objected to the defendant's pleading now, unless upon condition of going to trial at this term.

But THE COURT (nem. con.) permitted the defendant's attorneys to plead any issuable plea to the merits, and refused to order the cause for trial at this term.

DARNAUD (UNITED STATES v.). See Case No. 14,918.

DARNELL (CHINN v.). See Case No. 2,684.

DARRACH (BLOUNT v.). See Case No. 1,567.

DARREL (CAZENOVE v.). See Case No. 2,539.

Case No. 3,579.

DARRELL v. The ALICE GRAY.

[N. Y. Times, April 19, 1865.]

District Court, S. D. New York.

ADMIRALTY PLEADING — AMENDMENT OF LIBEL—RIGHTS OF SURETIES.

[The obligations of the sureties of a vessel are not increased by amending the libel against her by increasing the amount claimed.]

[Libel by William E. Darrell and others against the brig Alice Gray.]

BETTS, District Judge. This case came up for a motion to amend the libel by statements increasing the amounts claimed in the action, which was brought to recover damages for alleged breach of a charter party. The claimant objected to the amendments, urging that their effect might be to expose the sureties for the vessel to a greater responsibility than they originally assumed.

HELD BY THE COURT: That such increase is only conjectural as yet. The general rule is that the précise limitations of the obligations of suretyship are not disturbed by collateral arrangements, voluntary or involuntary, between the principals without the assent of the sureties. Motion granted.

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

DARRELL (BOLCHOS v.). See Case No. 1,607.

Case No. 3,580.

DARST v. DUNCAN.

[Brunner, Col. Cas. 521;[1] 2 Law Rep. 246.]

Circuit Court, E. D. Pennsylvania. Nov. Term, 1839.

SHERIFF—LIABILITY FOR ESCAPE OF DEBTOR.

In an action of debt on the statute against a sheriff for an escape, the plaintiff can recover no more than his debt and costs; and he can recover his debt and costs although he may have lost nothing by the escape. But in an action on the case at common law the plaintiff may recover for what damages he has sustained.

The plaintiff in this case [Isaac Darst] having a judgment in this court against Jacob Roth, on which there was a balance due of $2,000.43, took out a capias ad satisfaciendum against the defendant in the judgment [Andrew Duncan], who resided in York county, Pa. He was arrested by the United States marshal for that district on the 6th of December, 1832, and committed to jail in York county, and on the day following was at large. Darst then brought this suit against the defendant who was the sheriff of York county, for an escape, according to the rule in Shewel v. Fell, 4 Yeates, 47. The justification set forth by the defendant's plea was that Roth had been discharged from jail by the judges of the court of common pleas of York county, upon his application and compliance with the Pennsylvania insolvent law, which act provides that a debtor arrested or held on execution on a bail piece, in a civil suit, and who shall have resided six months in this commonwealth, may apply, when arrested or held in execution, to the president or any associate judge of the court of common pleas of the county in which he is arrested, for his discharge from prison on complying with the requirements of the law. And further, that by act of congress, approved May 19, 1828 [4 Stat. 281], the said law of Pennsylvania was considered the law of the land so far as regards the several courts of the United States in the state of Pennsylvania. The prisoner having complied with the law in question, was discharged by the sheriff after having received an order from one of the judges of the court of common pleas of York county to that effect. To this plea the plaintiff demurred, and the defendant joined in the demurrer. On this demurrer judgment was rendered for the plaintiff. [Case No. 3,581.] The defendant's counsel then moved that judgment should be entered only for the debt, without interest, which was submitted to the court upon authorities cited.

T. C. Hamley and C. Wheeler, for plaintiff.

A. C. Ramsay and J. M. Read, for defendant.

[1] [Reported by Albert Brunner, Esq., and here reprinted by permission.]

HOPKINSON, District Judge, in delivering the opinion of the court on this point, stated that in examining the cases in England, as well as in the supreme courts of this state and New York, they were found to concur in the doctrine that if a plaintiff in a suit against a sheriff for an escape, brought his action of debt upon the statute, he can recover no more than his debt and costs; and that on the other hand he had a right to recover his whole debt and costs, although in truth he may lose nothing by the escape. If he brings his action on the case for damages, at common law, then he may recover whatever damages he can show he has sustained, although it may exceed his debt. But in such an action the defendant would also be permitted to show any circumstances to prove that a much smaller amount of damages had been sustained by the escape, and even to reduce the verdict of judgment to mere nominal damages. In this case the action was in debt on the statute, and the plaintiff has a right to a judgment for debt and costs, and no more.

[NOTE. Defendant took the case, on writ of error, to the supreme court, which affirmed the judgment on the ground that a person in custody under process of a federal court could not legally be discharged by a state officer acting under a state insolvent law. 1 How. (42 U. S.) 301.]

Case No. 3,581.

DARST et al. v. DUNCAN.

[2 Law Rep. 357.]

Circuit Court, E. D. Pennsylvania. Nov., 1839.

IMPRISONMENT FOR DEBT — DISCHARGE BY STATE JUDGES — CONSTRUCTION OF THE ACT OF CONGRESS OF MAY 19, 1828 [4 STAT. 281], SECTION 3.

1. State insolvent laws have no operation, proprio vigore, upon the process and proceedings of the courts of the United States.

2. The act of congress of May 19, 1828 [4 Stat. 281], did not adopt the provisions of the Pennsylvania insolvent law, passed in 1820, and make them the law of the courts of the United States in Pennsylvania.

3. In an action against a sheriff for an escape of a prisoner committed on execution for debt, issued from the United States circuit court in 1832, it was *held* to be no defence, that the prisoner was discharged by virtue of the insolvent law of the state.

[See note at end of case.]

The plaintiff in this case [Isaac Darst], having a judgment in this court against Jacob Roth, on which there was a balance due of $2,000.43, took out a capias ad satisfaciendum against the defendant in the judgment, who resided in York county, Pa. He was arrested by the United States marshal for that district, on the 6th of December, 1832, and committed to jail in York county, and on the day following was at large. Darst then brought this suit against the defendant [Andrew Duncan], who was the sheriff of York county, for an escape. The justification set forth by the defendant's plea was, that Roth had been discharged from jail by the judges of the court of common pleas of York county, upon his application and compliance with the Pennsylvania insolvent law. And further, that by act of congress, approved May 19, 1828, the said law of Pennsylvania was considered the law of the land so far as regards the several courts of the United States in the state of Pennsylvania. To this plea the plaintiff demurred, and the defendant joined in the demurrer.

T. C. Hamley and C. Wheeler, for plaintiff.

A. C. Ramsay and J. M. Read, for defendant.

HOPKINSON, District Judge. If the matters set out in the defendant's plea can avail him to defeat the plaintiff's action, it must be by virtue of some act of congress of the United States. It is now settled so as no longer to be a subject of debate, that "state insolvent laws have no operation, proprio vigore, upon the process and proceedings of the courts of the United States." This is the language of Judge Story, delivering the opinion in the supreme court in the case of Beers v. Haughton, 9 Pet. [34 U. S.] 359, and he there refers to various decisions of the same court, in which the same doctrine is declared, particularly to the leading cases of Sturges v. Crowninshield, 4 Wheat. [17 U. S.] 200, and Ogden v. Saunders, 12 Wheat. [25 U. S.] 213. The opinion in Ogden v. Saunders is affirmed, and the principles there established are considered to be no longer open to controversy; the decrees of the court upon the effect of state insolvent laws are to be deemed final and conclusive. In the decision of Beers v. Haughton, the language of the court is particularly strong and explicit. "State laws," it is said, "cannot control the exercise of the powers of the national government, or in any manner limit or affect the operation of the process or proceedings in the national courts. The whole efficacy of such laws in the courts of the United States depends upon the enactments of congress. So far as they are adopted by congress, they are obligatory. Beyond this, they have no controlling influence." In referring to the cases of Wayman v. Southard [10 Wheat. (23 U. S.) 1], and Bank of U. S. v. Halstead [10 Wheat. (23 U. S.) 60], the court say, "It was then held that this delegation of power by congress was perfectly constitutional; that the power to alter and add to process and modes of proceeding in a suit, embraced the whole progress of the suit and every transaction in it from its commencement to its termination, and until the judgment should be satisfied, and that it authorized the courts to prescribe and regulate the conduct of the officers in the execution of final process, in giving effect to its judgment." It must be borne in mind hereafter, that this power is limited to proceedings in the suit, to transactions in it, and to the conduct of the officers of the court, in the execution of

the final process of the court to give effect to the judgment of the court. It is added that this power of the courts of the United States "enables the courts of the Union to make such improvements in its forms and modes of proceeding as experience may suggest, and especially to adopt such state laws on this subject, as might vary to advantage the forms and modes of proceeding which prevailed in September, 1789;" and further "that the courts may, by their rules, not only alter the forms, but the effect and operation of the process, whether mesne or final, and the modes of proceeding under it." We must observe, as particularly affecting the case now before this court, the example given as explanatory of this doctrine, "so that it may read property not liable in 1789, by the state laws to be taken in execution, or may exempt property which was not then exempted, but has been exempted by subsequent laws." This is the language of the supreme court in an examination of the act of congress, we have to consider. It is true the case in the supreme court turned upon the construction of a proviso in the act, which has no bearing upon our case, as this court has made no such rule as is mentioned in that proviso. My object in referring to the opinion in Beers v. Haughton, is to show, that no court of the United States, nor any state legislature, can exercise the power claimed over the process and proceedings of the courts of the United States, which is a power over the rights of the suitors in those courts, but by and under the authority of an act of congress. The supreme court of Pennsylvania have unequivocally adopted the decisions of the courts of the United States, in relation to the effect of state insolvent laws, upon the process of the courts of the United States. In Duncan v. Klinefelter, 5 Watts, 142, the supreme court of this state say, "The provisions of the act of assembly (for the benefit of insolvents) relate only to debtors held under executions issued from the state courts. It has never been supposed that they intended to give to the state courts or judges power to control the process of the United States acting within the jurisdiction of the latter." It is equally clear, that the order of a state judge to discharge a debtor from imprisonment by virtue of an execution from a court of the United States will afford no protection or defence for the sheriff or jailor who discharged him, if the judge in making the orders exceeded his jurisdiction. The object and design of the acts of congress, for there have been several, to regulate the process of the courts of the United States, have been to conform the process and the proceedings of their courts to the process and proceedings of the states, but beyond that, no act of congress has pretended to go, either in giving power to their own court, or in adopting state laws and regulations. It was the intention of congress that the process and mode of proceeding in the courts of the United States should be in harmony and uniformity with those of each particular state in which the courts of the United States were held. Thus, if in any state the defendant could not be arrested or held to bail on mesne process from a state court, he would have the same privilege against process from the court of the United States. If on final process of execution the person of the debtor could not be taken and imprisoned by the laws of the United States, he had the like exemption from final process issued from the courts of the United States; that is, if such exemption were given by state laws in force at the time of the passing of the law of congress, which was presumed to embrace or adopt the state law, but not to be extended to regulations which might be subsequently made by state legislatures.

The question we have to decide results in the inquiry, whether the discharge of Jacob Roth from imprisonment by the order of an associate judge of York county, according to the provisions of an act of assembly for the relief of insolvent debtors of Pennsylvania, passed on the 28th day of March, 1820, was or was not authorized by the act of congress of the 19th of May, 1828. If the act of congress adopted the provisions of the act of assembly, and made them the law of the courts of the United States, then the defendant was warranted in discharging Roth from his imprisonment, and the order of the judge will afford him protection and defence against the claim of the plaintiff in this suit. If, on the other hand, the act of assembly has not been adopted and made the law of the courts of the United States in Pennsylvania, then the order of the state judge was an act beyond his jurisdiction, and will not avail the defendant against the claim of the plaintiff. The section of the act of congress of 1828, applicable to this case, is as follows: "That writs of execution and other final process, issued on judgments and decrees rendered in any of the courts of the United States, and the proceedings thereupon shall be the same except their style in each state respectively, as are now used in the courts of such state, saving to the courts of the United States, in those states in which there are not courts of equity, with the ordinary equity jurisdiction, the power of prescribing the mode of executing their decrees in equity by rules of court." The plea of the defendant avers that by an act of assembly of the commonwealth of Pennsylvania, approved on the 28th day of March, 1820, a debtor held in execution in a civil suit, may apply when arrested in execution, to the president or any associate judge of the court of common pleas of the county in which the suit was instituted, and give bond to the plaintiff, with sureties, to be approved by the judge, with the condition that the debtor shall appear at the next court of common pleas for the said county, and take the benefit of the insolvent laws of the commonwealth, &c., &c. Whereupon

the said judge shall give an order to the sheriff, constable, or other person having said debtor in custody, to forthwith discharge him. The plea then avers, that by the third section of the act of congress of the United States, of the 19th of May 1828, the said act of assembly and the provisions aforesaid, became the law of the court of the United States, in the state of Pennsylvania. It is then averred that Jacob Roth, being arrested on execution, applied to a judge of the court of common pleas of the county in which he was arrested, and, having complied with the directions and provisions of the act of assembly, was discharged out of custody by the order of the judge. Taking it, for the present, for granted that the application for the benefit of this law was properly made to the state judge, although the suit was not instituted in the county in which he was a judge, I will enquire whether the case of Jacob Roth is embraced by the act of congress; in other words, whether the defendant has maintained the allegation of his plea, that "the said act of assembly and the provisions aforesaid became the law of the courts of the United States in Pennsylvania."

The law of congress enacts, that "writs of execution, and other final process issued on judgments and decrees rendered in any of the courts of the United States, and the proceedings thereupon shall be the same, except the style in each state respectively, as are now used in the courts of each state." The process here was a capias ad satisfaciendum. It was executed upon the person of the defendant, and he was committed to prison, as he might have been by the existing law of the state. In all these proceedings, the directions of the act of congress were strictly complied with, and the execution was duly and legally served by the arrest and imprisonment of Jacob Roth. The whole defence in this case must depend upon the meaning and construction which shall be given to the words of the act of congress, "and the proceedings thereupon;" that is, the proceedings upon writs of execution or other final process issued, or judgment rendered in the courts of the United States. Was the application of Jacob Roth to the judge of York county for the benefit of the insolvent laws of Pennsylvania, a proceeding upon the writ of execution, under which he was imprisoned in the jail of the county of York? Was it a proceeding in any manner under the direction or control of the court which issued that writ of execution? Or had it any necessary or legal connection with that execution so as to be legally, or properly speaking a "proceeding thereupon?" Was it not altogether a new proceeding under the authority and direction of another tribunal, for an object not only different from, but adverse to, the proceeding in the court of the United States and the judgment then rendered and the process issued for the satisfaction of that judgment? If, indeed, a state law had enacted that no debtor should be arrested or imprisoned by any final process or execution upon a judgment obtained against him, the courts of the United States, in common with those of the state, would have been bound so to alter their final process and the "proceedings thereupon," which is their direction to their officer, that the person of the debtor should not be arrested or imprisoned under it, but the process in this case did rightfully and lawfully order the officer to take the debtor and commit him to prison; the writ was a lawful one, and the proceeding upon it by the officer was lawful; the command of the writ was fully obeyed, and the duty of the officer performed and fulfilled by committing the defendant to the jail of the county of York. When that was done, both the writ and the officer of the court had exhausted their power, and done all they had to do in obedience to the command of the court. The proceedings upon the judgment and execution are the proceedings of the plaintiff in the suit, and of the court by which the judgment was rendered, and are under their direction and control, and the plaintiff and the court were bound by the act of congress to conform them to similar proceedings in the court of Pennsylvania. But after the writ of execution and the proceeding upon it had been thus executed, and the defendant was committed to prison by virtue of it, another proceeding was instituted by the action of the defendant for his own benefit, and commenced and pursued by his own will wholly independent of the plaintiff or the court, whose process had confined him, and being no proceeding by them, by their order, or for the execution or satisfaction of their judgment, how can it be said to be a proceeding upon that execution, by which must be understood a proceeding for the furtherance of the object of that execution; a proceeding to obtain the payment or satisfaction of the judgment for which the execution was issued? It is true, that the execution of this final process upon the person of Jacob Roth, was his inducement to apply to the judge of a state court for the benefit of a state insolvent law. It was the necessity, which drove him to this relief, but it was nevertheless, no proceeding upon the process, either legally speaking or in common parlance. In truth, when the application was made by Jacob Roth to the judge of York county, the capias ad satisfaciendum was functus officii; it had no longer any legal existence or vitality; it had fulfilled its duty; there was an end of it, and no future or further proceeding could be had upon it or by its virtue. When a defendant is taken on a ca. sa., it is as to him considered in law a satisfaction of the debt. If the plaintiff consent to his discharge even on a promise not afterwards performed, he cannot resort to his judgment again. So far was this doctrine once carried, that if a defendant taken on a ca. sa. died in prison, the plaintiff had no further remedy. By a

statute, this injustice was redressed, and a plaintiff was allowed to have process against the goods of a debtor dying in prison. If a party taken on a ca. sa. escape or be rescued, he cannot be retaken on the same writ, but the plaintiff must sue out a new execution: so entirely is the first writ extinguished or defunct by the arrest and imprisonment of the defendant.

A reference to several decisions of the supreme court of the United States will, I think, fully support my construction of the act of congress of 1828, in the use of the words "process and proceedings thereupon." Some of these opinions, it is true, were antecedent to the passage of that act, but they relate to expressions in other acts of a similar import, and in some instances the same. In delivering the judgment of the court in Wayman v. Southard, 10 Wheat. [23 U. S.] 27–32, the chief justice is very particular in giving the construction of the phrases "modes of process," and the "forms and modes of proceeding in suits," and says that "the last embraces the whole progress of the suit and every transaction in it, from the commencement to its termination." "It may then, and ought to be understood as prescribing the conduct of the officers in the execution of process, that being a part of the proceedings in the suit." Must we not conclude from this, that when the officer has executed the final process, the proceedings in the suit are ended? In U. S. Bank v. Halstead, 10 Wheat. [23 U. S.] 60, Judge Thompson, speaking for the court, says: "The general policy of all the laws on the subject is very apparent. It was intended to adopt and conform to the state process and proceedings as a general rule." And on page 61: "The power given to the courts over their process, is no more than authorizing them to regulate and direct the conduct of the marshal in the execution of the process. It relates, therefore, to the ministerial duty of the officer." Again at page 64: "An execution is the fruit and end of the suit; all the proceedings on the execution, are proceedings in the suit." "The court will enforce upon the officer a compliance with his duty, and a due execution of the process according to its command."

I have already referred to the case of Beers v. Haughton, for another purpose. At page 362 of 9 Pet. [34 U. S.], there is a passage in the same case which applies to the question I am now considering. The court are discussing the act of congress of 1828, on the meaning of which, the decision of our case must depend; and giving their construction of the words "the proceedings on writs of execution and other final process." They say, "They must, from their purport, be construed to include all the rights, duties, and conduct of officers in the service of the process, according to its exigency, upon the person or property of the execution debtor." Thus far, this construction relates only to the rights and duties of the officer; in what follows, we see what is provided for the execution debtor: "And also all the exemptions from arrest and imprisonment under such process enacted by those laws." Can the defendant in this case contend that by the laws of Pennsylvania, Jacob Roth was exempted from arrest and imprisonment by the marshal under the process in his hands which he was commanded to execute? Did the marshal in the service of that writ violate any privilege or exemption to which Jacob Roth was entitled by the laws of the state? Certainly he had no such exemption or privilege. Certainly it was right and lawful for the officer of the court of the United States to arrest and imprison him, and having done so, there was an end to his duty, to his responsibility, and to his power over the person of the debtor, or of the writ by virtue of which he was imprisoned. There is a manifest distinction between an exemption of the person of a debtor from arrest and imprisonment, and his liberation from confinement after he has been legally arrested and imprisoned. The first is a regulation of the process and proceeding of the court and its service, the other is a new power and proceeding for the relief of the debtor from the effects of the process by which he was imprisoned. But by an act of the assembly of Pennsylvania, a debtor arrested and held in execution my apply to a judge of the court of the county in which the suit was instituted, and upon his complying with the requisitions of the act, the judge shall give an order to the sheriff to discharge him, and the sheriff shall be exonerated upon his making return of said order, or the process under which the said debtor was held in custody. It is difficult to apply the words or provisions of this act to process from a court of the United States executed by the marshal of that court, and to which he may have already made his return. But putting aside this difficulty, it is undeniable, and so treated in the defendant's plea, that unless this law of the state is extended to the court of the United States by the act of congress of May, 1828, it cannot be applied to the process of those courts, nor afford any defence against the suit of the plaintiff here, and it is equally undeniable that the law of the state is not thus extended, unless it be so by force of the enactment in the act of congress, that, "writs of execution and other final process on judgments in the courts of the United States, and the proceedings thereupon shall be the same as are now used in the courts of the state." If, therefore, I have succeeded in showing that Roth's application to a state judge for the benefit of the state law cannot be considered as a proceeding upon the writ of execution which issued from this court, and was duly executed by the officer of this court, I have demonstrated that the discharge of Roth from his imprisonment by the defendant, was unau-

thorized, and of course that he must answer for it to the plaintiff in this suit. When we speak of a proceeding upon a writ, we intend something done in pursuance of it, under its command and authority. If we go farther than this, I know not where we shall find a limit. May we follow the imprisonment into all its consequences, and call them proceedings upon the writ of execution? The application of the debtor for the relief afforded by a law of Pennsylvania, was no part of the proceeding upon the final process of this court, nor had it any relation to the duty of the officer of the court in executing that process. The manifest object and effect of the plea before us, and of the argument by which it has been supported, are that, under a law of congress to "regulate processes in the courts of the United States," we shall introduce by construction an insolvent law of Pennsylvania as obligatory upon the court of the United States, which insolvent law has never been recognized or adopted by any act of congress, unless it can be implied from the words in the act I have so often alluded to. Thus a suitor in a court of the United States is to be defeated in his right, and deprived of the remedy for the satisfaction of his judgment, to which by the laws of the United States he is entitled, by the action of another court, and the operation of a state law which has "no operation, proprio vigore, upon the process and proceedings of the courts of the United States," nor consequently upon the rights and remedies of the suitors in those courts. Congress has not left the case of a debtor imprisoned under an execution unprovided for. A law of the United States has provided a means of relief for persons imprisoned for debt on process of execution from any court of the United States. What are we to do with this law with the construction now put upon the process act of 1828, which will entirely supply and supersede in practice the act of January, 1800 [1 Stat. 4], "for the relief of persons imprisoned for debt?" One of the counsel for the defendant has argued that this law is repealed by the act of 1828. I see nothing to warrant this conclusion, and certainly the judges of the United States have continued to act under the law of 1800, without a suspicion that it was repealed. It may indeed be said that if we adopt the construction of the defendant of the act of 1828, the law of congress for the relief of imprisoned debtors will seldom, if ever, be resorted to, if the debtor can obtain the more extensive relief of the state law.

It will be observed that this case differs from that of Beers v. Haughton [9 Pet. (34 U. S.) 359] in some important particulars: 1. The insolvent, Harris, was never arrested on the ca. sa. issued against him at the suit of Beers, and of course was not imprisoned under that process. Before the commencement of the suit against Haughton, as the bail of Harris, Harris had been duly discharged from imprisonment from all his debts by the insolvent law of Ohio, and it was to the action thus brought on his recognizance, that he pleaded the discharge of Harris by that law. It was not a case in which the defendant had been duly arrested and imprisoned by the final process of the circuit court, and was released from imprisonment by a subsequent order of a state court under a state law. 2. The rule of the circuit court of the United States for the state of Ohio, has not been adopted here, nor any similar one ordered. Indeed, there is no occasion for any rule on the subject, inasmuch as the law of Pennsylvania was enacted long prior to the act of congress, under which that rule was made to provide, I suppose, for state laws that might be afterwards enacted, but that existing state laws are to be judged by the act itself, which cannot be changed or affected by any rule of court. In our case, therefore, we must rest upon the enactments of the act of congress of May, 1828, and if that act did not authorize the release of Roth from his imprisonment, the defendant can obtain no protection from it. It is true the terms of the rule of court in Ohio are that, "under neither mesne or final process shall any individual be kept in prison, (not shall be imprisoned) who, under the insolvent law of the state has, for such demand been released from imprisonment." This rule goes beyond the case of Beers v. Haughton, and if we had the same rule it would probably embrace the case before us. It greatly enlarges the privilege of the debtor as given to him by the act of congress, according to my construction of it, which I have already explained, and will by a rule of court, give an effect to state laws enacted subsequent to the act of congress, stronger than is given by the act to such laws then in existence.

It is not for me, at this time, to inquire whether the proviso in the act of congress which gives a power to the court of the United States so far to alter their final process as to conform to any change which may be adopted by the legislatures of the respective states for the state courts, was intended only to give to subsequent state laws the same effect in the form and execution of the process of the United States, as the act of congress gave to the state laws then in existence, or whether it was intended to allow the courts by their rules to enlarge the privilege given by the act, so as not only to conform their process to the process of the state, but to release a debtor who had been legally and duly imprisoned according to the commands of the process of the court, which process was in conformity with that of the state court. Such, it seems to me, would be the effect of a rule that no man should be kept in prison who had been discharged by a state insolvent law. This question would have arisen in the case of Beers v. Haughton [supra], if Harris had been taken and

imprisoned under the ca. sa. of the court of the United States, and had been afterwards released by a law of Ohio passed after the execution of that process. Such, however, was not that case, nor does the decision of the supreme court touch that question.

In my opinion, the judgment on this demurrer must be entered for the plaintiff.

[NOTE. Defendant afterwards moved that judgment should be entered only for the debt, without interest, and the court held that plaintiff had a right to a judgment for the debt and costs, and no more. Case No. 3,580. The case was then taken on writ of error to the supreme court, where the judgment was affirmed on the ground that one imprisoned on process from a federal court cannot legally be discharged by a state officer acting under a state insolvent law. 1 How. (42 U. S.) 301.]

Case No. 3,582.

DARST et al. v. ROTH.

[4 Wash. C. C. 471.] [1]

Circuit Court, E. D. Pennsylvania. Oct. Term, 1824.

ACTION OF COVENANT—VARIANCE—PARTNERSHIP COVENANT.

1. Covenant by A, B and C. The declaration states, that they by the name and description of A. D. & Co. and the defendant, entered into an agreement under their respective hands and seals, whereby they agreed to sell to the defendant certain lands, &c. The agreement offered in evidence, has the signature and seal of A. D. & Co. and that of the defendant.

2. The execution of the assignment by one of the partners, with the consent of the others, either expressly given at the time, or recognized and agreed to by them afterwards, makes it the deed of all though there be but one signature; and the instrument is properly admissible in evidence, proof of the consent of the other parties in the form stated being given.

The declaration is in the name of Henry Darst and two others of the same surname, and sets forth, that "they, by the name and description of Henry Darst & Co. and the defendant, entered into an agreement under their respective hands and seals," whereof profert is made, whereby they agreed to sell to the defendant certain lands in the state of Ohio, for which the defendant was to pay a certain sum of money, for the breach of which contract this suit is brought. Pleas, covenants performed, and non est factum. Wheeler, for the plaintiffs, offered the instrument declared on in evidence, with proof of its execution. This was objected to by Sergeant, for the defendant, because the instrument has only the signature and seal of Henry Darst & Co. and of the defendant. He contended that this is the deed of Henry Darst only, and that it is not the deed declared on, the declaration stating that it is under the respective hands and seals of the three plaintiffs and the defendant. The evidence, he contended, was improper, on the plea of non est factum. To this it was answered, that the execution of the deed by one of the plaintiffs, by the direction, or with the assent and concurrence of the others, though evidenced by their subsequent ratification, made it the deed of each of the plaintiffs, and that their assent was to be proved by the evidence which the plaintiffs yet had to offer. He cited Co. Litt. 35, 230b; Pink. .Conv. 130; W. Jones, 268; 4 Durn. & E. [Term R.] 313; 9 Johns. 285; 19 Johns. 513.

Mr. Wheeler, for plaintiffs.
John Sergeant, for defendant.

WASHINGTON, Circuit Justice. The plea of non est factum has nothing to do with this question, which respects the instrument offered in evidence as the deed of the plaintiffs, whereas this plea merely denies it to be the deed of the defendant. The real question is, whether the deed offered in evidence is the same as the one which is declared upon? Now the cases, which have been read, abundantly prove that the execution by Henry Darst, one of the partners and owners of the land, with the consent of the other two, made it their deed; and although there be but one seal, yet that is, in point of law, the seal of each of them. But it is contended that the declaration avers that each of them sealed the deed, whereas in point of fact, two of them did not seal it, but only assented to the sealing, by the one who did affix the seal. But if the declaration would bear the construction given to it by the defendant's counsel, still I do not see that it would not be a legal truism, that the deed was sealed by those other two, upon the principle laid down in the cases cited at the bar. What a man does by his constituted agent, is done by himself, and he may so aver it. But the declaration is misconstrued by the counsel. The expressions are, that the plaintiffs, by the name and description of Henry Darst & Co., and the defendant, respectively signed and sealed the instrument; that is, H. Darst & Co. and the defendant, not the three plaintiffs and the defendant; and the fact corresponds strictly with the allegation. Proof of the assent and concurrence of the other two being given, if their joining in this suit be not itself sufficient for the purpose, the agreement is good evidence to go to the jury.

The concurrence of the other two having been proved, as well as the compliance of the plaintiffs with the contract on their parts, THE COURT directed a verdict to be found for the plaintiffs for the balance of the purchase money due. Verdict accordingly.

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

END OF CASES IN BOOK 6.

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